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Chain liability as a mechanism for strengthening the rights of posted workers

The German chain liability model

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Executive summary

This paper examines the concept of liability in subcontracting chains in the context of posting of workers, and explores the potential of the German liability model to be used as an instrument to effectively enforce individual posted workers' rights. The paper contributes to the wide debate on chain liability, often resulting with compromises as the Article 12 of the Enforcement Directive or the recent Commission's Proposal for a targeted revision of the Posting of Workers Directive (PWD). Could a comprehensive legal framework with an extensive scope of subcontracting chain liability lead to a more effective enforcement of posted workers' rights? What lessons could be learned from the German case?

The first part of the paper reconstructs the different stages of development of the legal framework regulating the German liability model, from the status quo until the current unconditional chain liability. The analysis clearly shows that it takes a long time to gradually broaden the liability concept, foremost due to the opposition of various institutional and socio-political factors, which emerge as a result of the delicacy of this issue. The paper finds that even in a widely reaching model of strict chain liability as in the German case, there are many obstacles on the way towards effective employment rights enforcement. Their vulnerable position on the labour market creates many impediments for the posted workers, hampering an effective use of the chain liability provisions. The lack of written employment contracts, A1 certificates or documentation of their working hours (official time sheets), and the limited access to legal assistance as a result of lack of financial resources and not being members of trade unions, makes the access to the German judicial system difficult for the posted workers. Even if they reach the labour courts, it appears that they face serious difficulties to prove their claims, mostly due to the uncertain state of evidence. Furthermore, the new checks and controls as a result of the strict and unconditional chain liability regulations create new unexpected burdens for the posted workers to enforce their rights. The increased and spreading practices of signing *blanco* statements for received sectorial minimum wages creates serious troubles for posted workers to enforce their rights, either through informal negotiation processes or through the labour court system.

Furthermore, through the analysis of the "Mall of Berlin" case, the paper demonstrates that the scope of the German liability regulations is still an object of contested court interpretation. Who in the subcontracting chain could be held liable? There are still different interpretations with no unanimity on the exact definition of client and contractor for the purpose of the norms of the Posted workers law and National minimum wage law. This also makes route to successful labour rights enforcement through chain liability quite burdensome. All these findings being either of factual or legal nature, should serve as an indicator that the vaguer the European legislation dealing with the liability issue remains, the harder it would be for the posted workers to benefit from it on national level.

However, even though all the afore-mentioned difficulties exist, trade unions and counsellors for mobile and posted workers highly praise the German chain liability model. There are numerous successful cases where the chain liability mechanism has been employed in out-of-court negotiations, and many times different stakeholders (e.g. SOKA-BAU) have achieved success in contributions collections and fining misbehavior, which would be unimaginable without such a regulation. Therefore, the extensive chain liability regulation in Germany is certainly a big step forward for the enforcement of posted workers' rights. Its effectiveness, however, largely depends on first addressing the factual position of posted workers in the labour market, but also on the existing uncertainties of the legal interpretation and implementation of the existing regulatory framework.

Hence, from the perspective of a better enforcement of posted workers' rights through chain liability, the following three remarks should be taken into consideration when further regulation of this matter is concerned. First, the minimum ground of a future liability provision on a supranational level should have as clear and as wide reaching scope as possible. The more guarantors in a subcontracting chain, the better the chances of the posted workers will be to enforce their rights in the host country, especially in the cases of claiming unpaid wages. Second, a clearly defined extensive scope of chain liability would eliminate the current EU-wide fragmentation of various liability models and would help to better facilitate cross-border cooperation between courts or between authorities of different Member States. Finally, it would be hard to imagine an effective chain liability model (independent of its extensiveness) without sufficient empowerment of trade unions to adequately represent posted workers. In this regard, the decision of the European Court in *Sähköalojen ammattiliitto* (C-396/13) goes in the right direction.

I. Introduction

In the face of the ongoing debate regarding the European Commission's (EC) Proposal for a targeted revision of the Posting of Workers Directive (PWD)², this is the right moment to discuss the current state of the legal framework defining the mechanisms meant to protect the rights of posted workers and the prospects of its future betterment. In this regard, the subcontracting liability has been seen as such a mechanism with potential to tackle fraud and abuse in transnational subcontracting chains, and at the same time to increase the chances of individual posted workers to effectively enforce (some of) their worker's rights in the host country.³ Although workers are posted from and to nearly every European Union (EU) country, this paper focuses on the workers posted to Germany from the Central and Eastern European (CEE) countries belonging to EU.

The numerous studies and reports from the last two decades documenting the living and working conditions of posted workers abroad have shown that many low and medium skilled posted workers in different industries have been utterly left at the mercy of the Single Market for Services whose moral limits have become ever blurrier.⁴ The increasing awareness of the widespread abusive practices of illegal posting or posting through letter-box companies easily declaring bankruptcies in the countries where they have their seats, makes it necessary to set a regulatory focus on the cooperation between national authorities as the European Commission has done in the Enforcement Directive (Directive 2014/67/EU).⁵ As the cross-border cooperation between national authorities would hopefully contribute to more efficient exposure of fraudulent practices and better transnational enforcement of fines and penalties for misbehaving companies, it is questionable to what extent it would improve the enforcement of individual workers' claims against, for example, unpaid wages or particular social contributions.

Hence, what could a posted worker do in order to effectively claim their outstanding wage for the time spent working abroad? Posting of workers by its nature involves at least two different labour and social protection systems as well as two different national jurisdictions. The practical difficulties of holding some posting companies liable for the payment and working conditions of their posted employees (e.g. the case of letter box firms) would suggest that focusing on the rights enforcement mechanisms available in the

² COM (2016) 128 final: Commission's proposal for a targeted revision of the Posting of Workers Directive (Directive 96/71/EC), 8 March 2016.

³ See Jorens, Y., Peters, S. and Houwerzijl, M. (2012), Study on the protection of workers' rights in subcontracting processes in the European Union, European Commission.

⁴ See for e.g. Lillie, N. and Wagner, I. (2015), Subcontracting, insecurity and posted work: evidence from construction, meat processing, and ship building, in J. Drahokoupil (ed.) *The outsourcing challenge: organizing workers across fragmented production networks*. Brussels: European Trade Union Institute: 157- 174.

⁵ Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the Enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation').

host countries rather than the countries of origin might be more effective for the ones being holders of those rights. This should be by no means understood as an attempt to discredit the judicial or law enforcement systems of the countries of origin (the new EU Member States) as being less efficient, but it merely states the logical necessity to look for a guarantor liable for the rights of posted workers when faced with an inability or unwillingness of their direct employer or contractor to fulfill their legal obligations. As posting of workers always takes place within an arrangement for contracting services between clients and different levels of contractors, it is essential to understand the conditions under which users and providers of services in a multi-level contractual relationship can be held liable for violations of workers' rights.

