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Climbing the chain: the Belgian system of joint liability for the payment of wages

Belgijski system wspólnej odpowiedzialności za wypłatę wynagrodzeń — łańcuch wzajemnych powiązań

Abstract
Due to the increased use of subcontracting and of posted workers in the Belgian labour market, problems regarding correct remuneration of these employees have come under scrutiny. The Belgian authorities are often confronted with situations where these workers do not receive the correct wages by their employer, often a (sub)contractor working for a Belgian company. A joint liability scheme was therefore introduced in 2012 where a client or contractor can be held liable for the correct payment of the wages to the employees of the (sub)contractor when the latter has seriously failed to fulfil their obligation to pay their employees the wages to which they are entitled. This article discusses the liability scheme in theory and in practice, by reviewing its application in the case of a Polish posting undertaking.

Keywords
posting of workers, joint liability, remuneration, Belgium

Streszczenie
Ze względu na zwiększone wykorzystanie na belgijskim rynku pracy podwykonawstwa i pracowników delegowanych pojawiają się problemy z prawidłowym ich wynagradzaniem. Władze belgijskie często spotykają się z sytuacjami, w których wskazane kategorie pracowników nie otrzymują od pracodawcy, będącego często (pod)wykonawcą przedsiębiorcy belgijskiego, prawidłowego wynagrodzenia. W związku z tym w 2012 r. wprowadzono program wspólnej odpowiedzialności, w którym klient lub wykonawca może zostać pociągnięty do odpowiedzialności za nieprawidłową wypłatę wynagrodzeń pracownikom (pod)wykonawcy, jeżeli ten w sposób rażący nie wywiązał się z obowiązku wypłaty wynagrodzenia pracownikom. W artykule omówiono schemat odpowiedzialności zarówno z praktycznej, jak i teoretycznej perspektywy, dokonując przeglądu jego zastosowania w przypadku polskiego przedsiębiorstwa delegującego.

Słowa kluczowe
delegowanie pracowników, wspólna odpowiedzialność, wynagrodzenie, Belgia

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Introduction

Joint liability schemes have long been considered a useful tool to protect the rights of workers in the context of subcontracting chains. In very brief, these schemes allow workers to bring a claim against the main contractor (or even the entire chain) when their 'direct' employer is not able to fulfil its obligations towards them, for instance in case of bankruptcy. Their usefulness is even more visible when these chains involve a cross-border element, and notably, in the European context, the use of posted workers.[1] It has been highlighted that these schemes allow workers to identify multiple 'guarantors', thus increasing their chances of recovering unpaid wages, either through court proceedings or by using the threat of potential legal action to reach out-of-court settlements (Bogoeski, 2013, pp. 2–3). The so-called Enforcement Directive[2], in Article 12, encourages Member States to introduce a joint liability scheme 'with respect to any outstanding net remuneration corresponding to the

minimum rates of pay' of posted workers. This was also confirmed in Recital 25 of the recent Directive amending the Posting of Workers Directive.[3] The Court of Justice of the European Union (CJEU) in *Wolf and Müller*[4] concluded that these schemes are 'appropriate measures' for the enforcement of obligations under the Posting of Workers Directive (PWD).[5]

In this article we present an example of a national implementation of such a scheme, notably the Belgian scheme for joint liability for unpaid wages. We do so by first explaining the functioning of the scheme (Section 2) and, second, by analysing a rare court decision regarding this scheme (Section 3). We conclude with some reflections about the strengths and weaknesses of the Belgian regulation (Section 4). It goes without saying that space limitations do not allow us to provide even a superficial introduction to the Belgian labour law system. For such an introduction in English, we refer to the text, although slightly outdated by now, by Roger Blanpain (Blanpain, 2012).