The legal framework currently regulating the liability in subcontracting chains in the context of transnational posting of workers is fragmented and varies from Member State to Member State.⁶ The supranational directions have been deliberately left vague, thus offering the member states a considerable margin of discretion regarding their implementation preferences.⁷ Considering the delicacy of the matter, choosing such a compromise to respond to the varieties of the national traditions of market regulation comes as no surprise. Even though there is not yet a solution blueprint neither at the European nor at national level, the German legal framework regulating the liability in subcontracting chains has been referred to as a positive example and an instrument with certain potential to strengthen the rights of low and semi qualified EU posted workers.⁸

The main objective of this article is to offer an overview of the German regulatory framework regarding liability in subcontracting chains in the context of posting of workers and thereby to examine its capacity to serve as a mechanism to better protect posted workers' rights. It begins with a reconstruction of the development of the legislation regulating liability in subcontracting chains from its original introduction in the German Posted workers law of 1996 (*Arbeitnehmersendegesetz, AEntG*) to the current legislative framework. The next part continues examining the practical implications illustrating the main challenges and obstacles for the implementation of the German model as an instrument for successful enforcement of posted workers' rights. Both the legal and factual problems will be discussed. The third part highlights some of the current hurdles exemplary mirrored in the latest decision of the Berlin Labour Court in the "Mall of Berlin" case⁹. The article concludes with a reflection on the current state of the German model with regard to the pending Proposal for a targeted revision of the PWD.

II. The German model of subcontracting liability in the context of posting of workers

When talking about subcontracting *chains*, it would certainly not be wrong to think of vast and hardly comprehensible clusters of companies engaged on a same project and interconnected with each other through outsourcing or subcontracting parts of their work in different production processes.¹⁰ The bigger the contracting chain, the harder it becomes to clearly determine some of the contractual relationships and thus the liability for wages and working conditions of posted workers. In Germany, complex subcontracting chains involving considerable number of companies are commonplace in almost all industrial sectors where posting of workers mostly occurs.¹¹ These often unclear structures allow

⁶ Jorens, Peters and Houwerzijl (2012), supra note 3.

⁷ See Eichhorst, W. (1998), European Social Policy between National and Supranational Regulation: Posted Workers in the Framework of Liberalized Services Provision, MPIfG Discussion Paper 98/6.

⁸ Supra note 3.

⁹ Pressemitteilung Nr. 11/17 vom 03.05.2017, Arbeitsgericht Berlin, Urteil Az. 14 Ca 14814/16, <https://www.berlin.de/gerichte/arbeitsgericht/presse/pressemitteilungen/2017/pressemitteilung.587482.php> [accessed May 15 2017].

¹⁰ See Wagner, B. and Hassel, A. (2016), Posting, subcontracting and low-wage employment in the German meat industry, *Transfer*, Vol. 22(2): 163-178.

¹¹ Ibid.

companies in Germany to evade sectoral agreements or to renegotiate company agreements.¹² According to *the Bundesregierung*, most of the workers posted to Germany in 2016 worked in the construction industry (main and secondary trades), slaughtering and meat processing industry, metal industry and manufacturing as well as in private households.¹³ This is important background information to better visualize the market reality where the liability mechanism will practically be employed as a tool protecting the ones being always at the bottom of these subcontracting chains – the posted workers themselves.

Before starting to analyze the genesis of the German legal framework regulating subcontracting liability, defining several crucial legal concepts will be necessary as some of them are often interchangeably used as synonyms in the media and partly in the literature, which might eventually lead to confusions.

For the purpose of this paper, subcontracting liability should be understood as the co-responsibility of multiple actors other than the direct employer (main contractor, other contractors, client or user company in the case of temporary agency workers) within a subcontracting chain, which together could be held liable for workers' labour and social rights.¹⁴ Haidinger differentiates between soft law and hard law arrangements for the establishment of different liability regimes.¹⁵ Notwithstanding that the variety of soft law measures such as responsible supply chain management practices or International framework agreements are beyond doubt of a great significance for the regulation of working conditions in subcontracting processes, this paper will focus on the analysis of the German hard law regulatory arrangement which establishes the legal framework regulating the subcontracting liability on national and sectoral level. Furthermore, the analysis focuses on the aspects of the liability regulation with a direct impact on the enforcement of individual employment rights of posted workers, leaving aside the aspects relevant for different stakeholders such as the tax and revenue authorities, social insurance institutions or customs offices.¹⁶

The examination of the German liability model presupposes a precise understanding of the actors constituting a multilevel subcontracting relation. The practice of subcontracting creates a triangular employment relationship with three principal partners: 1) The client (either an individual or a business entity) who orders the work; 2) The principal or main contractor (or contractors) who mostly either partially or entirely assigns the work to further contractors; and 3) The subcontractor who receives the work from the contractor, and then either performs that work itself or in part assigns it to another subcontractor of a lower tier.¹⁷ It is important to note that joint and several liability has been often incorrectly used as a synonym with chain liability. The companies within the subcontracting chain could be jointly and severally liable either only directly in a straight contractual relationship between two directly contracting parties in

¹² Ibid. See more in Doellgast, V., Holtgrewe, U. and Deery, S. (2009), The Effects of National Institutions and Collective Bargaining Arrangements on Job Quality in Front-line Service Workplaces, *Industrial and Labor Relations Review* 62(4): 489–509.

¹³ The German Government reported that according to the number of A1 certificates registered with the German authorities for the month of July 2016 (taken as a random sample), most of the posted workers in Germany have worked in the following sectors (in descending order): Building construction; Manufacture of products from concrete, cement and sandstone; Meat processing; Slaughtering (not including poultry); Private households; Event organizing industry; Filling and packaging; Electricity production; Treatment and coating of metals; Manufacture of machinery and equipment for special-purposes. See „Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Beate Müller-Gemmeke, Brigitte Pothmer, Corinna Ruffer, weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE GRÜNEN“ – Drucksache 18/9470 – Entsendungen – Umsetzung der Durchsetzungsrichtlinie, Berlin, 09.09.2016.

¹⁴ Supra note 3; See also Haidinger, B. (2016), Liability and co-responsibility in subcontracting chains, *Social Standards at Risk: Making the case for Labour Citizenship in Europe*, LABCIT Project.

¹⁵ Ibid.

¹⁶ For more details regarding the involvement of other stake holders in posted workers' rights enforcement see Voos, E. et al (2016), *The Posting of Workers Directive – current situation and challenges*, Study for the EMPL committee.

¹⁷ Amon, M. R. (2010), Liability regulations in European subcontracting: will joint liability be the 21st century European approach?, *The Journal of International Business & Law*, nr 1 (9).

one segment of the contracting chain (purely contractual liability¹⁸), or throughout the entire chain including the main contractor or even the client.¹⁹ Hence we distinguish simple direct from chain liability.

a. The long way towards a wide-reaching unconditional chain liability in Germany

Going through the development of the German legal framework on chain liability would help to understand its delicate legal and practical nature. Moreover, it shows that withstanding the resistance of various socio-political forces who oppose the establishment of broad or even narrow liability regimes takes time. In the sense of the varieties of capitalism and welfare states literature²⁰, depending on their institutional traditions and industrial relations settings, in some countries such initiatives would be harder to introduce and implement – which is another argument why it is not easy to reach an agreement for a supranational solution on the subject of liability.²¹ Despite the continuous efforts of the European Federation of Building and Woodworkers (EFBWW) to push for extensive chain liability, Article 12 of the Enforcement Directive²² has only introduced a direct contractual liability and only for the construction sector.²³ Both, the compromise of the Enforcement Directive as well as the Commission's Proposal for a targeted revision of the PWD appear to be insufficient in tackling the regulation of the liability matter. The option for the Member States to go beyond the norm of Article 12 is mitigated by the requirement for any transposition measures on national level to be justified and proportionate in order not to interfere with Articles 49 and 56 of the Treaty on the Functioning of the European Union (TFEU). The proportionality test in regard to posted workers has been petrified through the decisions of the Court of Justice of the European Union (CJEU) starting with the 'Laval' case²⁴, even though some deviation of this course of the CJEU could be noticed in its more recent decisions.²⁵

The fact that in Germany (and almost everywhere) the concept of liability for wages and working conditions in subcontracting chains has been for the first time introduced in the context of posted (or migrant)²⁶ workers is highly diagnostic and speaks of the relevance this matter has for the enforcement of posted worker's rights. Not being the first, but still one of the member states who pioneered in introducing elaborated regulatory framework for chain liability in subcontracting chains,²⁷ Germany introduced *liability* for the contractors in the construction sector (and navigation-related services - *Seeschiffahrtsassistenz*) with the Posted workers law of 1996 (*Arbeitnehmersendegesetz AEntG*)²⁸.

¹⁸ See Houwerzijl, M. and Peters, S. (2008), Liability in subcontracting processes in the European construction sector, European Foundation for the Improvement of Living and Working Conditions.

¹⁹ Ibid.

²⁰ See Hall, P.A. and Soskice, D. (2001), Varieties of Capitalism: The Institutional Foundations of Comparative Advantage, Oxford University Press; Esping-Andersen, G. (1990), The Three Worlds of Welfare Capitalism, Cambridge: Polity Press.

²¹ There have been such endeavors prior to the Enforcement Directive; see e.g. 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 <https://goo.gl/23EkYX> [accessed 24 March 2017].

²² Supra note 5.

²³ See Wagner, I. (2015), Labour citizenship and enforcement gaps in a Pan-European labour market, migrationonline.cz, 11.8.15, available at <https://goo.gl/QmEde9> [accessed 30 April 2017].

²⁴ Case C-341/05 Laval [2007] ECR I-11767.

²⁵ See Freedland, M. and Prassl, J. (eds.) (2015), Viking and Laval in EU Law in the Member States: Viking, Laval and beyond, Hart Publishing Oxford.

²⁶ See Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

²⁷ Joint liability laws in subcontracting chains date back to the 1960s and 1970s for Italy, the Netherlands, Belgium, Finland and France. Spain, Austria and Germany followed in the 1980s and 1990s. The motivation for the introduction of such legislation was predominantly the prevention of abuse of employee's rights as well as combatting undeclared work and unfair competition. See more in supra note 7.

²⁸ Art. 5 (2) Arbeitnehmer-Entsendegesetz (AEntG 1996) - Gesetz über zwingende Arbeitsbedingungen bei grenzüberschreitenden Dienstleistungen vom 26.02.1996 (BGBl. I 1996, pp. 227-229).

The German Posted workers law came into existence shortly before the Posted workers directive itself, as a response to “social dumping”²⁹ in the booming German construction sector in the aftermath of the German reunification.³⁰ As a delicate case of collision of laws in terms of Private international law, posting required additional regulatory framework on national as well as supranational level going beyond the “Rome Convention” (later Rome I).³¹ Writing in 1997, Fritz Scharpf referred to the Posted Workers Directive as a possibility to “limit the impact of negative integration” which summarizes the motivation for the European and by the same token, for the German regulation.³² The motivation for the introduction of a liability provision in the Posted workers law of 1996 has been interpreted differently on each side of the social partnership. The unions have welcomed the liability provision as a potential mechanism for prevention of the abuse of employment rights, domestic businesses have, on the other hand, protested against the burdensome liability provisions.³³

The first Posted workers law has only entrenched a liability for the contractors who subcontract work in the case when their subcontractors fail to comply with the minimum requirements.³⁴ It was solely an administrative offence to be sanctioned with a fine up to 100.000 DM with no direct liability for minimum net wages.³⁵ While it certainly was a huge step forward from the existing status quo³⁶, this initial version of legislation allowed for *exculpation* of the contractors on basis of the due diligence principle.³⁷ The client (only if it was a company purchasing services) and every contractor could be held liable for non-compliance of their subcontractors with the exhaustively listed minimum labour conditions and the payment of wages by other subcontractors in the chain, only as long as they were or negligently were not aware of such a non-compliance.³⁸ Hence the first Posting law of 1996 addressed rather the responsible stakeholders and authorities and did not explicitly entitle posted workers to directly held contractors in the chain liable for the payment of their wages or contributions. Anyhow, the provision was intended to give a clear incentive to contractors to carefully select subcontractors and to monitor their compliance with relevant provisions, but it did not appear as a clear empowerment to posted workers as it did not explicitly provide for a direct claim of individual unpaid wages from any contractor in the subcontracting chain.

Such an explicit reference first came with the revision of the initial Posted workers law in 1999³⁹ adopted under the more union-friendly Social-Democrat and Green government elected in late 1998⁴⁰, where § 1a for a first time established a *strict* chain liability for all contractors in a given subcontracting chain in the construction industry. The article imposes liability on every contractor, their subcontractors or latter’s own subcontractors in a sense that every posted worker could claim their unpaid wages (only net pay, not extended to social security and taxes⁴¹) or particular contributions from any contractor in the chain above their own employer. The additional clarifier “strict” means that the liability was made independent of

²⁹ For further details on the notion of “social dumping” see Bernaciak, M. (2014), Social dumping and the EU integration process, Working Paper 2014.06, ETUI aisbl, Brussels. Also see Barnard, C. (2009), Fifty Years of Avoiding Social Dumping, in M. Dougan and S. Curie (eds.), 50 Years of the European Treaties. Looking Back and Thinking Forward, Oxford, Hart: 317–319.

³⁰ In supra note 7.

³¹ Convention on the law applicable to contractual obligations (Rome Convention), 1980; Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

³² Scharpf, F. W. (1997), Balancing Positive and Negative Integration: The Regulatory Options for Europe, MPIfG Working Paper 97/8.

³³ Supra note 7.

³⁴ Supra note 28.

³⁵ Art. 5 (3), in supra note 28.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

³⁹ See § 1a, AEntG 1999; The revision of 1999 served to adapt the German Posted workers law to the Posted workers directive 96/71/EC.

⁴⁰ Kahmann, M. (2006), The posting of workers in the German construction industry: responses and problems of trade union action, Transfer, January 2006. See also Supra note 7.

⁴¹ Net pay in the context of the Posted workers law means the minimum wage after deductions in respect of tax, social security contributions, payments towards the promotion of employment or other such social insurance payments.

finding guilt or negligence of the respective contractors, main contractor or the client.⁴² Also there was no requirement for first having a negative outcome of a court procedure against the direct employer in order to be able to reach to the other contractors upwards in the network. In other words, the foundation for strict and unconditional chain liability has been set, still covering only the construction sector.