The Belgian federal law of 12 April 1965 on the protection of workers' remuneration(hereinafter 'LPWR') stipulates the rights and rules of payment of remuneration to employees.[6] It is therefore intended to guarantee the employee's access to the wages owed to him and aims to prevent any abuse regarding the payment. This law was amended by the program Law of 29 March 2012 (I) which added a new scheme of joint liability to guarantee that employees of (sub)contractors receive their wages due.[7]

This joint liability scheme for wage debts is considered an enforcement measure to meet the obligations of the Posting of Workers Directive (Croimans and Van Overmeiren, 2014, p. 106).[8] This Directive was transposed in Belgian legislation by the law of 5 march 2002 of which article 5 states that the employer who employs an employee posted in Belgium is obliged, for the work that is performed there, to comply with the employment, wage and employment conditions that are determined by legal, administrative or conventional (collective labour agreement) provisions punishable under criminal law.[9]

The creation of an extended liability scheme was deemed necessary given the effects of globalisation on the operation method of Belgian companies. As globalisation increased so did market competition, forcing Belgian companies to adapt their organisation, often by outsourcing. Due to this competition, pressure increased on the working conditions and wages of employees.[10] It should be borne in mind that labour costs in Belgium are among the highest in the European Union.[11] The joint liability system therefore aims to prevent distortions of competition caused by contracting chains in which a subcontractor, in breach of legal provisions, pays its employees less than what is required, thus gaining an unfair advantage over its competitors.[12]

The bill of the Belgian program law of 29 March 2012 (I), that introduced this new liability scheme, emphasizes the equality of employees by specifically referencing paragraph O. of the motion for a European Parliament Resolution on the social responsibility of subcontracting undertakings in production chains of 26 March 2009[13]:

O. whereas it must be ensured that the basic principle of equal pay for equal work in the same place applies to all employees, regardless of their status and the nature of their contracts, and that it is enforced[14].

The rule of joint liability therefore allows an employee to obtain, under certain conditions, the payment of his or her wages from a third party (the client or contractor in case of a subcontractor) which is considered jointly liable together with his or her employer (the subcontractor).[15]

Chain Liability: general rules and regulations

The rules and regulations relating to the chain liability for payments of remuneration are explained in detail in the LPWR, as well as in the Belgian social criminal code. It is important to highlight that the LPWR includeshree liability schemes: a general regulation of joint liability with regard to wages (hereinafter referred to as the 'general regulation') and two special regulation relating to the construction industry and the illegal employment of nationals of a third country, both of which are outside the scope of the present article.

Art. 35/2 § 1 of the abovementioned law of 1965 states the core of the liability scheme: 'The client, contractors and subcontractors who rely on one or more contractors or subcontractors for the activities specified in article 35/1, § 1, 1°, and who, in accordance with Article 49/1 of the Social Criminal Code are informed in writing by the Social Inspection that their contractors or subcontractors seriously fail to fulfil their obligation to pay their employees the wages to which they are entitle on time, are held jointly and severally liable for the payment of the wages to the employees concerned to the extent and during the period as determined in Article 35/3'.

i. Definitions

The LPWR gives a clear definition of the terms and categories that fall under this law and therefore the liability scheme. A client is regarded as 'anyone who gives the order to carry out activities or have them carried out for a price'. A contractor is defined as' anyone who carries out the requested activities or have them carried out for the client for a price' and a subcontractor is 'anyone who carries out the requested activities or have them carried out for the contractor for a price'.[16]

Wages are generally defined as 'the wages in money to which the employee is entitled by virtue of their employment at the expense of the employer; the gratuities or service fees to which the employee is entitled as a result of their employment or local customs; the benefits which can be valued in money to which the employee is entitled due to his employment'.[17]

The description of the term 'wages owed' is referenced specifically in the liability scheme as 'the wage that has become claimable since the start of the joint liability period'.[18] By specifically defining the term, the Belgian

legislator aimed to define the scope of the liability and exclude certain fees or allowances that are not a compensation for work performed by the employee.[19] For instance, the liability scheme does not apply to the compensations to which the employee is entitled following the termination of the employment contract, such as severance pay.[20]

ii. Activities

The rules regarding the chain liability scheme are only applicable to certain works or services determined by the government by Royal Decree after unanimous advice from the relevant joint committees or, in absence thereof, the national labour council.[21] As a general rule, the system of joint liability is not applicable in situations where the client has the activities carried out by a contractor for private purposes.[22]