The introduction of the unconditional chain liability has been received with a great outrage by Germany's employers association as well as other interest groups.⁴³ The fact that the liability was defined as strict without requiring breach of the "due diligence" principle by the contractor, caused even greater response by affected parties. The provision has been considered to be purely protectionist by the "posting" member states, who asserted it would lead to general avoidance of cooperation with foreign subcontractors as the latter would be *ipso iure* stigmatized as less trustworthy and reliable. At the same time, the provision has been accused of being extremely burdensome and unfair, allowing for German contractors to be held liable for bankruptcy of their subcontractors - something they would not have a direct influence on.⁴⁴ The unconditionality of the chain liability has been highly contentious and legally challenged for restricting the right to provide services (Art. 49 and 56 TFEU)⁴⁵, but the decision of the CJEU in the *Wolff & Müller* case has at least formally calmed the tensions, stating that the protection of workers such as safeguarding their pay is an overriding reason relating to the public interest capable of justifying restrictions to market's freedoms.⁴⁶ Schlachter points out that the main contractor cannot justify oneself by stating that they have not been aware of it, nor that they were not able to prevent it.⁴⁷ Therefore, it is always possible to hold the main contractor liable.⁴⁸ Several German labour courts have ruled on this matter that such an interpretation is in line with established case law, because this rule furthers the effective enforcement and therefore, it is a necessary, proportionate and suitable measure.⁴⁹ Since the liability is unconditional, it does not have to be established *ex ante* in order for actual court proceedings to start. Regarding the liability of the client, there is currently wide margin for interpretations and it is worth of further comments in the following sections.

Hence, the incentive for introducing strict chain liability in the subcontracting relations in the construction sector has been at least twofold: on one hand the intention was to establish a certain level of precaution when contractors are subcontracting part of their work, thus inciting them to choose the companies they cooperate with more carefully. At the same time, it was supposed to establish a better level of protection of the rights of posted workers, creating an additional channel of redress when the employer "disappears" or becomes insolvent.⁵⁰

The most controversial and by the same token, the most significant alteration of the revision of 1999 was that the Ministry of Labour was enabled to declare wages and working conditions to be generally binding by a ministerial directive, thus rendering the consent of the employers' association unnecessary.⁵¹ This has paved the way for increasing the existing universally applicable sectoral collective agreements and extending the coverage of the Posted workers law and chain liability beyond the construction sector.

⁴² Harbrecht, T. (1999), Die Auswirkungen der Einführung des § 1a Arbeitnehmer-Entsendegesetz (AEntG), BauR 1999: 1376-1381.

⁴³ Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Dr. Irmgard Schwaetzer, Rainer Funke, Rainer Brüderle, weiterer Abgeordneter und der Fraktion der F.D.P., Drucksache 14/1885, Berlin 1999.

⁴⁴ Ibid.

⁴⁵ Consolidated Version of the Treaty on the Functioning of the European Union art. 56, 2008 O.J. C 115/47, at 70.

⁴⁶ Case C60/03 *Wolff & Müller GmbH* [2004] ECR I-9553.

⁴⁷ Schlachter, M. (2010), The Posting of Workers Directive – German reactions and perceptions, FORMULA Working Paper No. 14.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Briefing note No. IP/A/IMCO/SC/2006-070, Liability of principal contractors: Selected national experiences, Centre for European Policy Studies on behalf of DG Internal Policies, Policy department: Economic and Scientific Policy, 2006, Brussels.

⁵¹ *Supra* note 7.

Since then the German Posted workers law has been amended several times over the years and the scope of application of the liability provision has been significantly broadened through extending the coverage of the law to ever more sectors. § 4 of the last revision of the AEntG from 2013 covers minimum wages for the following industries: construction industry (main and secondary trades), building-cleaning industry (Gebäudereinigung), electrical trades (Elektrohandwerk), mail delivery services (Briefdienstleistungen), security services (Sicherheitsdienstleistungen), special services in coal mining (Bergbauspezialarbeiten auf Steinkohlebergwerken), slaughtering and meat processing industry (Schlachten und Fleischverarbeitung), industrial textile services (in particular industrial textile cleaning), waste disposal and professional further training (Berufliche Aus- und Weiterbildung).⁵²

The next and for the time final milestone in the regulation of the German chain liability model has been the adoption of the Law of national statutory minimum wage in 2015 (Mindestlohngesetz MiLoG 2015) which in §13 has explicitly referred to § 14 of the Posted workers law (the chain liability provision). Consequently, this way the chain liability now covers almost every industry in Germany as there are very few exceptions where transitional periods are precluding the applicability of the of National statutory minimum wage act.⁵³

The German *chain liability* as currently stipulated in §14 of the latest edition of the Posted workers law (AEntG) must be interpreted as the possibility for the posted worker to hold all guarantors liable, including the main contractor, the client (only when it is a company and not a private owner), and the intermediary contractor or user company (in the case of temporary agency workers).⁵⁴ This results in the possibility for every posted worker to always be able to hold a contractor liable as a guarantor when the employer does not pay the German minimum wage for the respective industry. But what does “all” contractors exactly mean? Even though the reading of the norm implies that every contractor in a chain could be held liable, according to the case law of the German Federal labour court (Bundesarbeitsgericht), the norm shall be interpreted restrictively in its spirit and purpose.⁵⁵ Hence, the Federal labour court suggests an interpretation of the liability provision in a way that not every contractor in the chain is to be held liable, but in some cases only the ones who are outsourcing part of their work to subcontractors.⁵⁶ This is why the chain liability in German is still often referred to as a “Generalunternehmerhaftung” or liability of the main or principal contractor.⁵⁷ This could be misleading, because in general, the norm refers to liability of the contractor (Auftraggeberhaftung), so therefore it does not refer to the main or principal contractor only.

In summary, the German model of chain liability shows that at least from the perspective of the current legal framework, its scope is considerably extensive in material, personal and territorial meaning.⁵⁸ In the following section, it will be examined how this legal framework works in practice and if it could be effectively used as an instrument for enforcement of individual rights of posted workers.

b. Effectiveness – chain liability as a compliance tool and rights enforcement mechanism

After being outlined in an evolutionary context, the legal framework regulating the German model of chain liability in subcontracting chains convinces with its thoroughness and extensive scope. However, in spite

⁵² Arbeitnehmer-Entsendegesetzes, BAnz AT 18.10.2013 V1.

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⁵⁴ §14 Gesetz über zwingende Arbeitsbedingungen für grenzüberschreitend entsandte und für regelmäßig im Inland beschäftigte Arbeitnehmer und Arbeitnehmerinnen (Arbeitnehmer-Entsendegesetz - AEntG).

⁵⁵ Vielmeier, S. (2015), Risiken der „Auftraggeberhaftung“ nach § 13 Mindestlohngesetz (MiLoG), Noerr.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ More on these categories see in Supra note 3 and 18.

of having such a comprehensive legal framework, still not many posted workers seem to find their way to the German labour courts in order to claim their unpaid wages and contributions on the grounds of the contractor's liability of the Posting or National minimum wage law.⁵⁹

The effectiveness of the German liability model could therefore be assessed from at least two perspectives: from the perspective of the involved stakeholders and authorities regarding posing fines and collecting taxes and contributions, or the perspective of the posted workers and the enforcement of individual employment rights such as claiming unpaid wages on grounds of liability.

The paper examines the effects the chain liability from the second perspective, or how it could directly benefit the posted workers. It has been historically introduced as an instrument fighting illegal employment practices and social dumping in the construction sector, but we currently witness a transition of the narrative from migrant workers as "wage dumpers" to migrant workers as exploited workers that should have equal rights.⁶⁰

Replying to an enquiry on behalf of Green party's Members of the Parliament in a formal questioning procedure, *the Bundesregierung* has stated that currently there is no official data on how often posted workers have reached to existing enforcement mechanisms such as chain liability.⁶¹ Since there is no official study or statistics data available, the reflections on the effectiveness of the German chain liability model in this section largely rely on 1) the author's insights gained during his three years of experience as counsellor for mobile and posted workers with the Fair Mobility Project (FMP) – a Germany wide network of counselling offices of the German Confederation of Trade Unions (DGB); 2) three interviews and several less formal talks conducted with counsellors from the FMP and the Berlin counselling office for posted workers⁶²; 3) an interview with a lawyer from the German Construction workers' trade union (IG BAU); and 4) reports, media articles and additional consultations with practitioners and trade union officials.

i) Checks, controls and side effects for the workers

As mentioned earlier, the proponents of an extensive and strict chain liability (mostly trade unions from the affected industrial sectors) have been arguing that one of its main benefits would be the incentive for contractors to better check and audit the compliance of their subcontractors with the minimum working conditions of § 3 of the Posted workers law. In the construction industry, the SOKA-BAU⁶³ as well as the trade unions with their network of counselling offices are witnessing an increased usage of certain check and control mechanisms by German contractors. Wagner and Berntsen have also observed that major German construction companies often use a system of checks.⁶⁴ The experience of the FMP counselling

⁵⁹ Art. 6 of the Posting Directive 96/71/EG and § 15 of the German Posted workers law (AEntG) explicitly entitle the posted workers with an access to judicial proceedings in the host country. See Böning, M. (2013), Warum entsandte Arbeitnehmer und Arbeitnehmerinnen den Weg zu den Gerichten nicht finden, Tagung zur sozialen Dimension Europas, Europäische arbeitsrechtliche Entwicklungen, Arbeitnehmerentsendung und Arbeitnehmerüberlassung 25. / 26. Januar 2013; this also matches the experiences of the DGB Fair Mobility Project.

⁶⁰ Supra note 40.

⁶¹ Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Beate Müller-Gemmeke, Brigitte Pothmer, Corinna Ruffer, weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE GRÜNEN – Drucksache 18/9470 – Entsendungen – Umsetzung der Durchsetzungsrichtlinie, Berlin, 09.09.2016.

⁶² Fair Mobility Project: <http://www.faire-mobilitaet.de/> and Berlin counselling office for posted workers: http://berlin-brandenburg.dgb.de/beratung/eb/?tab=tab_0_6.

⁶³ SOKA-BAU is the umbrella name for two paritarian social funds of the German construction industry: The "Urlaubs-und Lohnausgleichskasse der Bauwirtschaft" - ULAK - (Holiday and Wage Compensation Fund of the Building Industry) and the "Zusatzversorgungskasse des Baugewerbes AG" - ZVK - (Supplementary Pension Fund of the Building Industry).

⁶⁴ Wagner, I. and Berntsen, L. (2016), Restricted rights: obstacles in enforcing the labour rights of mobile EU workers in the German and Dutch construction sector. Transfer: European Review of Labour and Research, 22(2): 193-206.

offices is in line with the findings of the afore-mentioned study. In addition, the interviewed counsellors also have noticed an increase of the number of small and medium-sized companies, who require from their foreign subcontractors to let their employees sign declarations which confirm that they have received payments in accordance with the mandatory minimum standards of the German collective agreements.

According to the experience of the FMP, this mostly occurs in construction, but also in other industries such as the electro and metal industry. It certainly is a positive development enabling a higher degree of internal monitoring at the usually non-transparent construction sites or electro and metal industry plants, but it is unfortunately not without negative externalities for posted workers confronted with unpaid wages. The rise of internal monitoring and other checks applied to secure a safe position for the contractors in a case of incompliance by the subcontractors has created many quite unexpected problems for posted workers. The obligation for the subcontractors to collect and submit monthly declarations signed by every posted worker which confirm the received minimum salary and the number of performed working hours, has led to a growing trend where posted workers have been coerced or urged by their employers to sign *blanco* declarations or fake statements where they falsely confirm that they have received their wages according to the respective collective agreement. These declarations are almost standardized and usually translated in several Eastern European languages (see Annex 1). The effect of these signed false declarations is at least threefold: first, they mislead the contractor to believe that their subcontractor complies with the mandatory working conditions where the opposite is the case; second, as a reliable evidence against the workers they might further complicate the already complicated court procedures or the negotiations in an out-of-court settlement; third, they often contain a false (shortened) amount of the actual working hours, which in a lack of other evidence might deprive the workers of remuneration for the full amount of working hours performed. On several occasions, it has even occurred that employers have forged the signatures of their employees.⁶⁵

But what would be the practical implications for the individual posted workers who might decide to file a legal claim with the authorized court in the host country invoking the subcontracting liability provision? The fact that the contractors might possess neatly collected evidence for the payment of minimum wages, signed by every employee on the concerned site, does not exempt them from liability regarding net wages (but it is not the same for social contributions), but it certainly makes a conciliatory hearing (*Guteverhandlung*) or proceedings in the labour court very complicated. This poses a great difficulty to the posted workers and their defenders to prove that outstanding payments are involved in the first place. Considering that due to financial pressure the posted workers often need to leave the host country before the court proceedings have even started, the evidence collection and counter witnessing would be almost impossible in many of the cases. This leaves the claimants with a little chance of successfully proving the outstanding pay and performed working hours, so the court would not even go into discussing the chain liability, as the disputed matter cannot be proven at all. Sometimes due to lack of evidence, proving the employment status, identifying the place of work or the main contractor could also be utterly problematic. There are certainly ways of proving the outstanding payments or working hours, but another practical difficulty would be to find a trade union or legal representative showing willingness to take such a case with shaky evidence.⁶⁶ According to Art. 11 of the Labour court act (*Arbeitsgerichtsgesetzes ArbGG*), trade unions are entitled to represent posted workers in front of the German labour courts.⁶⁷ However, internal statutory requirements ask for a trade union membership of at least three months prior to making

⁶⁵ The case has involved a group of ca. 20 electricians, nationals of several South-East European countries posted through a Slovenian company. The case has been settled out-of-court, the main contractor paying the net wages to the workers. A criminal procedure against the subcontractor has been launched, but no further details regarding this are known.

⁶⁶ Based on experiences of the counsellors.

⁶⁷ Art. 1 (2) 2 des *Arbeitsgerichtsgesetzes (ArbGG)*, this is in line with Art 11 of the Enforcement Directive. For further details on trade union representation of posted workers see Case C-396/13 *Sähköalojen ammattiliitto ry v Elektrobudowa Spolka Akcyjna*.

use of trade union legal assistance.⁶⁸ As cases involving bigger groups of posted workers are known for being highly demanding and the membership requirement remains almost without exception unfulfilled, posted workers not uncommonly fail to break the vicious circle and obtain trade union legal assistance.⁶⁹

ii) Enforcing individual rights of posted workers

As the construction sector is the one having the longest experience with the German chain liability model (for most of the sectors it has been introduced quite recently), the experience of the IG BAU and the DGB counselling structures are certainly insightful for the assessment of the effectiveness of the instrument when it comes to enforcement of posted workers' rights. However, the FMP counsellors also report about experiences from other sectors, such as electro-metal and meat processing industry. Enforcing individual labour rights in this paper is to be understood in a narrow meaning of enforcing claims for net wages and overtime working hours.