The joint liability scheme is currently applicable in nine sectors.[23] Having been involved in a recent research project dealing with the meat industry, we will focus briefly on the food and food trade industries, covered by Royal Decree of 17 August 2013[24] , amended by Royal Decree of 11 September 2013[25] .In fact, the meat industry in Belgium faces important labour shortages, with the employers' association lamenting a mere 1.4 applications for each job opening (Rocca and Vrijsen, 2019, p. 9). Thus, the recourse to subcontracting and posting of workers has emerged as an important source of manpower to solve this situation. The interviews we conducted for the project, with both the main employers' association[26] and the main trade union in the sector[27], as well as with the former chairman of the Joint Committee[28] for the food industry, all referred to the scheme for joint liability as a relevant legal instrument for the sector. Indeed, the trade union representative considered its introduction as a main victory for the trade union movement in the meat industry, as it provided them with a powerful tool to fight against unscrupulous practices. However, although the chairman of the Joint Committee confirmed to us that both employers' associations and trade unions lobbied in favour of the introduction of the scheme, Belgian employers lament that the threat of joint liability is a cause of great frustration and anxiety for Belgian meat companies as they (often in their position as client) can be held liable for the shortcomings of their (sub)contractors. Hence, notwithstanding the specific and, as we will see in Section 3, seldom litigated nature of the joint liability scheme we are discussing here, its importance seems to go beyond its legal implications.

iii. Serious breach

The procedure of joint liability can only be used when the (sub)contractor is responsible for a 'serious breach' in its obligation to pay wages in time.[29]

The Belgian social inspection, a governmental body that checks the compliance of a company with the social legislation, has a key position in this scheme as under the LPWR it decides whether a breach is deemed to constitute a 'serious breach'. As an example, the preparatory work of the program law of 2012 states that the payment of wages below the minimum wage applicable in the given sector is considered a serious breach.[30] However, simply paying too little is not sufficient to establish joint liability.[31] A minimum of one month will have to pass for the social inspection to be able to determine whether the missed payment is a one off or part of a structural problem.[32]

iv. Procedure

a) Notification by the social inspection and period of liability

When the social inspection has determined that a (sub)contractor has seriously failed to fulfil its obligation to pay its employees the wages owed on time, a written notification of this breach is sent to the client and/or (sub)contractors of the responsible (sub)contractor.[33] A copy of the notification is also sent to the responsible contractor or subcontractor.[34]

The liability of the client and/or (sub)contractor will start14 working days after the notification of the social inspection and lasts for a period that is determined by the social inspection but that cannot last longer than one year.[35] A party is therefore only held liable for a defined period of time determined by the social inspection.

The written notification must include the following information:

1. the number and identity of the employees for which the inspection has determined that they have carried out work for the liable party either directly or through intermediary contractors or subcontractors;
2. the wages to which the employees concerned are entitled at the expense of the employer;
3. the part of the wages to which the employees are entitled that was not paid by the employer during the preceding payment period;
4. the average number of employees employed at the time of the notification by the contractor or subcontractor to whom the notification relates;
5. the minimum wage;
6. the percentage referred to in Article 35/3, § 3, of the LPWR(infra);
7. the period during which the joint and several liability applies.[36]

As said above, the liability only applies to the wages that have become due during the period of joint liability, meaning that the liability only applies to *future* wage debts and not to the wage debts that are due and payable before the commencement of the period of joint liability.

The circumstance that the joint liability only kicks in after 14 working days gives the client or (sub)contractor the time and opportunity to take certain measures to minimize or avoid his liability.[37] In particular, a stipulation in the agreement between the client and the (sub)contractor stating that a notification by the social inspection constitutes a resolutive condition in the contract is considered to be a legitimate way of avoiding any liability in case of wage debts.

In this context, it is important to highlight that the Royal Decree extending the scheme to the food industry

denies the possibility to terminate the agreement in three situations, and notably i) if the subcontractor pays the remuneration due before the end of the 14 days period; ii) if the jointly liable party has already in the past received a notification for the *same subcontractor*; iii) if the conditions of the contract made it "manifestly impossible" to perform it while paying the applicable minimum wage.[38]

Instead of a dissolution or termination clause, a subcontracting agreement can also include a right of control for the client, allowing it to check whether its contractor pays his employees the correct wages or to make deductions from the invoices of the (sub)contractor as long as no proof of correct payment is provided.[39]

b) Notification of breach

During the period of liability, established by the written notification of the social inspection, the liable party (client or (sub)contractor) is obliged to immediately pay the unpaid wages of the employee if it is instructed to do so by means of a registered letter, sent either by the concerned employee or the social inspection.[40] The liable party is required to pay the wages due within five working day after the notification, after which the liable party is forced to pay interests and is held criminally punishable according to the social criminal code.[41]