The insights gained from the involved trade union officials and the counsellors show that the effectiveness of the chain liability could be examined from at least two perspectives, depending on whether the matter is settled out-of-court, or whether there are actual labour court proceedings.⁷⁰ In the first situation, especially in the cases from the construction sector, counsellors and trade union officials praise the extensive chain liability as a useful rights enforcement instrument in the case of posting. In these cases, making a reference to the liability provisions of the Posted workers law and National minimum wage law during out-of-court negotiations for wage payment with contractors and main contractors, does often result with success. The size of the case (how many posted workers are involved), the reputation of the companies involved or how prone the case would be to media exposure, are decisive factors for securing effective representation for the posted workers as non-members of a trade union in the host country.⁷¹ Hence, when informally negotiating with (main) contractors, counsellors and trade union officials refer to the chain liability using it as crucial negotiation leverage. The success of it would then depend on different other factors, for example the size and reputation of the contractor.⁷² However, it can be concluded that there have been positive experiences with negotiating with main contractors prior to the labour court proceedings. In significant number of cases, the main contractors agreed to pay the workers their outstanding net wages without starting official court proceedings. There have also been cases where after the counsellors or trade unions have started negotiations with the (main) contractor, the latter has managed to put pressure on the subcontractor and thus secure the worker's wages. In the "Kazcor" case⁷³, some 300 Eastern European workers partially received their wages through the main contractors, as well as 50 Romanian workers in the "K&T Contract Germarom" case⁷⁴, and over 20 Bosnian workers in the "Bauer Elektroanlagen GmbH" case⁷⁵ etc. These are only a few of the many examples documented by the FMP counselling centers and IG BAU officials.⁷⁶ The avoidance of public attention and reputation

⁶⁸ Wagner, B. and Hassel, A. (2016), Posting, subcontracting and low-wage employment in the German meat industry. Transfer: European Review of Labour and Research, 22(2): 163-178.

⁶⁹ Supra note 66; Interview with A. Allgeier, IG BAU.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Molitor, C. (2015), Geschäftsmodell Ausbeutung. Wenn europäische Arbeitnehmer_innen in Deutschland um ihre Rechte betrogen werden, FES Studie.

⁷³ Kazcor Bauunternehmen GmbH, Seit April kein Lohn: Bauarbeiter demonstrieren im Europaviertel, Frankfurter neue Presse, 22.05.2015, <http://www.fnp.de/lokales/frankfurt/Seit-April-kein-Lohn-Bauarbeiter-demonstrieren-im-Europaviertel:art675,1413171> [accessed 25 April 2017]; Pressespiegel zu dem Fall Kazcor, European Migrant Worker's Union 26.11.2015, <http://www.emwu.org/pressespiegel-zu-dem-fall-kazcor/> [accessed 25 April 2017].

⁷⁴ Supra note 72.

⁷⁵ Mindestlohn-Haftung verunsichert Firmen, Handelsblatt, <https://www.dub.de/newsinhalte/recht-steuer/mindestlohn-haftung-verunsichert-firmen/> [accessed 25 April 2017]; See also Wolfratshausen - Subunternehmer beutet Arbeiter aus, Süddeutsche Zeitung, 20.03.2015, <http://www.sueddeutsche.de/muenchen/wolfratshausen/skandal-in-wolfratshausen-subunternehmer-beutet-arbeiter-aus-1.2403500> [accessed 25 April 2017].

⁷⁶ Supra note 66.

damages creates an incentive for the (main) contractors to cooperate and opt for an out-of-court settlement rather than the labour court procedure. The cases where the subcontractor has not yet received the full amount for the performance of the purchased services tend to be more successful, because some contractors agree to arrangements where they transfer the rest of the money directly to the unpaid posted workers instead of the subcontractor.⁷⁷

The second way of using chain liability with a direct effect on the rights of posted workers is to use it as a ground for starting court proceedings in order to claim unpaid wages and overtime working hours. In terms of institutions claiming contributions on liability grounds, SOKA-BAU has had succeeded on multiple occasions.⁷⁸ However, the rate of the court cases concerning posted workers is still insignificantly low compared to the number of entries registered by counselling services where posted workers have reported their experiences of different abusive practices at the work place.⁷⁹ There are plenty of factors standing in the way of effective usage of the liability regulations as a ground for labour court proceedings, beginning from the language difficulties, lack of information and financial resources, the problem of posted workers not being unionized in the host countries, the difficulty of finding legal *pro bono* representation, unclear state of evidence etc.⁸⁰ Most of the court proceedings fail in the initial phase due to lack of evidence in order to prove an employment relationship, worker's status, the unpaid wages or the total sum of performed working hours.⁸¹ So the majority of the existing obstacles are of a factual nature. However, despite the factual ones, there are also legal obstacles regarding the reading and interpretation of the existing legal framework regulating chain liability by the labour courts. One such a point of clarity and contestation is the interpretation of the terms of contractor, main contractor, undertaking (company) and client for the purpose of Art. 14 of the Posted workers law and Art. 13 of the Minimum wage law. This will be illustrated through the latest decision of the Berlin labour court in the "Mall of Berlin" case regarding chain liability in the German construction sector.

c. The "Mall of Berlin" case and the terminology of client and main contractor

The "Mall of Berlin" case⁸² has been chosen in this paper to illustrate a current tension regarding chain liability in Germany, because it is exemplary of the practical and legal difficulties that might arise when posted workers initiate labour court proceedings based on the chain liability provisions from the Posting or Minimum wage law. The court decision in this case is also the most recent one, being delivered by the Berlin labour court on May 3 2017.⁸³ The case illustrates the tension between the legal framework on the one, and the reality on the other hand. The paper does not intend to draw general conclusions based on this single case, but it uses its multi-sided context to demonstrate certain limits of the current German chain liability model.

The "Mall of Berlin" case in the first place highlights the challenging time duration of the court proceedings and the costly resources which should be on posted workers' disposal, for them to be able to even consider reaching to the chain liability mechanism. The already mentioned factual obstacles and the results of various studies on living and working conditions of posted workers clearly demonstrate the starting position of a posted worker who might consider commencing court proceedings based on the

⁷⁷ Ibid.

⁷⁸ Supra note 55.

⁷⁹ Supra note 66. FMP annual statistics report for the years 2016, 2015, 2014.

⁸⁰ Supra note 66. See Böning, M. (2013), supra note 59.

⁸¹ Ibid.

⁸² More about the factual situation of the case see FAU Berlin (2015), 'Mall of Shame - Built on Exploitation'. *FAU Berlin - Mall of Shame*, https://berlin.fau.org/kaempfe/mall-of-shame?set_language=en&cl=en [accessed 26 April 2017]. See also Romanian country report, LABCIT project: http://migrationonline.cz/romania_country_report.pdf.

⁸³ Arbeitsgericht Berlin, Urteil vom 03.05.2017 – Az. 14 Ca 14814/16.

chain liability provisions.⁸⁴ The “Mall of Berlin” case involves a massive construction site in Berlin, with around 150 subcontractors, who have participated in building a luxury commercial mall and a hotel.⁸⁵ The claimants are a group of Romanian construction workers (recruited as building assistants - Bauhelfer), who officially have not had a status of posted workers (the subcontractors were Germany based companies), but the factual situation identically matches a classical posted workers case.⁸⁶ The Romanian workers had not been paid for several months. They were supported by a successful campaign by the German trade union FAU -(Free Workers' Union, which does not belong to DGB). The case attracted extensive media coverage and a labour lawyer became interested, and offered to represent the workers. He filed lawsuits with the Berlin labour court on behalf of five workers from the group, basing the claim on the chain liability provisions as stated in the Posted workers law.⁸⁷ Initially there were more than five claimants, but the rest of the workers returned to Romania prior to the proceedings. Due to the difficulties of maintaining contact they have not managed to be part of the legal process before the Berlin labour court.⁸⁸

The involved workers did not have any written employment contracts with their employer.⁸⁹ The first phase in such situation is that the workers need to prove their employment status and their activity on the concerned construction site.⁹⁰ Only after that has been done, the court would proceed on deciding who in the subcontracting chain has to be held liable for the wages and contributions claimed. The claimed wages were for the period from August until October 2014, which indicates that the proceedings have so far taken three years and it is not likely that they will be closed soon.⁹¹

The labour court has confirmed the claimed amount of unpaid wage and the fact that the concerned workers have been active at the particular construction site. After an unsuccessful attempt to enforce that unpaid amount against the direct employer and after the bankruptcy of the main contractor, the claimant has proceeded against the client. For this court procedure, the lawyer representing the workers has filed only one claim on behalf of one of the initially five claimants. The rest discontinued the proceedings. However, in the present decision the Berlin labour court has found that the client (Bauherr) in this case cannot be held liable in accordance with the meaning of the chain liability provision of the Posted workers law. According to the court’s interpretation of the liability provision, the client should be held liable only when it is a company which has ordered construction work done in order to sell the completed projects, but not when it uses them as an own property for renting them or for other business purposes.⁹²

Ever since the chain liability has been introduced, both definitions of ‘client’ and ‘contractor’ (Unternehmen) have been the object of different court interpretations.⁹³ What exactly are the features of a contractor and when exactly can a client be held liable under the same conditions as a contractor? The decision in the “Mall of Berlin” case says that the client does not fall under the chain liability of the Posted workers law when it does not purchase the constructed object exclusively in order to commercially

⁸⁴ See studies: Lillie, N. (2012), Subcontracting, posted migrants and labour market segmentation in Finland. *British Journal of Industrial Relations*, 50(1), 148-167; Lillie, N., & Sippola, M. (2011). National unions and transnational workers: the case of Olkiluoto 3, Finland. *Work, employment and society*, 25(2), 292-308. Lillie, N., Wagner, I. and Berntsen, L. (2014). Posted Migration, Spaces of Exception, and the Politics of Labour Relations in the European Construction Industry. In Hauptmeier, M. and Vidal, M. (eds), *Comparative Political Economy of Work*. Basingstoke: Palgrave Macmillan, pp. 312–331; N 60 supra.

⁸⁵ Supra note 82.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Decision of the Berlin Labour Court of Appeal of 13.01.2016, Aktenzeichen: 15 Sa 1622/15.

⁹¹ Wie geprellte Bauarbeiter gegen Windmühlen kämpfen, rbb Rundfunk Berlin-Brandenburg, 04.05.2017, <https://www.rbb-online.de/wirtschaft/beitrag/2017/05/mall-of-berlin-bauherr-muss-nicht-fuer-insolventen-subunternehme.html> [accessed .

⁹² Supra note 83.

⁹³ Thüsing, G. et al. (2016), *Mindestlohngesetz, Arbeitnehmer-Entsendegesetz Kommentar*, 2. Auflage, C.H. Beck.

alienate it or sell it. The overall impact this single decision might have on the labour court's positions in future similar cases is uncertain. However, it is certainly not a positive signal for trade unions, labour lawyers and activists who campaign for a broader coverage of the chain liability reaching for the clients when contractors cannot effectively be held liable. If the commercial element of selling and trading with the object interconnecting the contractors is the decisive characteristic in order for the client to be liable in the sense of the law, it forecloses a further debate regarding the introduction of chain liability for some less traditionally commercial branches such as home health care or posting to private households, where according to the latest data considerable posting occurs.⁹⁴ Could the family employing posted health care workers ever be considered a contractor or client in the sense of Art. 14 of the Posted workers law, under the definition of client as in the "Mall of Berlin" case? The practice must show what the actual implications for the construction sector or other branches might be, but the latest decision in the "Mall of Berlin" case does shed light over the already opaque interpretations of the nature and characteristic of the notions of client and contractor.

III. Conclusion

Having in mind the complex nature of posting as a multilevel conflict issue, the subcontracting liability cannot be the only approach to address the posting *problématique*. However, its capacity to serve as a mechanism which strengthens the rights of posted workers is worth examining. So what is to be concluded from the previous discussion?

Notwithstanding the extensive scope of the existing legal framework on chain liability in Germany, posted workers do not seem to make a full use of it in practice. I am conscious of the shortcomings of the methodology applied for this paper. In lack of official data on the number of court proceedings or trade union out-of-court interventions using chain liability as a mechanism to enforce individual rights of posted workers, I needed to rely on observing, interviewing and perusing documents from trade unions and counselling offices. Based on that, the conclusion is that the current rate of successful enforcements of employment rights of posted workers through chain liability is still quite low. It however should be by no means understood that this paper aims at rendering the chain liability as an ineffective and inefficient instrument. It has been praised by all trade union counsellors and officials as a useful instrument which needs to be further developed. This instrument does certainly give a chance to the posted workers to collect their unpaid wages. In the postings through letter box companies or in the case of bankruptcy of the employer, it is even the only conceivable way of wage enforcement. Minimum wage violations are a widespread phenomenon in the context of posting of workers, especially in the German construction industry.⁹⁵ In addition to the usage of liability by trade unions and counselling offices, there has been some considerable successful usage of the liability provisions by authorities and the SOKA-BAU in cases claiming holiday contributions from contractors.⁹⁶

However, one must not ignore the reality. The small number of rarely successful labour court proceedings suggests that there must be factual and legal constraints preventing the posted workers to take advantage of the established legal framework and effectively enforce their rights. Having in mind that many of the posted workers do not have written contracts, A1 certificates or documentation of their working hours (official time sheets), it is quite difficult to prove their demands before the labour courts in Germany. The

⁹⁴ Supra note 13.

⁹⁵ „Entsendung in der Baubranche – Erfahrungen aus der Praxis“, talk given at the conference „Gleicher Lohn für gleiche Arbeit am gleichen Ort – Entsendung in der Theorie und Praxis“ by a FMP councillor, Friedrich Ebert Stiftung, Berlin, 25.11.2016.