Unlike the standard situation where an employer is obliged to pay the wages spontaneously on set times on the basis of Article 9 of the LPWR, the liable party only has an obligation to pay after ithas received the said letter.[42] The preparatory work of the law clarifies that the requirement to send a notification first is a weakening of the principle of an automatic payment obligation but it is necessary to avoid the circumstance where an employee receives the same wages multiple times from the different liable parties.[43]

Thus, two scenarios can be envisaged at this stage. Either the notification to the third party (client or contractor) was sent by the employee affected (i), or by the social inspection (ii).

i. Notification by the employee

If the liable party was directly notified by the employee, the liability always relates to the part of the wage that has not yet been paid by the employer.[44]

However, if the liable party proves that the working time spent by the employee in the context of the activities that he or she has carried out either directly or through intermediary contractors or subcontractors is limited to a specific number of hours, the liability only applies to the unpaid part of the wages due according to these performances.[45] This proof can be delivered via a registration system of working hours for example.[46]

Moreover, if the liable party can prove that the employee in question did not perform any work in the context of the activities for which it is held liable, the joint liability scheme will not apply.[47]

ii. Notification by the social inspection

When the liable party receives the notification from the social inspection, the liability only relates to the unpaid part of the wages due corresponding to the work performed in the context of the activities for which it is responsible, either directly or through contractors or intermediary subcontractors.[48]

However, if it is not possible to determine the work performed by the employees concerned in connection to the work carried out by the liable party, either directly or through intermediary contractors or subcontractors, the liability shall relate to the payment of a percentage of a minimum wage to each employee mentioned in the notification. This percentage is equal to the share of the activities carried out by the liable party in the context of the assignment, represented in the turnover of the employer during a reference period.[49] The reference period starts one year prior to the notification by the social inspection, without going further than the start of the work carried out by the liable party, either directly or through intermediary contractors or subcontractors.[50]

c) Display of the notification by the employer

The employer involved, that is, the contractor or subcontractor who has not paid its employees their correct wages, has the obligation to inform all employees concerned of the notification made by the social inspection by posting a copy of this notification at every place where it employs people.[51] The jointly liable party to whom the notice has been sent by the social inspection must also affix a copy of the notification received at any place where the activities are carried out by the employees of the employer involved in this notification.[52]

By imposing an obligation to display the notification of the inspection, the employees will be informed that there is a jointly liable party that can be approached for the payment of their wages due.[53]

Belgian case law regarding the system of joint liability for the payment of wages

Although the abovementioned liability scheme provides theoretical possibilities for the (often foreign) employees to secure their future wages, in practice the system faces several challenges. The lack of case law regarding the liability scheme suggests that not a lot of (Belgian) companies are held responsible or liable for unpaid wages. Without extensive research on the root of this problem, the following reasons could be considered as partial explanations.

First of all, as mentioned above, the (often Belgian) client or contractor has the option, although subject to certain conditions, of implementing a dissolution or stipulation clause in the contract, giving it the option to break the contract when a notification of the social inspection is sent. If the Belgian client breaks the contract within 14 working days following the notification of the social inspection, it cannot be held responsible for any wage debts and has successfully avoided its liability.

Second, the total number of notifications resulting in lawsuits seems to be relatively low. Documents we were given access to in the context of the MEAT.UP.FFIRE

project show that the stakeholders themselves believe that the scheme was actually applied in a handful of cases. Given this situation, it is no wonder that decisions concerning the scheme we described are far and few between. The same seems to be applicable to the two special liability regulations regarding the construction industry and illegal nationals of a third- country.

Third, it is not unthinkable that foreign employees are hesitant to (in)directly start proceedings against their employer. Not only they rely on the employer for work and wages, resulting in a psychological restraint to initiate legal proceedings, but they also find themselves in a foreign land, often with little knowledge of the laws and customs (Lillie and Wagner, 2015, p. 161; Wagner and Brentsen, 2016, p. 197).

Despite the lack of legal cases in the general regulation scheme, we will explore the functioning of the scheme in practice by analysing a (relatively) recent decision of the Labour Court[54] of Brussels, of 21 October 2016[55] ,involving a Polish subcontractor in the construction industry. It will be clear in a moment that this case only tangentially deals with the scheme of joint liability. It does, however, provide a perfect illustration of the difficulty, for the client or main contractor, of assessing the respect of minimum wage obligations by (sub)contractors, particularly in the case of transnational posting of workers.

i. The facts

From October 2013 to December 2013, a company with registered office in Poland provided services as a subcontractor to a Belgian company in the construction sector. The Polish company sent five Polish workers to Belgium, all of whom have a Polish employment contract with the Polish company. The social inspection opened an investigation of the Polish company in 2014.

The Polish labour inspectorate consequently carried out a verification visit at the company where they confirmed that the Polish employees received a fixed monthly gross salary of 1.700 Zloty or 412 euros and a daily allowance of 48 euros. The Polish labour inspectorate further corroborated that, according to the Polish system of remuneration, these daily allowances are not regarded as wages but are considered a reimbursement of expenses related to the posting of workers. This information, combined with the LIMOSA-declaration,[56] showed that the Polish employees where severely underpaid as they only received an hourly wage that fluctuated between 2,13 and 4,61 euros, while the minimum wage in Belgium in that sector amounts to 14,189 euros per hour.

On the 20th of February 2015 the Belgian Social Inspection activated the procedure under the joint liability scheme we presented above. Thus, a notification was sent to the Belgian company stating that their subcontractor has seriously failed to fulfil his obligation to pay its employees the wages owed and that they would be then held jointly liable. A notification was also sent to the Polish company at their registered office in Poland.

ii. Decision of the Labour Tribunal (first instance) of Brussels of 26 May 2015

The Polish company initiated proceedings against the Belgian State on 9 March 2015, demanding the notification of the Belgian social inspection of 20 February 2015 to be immediately withdrawn on penalty of 2.500 euros per day of delay, an injunction to publish the decision in three newspapers, a provisional penalty of 12.500 euros, and an order to pay the legal costs.

The Polish company claimed that their employees had been paid sufficiently, because the daily allowance of 48 euros paid by the company should also be regarded as part of their wages. To prove their argument, the Polish company referred to the decision of the European Court of Justice in *Sähköalojen ammattiliitto*[57] where the daily allowance was considered part of the wage as it did not cover any costs related to posting. This was refuted by the Belgian administration, pointing out that this particular decision had no relevance to the daily allowances in question, as the Finnish daily allowances, at stake in the CJEU decision, were established in a generally binding collective agreement and considered as a compensation in return for work performed. However, the daily allowance of 48 euros paid by the Polish company was not a compensation owed because of a Belgian collective agreement, being instead a compensation owed because of the employment contract, established under Polish law.

Therefore, the Labour Tribunal had to decide whether the paid daily allowances were to be considered as a reimbursement for the expenses incurred due to posting, according to article 3§7 of the PWD, in which case they would be excluded from the calculation of the minimum wage applicable to posted workers. The Belgian administration referred to the information of the Polish labour inspectorate of 17 January 2008 and 29 April 2014 that define daily allowances as a compensation for the expenses incurred due to posting (such as the costs of meals and other minor expenses).

The Court further remarked that the Polish company failed to prove that the daily allowance of 48 euros was not meant as a compensation for the expenses of posted workers. The only proof the company provided was a rental agreement between their client and a Belgian landlord, as well as Polish invoices, presumably related to transport between Belgium and Poland. The Belgian administration lastly noted that the daily allowance was also paid on days when the employees were not working, thus confirming that it wasn't a compensation for work performed but a compensation for the costs incurred because of the posting.

In the decision of 26 May 2015, the president of the Labour Tribunal of Brussels rejected the claims of the Polish company, concluding that the Polish Company had failed to prove that the daily allowances of 48 euros were not meant as a reimbursement. According to the Court, the Belgian Social Inspection had rightly assessed that there was a serious breach within the meaning of Article 49/1 of the Social Criminal Code and the LPWR, as the Polish employees only received an hourly wage that

fluctuated between 2,13 and 4,61 euros, while the minimum wage in Belgium applicable in the specific sector amounts to 14,189 euros per hour.

iii. Decision of the Labour Court (court of appeal) of Brussels of 21 October 2016

Unsurprisingly, the Polish company did not agree with the decision and lodged an appeal.

Once again, the nature of the daily allowances lies at the heart of the decision. To decide on this point, the Labour Court refers to the PWD. The Court refers to article 3 of the PWD and art. 5§1 of the law of 5 March 2002 to highlight that allowances that are directly linked to the posting are considered to be part of the wage conditions, insofar as these are not paid as a reimbursement of expenses actually incurred in connection with the posting, such as travel, accommodation and food expenses. The Court then refers to the clarification of 17 January 2008 in which the Polish labour inspectorate explains that an employee has a right to daily allowances, a reimbursement for transport and accommodation costs as well as other expenses determined by the employer, when the employee has been posted to a different country. The clarification further clearly states that daily allowances are a compensation for the cost incurred due to posting (such as the costs of meals and other minor expenses) and are not part of the wages of the employee. The letter of the Polish Labour Inspection of 24 July 2015 reaffirms this and explains that this is based on the Polish regulation of the minister of labour and social policy of 29 January 2013. Art. §13.1 of this regulation states that daily allowances during foreign business trips are meant to cover the costs of meals and other minor expenses. The amount varies depending on the country of destination. According to the annex of the regulation, the daily allowance for Belgium amounts exactly to 48 euros. The amount is reduced when employees make use of free meals or receive money for meals by the employer. According to the Court, this information confirms the compensatory nature of the daily allowance, which was indeed identical to the one established by the Polish regulation.

The Court consequently ruled that the daily allowance of 48 euro cannot be regarded as wages but merely as a compensation for costs related the posting of employees in the sense of art. 3 § 7 of the PWD. Hence, the Court concludes that the employees of the Polish company were paid much less than the compulsory minimum wage in Belgium and confirms that such a situation constitutes a serious breach. The judgement of the labour court in first instance was therefore confirmed.

Conclusion

In closing this contribution, we want to highlight three main conclusions emerging from the scheme presented in the present article which might be of interest in a comparative perspective.

The first element deals with the very aim of the Belgian scheme for joint liability. Indeed, we have seen that the joint liability itself only covers *future* unpaid wages, which become payable *after* the notification, either by the social inspection or by a given employee. As such, the scheme seems to play a lesser role in terms of actually protecting workers rights, as past unpaid wages are not covered, than in providing a potential sanction and, through this threat, an incentive to clients and main contractors to *prevent* violations. Interestingly, in *Wolf and Müller*, the CJEU confirmed the compatibility of a scheme of joint liability in subcontracting chains with the PWD and the freedom to provide services even 'if the safeguarding of workers' pay is not the primary objective of the legislation or is merely a subsidiary objective'.[58]

Hence, under this scheme, clients and main contractors are tasked with 'policing' the subcontracting chain. This is clearly visible in the conditions which the law attaches to the termination of a contract with a subcontractor in case of a notification for joint liability, which we discussed in Section 2, and in particular with the condition which does *not* allow for such a termination in case of contracts awarded to repeated offenders. However, the case we presented as an example clearly shows the difficulty for clients and main contractors to actually play the role of 'policemen' of the value chain, as indeed, assessing whether a (sub)contractor is paying the correct amount of wages to its workers can represent a complex task, particularly so when transnational posting of workers is involved. Considering again the case, one cannot but wonder how the Belgian company could have had the instruments to assess whether the final amount of wage paid by the Polish subcontractor was indeed insufficient due to the nature of the daily allowance. Further, the choice of not including past unpaid wages in the joint liability also puts pressure upon concerned workers, who have the incentive to bring the situation to the attention of the social inspection as soon as possible.

The second important point deals with the pivotal role of social inspections in the joint liability scheme which we highlighted along the previous pages. Not only do social inspectors hold the power to decide whether a breach is serious enough to warrant a notification engaging the joint liability, they also determine the period of liability of the third party (up to the maximum of one year).Hence, the 'threat' potential of the scheme is largely dependent upon the likelihood of checks by social inspections. Focusing once again on the meat industry, one can see how inspections are able to fulfil such an important role. Indeed, the meat industry, as other sectors covered by the joint liability scheme, has been object of a specific focus of inspection activities, with around 5300 workers having been checked in the year 2015 out of a workforce of around 13000 (Rocca and Vrijsen 2018, p. 18). Furthermore, a partnership agreement has been signed in 2012[59] between the social inspections, the trade unions, and the employers' associations of the meat industry. Under this partnership all actors have agreed, among other things, to share data and information about

violations, an exchange which has greatly improved the ability of social inspection to quickly identify problematic situations.[60] It is of course difficult to tell whether such a scheme could still ensure a 'credible threat' outside these rather specific conditions.

Our third and final point deals with the effectiveness of the scheme in the context of posting of workers. Indeed, it has been highlighted that the problem with enforcement of legal standards in these situations often does not come from the standards themselves, but from the obstacles and hurdles that posted workers have to overcome in order to effectively activate them, that is, generally, initiating court proceedings (Bogoeski, 2017, p. 2; Kullmann, 2015). As such, the Belgian scheme offers an interesting two-pronged approach at overcoming these difficulties, first, by putting the ability to activate the scheme in the hands of social inspectors and, second, by ensuring the information of potentially interested workers, through the displaying of the notice informing about the activation of the joint liability at the workplace of both the (sub)contractor and of the client/main contractor.

Przypisy/Notes

[1] Posting of workers in the European Union is regulated by Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18, 21 January 1997 (hereinafter 'Posting of Workers Directive' or 'PWD'). A posted worker is thus a worker who is sent to a Member State different from the state of establishment of their employer, in order to perform work in the context of a transnational provision of services.

[2] 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').

[3] Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

[4] CJEU, Case C-60/03, *Wolff & Müller GmbH & Co. KG v José Filipe Pereira Félix*, 12 October 2004.

[5] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers.

[6] The LPWR stipulates the rights and rules of payment of remuneration to employees, *BS* 30 April 1965.

[7] Program Law of 29 March 2012, *BS* 6 April 2012.

[8] Parliamentary proceedings, bill of program law (I), *Parl. St*. Chamber of Representatives, 2011–2012, nr. 2081/001, 40.

[9] Art. 5 § 1 Law of 5 March 2002, BS 13 march 2003.

[10] Parliamentary proceedings, bill of program law (I), *Parl. St*. Chamber of Representatives, 2011–2012, nr. 2081/001, 40.

[11] Statistics on labour costs in the EU can be consulted at: https://ec.europa.eu/eurostat/databrowser/view/tps00173/default/bar?lang=en

[12] Report on behalf of the Commission, *Parl. St*. Chamber of Representatives 2011–2012, nr. 53-2081/013, 3.

[13] Parliamentary proceedings, bill of program law (I), *Parl. St*. Chamber of Representatives, 2011–2012, nr. 2081/001, 40.

[14] Report on the social responsibility of subcontracting undertakings in production chains (2008/2249(INI). Committee on Employment and Social Affairs, 17 december 2009, consulted at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A6-2009-0065+0+DOC+XML+V0//EN#title1

[15] Art. 35/2 § 1 LPWR, BS 30 April 1965.

[16] Art. 35/1 § 1°, 2°, 3° and 4° of the LPWR, *BS* 30 April 1965.

[17] Art. 2 LPWR, BS 30 April 1965.

[18] Art. 35/1, 1. 8° LPWR, BS 30 April 1965.

[19] Parliamentary proceedings, bill of program law (I), *Parl. St*. Chamber of Representatives, 2011–2012, nr. 2081/001, 43.

[20] Art. 35/1, 8° of the LPWR.

[21] Art. 35/1 § 1, 1° of the LPWR.

[22] Art. 35/5 of the LPWR.

[23] The joint liability scheme is applicable in 9 sectors: surveillance and/or supervisory services; construction; electrical works; upholstery and woodworking; metal, machine and electrical construction; cleaning services; horticultural activities; certain sectors in the food industry and food trade (such as the meat industry).

[24] R.D. of 17 August 2013, BS 28 August 2013.

[25] R.D. of 11 September 2013, BS 19 September 2013.

[26] *FEBEV — Federatie van het Belgische Vlees / Fédération Belge de la Viande*, https://www.febev.be/en/home

[27] *CSC Alimentation et Services/ACV Voeding en Diensten*, https://www.hetacv.be/acv-voeding-en-diensten-sporta

[28] Joint committees (*Commission paritaires/Paritaire comités*) are established by government decree and are generally competent for, among other mission, collective bargaining for a specific branch of industry or activity. They are composed by representatives of most representative organisations operating in the given sector, in equal number.

[29] Art. 35/2 § 2 of the LPWR, *BS* 30 April 1965.

[30] Report on behalf of the Commission, Parl. St. Chamber of Representatives 2011–2012, nr. 53-2081/013, 7.

[31] Parliamentary proceedings, bill of program law (I), *Parl. St*. Chamber of Representatives, 2011–2012, nr. 2081/001, 43; Report on behalf of the Commission, Parl. St. Chamber of Representatives 2011–2012, nr. 53-2081/017, 25.
[32] Report on behalf of the Commission, *Parl. St*. Chamber of Representatives 2011–2012, nr. 53-2081/013, 7.
[33] Art. 35/2 § 1 LPWR, *BS* 30 April 1965.
[34] Art. 49/1 of the Social Criminal Code of 6 june 2010, BS 1 July 2010.
[35] Art. 35/3 § 4 LPWR, BS 30 April 1965.
[36] Art. 49/1 of the Social Criminal Code of 6 june 2010, BS 1 July 2010.
[37] Report on behalf of the Commission, *Parl. St*. Chamber of Representatives 2011–2012, nr. 53-2081/013, 36.
[38] R.D. of 17 August 2013, *BS* 28 August 2013, Article 2 (our emphasis).
[39] Parliamentary proceedings, bill of program law (I), *Parl. St*. Chamber of Representatives, 2011–2012, nr. 2081/001, 42.
[40] Art. 35/3 § 1 of the LPWR, *BS* 30 April 1965.
[41] Art. 35/6 of the LPWR; Art. 171/1 of the social criminal code.
[42] Art. 9 of the LPWR, BS 30 April 1965.
[43] Report on behalf of the Commission, *Parl. St*. Kamer 2011–2012, nr. 53-2081/013, 8.
[44] Art. 35/3 § 2, 1st paragraph of the LPWR, *BS* 30 April 1965.
[45] Art. 35/3 § 2, 2nd paragraph of the LPWR, *BS* 30 April 1965.
[46] Parliamentary proceedings, bill of program law (I), *Parl. St*. Chamber of representatives 2011–2012, nr. 2081/001, 44.
[47] Art. 35/3 § 2, 3rd paragraph of the LPWR, *BS* 30 April 1965.
[48] Art. 35/3 § 3, 1st paragraph of the LPWR, *BS* 30 April 1965.
[49] Art. 35/3 § 3, 2nd paragraph of the LPWR.
[50] Art. 4 R.D. of 17 August 2013, *BS* 28 August 2013.
[51] Art. 35/4, 1e lid of the LPWR, *BS* 30 April 1965; Art. 21, 4°/1 of the social criminal code.
[52] Art. 35/4 of the LPWR, BS 30 April 1965.
[53] Parliamentary proceedings, bill of program law (I), *Parl. St*. Chamber of representatives 2011–2012, nr. 2081/001, 45.
[54] The Labour Court is the court of appeal against the decision of Labour Tribunals (first instance courts).
[55] Arbh. Brussel (1e k.) nr. 2015CB7, 21 oktober 2016, *JTT* 2017, afl. 1266, 26.
[56] Belgian system where an employer who is employing foreign workers in Belgium has to report specific information to the Belgian government. See https://www.international.socialsecurity.be/working_in_belgium/fr/home.html
[57] CJEU, Case C-396/13, *Sähköalojen ammattiliitto ry v Elektrobudowa Spółka Akcyjna*, 15 February 2015.
[58] CJEU, *Wolf and Müller*, para. 45.
[59] Cooperation Protocol between the Ministry of Employment, Labour and Social Dialogue, the Ministry of Social Security, the National Office of Social Security, the National Employment Office, the Information and Social Research Service, the Federal Agency for the Security of the Food Chain, and the organisations represented in the Joint Committee for the food industry, with the aim of fighting against illegal work, social fraud and frauds concerning food safety, 17 April 2012.
[60] It is important to note in this respect, that unionisation in the sector is particularly high, although based on self-reported data. Indeed, trade unions report a 80% of membership in the meat industry, while the main employers' association consider that the near-entirety of employers in the sector (95%) are affiliated to an association.

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