⁹⁶ See Decision of the Federal Labour Court 10 AZR 190/11 of May 16 2012. See Aufdermauer, C. (2015), Die Bürgenhaftung des Auftraggebers für den gesetzlichen Mindestlohn: Das Prinzip der Generalunternehmerhaftung im MiLoG und wie ihm in der Praxis zu begegnen ist, Deutscher Anwalts Spiegel. Supra note 69.

opacity of different wage deductions creates an even more complicated situation.⁹⁷ The experience of the Fair Mobility counsellors shows that the most of the concerned posted workers are not willing to embark in court proceedings as they are skeptical of the efficiency of the judicial system in general. Especially the third-country nationals posted through companies based in CEE countries are in a poor position as they are often uncertain if they reside legally in Germany at all. Being doubtful if their employers have arranged the proper visa for them, in the most cases they would not even try to approach a public official or a labour court in Germany, and sometimes not even a trade union.⁹⁸ So how to take the first step forward? Can strategies raising activities by the labour courts prelude way to increase the effectiveness of the chain liability in the enforcement of individual employment rights of posted workers?

Furthermore, the decision in the “Mall of Berlin” case indicates that an uncertainty regarding the material scope of the legal term (Begriff) of client and respectively contractor currently exists and interpretation and definition through the jurisprudence of the labour courts is to follow. It is hard to tell if this single decision would have any consequences on the further interpretation of the scope of the “client”, but it certainly is relevant and forecloses a debate on the liability of the client in industrial sectors where the clients and purchasers of particular services are not companies (undertakings) in the meaning of the current interpretation of Art. 14 of the Posted workers law.

In summary, we have seen that even with such an extensive form of unconditional chain liability as in the German model (only in terms of net minimum wages), there are various obstacles preventing the posted workers to benefit from the extensiveness of the legal framework. The *culpa* of the contractors and clients does not need to be proven for them to be held liable, but there are many other impediments blocking the way. This should give a clear indication of what to be expected from a conditional chain liability as promoted by the European Commission in the Enforcement Directive and more recently, in the Proposal for a targeted revision of the PWD. Would the posted workers have a chance to make usage of the chain liability instrument when the due diligence or negligence of the (main) contractors needs to be proved? The answer could be read out of the previous section when we illustrated the different ways how contractors are introducing different checks in order to protect themselves even though their due diligence does not exempt them from liability. The same could be *a fortiori* expected when a conditional chain liability model is implemented, with severe consequences to the ones the chain liability is primarily intended to protect – the transnational posted workers themselves.

⁹⁷ Supra note 66.

⁹⁸ Bogoeski, V. (2016), Posting of workers – strengthening labour rights while securing free movement of services?, Labcit project series, migrationonline.cz, 11. 8. 15, <http://migrationonline.cz/en/e-library/posting-of-workers-strengthening-labour-rights-while-securing-free-movement-services> [accessed May 15 2017].

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ERKLÄRUNG

Bestätigung über den Erhalt des Mindestentgelts nach dem Mindestlohngesetz und dem Arbeitnehmerentgeltgesetz.

Projekt: Kehler Str. 1-9, 79108 Freiburg

Auftraggeber: Ignaz Haas Maler und Stuckateur

Arbeitgeber: i.o.

Mein Arbeitgeber hat mich über das Mindestlohngesetz und das Arbeitnehmerentgeltgesetz unterrichtet. Nach diesen Vorschriften halten Unternehmen (Auftraggeber), die ein anderes Unternehmen mit der Erbringung von Werk- oder Dienstleistungen beauftragen (Auftragnehmer), für die Verpflichtungen des Arbeitgebers (=Auftragnehmers) und weiterer Nachunternehmer oder Verleiher auf die Zahlung des Mindestentgelts.

Zur Abdeckung des Haftungsrisikos des Auftraggebers ist nachzuweisen, dass der Arbeitgeber seinen Verpflichtungen zur Zahlung des Mindestentgelts nachgekommen ist. Vor diesem Hintergrund bestätige ich,

Name, Vorname: Kilić, Marinko

Geburtsdatum: 21.01.1965

Dass ich je tatsächlich geleisteter Arbeitsstunde für den

Abrechnungszeitraum Juli

mindestens EURO 12,80 brutto, d.h. vor Abzug von Steuern und Sozialabgaben, erhalten habe.

Ich versichere ausdrücklich, dass mein Arbeitgeber neben den gesetzlichen Abzügen keine weiteren Abzüge von meinem Entgelt vorgenommen hat und alle meine tatsächlich geleisteten Arbeitsstunden für den Abrechnungszeitraum abgerechnet hat. Ich habe für den oben angegebenen Abrechnungszeitraum keine offenen Entgeltforderungen gegenüber meinem Arbeitgeber.

Ich verpflichte mich ausdrücklich, der Auftraggeber unverzüglich schriftlich intentions zu setzen, falls das mir zustehende Nettorentgelt (nach Abzug von Steuern und Sozialabgaben) nicht bis zum 15. des Folgemonats vollständig an mich ausbezahlt wird.

Bei schuldhaftem Verstoß gegen diese Pflicht zur Inkassozusicherung über die Unterschreitung des Mindestentgelts mache ich mich dem Auftraggeber gegenüber schadenersatzpflichtig.

Ich bin damit einverstanden, dass diese Bescheinigung potentiellen Auftraggebern vorgelegt bzw. zur Verfügung gestellt wird.

Datum: 01.08.2015

Unterschrift:

IZJAVA

Potvrda o primiku najniže naknade prema Zakonu o najnižoj naknadi i o Zakonu o stanju posloprimalca.

Projekt: Kehler Str. 1-9, 79108 Freiburg

Nalogodavac: Ignaz Haas Maler und Stuckateur

Poslodavac: i.o.

Moj poslodavac me upoznao sa Zakonom o najnižoj naknadi (Mindestlohngesetz) i sa Zakonom o stanju posloprimalca (Arbeitnehmer-Entgeltgesetz). Prema tim propisima poduzeća (nalogodavci), koji zadužuju neko drugo poduzeće s izvođenjem poslova i davanjem usluga (nalogoprimalci), jamče za obveze poslodavca (=nalogoprimalca) i ostalih poduzetnika ili iznajmljivača na plaćanje najniže naknade.

Zbog pokrivenja rizika jamstva nalogodavca mora se dokazati, da je poslodavac izvršio svoje obveze plaćanja najniže naknade.

Znajudi za ovo potvrđujem ja,

prezime, ime: Kilić, Marinko

datum rođenja: 21.01.1965.

da sam po stvarno odrađenom radnom satu za obračunski

period septanj

osobno primio najmanje EURO 12,80 brutto, tj. prije odbijanja poreza i socijalnih doprinosa.

Izričito potvrđujem, da moj poslodavac pored zakonskih odbitaka nije poduzeo nikakve druge odbitke od moje naknade i da je sve moje stvarno obavljene radne sate obračunao za period obračuna. Za gore navedeni period nemam od svoga poslodavca otvorenih potraživanja naknade.

Izričito se obvezujem, da ću neodoljivo pisanim putem obavijestiti nalogodavca, ukoliko mi se do 15. narednog mjeseca upotpunosti ne isplati neto naknada koja mi pripada (poslije odbijanja poreza i socijalnih doprinosa).

Kad skrivljenog kršenja ove obveze obavještanja o nedostizanju najniže naknade, obavezan sam na isplatu naknade štete nalogodavcu.

Suglasan sam s tim, da se ova potvrda priložio drzno stavi na raspolaganje potencijalnim nalogodavcima.

Datum: 01.08.2015.

Potpis: