European Federation
of Building
and Woodworkers

Sociale overwegingen bij openbare aanbestedingen

Een politieke keuze!

"Voorkomen is beter dan genezen"

Uitgever: **Werner Buelen, EFBH**
Auteurs: **Susanne Wixforth, Arbeiterkammer Wien**
Jan Cremers, Tilburg Law School

Brussel, september 2015

Project uitgevoerd met de financiële steun van de Europese Commissie

Dit project werd gefinancierd met steun van de Europese Commissie.

De verantwoordelijkheid voor deze publicatie ligt uitsluitend bij de auteur en de Commissie kan niet aansprakelijk worden gesteld voor het gebruik van de informatie die erin is vervat.

Inhoud

Omzetting en toepassing van de EU-Richtlijn betreffende de coördinatie van de procedures voor het plaatsen van overheidsopdrachten voor werken, leveringen en diensten, met speciale aandacht voor sociale aspecten en een eerlijk en gelijk speelveld voor iedereen

1. Voorwoord

Vele jaren vraag ik me af waarom de omzetting en toepassing van een vanzelfsprekende regel, waarvan iedereen vindt dat "het de juiste aanpak is" zo moeilijk is. Zo is iedereen het erover eens dat onze overheidsinstanties ons geld als een goed huisvader en ethisch correct moeten besteden.

Vakbonden, milieuorganisaties en organisaties voor eerlijke handel eisen voortdurend dat ons geld niet alleen hoogwaardige diensten of producten moeten opleveren, maar ook dat ons geld (1) de ontwikkeling van hoogwaardige sociale standaarden en normen moeten ondersteunen en (2) aan een eerlijke sociale-markteconomie moet bijdragen.

De EU-Richtlijnen betreffende openbare aanbestedingen (2014/24/EU, 2014/25/EU en 2014/23/EU) hebben duidelijk met onze kerneisen rekening gehouden en belangrijke sociale verbeteringen in de huidige EU-wetgeving inzake openbare aanbestedingen ingevoerd.

Als we bedenken dat de totale EU-overheidsuitgaven voor goederen, werkzaamheden en diensten (exclusief nutsvoorzieningen) in 2013 1.786,61 miljard bedroegen, zou er zeker iets positief kunnen worden ondernomen. Jammer genoeg moet de EU-wetgeving eerst worden omgezet in nationale wetgeving, alvorens ze in de praktijk kan worden toegepast. In deze grote grijze zone beschikken onze Lidstaten en overheidsinstanties over een grote beoordelingsmarge over hoe zij de recentelijk goedgekeurde "sociale normen" (willen) implementeren en toepassen. Zelfs als zijn sommige "sociale normen" in steen gebeiteld, toch blijft hun effectieve toepassing een politieke keuze.

Met deze handleiding probeert de Europese Federatie van Bouw- en Houtarbeiders (EFBH) haar aangesloten leden in de verschillende Lidstaten te ondersteunen bij de omzetting en toepassing van de recentelijk goedgekeurde Richtlijnen inzake overheidsopdrachten. We hebben nog tot april 2016 om de nieuwe EU-regelgeving in nationale wetgeving om te zetten.

De handleiding bestaat uit twee delen. Het eerste deel bevat een beoordeling van de huidige wetgeving en rechtspraak van de EU en geeft de krijtlijnen aan waarbinnen we "sociale normen" in openbare aanbestedingen kunnen implementeren en toepassen. Het tweede deel bevat een overzicht van diverse positieve ervaringen, die zouden kunnen worden overgenomen.

Zonder de daadwerkelijke steun van de aangestelde experts en de aangewezen contactpersonen van de nationale EFBH-bonden was het nooit mogelijk geweest de goede ervaringen in verband met de effectieve omzetting van sociale normen binnen de nationale wetgeving inzake openbare aanbestedingen te verzamelen. Wij zijn hun uiterst dankbaar voor de geleverde steun.

Voor het nauwgezet verzamelen en systematisch sorteren en verwerken van de grote hoeveelheid informatie over goede ervaringen in een leesbare handleiding zorgden Susanne Wixforth en Jan Cremers. We zijn ook hen erg dankbaar voor het feit dat ze deze moeilijke taak op zich genomen hebben.

We zijn ook erkenning verschuldigd aan de leden van de stuurgroep die hun ervaringen aanreikten en het hele project begeleidden en opvolgden.

Deze handleiding is het resultaat van een project van de Europese Federatie van Bouw- en Houtarbeiders, gefinancierd door de Europese Commissie.

Werner Buelen
Projectleider

2. Inleiding

Openbare aanbestedingen worden vaak beschouwd als een zuiver juridische aangelegenheid, gedomineerd door grote advocatenkantoren en gecompliceerde juridische discussies. Dit project had daarom tot doel een praktische handleiding voor de vakbonden op te stellen voor het implementeringsproces van de nieuwe EU-Richtlijn inzake overheidsopdrachten.[1] Er wordt specifiek aandacht besteed aan bestaande positieve ervaringen. Deze geven een goed overzicht van wat wettelijk allemaal mogelijk is binnen de krijtlijnen van de Europese Richtlijn, namelijk transparantie en non-discriminatie. Er dient ook te worden opgemerkt dat wettelijk vastgelegde principes niet kunnen worden nageleefd zonder een goed functionerende preventie, controle en handhaving. Daarom hebben we het voorbeeld van "zwarte en witte lijsten" en andere innovatieve controlemechanismen opgenomen als een belangrijk instrument om de dagelijkse realiteit van de bouwsector ook daadwerkelijk in praktijk te brengen.

Typerend voor de bouwsector zijn de complexe structuren van tijdelijke en mobiele bouwplaatsen, gecompliceerde ketens van onderaanneming, een (betreurenswaardig) hoog arbeidsongevallenpercentage en de aanzienlijke sociale fraude. Dit alles kan en moet worden aangepakt worden, ondermeer via een efficiënte en effectieve wetgeving inzake openbare aanbestedingen. Bijzonder in dit verband is ook het feit dat de wetgever een drievoudige rol heeft: als wetgever, overheidsdienst en partner in tripartiete onderhandelingen die het kader voor de arbeidsvoorwaarden bepaalt.

Voor vakbonden zijn overheidsopdrachten ook een zeer belangrijk actieterrein. Via goede sociale overwegingen en regels/normen in verband met de gezondheid en de sociale zekerheid kan veel leed bespaard worden. Openbare opdrachtgevers vervullen ook een voorbeeldrol:

> Ten eerste moeten ze zich inzetten als voorbeeld voor beroeps-, veiligheids- en gezondheidskwesties. Openbare bouw- en infrastructuurwerken vertegenwoordigen enkele van de belangrijkste segmenten van de overheidsuitgaven. Overheidsopdrachten die rechtstreeks binnen het toepassingsgebied van de Europese Richtlijnen vallen, zijn jaarlijks goed voor 422 miljard EUR of 2,6% van het BBP van de EU (cijfers van 2013). Door de aanhoudende financiële en economische crisis vormen de overheidsopdrachten de belangrijkste motor voor de bouwsector. Daarom verwachten de vakbonden dat de openbare opdrachtgevers de overheidsopdrachten niet aan de goedkoopste aannemer maar aan de economisch voordeligste inschrijver gunnen.
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> Ten tweede is het zo dat in tijden van enorme en tot 50% oplopende jeugdwerkloosheid, van openbare opdrachtgevers verwacht wordt dat ze jongeren kansen bieden door van praktijkstages voor leerlingen of stagiairs een criterium voor de gunning van overheidsopdrachten te maken.
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> Ten derde is gebleken dat in het bijzonder de bouwsector vatbaar is voor praktijken van sociale dumping en ongelijk speelveld. Cao's en de verantwoordelijkheid en aansprakelijkheid van de hoofdaannemer worden systematisch afgezwakt door onderaannemingsketens. Een dergelijke houding is totaal onverantwoord en dient wettelijk geregeld te worden via een opgelegd systeeem van ketenaansprakelijkheid, waarbij de hoofdaannemer aansprakelijk is voor de gehele keten van onderaannemers.

De nieuwe EU-Richtlijn inzake overheidsopdrachten biedt manoeuvreerruimte om ervoor te zorgen dat de openbare opdrachtgevers die politieke taken vervullen. Toch geven nationale regeringen nog vaak de voorkeur

[1] Richtlijn 2014/24/EU van het Europees Parlement en de Raad van 26 februari 2014 betreffende het plaatsen van overheidsopdrachten en tot intrekking van Richtlijn 2004/18/EG en Richtlijnen 2014/23/EU en 2014/25/EU.

aan de minste weerstand en kiezen ze voor minimale aanpassingen van de nationale wetgeving bij de omzetting van de Richtlijn. De vakbonden worden opgeroepen om zich fel tegen deze tendens te verzetten, om hoge kwaliteitsnormen met betrekking tot beroepsbekwaamheid en veiligheids- en gezondheidomstandigheden, in openbare aanbestedingsprocedures te formuleren.

Alle vakbonden zijn voor **transparantie** (het gaat dan om duidelijke en controleerbare voorschriften) en **afdwingbaarheid** en daarom staan ze terughoudend tegenover het maatschappelijk verantwoord ondernemen, raamovereenkomsten of andere niet-bindende afspraken. De vakbonden zouden tijdens het nationale omzettingsproces moeten uitgaan van de volgende principes:

- Rekening houden met sociale aspecten bij de omzetting en toepassing van de EU-Richtlijnen is een politieke overwegingsplicht en niet enkel een juridisch onderwerp;
- De toepassing van sociale normen bij openbare aanbestedingen moet een voorbeeldkarakter hebben, garanderen dat de overheidsmiddelen goed besteed worden en vereisen dat op de werkplek hoge sociale, educatieve, gezondheids- en veiligheidsnormen worden toegepast;
- Het vastleggen van de verplichting om sociale aspecten na te leven, is niet alleen in het belang van de bonden maar in dat van de ondernemingen die deze verplichtingen naleven. De wetgeving betreffende overheidsopdrachten is daarom een instrument om te zorgen voor een evenwichtig speelveld en het voorkomen van concurrentievervalsing;
- De bestrijding van sociale dumping is ook een politieke doelstelling, want zo kan men de extra kosten verminderen waarvoor de hele samenleving na de uitvoering van de overheidsopdrachten opdraait. De openbare opdrachtgever dient vooral met betrekking tot de volgende zaken een voortrekkersrol te spelen:
    - de naleving van en het rekening houden met collectieve arbeidsovereenkomsten;
    - de vestiging van een degelijk systeem van arbeidsverhoudingen op alle niveaus;
    - de openbare aanbestedingen gebruiken als hefboom om te verzekeren dat jonge werknemers de kans geboden wordt om opleiding van hoge kwaliteit te krijgen.

3. Juridische evaluatie van de nieuwe EU-Richtlijn inzake overheidsopdrachten

(EU- Richtlijn 2014/24/EU van 26 februari 2014 betreffende het plaatsen van overheidsopdrachten en tot intrekking van Richtlijn 2004/18/EG)

Door de openbare besturen aangekochte goederen, diensten en werken maken een aanzienlijk deel van het bruto binnenlands product (BBP) in Europa uit. Gemiddeld komt dat aandeel overeen met ongeveer 1/5 (19,7% in 2010) van het totale BBP van de EU variërend van 10,5% van het BBP in Cyprus en 30,6% in Nederland.[2] In Europa wijzen meer dan 250.000 aanbestedende instanties overheidsopdrachten toe. Een groot gedeelte van die goederen, diensten en werken blijven onder de EU-drempels.[3] Wanneer openbare aanbestedingen niet onder de EU-regelgeving betreffende overheidsopdrachten vallen, moeten de gunnende autoriteiten zelf beoordelen of de aanbesteding ook voor de economische actoren in andere Lidstaten belang kan hebben. Indien niet is de EU-wetgeving niet van toepassing. Over het algemeen zullen echter alle grote werkzaamheden en projecten onder de nieuwe regelgeving vallen die in april 2016 van kracht wordt. Naar verwachting komen er met de nieuwe aanbestedingsvoorschriften ruimere mogelijkheden om sociale problemen aan te pakken. De aanbestedende diensten zullen naast andere criteria ook met sociale aspecten rekening kunnen houden bij de gunning van een overheidsopdracht en de prijs zal niet langer de enige bepalende factor zijn. In de "oude" Richtlijn (2004/18/EG) was het begrip "economisch voordeligste inschrijving" reeds ingevoerd als alternatief voor de laagste prijs. De invoering van sociale overwegingen bleef echter voornamelijk beperkt tot de uitvoering van een contract. In de nieuwe Richtlijn wordt het concept van "economisch voordeligste inschrijving" veel gedetailleerder uitgewerkt en is het mogelijk om kwaliteitscriteria op te nemen in de specificaties, de contractvoorwaarden en de gunningsprocedure.

De opname van sociale clausules in overheidsopdrachten kan aanbestedende diensten en leveranciers verplichten kwetsbare mensen te beschermen, kansarme mensen te steunen, de sociale economie te ontwikkelen, het milieu te beschermen en andere sociale doelstellingen en voordelen voor de samenleving te stimuleren tijdens de uitvoering van de opdracht als voorwaarde voor de gunning. Zonder een degelijk ontwerp is dit beleid echter gedoemd om te mislukken. Daarom moet de omzetting grondig worden opgevolgd en moeten praktische maatregelen worden beoordeeld en gecontroleerd zowel voor als na de aanbesteding. De initiatieven moeten goed voorbereid zijn. Intussen zijn de Lidstaten met de voorbereiding van de omzetting begonnen en enkele initiatieven zijn veelbelovend. Toch zijn er ook al eerste aanwijzingen van Lidstaten die kiezen voor een gewone en niet ambitieuze omzetting. Dat is vaak het gevolg van het verzet van de openbare opdrachtgevers. Zij geven de voorkeur aan eenvoudige procedures: Als ze kiezen voor het model van de laagste prijs lopen ze minder risico op rechtszaken dan wanneer ze voor de economisch voordeligste inschrijving kiezen.

Dit kan er bijvoorbeeld toe leiden dat sociale clausules niet worden toegepast en dat de laagste prijs uiteindelijk de doorslag geeft als het elementair gunningscriterium. De potentiële stimuli om bij te dragen tot de bevordering van groene en sociale overheidsopdrachten zouden dan verloren gaan, ook al werden de wettelijke hinderpalen voor de goedkeuring van sociale criteria en criteria voor de bevordering van duurzaamheid in openbare aanbestedingsprocedures in theorie verwijderd. Het verslag uit Portugal[4] toont bijvoorbeeld aan dat

[2] Schulten T., K. Alsos, P. Burgess, K. Pedersen (2012) *Pay and other social clauses in European public procurement*, WSI/HBS, Düsseldorf.

[3] 207.000 EUR voor alle opdrachten voor diensten, alle prijsvragen, gesubsidieerde opdrachten voor diensten, alle opdrachten voor leveringen uitgaande van lokale overheden en 5.186.000 EUR voor alle opdrachten voor werken, alle concessieovereenkomsten voor openbare werken, gesubsidieerde opdrachten voor werken uitgaande van centrale overheidsinstanties.

[4] Verslag ingediend door Bruno Monteiro, Instituto de Sociologia, Universidade do Porto.

de regering zeer weigerachtig staat tegenover het opnemen van zinvolle sociale overwegingen in de aanbestedingsprocedure, enkel verwijzend naar de aanbeveling dat "het altijd mogelijk is dat de technische specificaties zo worden vastgelegd dat bij de eigenschappen van de aan te kopen goederen of uit te voeren bouwwerken rekening gehouden wordt met het feit dat ze ook door mensen met een handicap of een andere gebruiker moeten kunnen worden gebruikt." De conclusie is dat dergelijke procedures zeer negatief moeten worden beoordeeld, in het bijzonder ten aanzien van de sociale rechten en de arbeidsvoorwaarden van de werknemers. Door zich op economische gunningscriteria te concentreren zal de ondernemer tijdens de uitvoering op de onderaannemers druk uitoefenen opdat ze de geplande kosten niet overschrijden. Vaak gebeurt dat door het minimaliseren van de kosten van de sociale faciliteiten (overbevolking van slaapplaatsen, afwezigheid van kantines, enz.), veiligheidsuitrusting en gezondheidsvoorzieningen. De betrokken werknemers moeten dan vaak zelf hun veiligheidsuitrusting kopen en voor de verblijfkosten betalen. De gunning tegen de laagste prijs impliceert vaak dat de onderaannemers onderaan op de ladder het gelag betalen. De onderaannemingspraktijken verergeren zelfs het probleem door de grotere ondoorzichtigheid en het tijdelijke karakter.

Daarom moeten de vakbonden in de huidige omzettingsprocedure van de nieuwe EU-Richtlijn inzake overheidsopdrachten absoluut aan hun respectieve nationale regering duidelijk maken dat als die de overheidsopdracht aan de laagste bieder gunt in plaats van rekening te houden met de ruimere voordelen tijdens de duur van de opdracht en de voordelen op lange termijn, dit uiteindelijk zal leiden tot veel hogere uitgaven voor de overheidsbegroting. Indien men voor de laagste prijs kiest, brengt men niet alleen de kwaliteit van de banen en de prijzen in gevaar, maar loopt men zelf ook een veel hoger risico op een faillissement van de inschrijver of zijn onderaannemers, wat hoge extra kosten met zich brengt. Deense vakbonden onderzochten onlangs bijvoorbeeld de vermeende kostenbesparingen van 15% tot 20% die werden gerealiseerd door het uitbesteden van de lokale zorgdiensten. De bonden ontdekten dat dit verschil alleen mogelijk was door het inzetten van personeel met een lager opleidingsniveau en deeltijdse werknemers aan wie geen overuren werden betaald. Besparingen op de rug van de werknemers en een vermindering van de zorgkwaliteit leverden duidelijk alleen maar een fictieve besparing op.

Het verslag uit Ierland[5] toont aan dat Ierse openbare-aanbestedingsvoorschriften op het vlak van de naleving van arbeidsnormen de inschrijvers en de aanbestedende instanties ook heel weinig plichten opleggen. Hier spelen ministeriële richtlijnen, mechanismen van "zachte wetgeving" (circulaires, aanbevelingen, enz.) en bestuurlijke discretie een belangrijke rol. Er blijken geen systematische gegevens te zijn over de mate waarin de modelclausules worden gebruikt en - nog belangrijker - worden gehandhaafd. Nalevingsclausules hebben een contractueel (in plaats van een wettelijk) karakter. Elke daaropvolgende sanctie voor een contractbreuk moet daardoor contractueel voorzien worden (en ook zal ook onderworpen worden aan de algemene beginselen van het verbintenissenrecht, met inbegrip van de interpretatie en, indien nodig, het oordeel van rechters). Ook hier is er blijkbaar een schaarste van betrouwbare informatie over de vraag of dergelijke strafclausules (gewoonlijk) worden voorzien en/of opgelegd.

Dit wordt bevestigd door de statistieken van de Ierse Arbeidsinspectie (NERA). Die tonen aan dat er een significant en aanhoudend probleem is met de naleving van overeenkomsten op openbare bouwplaatsen. Tijdens de eerste helft van 2010 voerde NERA bijvoorbeeld 191 inspecties in de bouwsector uit en stelde ze vast dat de arbeidswetgeving slechts in 43 procent van de gevallen nageleefd werd.[6] Overheidsafnemers

[5] Verslag ingediend door prof. Michael Doherty, Maynooth University Department of Law, Maynooth University, County Kildare, Ierland.

[6] De cijfers hebben niet uitsluitend betrekking op openbare bouwplaatsen, maar volgens de vertegenwoordiger van NERA werd het grootste deel van de inspecties op dergelijke bouwplaatsen uitgevoerd: http://www.employmentrights.ie/en/media/NERA%20Quarterly%20Update%20-%20June%202010.pdf.

beschouwen dit blijkbaar als een "invuloefening" en er worden niet echt inspanningen voor een betere handhaving gedaan.[7] Het probleem is blijkbaar algemeen verspreid maar bijzonder acuut in de bouwsector.

Ten eerste vonden de informanten dat de overheidsinstanties tijdens de gunningsfase nagenoeg uitsluitend voor de prijs oog hebben en niet echt nagaan hoe de inschrijver zijn plichten op grond van de arbeidswetgeving zal naleven. Door het harde economische klimaat is het probleem de laatste jaren alleen maar toegenomen.

Ten tweede, omdat de modelclausules betreffende de arbeidswetgeving een contractueel karakter hebben, lijken sommige aanbestedende overheidsinstanties zeer weigerachtig te staan tegenover clausules waarin met opschorting van betaling wordt gedreigd, bang als ze zijn dat ze in dure gerechtelijke procedures verwikkeld zouden kunnen raken.

Ten derde zijn er een aantal algemene problemen in verband met de handhaving. De handhavingsautoriteiten zijn sterk afhankelijk van de ontvangen informatie bij gevallen van vermoedelijke niet-naleving. Daardoor spelen de vakbonden overal waar ze aanwezig zijn, een belangrijke rol om ervoor te zorgen dat maatregelen gehandhaafd worden. De vakbondsorganisatiegraad neemt de voorbije jaren echter in Ierland net als in de meeste EU-Lidstaten af en in andere sectoren zijn de bonden maar beperkt (indien überhaupt) aanwezig. Het verminderde vermogen van de bonden om hun traditionele rol van "politieman" te vervullen legt extra druk op de middelen van de handhavingsautoriteiten van de overheid. Voor de overheidsdiensten is het voeren van een onderzoek tegen een buitenlandse dienstverlener - zeker een die maar gedurende een bepaalde periode in het rechtsgebied verblijft - logistiek moeilijk en het slorpt veel middelen op. Zelfs als een klacht terecht blijkt, blijft het problematisch om in het buitenland gevestigde ondernemingen sancties op te leggen.

Hoewel men in Ierland in de praktijk bij openbare aanbestedingen clausules in verband met de naleving van de arbeidswetgeving in overheidsopdrachten opneemt, blijkt het nog maar de vraag in hoeverre die efficiënt tot de handhaving van arbeidsnormen bijdragen.

De vraag is dus of de nieuwe regels de integratie van sociale clausules in contracten van overheidsopdrachten en een maximalisatie van de sociale voordelen en waarde in het aanbestedingsproces kunnen garanderen. Volgens het EVV bevat de Richtlijn verschillende positieve dimensies:

- Ze biedt een sterker platform voor het afdwingen van belangrijke eisen zoals naleving van collectieve arbeidsovereenkomsten, arbeids- en loonvoorwaarden, de naleving van veiligheids- en gezondheidstools, de opleiding van werknemers en mogelijkheden voor leerlingen/stagiairs en andere sociale criteria.
- Ze verruimt de mogelijkheid om duurzaamheidscriteria en andere maatschappelijke beleidsaspecten op te nemen.
- Ze kan een einde maken aan het feit dat men zich op het goedkoopste aanbod blindstaart, want dit criterium werd aanzienlijk afgebouwd.
- Het zet het raam open voor een toekomstig beleid inzake openbare aanbestedingen dat bijdragen aan een gebruik van overheidsgeld ter bevordering van sociale cohesie en economische ontwikkeling, werkgelegenheid van goede kwaliteit en kwaliteitsvolle diensten, goederen en werken.[8]
- Ze is een poging om de transparantie in onderaannemingsketens te verbeteren.
- Ze vormt een middel ter bestrijding van de sociale dumping.

[7] De richtlijnen voor aanbestedende diensten zoals ze op de website voor nationale openbare aanbestedingen gepubliceerd zijn, verwijzen inderdaad nergens naar de naleving van de arbeidswetgeving: http://www.procurement.ie/sites/default/files/Public-Procurement-Checklist.pdf.

[8] In Bijlage 14 staat een lijst van "sociale en andere bijzondere diensten" met een waarde van meer dan 750.000 euro. De Richtlijn voorziet een "lichtere regeling" voor deze diensten.

De Richtlijn ligt doelstellingen met betrekking tot sociale overwegingen vast. Veel hangt echter af van de omzetting in nationale wetgeving. Er moet ernstig nagedacht worden over het definiëren en waarborgen/bevorderen van sociale overwegingen[9], maar ook hoe de controle op de toepassing en de naleving van de minimumlonen kan worden verbeterd.

3.1. Mogelijkheden voor sociale overwegingen

De Europese Commissie ondernam al in 2011 een poging om te verduidelijken hoe sociale aspecten in overheidsopdrachten ingang kunnen vinden, toen ze een Gids over sociaal verantwoorde openbare aanbestedingen publiceerde.[10] De gids biedt een hulpmiddel om overheidsinstanties te helpen op sociaal verantwoorde wijze en in overeenstemming met de EU-regelgeving goederen en diensten aan te kopen. Hij wijst ook op de bijdrage die openbare opdrachtgevers kunnen leveren aan de bevordering van een grotere sociale integratie. Hoewel de titel veelbelovend klinkt, blijven de goede bedoelingen van de Europese Commissie "om de markt in een meer maatschappelijk verantwoorde richting te sturen en op die manier meer algemeen aan de duurzame ontwikkeling bij te dragen" gevangen in het krappe keurslijf van het verplichte verband houden met het voorwerp van de overheidsopdracht evenals het dogma van de concurrentie tussen de Lidstaten, dat ook een loonconcurrentie inhoudt en zo de toepasbaarheid van collectieve arbeidsovereenkomsten beperkt.

Daarom wil art. 18, lid 2, van de nieuwe Richtlijn de naleving garanderen van de arbeidsvoorwaarden die wettelijk of krachtens collectieve arbeidsovereenkomsten van toepassing zijn op de werkplek. Als dit goed wordt geïmplementeerd, zouden de nieuwe voorschriften moeten garanderen dat de collectieve arbeidsovereenkomsten na een openbare aanbestedingsprocedure op de werkplek toegepast worden. De verplichting om te garanderen dat ondernemers de toepasbare arbeidsvoorwaarden naleven ligt bij de Lidstaten, niet bij de aanbestedende lokale, regionale of nationale overheidsinstanties. De overgang van de bijna "verplichte" toewijzing aan de goedkoopste bieder naar een facultatief gebruik van sociale clausules in de gunningsprocedure vormt ook een uitdaging voor de vakbonden en de ngo's die voor een verruiming van de regels inzake overheidsopdrachten gelobbyd hebben. Nu is het hun beurt is om de vinger aan de pols te houden. Lokale, regionaal en nationale overheden kunnen zich niet langer het dogma van het goedkoopste bod verstoppen.

Het inzetten van gedetacheerde werknemers in de context van een overheidsopdracht kan gevolgen hebben voor de aard van de collectieve overeenkomsten die aan het bedrijf opgelegd kunnen worden, afhankelijk van de nationale omzetting van de Richtlijn betreffende de detachering van werknemers. Een overheidsopdracht waarbij geen gedetacheerde werknemers worden ingezet, moet in elk geval worden uitgevoerd in overeenstemming met het gehele arbeidsrecht en de collectieve arbeidsovereenkomsten zoals die op de werkplek gelden.

De vraag is ook waar de sociale overwegingen ter sprake dienen te komen. In alle stadia van de aanbesteding of zijn er ook elementen die daarbuiten vallen, bijvoorbeeld de technische specificaties of de aanbestedingsvoorwaarden? De Richtlijn verwijst in dat stadium niet naar art. 18, lid 2. Een overheidsinstantie kan nog altijd de naleving van toepasselijke arbeidsvoorwaarden verzekeren door voorwaarden voor de uitvoering van de overheidsopdrachten op te leggen. Omdat art. 18, lid 2, duidelijk een verplichting inhoudt en

[9] *New EU framework on public procurement – ETUC key points for the transposition of Directive 2014/24/EU*, EVV, Brussel, oktober 2014.
[10] Europese Commissie (2011) *Sociaal kopen: Gids voor de inachtneming van sociale overwegingen bij overheidsaanbestedingen*, Brussel.

de naleving ervan gedurende verschillende stadia van de aanbestedingsprocedure moet worden gecontroleerd, zou het zinvol zijn dat de omzettingswetgeving eveneens een verwijzing naar verplichte sociale overwegingen in de technische specificaties omvat, want de niet-nakoming van een technische specificatie is een criterium voor eliminatie. Daardoor kan de inschrijver die fout niet meer goedmaken door "snoepjes" - bijvoorbeeld een langere garantieperiode – aan te bieden.

De contractvoorwaarden kunnen met name verband houden met sociale overwegingen, zonder dat er daarom een verband is met het voorwerp van de opdracht. Uit hoofde van overweging 99 kunnen ze onder andere de voorkeur geven aan beroepsopleiding ter plaatse of de bestrijding van de werkloosheid. Een ander belangrijk criterium is de kwaliteit van het personeel, met inbegrip van zijn organisatie, kwalificatie en ervaring, aangezien de kwaliteit van het personeel van invloed kan zijn op de kwaliteit van de uitvoering van de opdracht (art. 67, lid 2, punt b en overweging 94). Dat kan bijvoorbeeld de plicht inhouden om tijdens de uitvoering van de opdracht in opleidingsacties voor werklozen of jongeren te voorzien of in essentie te voldoen aan fundamentele conventies van de Internationale Arbeidsorganisatie (IAO). Stages of leerlingwezen zijn een belangrijk instrument om de doelstellingen van de Europa- 2020-strategie voor slimme, duurzame en inclusieve groei te halen. Ze verzekeren immers de passende opleiding van jonge werknemers ten aanzien van de kwaliteit van het werk, de technische vaardigheden, de arbeidsnormen en de risicopreventie. Daarom moet dit een belangrijk aspect zijn bij de gunning van een overheidsopdracht, want alleen zo kan de belangrijke sociaal-politieke rol worden vervuld die erin bestaat voldoende geschikte banen voor de jonge generatie te beschikbaar te stellen. Deze mogelijkheid bestond altijd al bij openbare aanbestedingen, maar wordt nu door de nieuwe Richtlijn versterkt dankzij de invoering van de "beste prijs-kwaliteitverhouding". De aanbestedende diensten moeten worden aangemoedigd gunningscriteria te kiezen waarmee zij werken, leveringen en diensten van hoge kwaliteit kunnen verwerven (overweging 92), inclusief de organisatie, kwalificatie en ervaring van het personeel dat nodig is om de opdracht te kunnen uitvoeren. In het licht van de onaanvaardbaar hoge werkloosheid in de EU vooral bij de jonge generatie speelt het openbare aanbestedingsbeleid een cruciale rol om die ondernemers te steunen die stageplaatsen aanbieden. Deze optie werd bijvoorbeeld gekozen in Noorwegen en Oostenrijk, waar het aanbieden van praktijkstages in de inschrijvende onderneming een gunningscriterium respectievelijk een voorwaarde voor de uitvoering van de opdracht is bij het kiezen van het beste aanbod.

Die goede voorbeelden mogen ons echter niet afleiden van het probleem, hoe de naleving van die wettelijke verplichtingen moet worden gecontroleerd en hoe de aanbestedende diensten dit zullen kunnen controleren. Dat dit niet onmogelijk is, bewijst een andere best practice uit Oostenrijk, waar de "Loon- en sociale antidumpingwet" aangenomen werd. Die wet voorziet controlerechten op de bouwplaatsen, verbindt verschillende betrokken instanties met elkaar, vergroot de informatie aan werknemers over schendingen van collectieve arbeidsovereenkomsten en past aanzienlijke sancties toe.

Ten slotte werd het nieuwe begrip "levenscycluskosten" (art. 68) in de Richtlijn ingevoerd. In de bouw heeft het concept levenscyclus - van de wieg tot het graf of vanaf de tekentafel tot de uitvoering - altijd een zeer sterke directe band met veiligheid en gezondheid (op de bouwplaats en met betrekking tot de producten) gehad voor alle gebruikers (de werknemers in de hele productieketen, het publiek en de eindgebruiker). Hoewel het begrip "levenscycluskosten" wellicht niet voor sociale bescherming en de bevordering van fatsoenlijke verloning kan worden gebruikt, zou het aspect van gezondheid van de werknemers wel een actieterrein voor de vakbonden kunnen vormen.

3.2. Keurmerken en certificeringen

Kwaliteitslabels zijn een keurmerk of een ontwerp van authenticatie waarmee de consument kan nagaan of een product of een dienst aan bepaalde kwaliteitscriteria voldoet. Dit aspect zou voor de bonden belangrijk kunnen zijn, naarmate sociale criteria op de markt ingang vinden (bv. eco-bau, Design für alle). Het onderscheidt zich enerzijds van de sociale verantwoordelijkheid van ondernemingen, die een vrijwillige verbintenis van een bedrijf is om in hun gedrag sociale overwegingen in acht te nemen, en anderzijds van een maatschappelijk statement, dat een momentopname van de activiteiten op het vlak van duurzame ontwikkeling van een bedrijf is. In zijn arrest "Max Havelaar" oordeelde het HvJ dat een openbare aankoper niet naar specifieke keurmerken mag verwijzen om een aantal extra punten toe te wijzen bij de keuze van de economisch voordeligste inschrijving. Het HvJ bevestigde zijn doctrine van voorwerp van de opdracht. Daarom kan dit concept niet worden opgenomen in de specificatiecriteria met betrekking tot de productiecyclus (een bepaald type verpakking bijvoorbeeld). Het zou nuttig zijn in de handel, maar houdt geen verband met het voorwerp van de opdracht. Art. 43 van de Richtlijn biedt overigens de mogelijkheid van een alternatief systeem waarbij specifieke keurmerkeisen worden gesteld om te bewijzen dat de diensten of leveringen in kwestie aan de vereiste sociale kenmerken voldoen. Op die manier heeft de Europese wetgever het krappe kader van het HvJ ongedaan gemaakt. De keurmerkeisen moeten betrekking hebben op criteria die verband houden met het voorwerp van de opdracht, het keurmerk moet worden vastgesteld in een open en transparante procedure waaraan alle belanghebbenden kunnen deelnemen en het keurmerk moet worden vastgesteld door een derde partij. Hoewel de codificatie van de aanvaardbaarheidsvoorwaarden van sociale keurmerken in principe toe te juichen is, zal de toepassing ervan moeilijk blijken te zijn, aangezien de voorwaarden streng zijn en hun toepassing facultatief is.

Certificaten zijn zeker a mogelijkheid om reeds vooraf controlemogelijkheden in te bouwen en de kwaliteitsnormen in de bouwsector veilig te stellen. Er moet echter goed worden gekeken naar wie die normen vastlegt. Mag de sector die moeten worden gereglementeerd, zoiets dan zelf doen? Als dat gebeurt, spreekt het voor zich dat de voorschriften op het vlak van gezondheids-, beroeps- en veiligheidsmaatregelen ten gunste van de werknemers zeker niet zullen voldoen, maar dat men de kosten zal proberen te minimaliseren door de vereiste normen tot een minimum te herleiden. Als de normen door een overheidsinstantie worden vastgelegd en als vakbonden of werknemersvertegenwoordigers hun zeg hebben in de procedure voor de vaststelling van certificaten, dan kunnen zij een belangrijke rol spelen en als instrument fungeren in de procedure van specificatie en gunning enerzijds en ten aanzien van de voorwaarden voor de uitvoering van de opdracht anderzijds. Daartoe behoren ook de opstelling van lijsten van bedrijven die aan de speciale kwaliteitscriteria zoals ingesteld door de bevoegde overheidsinstantie voldoen evenals het instrument van de sociale identiteitskaarten. Deze vormen "een hulpmiddel voor de certificering van individuele werknemers dat zichtbare en veilig opgeslagen elektronische gegevens bevat om te bewijzen dat door de werkgever van de werknemer en/of door de werknemer zelf aan specifieke sociale en/of andere (bijvoorbeeld ten aanzien van de beroepskwalificaties, de beroeps-/veiligheids-/gezondheidsopleiding, de sociale bescherming/ veiligheidsonderwerpen, enz. gestelde) eisen voldaan is".[11]

[11] Sociale identiteitskaarten in de Europese bouwnijverheid, januari 2015, EFBH, eindverslag.

3.3. Richtlijnen – buitenwettelijke regelingen

Hoewel buitenwettelijke regelingen op het eerste gezicht niet een middel lijken om "meer kwaliteitsvolle" aanbestedingen te bereiken, kunnen ze toch een begin vormen om uiteindelijk bindende regels vast te stellen. Vaak hebben regelingen (bv. de zogenoemde "sociale clausules" in collectieve arbeidsovereenkomsten in Finland of Nederland, of "Towards 2016" in Ierland) tussen vakbonden en bedrijven uit een specifieke sector tot doel de kwaliteit van de opleiding en de veiligheid op de bouwplaats te verbeteren en worden ze dan tot het gehele grondgebied van een Lidstaat uitgebreid. Als grote publieke inkopers hun aanbestedende diensten bovendien adviseren om bepaalde sociale criteria in acht te nemen, heeft "naming-and-shaming" een aanzienlijk effect.

Bij openbare aanbestedingen kunnen op die manier richtlijnen uitgewerkt door overheden en ondernemers een beginpunt vormen daar waar de federale structuur of het ontbreken van een aankoopcentrale geen bindende wetgevende maatregelen toelaten. In dat geval kunnen richtlijnen een specifiek houvast aan de aanbestedende diensten geven en kan het niet in acht nemen twee gevolgen hebben:

1. Noodzaak om te rechtvaardigen: indien de uitvoerder van een openbare opdracht de kwaliteitsrichtlijnen niet toepast, moet hij uitleggen waarom hij dat nalaat.
2. Naming-and-shaming: De bonden kunnen de afwijkingen van de in richtlijnen vastgelegde kwaliteitsnormen publiceren en een witte en zwarte lijst opstellen van de ondernemers die de richtlijnen wel respectievelijk niet toepasten.

3.4. Uitsluiting van inschrijvers die niet de geldende arbeidsvoorwaarden toepassen

In art. 56 van de Richtlijn staat dat aanbestedende diensten kunnen besluiten een opdracht niet te gunnen aan de inschrijver die de economisch meest voordelige inschrijving heeft ingediend, indien de inschrijving niet voldoet aan de in artikel 18, lid 2, genoemde toepasselijke verplichtingen. Men kan dus concluderen dat de herziene Richtlijn mogelijkheden voor de individuele EU-Lidstaten biedt om verplichte gronden tot uitsluiting van inschrijvers voor overheidsopdrachten vast te stellen, onder meer wanneer een inschrijver de arbeidswetgeving (naast de fiscale wetgeving) overtreedt. Dankzij die veranderingen kunnen overheidsinstanties daadwerkelijk ondernemingen op een zwarte lijst zetten en verhinderen dat ze op openbare aanbestedingen inschrijven. Het woord "kunnen" in art. 56 in plaats van "moeten" is in duidelijke tegenspraak met de geest van art. 18, lid 2, dat duidelijk een verplichting inhoudt. Hopelijk helpen de implementeringswetten om duidelijk te maken dat de overheidsinstanties in dit opzicht geen keus hebben: de opdracht kan niet worden gegund aan een inschrijver die de geldende arbeidswetgeving of collectieve arbeidsovereenkomsten op de werkplek niet naleeft. Bovendien verplicht art 18, lid 2, de Lidstaten om passende maatregelen te nemen. Deze moeten passende handhavingsmaatregelen omvatten om de daadwerkelijke toepassing van art. 18, lid 2, te verzekeren. In dit verband geeft overweging 39 meer aanwijzingen: De geldende verplichtingen kunnen worden weergegeven in contractbepalingen. Ook moet het mogelijk zijn, in het contract bepalingen op te nemen die de naleving van collectieve overeenkomsten garanderen. Niet-naleving van de geldende verplichtingen kan worden beschouwd als een ernstige fout van de betrokken ondernemer, en ertoe leiden dat hij wordt uitgesloten van de gunningsprocedure.

De uitsluitingsgronden worden in art. 57 verder gedefinieerd: Aanbestedende diensten mogen een ondernemer uitsluiten van deelname aan een aanbestedingsprocedure wanneer de aanbestedende dienst met elk passend middel voor of na de aanbestedingsprocedure kan aantonen dat de ondernemer art. 18, lid 2, overtreedt. Bovendien, moeten de Lidstaten de periode bepalen waarbinnen de uitsluiting van openbare aanbestedingen

geldt. Als de uitsluitingsperiode niet krachtens een vonnis op een andere wijze vastgelegd werd, mag de uitsluiting niet meer dan drie jaar duren te rekenen vanaf de datum van de inbreuk.

Daarom moeten de in art. 18, lid 2, vastgelegde criteria als net zo belangrijk worden beschouwd als de leidende beginselen van het aanbestedingsrecht, namelijk transparantie, gelijke behandeling en toereikendheid.

Art. 59 voert een vereenvoudigde procedure in: het gebruik van een Uniform Europees Aanbestedingsdocument (UEA), bestaande uit een bijgewerkte eigen verklaring van de ondernemer als voorlopig bewijs. Het is van het grootste belang dat tijdens de omzetting aan deze bepaling aandacht wordt besteed. Deze documenten kunnen vrij eenvoudig misbruikt worden en het is absoluut noodzakelijk dat de overheidsinstantie of een betrouwbare derde partij alles passend verifieert. Daarom zou het verstandig zijn om een wettelijke verplichting tot diepgaand onderzoek van de ondernemer in te bouwen.

Een van de belangrijke vragen in verband met de uitsluiting is het vereiste bewijs. Is het bijvoorbeeld gerechtvaardigd dat ondernemingen significante of aanhoudende tekortkomingen bij het uitvoeren van vorige overheidsopdrachten hadden of wanneer dergelijke tekortkomingen hebben geleid tot een vroegtijdige beëindiging van een contract, schade of andere sancties? En moet dit bewijs noodzakelijkerwijs worden gebaseerd op ervaringen op het eigen nationale grondgebied of zijn misbruiken bij grensoverschrijdende aanwerving en inbreuken in andere landen toereikend? Kan Duitsland bijvoorbeeld een inschrijver uitsluitend op grond van een negatief rapport van de Luxemburgse arbeidsinspectie uitsluiten? Kan een onderneming die door de vakbonden in Frankrijk wegens de niet-naleving van de arbeidsvoorwaarden voor de rechter gedaagd werd, op basis van het Franse vonnis in België uitgesloten worden?[12] Er is een duidelijke noodzaak om de aard van de gebreken, het vereiste bewijs en de bevoegdheden van de overheidsinstanties te definiëren. Men dient ook te overwegen om een wettelijke voorlichtingsplicht ten aanzien van de ondernemer in te voeren om na te gaan of de inschrijver inbreuken op de sociale zekerheid, wetgeving inzake sociale dumping of andere wetten gepleegd heeft, als er relevante databanken in de Lidstaat bestaan.

3.5. Laagste prijs of economisch voordeligste inschrijving

Van de laagste prijs het belangrijkste gunningscriterium maken, zou niet problematisch zijn, als de specificaties en contractvoorwaarden reeds de aspecten arbeid, veiligheid en gezondheid zouden inhouden. Als men deze aspecten reeds bij de specificaties definieert, houden ze geen verband met het voorwerp van het contract maar met de inschrijvende onderneming. Als ze bovendien niet vervuld worden, vormen ze verplichte gronden tot uitsluiting van het aanbestedingsproces. Op grond van art. 57 kunnen ondernemers ook worden uitgesloten, als zij bepalingen van internationaal of nationaal erkende sociale normen overtreden hebben. Bovendien kan een verbintenisverklaring dat de inschrijver de fundamentele arbeidsnormen van de IAO zal naleven, als voorwaarde voor de uitvoering van de opdracht gevraagd worden.

De Richtlijn effent echter ook de weg voor de verplichte toepassing van de economisch voordeligste inschrijving. In dit verband voert ze het concept van beste prijs-kwaliteitverhouding in (art. 67, lid 2). Dit concept wordt als dwingende notie gebruikt ten aanzien wat de aanbestedende dienst als beste van alle inschrijvingen in aanmerking neemt. Een van de doelstellingen van de door de Europese Commissie aangekondigde herziening was om te zorgen voor een evenwicht tussen de behoefte om sociale en ecologische behoeften enerzijds en het

[12] Een berucht voorbeeld is Atlanco-Rimec. Deze onderaannemer was het voorwerp van verschillende gerechtelijke en administratieve sancties. Kunnen die sancties op het grondgebied van andere Lidstaten worden gebruikt om het bedrijf uit te sluiten? (cf. ook het deel van de handleiding over best practices).

vermijden van hinderpalen voor de openstelling van de interne markt anderzijds. Om de tweede reden heeft de Europese Commissie jammer genoeg geen speciaal hoofdstuk over de verplichte sociale clausules opgenomen, waardoor de gunning van een overheidsopdracht uitsluitend op grond van een beoordeling van de prijs niet kan worden uitgesloten. Dit mag de vakbonden er echter niet van weerhouden om te eisen dat zulke clausules in de nationale wetgeving worden opgenomen, aangezien het kostencriterium alleen tot een neerwaartse druk op de arbeidsvoorwaarden en de kwaliteit van de dienstverlening leidt. Ook al moeten de aanbestedende diensten verplicht de prijs of de kosten (art. 67) beoordelen, toch mogen ze ook een prijs-kwaliteitverhouding in acht nemen die bijkomende kwaliteitscriteria zoals vermeld in art 67, lid 2, inhoudt. De overwegingen 97 en 99 van de Richtlijn specificeren het toepassingsgebied van art. 67 als volgt: "Voorts moet de aanbestedende dienst, met het oog op de betere integratie van [...] sociale [...] criteria in de aanbestedingsprocedures, met betrekking tot de werken, leveringen of diensten in het kader van de opdracht, gunningscriteria of contractvoorwaarden kunnen hanteren, onder meer factoren die verband houden met het specifieke proces van productie, verrichting of verhandeling de voorwaarden daar-voor [...]." Die kunnen omvatten: "maatregelen ter bescherming van de gezondheid van het bij het productieproces betrokken personeel [...]" en "[...] dergelijke criteria of voorwaarden kunnen onder meer betrekking hebben op [...] de implementatie van opleidingsmaatregelen voor [...] jongeren [...]".

Het komt dus de Lidstaten toe om te beslissen over de invoering van een verplichte toepassing van het principe van de economisch voordeligste inschrijving in de aanbestedingsprocedure en welke sociale criteria zij toepassen. In de nationale omzettingsprocedure kunnen de Lidstaten geneigd zijn om een facultatieve toepassing van het principe van de economisch voordeligste inschrijving te voorzien met het argument dat dit prijsstijgingen zou kunnen veroorzaken. Tegen deze redenering wordt een in de nieuwe bepaling in artikel 67, lid 3, een mogelijkheid geboden voor bindende bepalingen in sectorspecifieke wetgeving. Over deze optie wordt in Oostenrijk gediscussieerd, namelijk om een sectorspecifieke economisch voordeligste inschrijving in de bouwsector op te leggen. In dit verband mag men niet vergeten dat de naleving van de op de werkplek geldende arbeidswetgeving en collectieve arbeidsovereenkomsten niet mogen worden beschouwd als een criterium dat een onderdeel van een beste prijs-kwaliteitverhouding vormt. Het is een alleenstaande verplichting.

3.6. Abnormaal lage inschrijvingen

Ervaringen hebben bewezen dat in een grensoverschrijdende context minstens sommige bedrijven (en werknemers) bereid zijn om werken uit te voeren tegen lonen en met arbeidsvoorwaarden die ver onder de nationale normen liggen, in het bijzonder in de bouw, de landbouw, de schoonmaak en andere categorieën van diensten.[13] Dit kan leiden tot abnormaal lage inschrijvingen bij openbare aanbestedingen onder de mom van "vrij verkeer van diensten". Verschillende landen hebben geprobeerd om dit probleem aan te pakken.

In de Richtlijn van 2004 stond de notie dat een aanbestedende dienst om een verklaring kan verzoeken voor een "abnormaal lage" inschrijving om een reeks redenen, onder meer het verzoek om te bewijzen dat de bepalingen inzake arbeidsbescherming en arbeidsvoorwaarden die gelden op de plaats waar de opdracht wordt uitgevoerd, nageleefd worden. Om de handhaving van loon- en andere sociale clausules te verbeteren bevatten de meeste Duitse deelstaatwetten inzake openbare aanbestedingen gedetailleerde bepalingen over deze rechten en soms zelfs de verplichting voor de aanbestedende diensten om de inschrijvende bedrijven te controleren, in het

[13] Cremers J. (2011), In search of cheap labour in Europe, CLR/International Books, Brussel/Utrecht.

bijzonder bij een "abnormaal lage inschrijving", meestal gedefinieerd als een inschrijving dat minstens 10% onder het op een na laagste bod ligt.[14]

In sommige landen voorziet het algemene aanbestedingsbeleid dat de arbeidsvoorwaarden alleen bij abnormaal lage inschrijvingen worden gecontroleerd, in het bijzonder in landen die de IAO-conventies niet geratificeerd hebben. In dergelijk gevallen staat er maar een zeer algemene verwijzing in de aanbestedingsregelgeving waarbij de arbeidsvoorwaarden van inschrijvende bedrijven bij een abnormaal lage inschrijving onderzocht dienen te worden.[15] In de loop der jaren hebben echter nog altijd te veel overheidsinstanties gewoon gekozen voor en kiezen ze nog altijd voor de aanpak van de laagste kosten en gaven ze niet veel om sociale gunningscriteria, niet het minst door hun financiële beperkingen, maar ook wegens de omslachtige procedure en het gebrek aan bekwaam personeel.

Wordt deze situatie beter dankzij de nieuwe regels? De formuleringen in de Richtlijn voorzien in een uitsluiting van abnormaal lage inschrijvingen die betrekking kunnen hebben op de naleving van de verplichtingen vastgelegd in art. 18, lid 2, of de naleving van de verplichtingen vastgelegd in art. 71 (over onderaanneming). Ten eerste moet de vraag beantwoord worden in hoeverre de aanbestedende dienst verplicht is om de arbeidsvoorwaarden te controleren in het geval van abnormaal lage inschrijvingen. Art. 69 schrijft in feite voor dat de aanbestedende dienst ondernemer ertoe moet verplichten de in de inschrijving voorgestelde prijs of kosten nader toe te lichten, alvorens de inschrijving af te wijzen. Zoals het EVV terecht uitgelegd heeft, zijn de overheidsinstanties niet verplicht om een toelichting te vragen die specifiek met de naleving van art. 18, lid 2, verband houdt. Volgens het EVV is dit een hiaat in de Richtlijn en moet dat in de implementeringswetgeving aangepakt worden. Bij abnormaal lage inschrijvingen moeten de overheidsinstanties systematisch toelichting vragen in verband met de naleving van art. 12, lid 2 (EVV, 2014). Art. 69 verwijst ook naar de samenwerking tussen de Lidstaten, door middel van de uitwisseling van informatie. Wat de arbeidsvoorwaarden betreft, lijkt deze samenwerking echter beperkt tot detachering en biedt ze geen antwoord op de vragen in verband met algemene ervaringen met inbreuken zoals vermeld in hoofdstuk 3.4.

3.7. Onderaanneming en uitbesteding van werknemers – Detachering, uitzendbureaus en andere manieren van outsourcing

De laatste decennia werd genoeg bewijsmateriaal verzameld om te concluderen dat het gebruik van onderaannemingsketens een van de belangrijkste manier is voor de omzeiling van de toepasselijke arbeidsvoorwaarden en arbeidswetgeving. Marc Tarabella, rapporteur van het Europees Parlement, bedacht het begrip "sociaal duurzaam productieproces" en definieert het als een proces dat de veiligheid en de gezondheid van de werknemers respecteert en de sociale normen naleeft. Hij stelde daarom voor om de trapsgewijze onderaanneming te beperken door het opleggen van een limiet van drie achtereenvolgende onderaannemers en de hele onderaannemingsketen verantwoordelijk te stellen voor de naleving van grondrechten, de veiligheid en de gezondheid van de werknemers en de actuele arbeidswetgeving. In deze geest werd enige vooruitgang geboekt, ook al vinden we in de nieuwe Richtlijn geen verplichte beperking terug.

[14] Zie Schulten et al. (2012).

[15] De Estse Wet inzake Openbare Aanbestedingen van 2007 bepaalt dat "als de aanbestedende instantie vaststelt dat de waarde van een inschrijving abnormaal laag is, de aanbestedende instantie informatie moet vragen over de op de plaats van de uitvoering van de overheidsopdracht geldende regelingen ter bescherming van de werknemers en de arbeidsvoorwaarden" (geciteerd in Schulten et al., 2012). Het Verenigd Koninkrijk, Letland en Litouwen hebben soortgelijke bepalingen.

De Lidstaten worden verzocht de nieuwe manoeuvreerruimte te benutten door passende maatregelen te treffen om zoveel mogelijk de naleving van de sociale normen te controleren. Art. 71 verwijst naar de naleving van de bepalingen uit art. 18, lid 2, in geval van onderaanneming. De genoemde verplichtingen gelden ook voor onderaannemers. Er is al veel kritiek geweest op de vage formulering van dit artikel. Op het eerste gezicht vestigen de nieuwe regels het beginsel van gelijke behandeling op de werkplek. Dit lijkt echter tot binnenlandse werknemers beperkt te blijven. Het is niet duidelijk wat nageleefd moet worden, wanneer ondernemingen gedetacheerde werknemers inzetten. Op het HvJ vertrouwen voor een situatie die door de wetgever niet op een duidelijke en transparante wijze geregeld is, belooft niet veel goeds. In eerdere arresten (Rüffert) oordeelde het HvJ dat wanneer een overheidsinstantie een loonpeil oplegt dat vastgelegd is in een collectieve arbeidsovereenkomst die niet algemeen verbindend verklaard is, dit indruist tegen de Detacheringsrichtlijn en het Verdrag. Volgens het HvJ vormt een dergelijke verplichting een "hinderpaal" voor de vrijheid van diensten. Het EVV concludeert terecht: Als de interpretatie van Richtlijn 96/71/EG door het HvJ strikt zou worden toegepast, zou een hele brok van de nieuwe wetgeving inzake overheidsopdrachten in bepaalde Lidstaten overboord kunnen worden gegooid. Dit zou zelfs verder vragen kunnen doen rijzen over de legitimiteit van het HvJ legitimiteit als medewetgever. Wanneer de nieuwe Richtlijn inzake overheidsopdrachten in werking treedt, moet men zich afvragen of een andere zaak Rüffert nog altijd mogelijk zou kunnen zijn (EVV, 2014).

Daarom moet het inzetten van gedetacheerde werknemers in het kader van overheidsopdrachten altijd zorgvuldig worden onderzocht. Een eenvoudige vrijwillige verklaring van een onderaannemer mag niet volstaan. De Richtlijn op de handhaving van Richtlijn 96/71/EG verduidelijkt de omstandigheden waarin van detachering gebruik kan worden gemaakt. Brievenbusfirma's zonder een echte plaats van vestiging in het land van herkomst en bedrijven die permanent gedetacheerde werknemers tewerkstellen, kunnen niet beweren dat ze onder de bepalingen van Richtlijn 96/71/EG vallen. Dergelijke werknemers moeten als binnenlandse werknemers worden behandeld. Art 71, lid 6, verduidelijkt dat de uitsluitingsgronden ook voor de onderaannemers gelden en definieert deze maatregelen meer in detail: De aansprakelijkheidsregeling kan ook voor onderaannemers gelden. In geval van overtreding van de IAO-arbeidsnormen en andere overeenkomsten uit de Bijlage X van de Richtlijn kan de ondernemer wettelijk verplicht worden om dergelijke onderaannemers te vervangen. Deze bepalingen kunnen tot de leveranciers worden uitgebreid. Indien een leverancier bij de uitvoering van een leveringscontract de in art. 18, lid 2, opgesomde normen overtreedt, kan dit een verplichte uitsluitingsgrond zijn, als dit in het nationale recht werd vastgelegd. Bovendien zou het vaststellen van dergelijke praktijken en vergelijkbare ervaringen met misbruiken in andere Lidstaten moeten volstaan voor de uitsluiting van kandidaten.

De tendens om de contractuele aansprakelijkheid van de hoofdaannemer af te zwakken door middel van oneindige lange onderaannemingsketens dient te worden gestopt door de invoering van een wettelijke beperking. Dit zou men kunnen doen door het beperken van de keten tot het niveau van onderonderaannemer. Bovendien zou de inschrijver verplicht moeten worden om de essentiële taken van het werk uit te voeren en de openbare opdrachtgever te informeren over en te vragen om de toestemming voor de inschakeling van onderaannemers. Verder zou de aansprakelijkheid van de hoofdaannemer duidelijk in de wet moeten worden gedefinieerd. Dit betekent dat de hoofdaannemer aansprakelijk wordt gesteld voor niet-naleving of gebrekkige uitvoering. De aansprakelijkheid is in de Lidstaten echter zeer verschillend geregeld. Hoewel er op het eerste gezicht strenge wettelijke verplichtingen van kracht lijken te zijn, blijken ze bij nader toezien niet geldig te zijn. Dat is bijvoorbeeld het geval in Oostenrijk, waar de aansprakelijkheid bij het faillissement van de onderaannemer eindigt. Zonder steunfondsen (in Oostenrijk het Insolvenz-Entgeltfonds) worden de werknemers van onderaannemers gewoon niet voor hun werk betaald. Daarom is het zeer belangrijk om het advies van Marc Tarabella te volgen, d.w.z. de aansprakelijkheid van de hoofdaannemer vast te leggen ongeacht de economische toestand van de onderaannemers. Dit betekent een onbeperkte en strikte aansprakelijkheid.

3.8. Toekomst

Sinds de oprichting van de Europese Economische Gemeenschap in 1957 vormden de fundamentele beginselen van vrij verkeer van goederen, personen, diensten en kapitaal de belangrijkste pijlers voor de oprichting van een grote Europese interne markt. De aanpak van de Gemeenschap was dan ook vooral economisch, ook al verwaarloosden de zes stichtende Lidstaten van de Gemeenschap niet de sociale aspecten voor de toekomst: Het idee was dat een tweeledig systeem waarbij de Europese Economische Gemeenschap instaat voor de totstandkoming van een interne markt en de Lidstaten hun verschillende nationale sociale stelsels en systemen van collectieve onderhandelingen of minimumlonen zouden behouden, zowel de economische ontwikkeling als het sociaal model in Europa wederzijds zou verbeteren. Dat idee werd echter geen werkelijkheid, want het werd terzijde geschoven door de uitbreiding van de EU, de liberalisering van de markten, de toename van migrerende werknemers en de globaal opererende industrie. Deze ontwikkelingen zorgen voor toenemende negatieve effecten op de arbeids- en loonvoorwaarden in de bouwsector. Bovendien gaat liberalisering hand in hand met de afschaffing van administratieve overlast en de vervanging door intelligente instrumenten. Zelfregulering en zelfreiniging zijn de nieuwe afgeslankte instrumenten zoals ze op EU-niveau voorgesteld worden.

De vakbonden moeten zich hevig verzetten tegen deze tendensen, vooral in de bouwnijverheid met haar typische kenmerken zoals de grote mobiliteit, het arbeidsintensieve karakter, het specifieke en complexe productieproces, de talrijke werkplekken, het grote aantal arbeidsongevallen en vormen van sociale fraude. Daarom is een efficiënte controle van de inachtneming van de sociale verplichtingen, de arbeids- en loonvoorwaarden, de naleving van de veiligheids- en gezondheidstools, de opleiding van werknemers en leerlingen absoluut noodzakelijk.

In het licht van de aanhoudende budgettaire beperkingen en de economische druk die op de aanbestedende diensten wordt afgewenteld, zou men kunnen concluderen dat het nodig is een controleorgaan op te richten om de uitvoering van de opdracht door beide contractpartners te controleren, d.w.z. de aanbestedende dienst en de ondernemer met inbegrip van alle onderaannemers. Het controleorgaan zou een toezichthouder of een openbare aanklager inzake aanbestedingen kunnen zijn. Om de focus op sociale, gezondheids- en veiligheidsaspecten binnen de openbare aanbestedingsprocedures in praktijk te brengen is de betrokkenheid van vakbonden als werknemersvertegenwoordigers een belangrijk gemeenschappelijk doel op EU-niveau.[16]

[16] Een goed begin of een goed voorbeeld is de nationale overeenkomst tussen de vakbonden en de bouwnijverheid in het Verenigd Koninkrijk: http://www.njceci.org.uk/national-agreement/.

4. Het Europees Hof van Justitie en de sociale aspecten in openbare aanbestedingen – een overzicht

4.1 Inleiding

De bij openbare aanbestedingen geldende voorschriften en procedures speelden een belangrijke rol sinds de start van het project voor de realisering van een interne markt begin jaren 1980 in de (toenmalige) Europese Economische Gemeenschap. Het doel van de regelgeving inzake openbare aanbestedingen was de openstelling van met overheidsgeld gefinancierde projecten voor de concurrentie op de hele interne markt. De Europese Commissie initieerde een pakket wetgevende maatregelen bestaande uit Richtlijnen voor openbare werken, diensten en concessies. De regels voor de openbare aanbestedingen moesten een wettelijk kader scheppen dat tegelijk toegang voor alle Europese ondernemingen tot overheidsopdrachten en efficiënte overheidsuitgaven waarborgt.

De regels moesten een belangrijke impact hebben op de algemene economische prestaties van de EU. Begin jaren 1990 stelde de Europese Commissie het ontwerp voor wetgeving inzake overheidsopdrachten voor als een louter "technische aangelegenheid" die niet door sociale of milieuoverwegingen "besmet" mocht worden. Volgens de officiële versie was het Unierecht neutraal met betrekking tot sociale overwegingen in openbare aanbestedingen, zolang de algemene beginselen van transparantie, non-discriminatie en gelijke behandeling in acht werden genomen. De overheersende redenering was dat de efficiëntste manier om het geld van de belastingbetaler op de voordeligste manier voor de samenleving te besteden erin bestond het goedkoopste bod te zoeken. De openbare aanbestedingen werden daarom heel lang beheerst door het bekrompen dogma van de laagste prijs, zonder rekening te houden met de gevolgen voor de werknemers of het milieu.

De aanbestedende overheidsinstanties die sociale of ecologische criteria wilden opleggen, werden en worden nog altijd geconfronteerd met een omslachtige procedure. Het HvJ verklaarde de aanbestedingsprocedure vaak nietig. Maar omdat de meeste openbaar aanbestede projecten worden uitgevoerd door het gebruik van arbeid in loondienst en omdat de uitgaven voor lonen en andere arbeidsvoorwaarden berekend moeten worden bij de inschrijving op overheidsopdrachten, is er een sterke relatie tussen de werknemersrechten en overheidsopdrachten. Verschillende Lidstaten hebben trouwens een lange traditie waarbij ze hun openbare aanbestedingen gebruiken voor de bevordering van verschillende doelstellingen in verband met het sociaal beleid (Ahlberg en Bruun, 2012).

De Richtlijnen als zodanig zijn gebaseerd op artikelen en principes gerelateerd aan de interne markt en op de jurisprudentie. In de loop der jaren heeft het Europees Hof van Justitie (HvJ) vastgelegd hoe de artikelen van de Europese verdragen en de beginselen van de economische vrijheden van de interne markt dienen te worden uitgelegd in het kader van overheidsopdrachten. In sommige gevallen aanvaardde het HvJ sociale overwegingen in aanbestedingsprocedures. In **Europese Commissie tegen Frankrijk** (C-225/98) stond het HvJ toe dat het vermogen van de inschrijver om de werkloosheid te bestrijden, als aanvullend gunningscriterium mag worden gebruikt, ook al hield het geen verband met het voorwerp van het contract.

In andere gevallen echter - in het bijzonder die in verband met de detachering van werknemers - lieten de Europese Commissie en het HvJ (vanaf de jaren 1980) zien dat ze de mate wilden beperken waarin sommige Lidstaten verplichte doelstellingen inzake sociaal (of milieu-)beleid in openbare aanbestedingen toepassen. In sommige arresten zwakte het HvJ de toe te passen sociale wetgeving en de mogelijkheden van de Lidstaten af om de naleving door de inschrijver te controleren, in het bijzonder de bevoegdheid van de Lidstaten om verplichte arbeidsnormen en bepalingen te formuleren die in acht moeten worden genomen door alle ondernemingen en iedereen die werkzaamheden op hun grondgebied uitvoert.

Bovendien verwierp het HvJ eenzijdig delen van het nationale regelgevende kader (van arbeidsnormen en arbeidsvoorwaarden) die op arbeidswetgeving en collectieve arbeidsonderhandelingen gebaseerd waren. Bij inbreuken waarbij arbeidsrechten werden betwist, lijkt het HvJ weinig belang te hechten aan voorgeschreven arbeidsvoorwaarden die in nationale systemen voor arbeidsverhoudingen vastgelegd zijn, ook al werden de inschrijvers gelijk behandeld. De arresten van het HvJ over detachering (in het bijzonder in de zaken **Luxemburg** en **Rüffert**) creëerden een situatie waarin de binnenlandse dienstverleners verplichte regels van de nationale wetgeving moesten naleven, terwijl buitenlandse dienstverleners niet aan deze verplichtingen hoefden te voldoen. Het Europees Verbond van Vakverenigingen (EVV) concludeerde in 2008 dat het arrest in de zaak Rüffert de Detacheringsrichtlijn van 2004 terzijde schoof, die uitdrukkelijk sociale clausules toestond.

Het arrest negeerde het recht van de Lidstaten en overheidsinstanties om openbare aanbestedingen te gebruiken voor het tegengaan van oneerlijke concurrentie op basis van de arbeidsvoorwaarden van werknemers van grensoverschrijdende dienstverleners, omdat deze volgens het HvJ onverenigbaar waren met de Detacheringsrichtlijn. Het erkende ook niet het recht van vakbonden om gelijke lonen en arbeidsvoorwaarden en de inachtneming van collectief overeengekomen normen op de werkplek voor gedetacheerde werknemers te eisen, die gelijk zijn voor alle inschrijvers, ongeacht hun nationaliteit en die de in de Detacheringsrichtlijn erkende minimumnormen overschrijden.

4.2 Korte inventarisatie

De arresten van het Europees Hof van Justitie aangaande sociale clausules bij overheidsopdrachten hadden in de loop der jaren een beslissende invloed op de herziening van de Richtlijnen inzake overheidsopdrachten en ze drukten hun stempel op de interpretatie door de nationale rechters. In dit overzicht vatten we enkele van de meest relevante arresten en andere legislatieve acties van de Europese Commissie en het HvJ samen.

Een van de eerste zaken en nog onder het oude stelsel van Richtlijn 71/305/EEG van de Raad vallend, maar met ernstige gevolgen voor openbare aanbestedingen en sociale aangelegenheden was de zogenaamde zaak **Beentjes** (C-31/87) met uitspraak in 1988. De procedure was het gevolg van een nationaal geschil tussen een inschrijver en de Nederlandse staat. Samengevat oordeelde het HvJ dat een sociaal criterium voor de uitvoering van de opdracht - waarbij in dit geval de ondernemer aan wie de opdracht gegund wordt, langdurig werklozen moet tewerkstellen - in het proces van de gunning van een overheidsopdracht mag worden gebruikt, als het voldoet aan alle relevante bepalingen van het Gemeenschapsrecht. Het HvJ oordeelde: "De voorwaarde in verband met het inzetten van **langdurig werklozen** is verenigbaar met de richtlijn, indien zij voor inschrijvers uit andere Lidstaten van de Gemeenschap geen direct of indirect discriminerende werking heeft. Een dergelijke aanvullende bijzondere voorwaarde moet in de aankondiging van de opdracht worden vermeld."

Het oordeel van het HvJ in de zaak Beentjes werd herhaald in de zaak **Nord-Pas-de-Calais** (C-225/98). Hierbij dient erop te worden gewezen dat dit een zaak van de Europese Commissie tegen de Franse staat was. De Europese Commissie probeerde het positieve resultaat van de zaak Beentjes voor sociale overwegingen te neutraliseren. De aanbestedende regio had in haar aankondiging als gunningscriterium de mogelijkheid van de uitvoerders opgenomen om **de lokale werkloosheid te bestrijden**. De Europese Commissie voerde aan dat werkgelegenheidsgerelateerde aangelegenheden weliswaar als een voorwaarde voor uitvoering van de opdracht kunnen worden beschouwd, maar dergelijke zaken niet als een gunningscriterium kunnen worden aangemerkt. Het HvJ wees dit argument af, omdat de Europese Commissie niet kon aantonen dat het criterium discriminerend was of dat het niet in de aankondiging van de opdracht gepubliceerd was geweest. Volgens het HvJ mochten de aanbestedende instanties een dergelijk gunningscriterium gebruiken op voorwaarde dat het in

overeenstemming was met de fundamentele principes van het Gemeenschapsrecht, meer bepaald met het beginsel van non-discriminatie.

Er dient te worden opgemerkt dat beide gevallen voornamelijk verwezen naar **algemene voorwaarden van "sociaal beleid"**, niet naar arbeidsvoorwaarden of andere bepalingen die met werknemersrechten verband houden. In zijn arresten zei het HvJ niet dat het opleggen van arbeidsvoorwaarden met de Richtlijn verenigbaar is. De conclusies die de Europese Commissie op basis van deze arresten maakte, waren daarom ook intrinsiek tegenstrijdig. Volgens de interpretatieve mededeling van de Europese Commissie betreffende de mogelijkheden om sociale aspecten in overheidsopdrachten te integreren, kunnen deze alleen als een tweede soort van en niet doorslaggevend gunningscriterium worden gebruikt bij het kiezen tussen twee voor het overige identieke inschrijvingen.[17]

In 2002 volgde er een uitspraak in een volgende interessante zaak. Intussen werd verwezen naar de begin jaren 1990 herziene Richtlijnen (vooral Richtlijn 92/50). In de **zaak Concordia Bus Finland tegen Helsingin** (C-513/99) oordeelde het HvJ dat een aanbestedende dienst het recht had om milieuoverwegingen in de gunningscriteria op te nemen. Dit arrest was om twee redenen relevant: Ten eerste oordeelde het HvJ dat **gunningscriteria niet zuiver van economische aard moeten zijn**. Ten tweede stelde het HvJ: "(...) Richtlijn 92/50 sluit niet uit dat de aanbestedende dienst in het kader van de beoordeling van de economisch voordeligste aanbieding criteria met betrekking tot milieubescherming hanteert", zolang de vastgestelde criteria om te bepalen wat de economisch voordeligste aanbieding is, toegepast worden in overeenstemming met alle procedurele voorschriften zoals vastgelegd in Richtlijn 92/50, in het bijzonder de regels voor reclame. Het belang van het arrest gaat zelfs verder dan de directe gevolgen in de bewuste zaak zelf. Het HvJ formuleerde in feite een **referentiekader voor aanbestedende diensten**. Men mag met zulke ecologische criteria rekening houden, wanneer **de criteria verband houden met het voorwerp van de overheidsopdracht**; ze geen onvoorwaardelijke keuzevrijheid aan de aanbestedende dienst geven; ze uitdrukkelijk in het bestek of in de aankondiging van de opdracht vermeld zijn en in overeenstemming zijn met de fundamentele principes van het Gemeenschapsrecht, meer bepaald met het beginsel van non-discriminatie.

In een zaak uit 2003 (**Wienstrom tegen Oostenrijk**, C-448/01) werd deze redenering toegepast: Richtlijn 92/50 kan niet aldus worden uitgelegd, dat elk van de door de aanbestedende dienst gehanteerde **gunningscriteria** ter bepaling van de economisch voordeligste aanbieding, **noodzakelijk van zuiver economische aard is.** Toch concludeerde het HvJ dat er een inbreuk was, omdat het gunningscriterium niet van de vereisten voorzien was die een daadwerkelijke controle van de door de inschrijvers verstrekte informatie mogelijk maakten. Het HvJ concludeerde dat de aanbestedingsprocedure onverenigbaar was met de beginselen van het Gemeenschapsrecht op het gebied van het aanbestedingsrecht.

In de **zaak Lianakis** (C-532/06) verduidelijkte het HvJ dat er een duidelijk onderscheid tussen de selectie- en gunningscriteria gemaakt moet worden. Met het oog op de transparantie en gelijke behandeling moeten alle elementen die door de aanbestedende dienst bij het vaststellen van de **economisch voordeligste inschrijving** en hun relatieve belang in acht worden genomen, vooraf duidelijk moeten worden gepubliceerd. Dit betekent echter dat de interpretatiemarge van de aanbestedende diensten verminderd zal worden en de aanbestedende diensten niet toelaat om prioriteit te verlenen aan inschrijvingen die "socialer" dan anderen zijn, als zij niet vooraf en voldoende gedetailleerd de relevante criteria hebben vastgelegd.

[17] Interpretatieve mededeling van de Commissie betreffende het Gemeenschapsrecht van toepassing op overheidsopdrachten en de mogelijkheden om sociale aspecten hierin te integreren, COM(2001) 566 def.

Om de last van lokale openbare opdrachtgevers voor de opstelling van gunningscriteria en toewijzingsquota te verlichten, zijn openbare opdrachtgevers begonnen naar **keurmerken** te verwijzen in plaats technische specificaties voor het voorwerp van de opdracht op te stellen. Het HvJ liet in de **zaak Max Havelaar** (C-368/10) in principe toe dat **sociale of ecologische criteria** - in dit geval producten afkomstig uit de biologische landbouw - **begunstigd kunnen worden**. Toegepast op een bouwcontract, betekent deze uitspraak dat een onderneming waarvan het product voldoet aan de technische specificaties, niet over een milieukeurmerk dient te beschikken. Het moet gewoon bewijzen dat het product aan deze technische specificaties voldoet. Rekening houdend met de brede waaier van nationale en Europese keurmerken heeft deze uitspraak twee gevolgen: a) De aanbestedende diensten mogen sociale criteria invoeren en b) de administratieve vereisten voor ondernemingen worden beperkt, omdat ze geen specifieke keurmerken moeten verwerven, maar alleen moeten bewijzen dat ze aan de vereiste kwalificaties voldoen.

Het bewustzijn dat openbare opdrachtgevers het voortouw moeten nemen voor de sociale aspecten is toegenomen bij de opdrachtgevers op federaal en lokaal niveau. Noordrijn-Westfalen bepaalde bijvoorbeeld dat in alle openbare aanbestedingen de **minimumlonen** moeten worden toegepast. De stad Dortmund interpreteerde dit zo dat elke onderaannemer, om het even waar hij gevestigd is en waar de dienstverlening plaatsvindt, de Duitse minimumlonen moet betalen.

In dit geval besteedde de **Duitse Bundesdruckerei** het hoofdvoorwerp van de opdracht aan een Pools bedrijf uit. Het HvJ oordeelde dat de Duitse minimumlonen in een dergelijk geval niet van toepassing zijn. Volgens het internationale recht lijkt het logisch dat de rechterlijke bevoegdheid van een Lidstaat stopt aan de grenzen van zijn grondgebied. Toch riep het HvJ dit argument niet in maar verwees het naar principes van de interne markt. Deze redenering is een nogal cynische argumentatie, want het HvJ stelt: "Deze regeling gaat namelijk verder dan wat nodig is ter bereiking van het doel om de werknemers te beschermen, voor zover zij in een dergelijke situatie een vast minimumloon voorschrijft dat overeenstemt met het loon dat vereist is om de werknemers [in Duitsland] een passend loon te verzekeren, gelet op de kosten van levensonderhoud in die lidstaat, maar niet in verhouding staat tot de kosten van levensonderhoud in de lidstaat waarin de prestaties ter uitvoering van de betrokken overheidsopdracht zullen worden verricht [in casu Polen], en de in die lidstaat gevestigde onderaannemers dus de mogelijkheid ontneemt om een concurrentievoordeel te halen uit de bestaande loonverschillen."

Hieruit kunnen we twee zaken leren: Ten eerste dat het HvJ de overheersing van de concurrentie tussen de Lidstaten belangrijker blijft vinden dan andere principes. Ten tweede dat om dit soort ingrijpen door de medewetgever van de EU te vermijden de openbare opdrachtgevers verplicht zouden moeten worden om het geheel of het grootste deel van het voorwerp van de opdracht zelf uit te voeren. Bovendien moet de keten van onderaannemers wettelijk beperkt worden.

Deze maatregelen zouden oneerlijke concurrentie ten nadele van de werknemers en op basis van lonen voorkomen.

4.3 De impact van "uitbesteding van werknemers" – externe tewerkstelling: De arresten inzake detachering, outsourcing, insourcing (arbeidsbemiddeling), uitzendbureaus

De detacheringsvoorschriften waren het voorwerp van een reeks arresten van het HvJ. Het resultaat van deze zaken toonde aan dat het HvJ en de EC samen streven naar een enge en restrictieve interpretatie van de Detacheringsrichtlijn, met belangrijke gevolgen voor de openbare aanbestedingsprocedures.

De Lidstaten kozen voor een verschillende aanpak van de mate waarin openbare opdrachtgevers op insourcing/outsourcing een beroep kunnen doen. België bijvoorbeeld werkte een regelgeving voor uitzendkrachten uit. Ze moeten geaccrediteerd zijn en een minimale opleiding krijgen. In Noorwegen en Oostenrijk bepaalde de wetgever dat onderaannemingscontracten en tijdelijke uitzendkrachten wettelijk hetzelfde zijn. Daardoor worden de toegestane niveaus van "uitbesteed werk" automatisch verlaagd. Uit de ervaringen in bepaalde Lidstaten blijkt echter dat de beperking van de keten van uitbestede werken niet volstaat om de druk op de lonen te verminderen. In het Verenigd Koninkrijk bijvoorbeeld legt de opdrachtgever contractvoorwaarden op, inclusief de verplichting voor de onderaannemers om de boetes te betalen voor niet-naleving van de verplichte wettelijke voorwaarden, ook al zijn zij de zwakste partner in de hele keten.

In verschillende zaken (zoals in de zaken Rüffert en Laval) beperkt de HvJ-interpretatie van de bepaling in het Verdrag inzake het vrije verkeer van diensten de mogelijkheid om arbeidsnormen vast te leggen via mechanismen zoals collectieve onderhandelingen en sociale clausules in openbare-aanbestedingscontracten (Van Hoek en Houwerzijl 2011). Deze arresten van het HvJ grijpen op die manier direct in de mogelijkheid in om verplichte bepalingen met betrekking tot de arbeidsvoorwaarden op te nemen. De kernvraag is in hoeverre met het Gemeenschaps- of Unierecht verenigbaar zijn. Na de zaken Laval en Rüffert betekent de voorgestelde neutraliteit dat wanneer een overheidsopdracht wordt uitgevoerd door werknemers die uit een ander land worden gedetacheerd, de aanbestedende dienst de inschrijving voor een overheidsopdracht niet afhankelijk kan maken van "de inachtneming van de voorwaarden in om het even welke collectieve arbeidsovereenkomst". Deze beperking geldt niet, als het werk wordt uitgevoerd door werknemers van lokale ondernemingen (Ahlberg & Bruun, 2012).

Het HvJ is ook duidelijk over de **zaak** van de inbreuk ingediend door de **Europese Commissie tegen het Groothertogdom Luxemburg**. Volgens het HvJ is de lijst van voorschriften in de Detacheringsrichtlijn met betrekking tot de arbeidsomstandigheden en de arbeidsvoorwaarden uitputtend en geen lijst van minimumrechten. In overweging 32 van de zaak tegen Luxemburg stelt het HvJ dat de ruimte voor bijkomende bindende bepalingen beperkt blijft tot bepalingen "die gelet op hun aard en doel beantwoorden aan de dwingende eisen van algemeen belang" (zaak C-319/06). Volgens het HvJ komt het de Lidstaten niet toe eenzijdig de openbare orde vast te stellen die bijkomende bindende bepalingen rechtvaardigt bovenop de in de Richtlijn opgesomde minimale bepalingen. Deze beperking door het HvJ betekent in de praktijk, dat een **grotere bescherming dan wat minimaal in de Detacheringsrichtlijn voorzien is**[18], niet aan buitenlandse ondernemingen met hun gedetacheerde werknemers opgelegd kan worden. Zoals hierboven uitgelegd creëren de arresten van het HvJ een situatie waarbij buitenlandse dienstverleners niet moeten voldoen aan bindende regels uit het nationale recht, die door de binnenlandse dienstverleners wel dienen te worden nageleefd.

[18] Overweging 17: "Overwegende dat de dwingende bepalingen inzake minimale bescherming die in het ontvangende land van kracht zijn, geen beletsel mogen zijn voor de toepassing van arbeidsvoorwaarden en -omstandigheden die gunstiger zijn voor de werknemers."

Deze juridische aanpassing van de EU-medewetgever is voor de vakbonden onaanvaardbaar, want ze ondermijnt de goede wil van openbare opdrachtgevers en nationale wetgevers om ongelijke arbeidsvoorwaarden te bestrijden: enerzijds zijn er werknemers die onder lokale collectieve arbeidsovereenkomsten vallen en anderzijds zijn er werknemers uit andere EU-landen die met lagere lonen kunnen worden gecompenseerd. Het spreekt voor zich dat als men de interne markt op deze wijze interpreteert en blijft vasthouden aan de doctrine van de "markttoegang", dit de sociale spanningen zal verhogen. De conclusie van het HvJ in de **zaak Bundesdruckerei tegen Stad Dortmund** (C549/13) lijkt het cynicus hoogtepunt van een dergelijke marktdoctrine: "Deze [nationale] regeling gaat namelijk verder dan wat nodig is ter bereiking van het doel om de werknemers te beschermen, [...] en de in die lidstaat gevestigde onderaannemers dus de mogelijkheid ontneemt om een concurrentievoordeel te halen uit de bestaande loonverschillen."

Een soortgelijke **zaak** (C-115/2014) is nog bij het Europees Hof van Justitie hangende als verzoek om een prejudiciële beslissing. De postondernemingen **Regiopost GmbH** diende een klacht tegen de stad Landau in wegens de verplichte toepassing van minimumlonen volgens het Landestariftreuegesetz van Rijnland-Palts [= wet betreffende de naleving van de collectieve arbeidsovereenkomsten en minimumlonen bij overheidsopdrachten]. Het minimumuurloon bedraagt er 8,70 EUR. In aansluiting op de zaak Rüffert verzocht het Oberlandesgericht van Koblenz om de prejudiciële beslissing van het HvJ, namelijk dat dit door de overheid vastgestelde minimumuurloon een inbreuk op het Unierecht is, omdat het bedrijven uit andere Lidstaten met lagere loonniveaus de toegang tot de markt ontzegt. Omdat de bewuste deelstaatwet enkel minimumlonen voor overheidsopdrachten en niet voor particuliere opdrachten vastlegt, is het geen algemeen geldend minimumloon. Een uitspraak wordt nog dit jaar verwacht. Toch moet men er ten eerste rekening mee houden dat de bewuste maatregel bij wet vastgesteld is in overeenstemming met art. 3, lid 1, van de Detacheringsrichtlijn. Het is dus een maatregel van de overheid en niet alleen een collectieve arbeidsovereenkomst. Ten tweede moet het door de Duitse federale regering vastgelegde minimumuurloon van 8,5 EUR per 1 januari 2015 toegepast worden. Daardoor zijn op zijn minst vanaf die datum de voorwaarden zoals vastgelegd in artikel 3, lid 1, van de Detacheringsrichtlijn vervuld.

Nog meer hoop kan men putten uit het recente arrest in de zaak C-413/13: "schijnzelfstandigen". Met dit arrest staat het HvJ toe dat in een collectieve arbeidsovereenkomst vastgelegde minimumlonen en arbeidsvoorwaarden gelden voor "**schijnzelfstandigen**". De uitspraak komt voort uit een **zaak** die werd ingespannen door de Nederlandse vakbond **FNV KIEM**, die de indeling van freelance musici als individuele "ondernemingen" aanvocht. Volgens het Nederlandse mededingingsrecht hadden de vakbonden niet het recht om met hun werkgevers collectief te onderhandelen over vergoedingen voor zelfstandige werknemers. De bewuste Nederlandse collectieve arbeidsovereenkomst legde minimumtarieven vast voor remplaçanten in het kader van een dienstverband maar ook voor remplaçanten die hun werkzaamheid op basis van een overeenkomst van opdracht uitoefenen en niet worden beschouwd als "werknemers" in de zin van de overeenkomst zelf (de zelfstandige remplaçanten). Het arrest van het HvJ bepaalt dat **schijnzelfstandigen**, met andere woorden dienstverleners die zich in een situatie bevinden die vergelijkbaar is met die van werknemers, **van de werknemersrechten in een collectieve arbeidsovereenkomst kunnen genieten.**

Een laatste zaak die hier nog vermelding verdient, is een **Finse zaak van Poolse werknemers** die onderbetaald werden (Sähköalojen ammattiliitto ry tegen Elektrobudowa Spółka Akcyjna, C-396/13). In het arrest onderstreepte het HvJ dat de arbeidsomstandigheden en -voorwaarden die aan gedetacheerde werknemers gegarandeerd worden, moeten worden vastgelegd in de wetgeving van de gaststaat (zolang deze voorwaarden "algemeen geldig, verbindend en transparant" verklaard zijn). In deze zaak betwistte de buitenlandse onderaannemer de bevoegdheid van de vakbonden in het ontvangende land een gerechtelijke procedure konden inspannen, aangezien de arbeidsverhouding gebaseerd was op het recht van het land van herkomst. Het HvJ moest dus beslissen over de vraag of het recht op een daadwerkelijk rechtsmiddel, zoals vastgelegd in het

EU-Handvest van de grondrechten, ten aanzien van de rechten toegewezen krachtens de Detacheringsrichtlijn, geblokkeerd kunnen worden door de regel dat de wetgeving van het land van herkomst voorrang heeft (die de toewijzing van rechten op basis van de arbeidsverhouding verbood). Het HvJ oordeelde dat de **vakbond in het gastland bevoegd is om beroep in te stellen** bij de verwijzende rechter, aangezien dat beroep geregeld wordt door het Finse procesrecht, en omdat de Detacheringsrichtlijn duidelijk stelt dat vragen met betrekking tot **minimumlonen vallen onder wetgeving van het gastland**, om het even wat de op de arbeidsverhouding van toepassing zijnde wetgeving is. Door deze uitspraak kan een **onderneming in het gastland voor de rechter gedaagd worden** en dit zou directe gevolgen voor toekomstige aanbestedingsprocedures in datzelfde land kunnen hebben.

Het inzetten van gedetacheerde werknemers moet erger zorgvuldig worden gecontroleerd. De nieuwe Richtlijn over de handhaving van Richtlijn 96/71/EG verduidelijkt de omstandigheden waarin van detachering gebruik kan worden gemaakt. Bedrijven zonder een echte plaats van vestiging in het land van herkomst (brievenbusfirma's) en bedrijven die permanent gedetacheerde werknemers tewerkstellen, kunnen niet de bepalingen van de Richtlijn (Richtlijn 2014/67/EG) inroepen. Aangezien overweging 37 van de nieuwe Richtlijn onevenredig belang hecht aan de doctrine van de "markttoegang" zoals toegepast door het HvJ, lijkt het niet verstandig om deze bepaling in nationale wetgeving te laten omzetten.

5. Best practices

Precondition for the recording of best practices within the framework of this project was that they can demonstrate a tangible and measurable positive real output with regard to social considerations within the public procurement procedure.

5.1. Preventive measures to avoid that the public procurement procedure is abused/circumvented

France

Key point/background – Black list

The law relating to the posting of workers was introduced in July 2014 (**loi n°2014-790 du 10 juillet 2014) to reinforce the controls and penalties against undertakings employing posted workers at conditions less advantageous than local workers.**

Description of the measure in discussion/already in place

One element of this new legislation is the introduction of a black list, which will be published on a website. This list contains for a maximum time limit of two years all companies which have breached the above mentioned law, i.e. have been convicted for illegal employment. The requirement of publishing this information is imposed by the judge when deciding that a breach of labour law has occurred. The internet website is to be put into force by the Ministry of Labour.

Ireland

Key point/background – Exclusion from public procurement

The Irish public procurement market is undergoing a period of transformation. Traditionally, a semi-centralised procurement system operated in Ireland with various central government departments, local authorities and semi-state bodies held individually responsible for their own procurement requirements. The formalisation and establishment of a new Office of Government Procurement ("OGP") indicated a national movement towards a centrally controlled purchasing system. The OGP commenced operations in 2014, and together with four key sectors (Health, Defence, Education and Local Government), takes responsibility for sourcing all goods and services on behalf of the Public Service. The three overriding goals of the office are:

- To integrate procurement policy, strategy and operations in one office,
- To strengthen spend analytics and data management,
- To secure significant savings

Description of the measure in discussion/already in place

Within the process of adopting the three new EU public procurement Directives, the OGP launched a public consultation on the transposition of the new Directives on 31st October 2014.

The OGP is now considering how it will transpose the discretionary clauses laid out in the 2014 EU Procurement Directives. The OGP considers a mandatory exclusion of economic operators from procurement procedures for a certain time-span in the following transgressions:

- poor performance,
- submission of low-tenders and
- failure to comply with employment legislation.

Italy

Key point/background – White list

One of the biggest problems in public tenders in Italy is the existence of corruption and criminal organizations´ interests in public procurement procedures.

In the course of the last 30 years many governments have attempted to fight this phenomenon. In 2010 the government adopted a measure called "White List".

Description of the measure in discussion/already in place

To fight corruption, the government established a new agency called ANAC (National Anti-Corruption Authority) in 2014. The tasks of ANAC are to prevent corruption in public administration bodies as well as to control and supervise public procurement.

To support this measure, a White List was established. In the White List are registered those companies that are authorized to participate in public procurement procedures as contractors or subcontractors. Every employer, employee or supplier active on a worksite, having any form of contract relation to the contractor, must be checked as to links with criminal organizations.

The authorisation is subject to various controls and can be revoked. Companies which are cancelled from the list are prohibited to take part in public procurement procedures.

The precondition to be cancelled from the list is that the companies or persons with legal liability in the company have been condemned for corruption, fraud, or are suspected or involved in investigations related to connection with criminal organizations.

The White List also takes into account criteria relating to good reputation with regard to the company as a whole as well as to the members of the management. The White List is managed by the "Prefettura" (territorial entities of the central government) and is accessible to public authorities.

Italy

Key point/background – Centralised procurement body

Public procurement in Italy is characterised by a very inhomogeneous federal structure. Therefore, the government envisages a massive reduction of the number of public administration agencies that can call for tenders (actually about 30,000). This large number of entities makes it difficult to control public tenders (for instance, what kind of tenders, based on which standards, the quality level of work performed, duration of a worksite). This unstructured approach brings about a lack of control as well as criminal infiltration and corruption.

Description of the measure in discussion/already in place

The aim is to strongly reduce the number of bodies which can call for tenders, merging them in order to ensure the best quality of procedures and technical specification as to design and management of public procurement procedures as well as more control opportunities with regard to the contract performance.

Malta

Key point/background – Exclusion from public procurement; black list

The government aims to tackle precarious employment in the procurement of public works by means of a new legal notice (L.N. 65 of 2015. Public procurement (Amendment) regulations, 2015). It notes that companies breaching public procurement regulations or the Employment Act could be liable to being blacklisted for between six months and two years.

Description of the measure in discussion/already in place

The measure is to be carried out by the Director of Employment and Industrial Relations who shall request the Commercial Sanctions Tribunal to blacklist an individual from participating in procedures for the award of public contracts if he:

(a) has been found guilty of an offence in terms of the Employment and Industrial Relations Act; (b) has failed to provide employees with a written contract of service;

(c) has failed to provide employees with a detailed pay slip containing all relevant details;

(d) failed to deposit wages or salaries by direct payment on the employee's bank account;

(e) fails to provide the relevant bank statements of wages and salaries deposited and copies of detailed pay-slips which are to be made available as and when required by the Director of Industrial and Employment relations;

(f) has subcontracted a public contract to another person employing the same employees of the principle contractor to carry out the same or similar duties for the execution of the said public contract.

In the run-up to introducing this legal notice, the government blacklisted two companies from public contracts for two years because of precarious work. During this time period the convicted party will be banned from bidding for government tenders.

Since the beginning of 2015, bidders for public contracts have also been obliged to offer a minimum hourly rate equivalent to the basic wage for civil servants.

Finally, the government has increased the number of inspectors to carry out more frequent onsite inspections.

UK

Key point/background - Blacklisting

In the UK procurement practice is somewhat elusive from the involvement of trade unions. Comparable to Italy, a vast number of public administration agencies exists which all have their own processes and minimal governance.

Description of the measure in discussion/already in place

Some UK public bodies have written into procurement procedures statements on blacklisting due to the persecution and exclusion of trade union members carrying out legitimate trade union business on the grounds of health and safety. Some Statements are worded more strongly than others. An extract from Cambridge City Council is below:

'Cambridge City Council deplores the illegal practice of blacklisting within the construction industry and will ensure that any company known to have been involved in blacklisting practices that have not indemnified their victims will not be invited to tender for contracts until they have:

1 Identified the steps taken to remedy blacklisting for all affected workers
2 Identified the steps taken to ensure blacklisting will not happen again
3 Given assurances that they do not employ individuals who were named contacts involved in "The Consulting Association", providing black lists with members of trade unions to private companies.

UNITE´s view is that all public bodies can adopt this practice with one common statement on this key blacklisting issue. There is legislation already in place to allow for this all be it not very strong and it is a known fact that the companies involved in the UK blacklisting scandal have not been subject to any penalties. On blacklisting there are 3 key issues that need to be addressed –

- Stopping blacklisters tendering for public funded contracts.
- Public bodies having the ability to terminate contracts, if a company is found to be blacklisting after the contract award.
- Heavy and realistic fines for perpetrating companies.

UK/Scotland

Key point/background - Combat black-listing

In Scotland certain companies offer a list of persons that engage in trade union´s activities against payment. This practice is prohibited by the Employment Relations Act 1999 (Blacklists) and by the Trade union and Labour Relations (Consolidation) Act 1992.

Description of the measure in discussion/already in place

In order to ensure that blacklisting is not used in connection with the performance of public contracts in Scotland, the government put in place two measures:
Any company which engages in or has engaged in blacklisting of employees or potential employees is considered to have committed an act of grave misconduct in the course of its business and should be excluded from bidding for a public contract.
The contract will be terminated if a supplier is found to have breached relevant blacklisting legislation during the course of the contract.

Switzerland

Key point/background – Positive and negative list

Today the provisions on Public procurement are regulated on two distinct legal levels (federal and cantonal level): in the "Bundesgesetz über das öffentliche Beschaffungswesen" (BöB, federal) and the" Interkantonale Vereinbarung über das öffentliche Beschaffungswesen" (IVöB). Both provisions are in process of reform.

In order to allow the contracting authorities to control the compliance with the contract conditions and to better comply with the target of sustainable procurement, as much transparency as possible about the bidder market has to be obtained. This includes knowledge about the location of contract performance and of production as well as about the whole delivery and sub-contractor chain. Self-declarations by the bidders are not sufficient, an in depth examination by the contracting authority is necessary. To support this control, a positive list has been established in some cantons and a negative list is aimed to be established at the occasion of the transformation of the new Directive into Swiss law by the Trade Unions.

Description of the measure in discussion/already in place

The positive list includes all companies that have undergone an in-depth control and have proven to fulfil all legal conditions in order to participate in public procurement procedures. Such a list has been established in the Kanton of Zurich by the Trade Union "Unia" in order to ensure the subcontractor's accountability. The Trade Union aims at implementing this kind of positive list also for the procurement sector. The list should include only those companies which are not in breach with their obligations of payment of social security contributions, taxes, as well as minimum tariffs. Moreover, the establishment of a negative list is planned, which enumerates all excluded bidders. This comprises bidders that violated working condition standards and other relevant legal

obligations (social or wage dumping, discrimination) within the last 10 years. Such companies shall not be allowed to participate in public procurement procedures for this time span (i.e. 10 years). This centralised negative list shall be maintained for the whole territory of Switzerland and constantly be up-dated. Details should be regulated by way of ordinance.

5.2. Legislative measures to fight social dumping practices – fair level playing field

Austria

Key point/background – Combat against social dumping, equal pay for equal work in the same place

The construction sector is characterised by mobile working conditions and the employment of workers coming from the whole EU, often sent by companies without establishment in the country of the construction site. This offers a wide field of application of different, often unfair, labour conditions and wages.

Point of departure: An actual case

Members of the Financial Police, inspecting a building site came across 21 Polish, four Hungarian and one Slovenian citizen, who were carrying out dry wall installation work. Based on the written results of the interrogations it was established that the contracts for work were false, and by declaring "bogus self-employment" attempts had been made to conceal the true nature of the working relationships.

Legal assessment of the case: The Financial Police carries out inspections to check whether the Austrian wage provisions are adhered to. Here too, it must actually be checked on the basis of circumstances, whether the workers involved are "bogus self-employed", hence, workers who only pretend to be self-employed, but who in reality are employees. If this is the case it will be checked whether the wages the people concerned receive, at least correspond to the relevant collective agreement (here: building and construction industry—workers). If the applicable basic wage is undercut, it is a case of wage dumping. The pretence client, who is in fact the employer, would then be confronted with a high administrative fine and moreover could expect procedures to withdraw the trade licence respectively—if it concerns a foreign employer—being banned from being active in Austria for several years.

Description of the measure in discussion/already in place

In order to prevent unfair labour conditions when awarding construction works within public procedure, companies that were held liable by an administrative decision have to be excluded of the bidding procedure, as they cannot fulfil the specification criteria. Non-fulfilment of specification criteria is a knock-out reason.

Requiring the adherence to Austrian wages is one thing, their practical implementation another. It had only been provided for that workers could assert their entitlements under civil law. A posted Hungarian iron bender for example who continues only to be paid in accordance with
Hungarian provisions for his work in Austria, may sue for the difference to the Austrian Collective agreement for the building and construction industry. However, practice shows that this has hardly ever happened. In most cases, workers earn more abroad than in their native country, hence the incentive to claim the difference does hardly exist. Apart from that workers must expect that they will no longer be employed once they lodged their claim. Hence, in case of short-term posted or cross-border transferred workers, the sheer possibility to assert any claims themselves is not suited for enforcement. Moreover, the risk of the employer is very low. At worst he has only to pay what he would have to pay in the first place. Hence, trade unions and chambers of labour have requested for

years that Austria sets up an official control mechanism with the power to impose sanctions if the wages and salaries provided for are not adhered to.

In 2011, Austria implemented the Anti-Wage and Social Dumping Act (Lohn- und Sozialdumpingbekämpfungsgesetz – LSDB-G), which stipulates a wide range of possibilities for the public administration to supervise the compliance of Austrian legislation referring to wages. This law is inspired by the principle of "equal pay for equal work in the same place**"** in order to prevent competition at the expense of wages. As the Posting of Workers Directive also includes cross-border transfer, this principle also applies to temporary workers, who are transferred/loaned from one Member State to another.
The LSDB-G now includes an official control mechanism for the wages and salaries provided for. Most provisions refer exclusively to employers from other EU and third countries with no establishment in Austria, employing workers with usual working place in Austria, posted to Austria or within a temporary employment agreement. Central provision is that any such employer has to pay the wages as set in the relevant legal (by law or ordonnance) or collective agreement. Any violation is regarded as an administrative statutory offence and penalised.

This mechanism does not only apply to posted but to all workers. That means, if a domestic employer underpays his workers, he can expect sanctions. However, the competence of the authorities varies. Whilst the local control for cross-border workers who have been posted or transferred is carried out by the Financial Police, workers, who have their usual place of work in Austria, are checked by the respective Regional Health Insurance Fund. If the Regional Health Insurance Fund finds that wage dumping exists, it will notify the regional administrative authority. The latter will then take legal action and, if applicable, impose the penalty on the employer.

In cases with cross-border reference, the Financial Police will in general not file the complaint itself, but use a separate institution at the Regional Health Insurance Fund, in Vienna the so-called LSDB Competence Centre. The Financial Police will therefore carry out a rough check on site and then forward the file to the LSDB Competence Centre to conduct an in-depth check. If the latter finds that the determined basic wage has been undercut, it will file a complaint.

Apart from the authorities mentioned, the Construction Workers' Holiday and Severance Pay Fund is also called to carry out checks and file complaints within the scope of its responsibility.

The level of sanctions orientates itself on the Aliens' Employment Act. The penalties range between € 1,000 and € 10,000 for each employee. In case of wage dumping affecting more than three workers, the range of penalties per employee is automatically increased. In this case, it lies between € 2,000 and € 20,000 per employee, and in the case of repeated infringement between € 4,000 and € 50,000.

Concrete example for the calculation of penalties: If a construction company would speculate that by underpaying wages provided for by the collective agreement it would obtain a competitive advantage over its competitors and if inspectors find that wage dumping on the building site has taken place in case of 5 workers, the employer's minimum penalty would be € 10,000 (2.000 x 5) respectively the penalties would range between € 10,000 to € 100,000. In the case of repeated infringement, the minimum penalty would be € 20,000 and the range of penalties € 20,000 to € 250,000. The employer could also expect his trade licence to be withdrawn or—in case of a foreign employer—being banned from working in Austria for at least one year.

However, the application of the law was hampered by the fact that it mainly depended on the workers´ willingness to initiate proceedings in case of abuse.
Therefore, in 2015, the LSDB-G has been amended according to the requests of Austrian Chamber of Labour and Trade Union in order close loopholes relating to control and workers´ information:

- Extension of the above mentioned authorities´ power of control: besides the basic salary they are empowered to assess the correctness of compensation for overtime, extra allowances, special remunerations and bonuses. Before the recast, they were only competent to control the correctness of the basic salary.

- If the employer is not able to provide the wage records on the construction site, the new penalties amount from 1000€ to 10 000 € per worker. Thus, the non-provision of records is threatened by the same penalties as the non-payment of the correct wages.
- The statutory period of limitation for cases of wage dumping has been extended from one to three years. Hence, unpaid wages and connected legal titles can be called up for the last three years.
- The limit of prosecution has also been extended from 1 to 3 years. Within this time span the competent authorities can enact onsite controls and refer eventual violations to the administrative authorities.
- In case that wage dumping against a worker has been legally established by the regional administrative authority (authority of first instance), all the employees of the relevant company have to be informed. This measure was deemed to be necessary in order to assure that all employees become aware of the eventual incorrectness of their payment roll and are able to seek redress.

France

Key point/background – Ex-ante in depth control

The Social Security Act (loi n°2013-1203 du 23 décembre 2013 sur le financement de la sécurité sociale) was amended in 2013 to reinforce the liability of contracting authorities for ex-ante in depth control.

Description of the measure in discussion/already in place

Prior to the award of a contract amounting to a sum above 3000 euro, the contracting authority has

- to check if the client contractor has fulfilled all social and tax obligations;
- to ask for the necessary documents to prove that the future client company is in conformity with social and labour law and has not been convicted for illegal employment;
- to check if the client contractor has paid the due social security contributions.

In case the contracting authority did not comply with this control liability, it is jointly held liable for the due contributions if it turns out that the client contractor employs illegal workers.

Germany

Key point/background – Combat against abusive wage cutting and control mechanisms

Construction and other services, which are comprised by the workers´ posting law, are only allowed to be attributed to such companies, which have signed a written obligation that they will pay their employees the remuneration amounting to the sum and corresponding to the conditions determined in the tariff contract to which the employee is bound under the workers´ posting law. This legal obligation is set in 14 of the 16 German Länder.

Description of the measure in discussion/already in place

As for other cases, where tariffs do not exist, the minimum wage of 8,8 € as set specifically for public procurement contracts has to be applied in case of public tenders outside the scope of application of sector-specific minimum wages. In Bremen (one of the German Länder), the federal legislator has established a central “special commission minimum wage” liable for the implementation and control. For this purpose, the federal law provides that the contracting authority has to agree with the contracting company that the tendering authority is allowed to undertake controls and to assess the payroll accounting, relating to the workers employed for the accomplishment of the public contract.

Furthermore, it has to be agreed that the contracting authority is empowered to question the workers on the wages paid and their working conditions.

Moreover, § 16 al. 3 of the Tariff Adherence and Public Procurement Act of Bremen stipulates the general obligation of all contracting authorities to inform the "special commission minimum wage" about any awarded construction or service contract. The special commission registers these informations by an electronic collection system. The choice of control samples is further undertaken by the special commission on basis of the reported contracts. Within the selection process focus is put on such cases of public contracts which are typical for low wage sectors. The control is carried out by the contracting authority in close cooperation with the "financial control black labour", responsible for minimum wage controls outside public procurement.
In case that these controls reveal breaches threatened by penalties, they are reported to the competent authority "finance control black labour".
Moreover, within the context of sanctions specifically applying in public procurement cases, the federal law foresees a contractual penalty amounting to 1% for each breach of the minimum tariff, in case of repeated breaches up to 10% of the value of the contract value. The main contractor is liable for the abiding by the tariff applicable by the sub-contractors, which are employed for the execution of the contract. If manifold breaches occur, the contracting company may be dismissed without notice and asked for damages compensation.
And finally: The contracting company can be banned from any further public procurement procedure for an exclusion period of 2 years by a respective registration in the public procurement register.
Similar central control authorities exist in federal laws of Berlin, Nordrhein-Westfalen and Hamburg .

Italy

Key point/background - Combat against irregularity in payments of salaries and contributions
The construction sector in Italy is characterized by a low level of workers' rights. This fact is linked to several reasons. The most important one being that in general the award criteria applied in public procurement procedures is the lowest price. Trade Unions CGIL,CISL,UIL engage to improve the relevant legislation. Abuse of workers goes hand in hand with contribution evasion, unclear labour relations, absence of controls on construction sites by competent authorities, attempts of infiltration by organized crime in public procurement, lack of respect of health and safety measures especially with regard to subcontractors.

Description of the measure in discussion/already in place
To fight against abuses of payment of salaries and contributions, the Italian Public Procurement Act states that every company participating in a public procedure must produce a document certifying that payments of contributions to public social insurance agencies were correctly disbursed, including insurance against work injuries and pension contributions. This document is issued by "Cassa Edile" in accordance with national insurance companies for safety and pensions. "Cassa Edile" is a part of the bilateral relationship entity. It is a bipartite organism composed by Trade unions and employers´ representatives of national collective agreements (Sistema Bilaterale delle Costruzioni) and it is an entity established by the national collective agreement for construction workers that ensures the payment of a part of the workers' salary, such as vacation pay and other rights established by collective agreements.
This relevant document is called "DURC" (Certification of Labour Compliance, Documento Unico di Regolarità Contributiva).
If companies cannot provide this document to the contracting authority, they are automatically excluded from public tenders procedures.

The DURC is fully computerized and the contractors have to hand it over for every SAL (state of advancement of works) before asking the relevant compensation for accomplished works from the contracting authority. DURC is managed by "Cassa Edile", INPS (National Institute of Social Pensions) and INAIL (National institute of injuries on workplace).
Unfortunately, some loopholes have still to be closed: This system does not guarantee the payment of the monthly salaries. Some companies just pay the contributions in order to receive the DURC, which they have to hand over to contracting authority, without subsequently paying the monthly salaries to their workers.

Latvia

Key point/background - Prevention of wage dumping
Practice shows that the client contractors in the construction sector often pay a wages to their employees, which do not even amount to the average wage in the sector. In many cases under table pay is involved. To prevent spreading of gray economics, the "State Revenue Service" introduced amendments to the existing public procurement law.

Description of the measure (which will come into force on August 1, 2015)
All contracting authorities are obliged to evaluate if the tender is not abnormally cheap. All economic operators have to prove that their employees and the their subcontractor's employees are receiving at least 80% of the average hourly wage rate in the specific profession based on the relevant NACE code, for the first nine months of the last year. For example if company X is participating in the tender on January 1, 2015, then it has to prove that for the period between January 1, 2014 and September 1, 2014 (nine months) it has paid its employees at least 80% of the average hourly wage rate in the relevant sector based on the applicable NACE code. The amount of the average hourly wage rate for various sectors and professions is established by the State Revenue Service. These average hourly wage rates are publicly available on its website: https://www.vid.gov.lv/default.aspx?tabid=11&id=6864&hl=1

Norway

Key point/background - Administrative regulation on wages and working conditions in public procurement
In implementing ILO convention 94 (Convention concerning labour clauses in public contracts), an administrative regulation on wages and working conditions in public procurement was introduced. The regulation has since been evaluated by the EFTA court of justice and has been adjusted accordingly.
It aims at ensuring that public procurement contributes to creating a level playing field and fair competition and does not contribute to creating distortions in the labor market. The administrative regulation is also introduced to fulfill the obligations set out in the Posting or Workers Directive.

Description of the measure in discussion/already in place
The administrative regulation stipulates that companies, which provide services and construction work to public authorities, are obliged to apply wages and working conditions equal to those determined by generally applicable regulation or national collective agreements.

Portugal

Key point/background - Level playing field, public procurement portal

The «Instituto da Construção e do Imobiliário» (InCI) is the regulating entity for the construction and real estate sector in Portugal. The entitlement to exercise any of those activities is issued under its supervision (e.g. «construction authorization», «registration of the entity», «real estate operating licence»). Alongside, it tries to improve a «modern» and «competitive» market in those sectors through an «inspecting and supervisory action».

Description of the measure in discussion/already in place

From 2009 onwards, this institution, placed under the aegis of the Portuguese Ministry of Economics and Employment, publishes annual reports on the situation of these sectors, relying specifically on the data gathered through the «portal BASE», the «public procurement portal». The «portal BASE» was part of the new «Código de Contratos Públicos» (CCP) [«Public Contracts Code»], created to transpose the European norms (Directive 2004/18/EC) into the Portuguese legislation. The official reports highlight two distinctive aspects of this portal. First, it gathers in a single electronic portal all the information concerning public procurement in Portugal (being the first European Member State doing so). Even if there are 8 electronic platforms for the public procurement, those are accessible and connected with the «portal BASE» (InCI, 2013: 7, 16-17). Second, it seems to involve relatively high proportions of the total of contracts from the public procurement. Since 2009, tender procedures in Portugal must be performed through an electronic platform. The electronic public procurement rate in Portugal is 75% (2010), whereas the EU average is estimated to be less than 5%» (InCI, 2012: 9). For 2011, practically 62% of the procurement procedures were carried out using the electronic platforms for public procurement, a percentage that goes to 92% considering only the procedures related to values above the limits set in the EU Public Procurement Directives. The «InCi» states that the principal virtues of such electronic procurement are the «accountability» and «transparency» of the public organizations regarding public spending, besides offering exhaustive and immediate statistical information that any company or citizen can access.

5.3. Transparency measures for sub-contracting chains

Austria

Key point/background – Limitation of subcontracting chain

Austrian institutions are often confronted with workers´ claims against their employers of the construction sector relating to unpaid wages. Mostly, they come from other EU countries and cannot even identify who their employing company is, nor its name nor location. Of course, they are not able to identify the main contractor for whom their employer, normally a sub-contractor, was working. In most of the cases it turns out that the sub-contractor went bankrupt and did neither pay social contributions nor the workers´ wages, in which case the workers can refer to the publicly funded "Insolvenz-Entgelt-Fonds" (supplied by employers´ contributions and public funds) to be reimbursed. This is a very unsatisfactory situation especially in the case of contracting authorities who tend to award the bid with the lowest price. However, it often turns out to be the most expensive one in those cases that the sub-contractor goes bankrupt and the public has to pay the workers´ wages.

Description of the measure in discussion/already in place

Following the lead initiative of the Austrian social partners of the construction sector (amidst others Gewerkschaft Bau-Holz) the Austrian legislator proposed to cut the sub-contractor´s chain at the second level except in case that the contracting authority allows to employ further sub-contractors for certain specified crafts and where this is objectively justified. However, this is not admissible for the critical tasks of the craft (§ 83 Abs 5 and 240 Abs 5 , draft Austrian Public Procurement Law).

Austria

Key point/background – Exclusion of subcontractors for critical tasks; ÖBB

ÖBB is the Austrian railway company in public ownership. It goes without saying that for safety and security reasons of its passengers, the main factor for ÖBB´s construction activities is the quality of the construction performance. The economic pressure on bidders is high, the market situation is strained. To improve profits, the client contractors more and more often recur to the business model of subcontracting.

Description of the measure in discussion/already in place

In 2014, ÖBB decided to set the following priorities: The critical tasks have to be carried out by the economic operator whose technical and economic specification had been verified by an in depth assessment when awarding the contract.

As quality often is watered down by the employment of too many subcontractors, ÖBB decided to include new award criteria into its tenders:

- At least 50% of the critical tasks have to be carried out by way of own performance
- Main subcontractors have to fulfil all specification criteria. They have to carry out 80% of the work by own performance
- Prior to the employment of any subcontractor, ÖBB has to consent
- Sub-subcontracting is restricted
- In case of reasonable grounds that a breach of these obligations has occurred, a contractual penalty applies.

Since June 2014, about 30 projects amounting to a total volume of ca. € 400 million have been awarded on basis of these principles.

Denmark

Key point/background - subcontracting and exclusion grounds

During 2014, a tripartite working group has been elaborating a proposal for a new law on public procurement on the basis of the new EU Public Procurement Directives.

Description of the measure being discussed

The proposal was presented to the Danish parliament on 18 March 2015 and is expected to enter into force in October 2015.

In the remarks for the proposal it says that social provisions can be used as long as they comply with the EU-law and Danish law. The trade union participates in several working groups in this area and works intensely with this subject.

It currently requests the right of the client to approve all subcontractors prior to their employment. Moreover, trade union asks for the exclusion of subcontractors that proved to be fraudulent in the past.

France

Key point/background – Better framework for subcontracting

Subcontracting is an important case for the French trade unions. Frequently, client contractors roll over practically the whole subject matter of the contractual tasks on subcontractors, thus completely watering down the liability and in the end leaving society with the costs of non-compliance with the contractual obligations.

Description of the measure in discussion/already in place

Article 54 of the Public Procurement Act foresees the admissibility of subcontracting. However, the contracting authority can demand that certain tasks which are deemed to be essential for the contract have to be undertaken by the client contractor himself. This provision is further defined by the Law concerning sub-contracting (loi du 31 décembre 1975) specifying that although subcontracting is admissible, a significant part comprising certain essential tasks of the contract has to be undertaken by the main contractor.

Italy

Key point/background and measure – Subcontractors and involvement of trade unions

An important measure to ensure transparency for subcontractors is the obligation to forward to the contracting authority the list of subcontractors to be involved in the execution of the works prior to the beginning of construction works on the site. The access to the construction site is subject to authorization. Authorization is issued by the contracting authority. The following persons are endowed for inspection: representatives of the public entity, the labour inspectorate or the Health and Safety authority. Breaches of relevant legal provisions are threatened by administrative sanctions.

Description of the measure in discussion/already in place

Article 118, indent 6 of the Public Procurement Code (Decreto legislative 163/06) establishes that "Prior to the beginning of the work, the contractor as well as the subcontractors through him shall provide the client with documentation confirming that the social security authorities, including the Local Construction Fund, have been notified of the work and provided by a copy of the plan according to the provisions in paragraph 7 (plan on safety at work place)." In order to enable the payment of the amounts due on completion of various stages of the work and completion of the work as a whole,

the contractor, and through him, the subcontractors shall provide the client authority or administration with a Single Insurance Contribution Payment Certificate (DURC). The DURC is mandatory to perform construction contracts under a building permit. The effect of this regulation is that all the employers in the construction sector must abide by the applicable collective agreements, otherwise the certificate is not issued. As a consequence, a tenderer who does not apply the sector-specific collective agreement is excluded from the tendering procedure.

Moreover, prior to the beginning of works the contracting company has to send a "Preliminary Note", indicating every person involved in the works to the competent authority (Labour Inspectorate and Health and Safety Agency).
The national collective bargaining agreement for construction workers also foresees that the contractors have to inform local trade unions about the number of subcontractors, the collective bargaining agreement applied to the workers, the number of workers involved in the execution of the works and the duration of works.

Italy

Key point/background and measure – Requirement of the client contractor to perform certain tasks
The Italian Public Procurement Code provides specific rules for the protection of the rights of workers executing a public contract as well as for the selection of contractors and subcontractors.

Description of the measure in discussion/already in place
The subcontractor must be authorised by the contracting authority which verifies the content of the contract, the kind of activity subcontracted and the qualifying requirements of the subcontractor. Moreover, only a maximum of 30% of the value of the prevailing work (so called "categoria", which must be specified in the tender) for which the contract is to be awarded can be subcontracted to a third party. Further subcontracting is not allowed.

Netherlands

Key point/background – Code of conduct formulated by the client contractors
In 2008 a group of large contractors formulated a code of conduct. The main aim of the code was to elaborate a fair and transparent treatment in a chain of production among clients, contractors, subcontractors and suppliers. Moreover, the code also included several principles for a more social and sustainable procurement. As a follow-up of the initiative, an independent association *Bewuste Bouwers* (Conscience Builders) was formalised in 2010 with five basic principles: transparency, safety, sustainability, quality and social conduct. (http://www.bewustebouwers.nl/organisatie)

Description of the measure in discussion/already in place
The client contractors stated that they expected public and private clients to take more account of societal effects of the building activities. Therefore, the work should be based on price and quality, with more room for innovation.

Part of the code is the notion of the joint liability of the client and the main contractor. Together with the client the contractors shall guarantee a safe and healthy workplace, with social and sustainable working methods. The involved companies have agreed to integrate the principles of the code in their daily business.

Communication is the key value in the approach and the safety applies to the workers, visitors and the local residents. On the website of the association several projects are listed, which received a site related certificate as a result of the observance of the principles of the code. Auditors may visit the

sites to assess the compliance with the principles and the certificate can be withdrawn in case of a negative audit. In 2013 a (completely revised) handbook was produced. Unfortunately, the chapter on the social dimension is superficial, apart from the health and safety norms. There is mostly reference to clean facilities and to the engagement of minorities and apprentices.
Hitherto, observers signal that the principles have not become popular; even the main procurement offices that deal with public tenders often do not know about the existence of the code. Nevertheless, according to a recent article on the association's website the code has produced some effects. The authors cite several examples where the local authorities have integrated the code in their tender. An ad random glance over the 854 certificated and registered sites reveals that especially ecological concerns and the relationship with other stakeholders, like the clients or the local residents in the neighbourhood of a building project (noise nuisance, waste management), have become a core aspect of the application of the code (http://www.bewustebouwers.nl/wp-content/uploads/2014/10/Bouwend-NL-artikel-Jansma-en-provincie-Friesland-sept-2014.pdf visited 23-03-2015).

Norway

Key point/background - Limitation of the number of subcontracting levels under the main contractor

Both public control authorities, the trade unions and several research institutions claim that the more levels under the main contractor, the less transparency and control. From this factor derives more social dumping and crime in the construction sector. By shortening the contracting chain it will be easier to put in place control mechanisms to secure compliance with legislation. Several local communities have already adopted maximum levels in the contracting chain, and experience shows that the big contractors quickly adapt to such legislation.
The Norwegian government is working on the implementation of the new EU Public Procurement Directive. The Norwegian Construction Trade Unions intend to campaign for the inclusion of good practices that have been established by local authorities into national law.

Description of the measure in discussion/already in place
In 2015, the government will change legislation so as to have the possibility to limit the maximum number of admissible subcontracting levels in the subcontracting chain in public procurement. It is expected that it will be left to local and regional authorities to stipulate the limitation according to local preferences and necessities. The parliamentarian opposition has proposed to have an absolute maximum limit of 2 levels under the main contractor.
Public procurement giants like Statsbygg (public property owner), Veivesenet (Road construction) and Forsvarsbygg (Defence property) already apply a limit of two levels of subcontractors in their procurement policy.

Norway

Key point/background - Contractor clause and demand of own employees
Originally, this regulation was introduced to combat misuse of false self-employment. Today the regulation is also used to tackle misuse of obscure work contracts and to reduce the number of hired workers with temporary contracts, a business model incompatible with the legislation on regular work contracts. This measure aims at supporting reliable companies contracting a large number of permanent employees and possessing own competence. Experience shows that these companies are more trustworthy and often are organized workplaces ("Union Workplaces- Safer Workplaces").

Description of the measure in discussion/already in place

In the administrative regulation on public procurement a provision stipulates that the contracting company shall dispose of own employees. For construction work executed in Norway the main contracting authority can define as a specification criterion for a contract to be executed that the construction work has to be performed by the contracting company and its own employees, or by subcontractors and their employees or by employing legally hired workforce. The main contractor can demand that the employment of single person companies, which are not the main contractor or a subcontractor, has to be justified.

Slovenia

Key point/background – Combat against lenient payment discipline

In the Republic of Slovenia the Public Procurement Act lays down the mandatory actions required of contracting authorities and tenderers in awarding public supply contracts, public service contracts and public works contracts. The competent authority is the Public Procurement Directorate. Due to increasing lack of payment discipline, which affected subcontractors as vulnerable participants in public procurement, the legislator´s attention was turned on the regulation of this legal area to avoid that subcontractors "plunge" as a result of the principal contractor´s default. It aims at reinforcing the strength and resistance of the subcontracting chain, indirectly benefitting the subcontractor´s workers.

Description of the measure in discussion/already in place

In order to ensure financial discipline, the Public Procurement Act includes provisions in case the client contractor employs subcontractors. In such a case, the contracting authority is entitled to pay directly to subcontractors, on the basis of endorsed invoices or statements. Furthermore, the main contractor is obliged to attach endorsed invoices or status reports of his subcontractors to his own invoice or statement. Violation of these provisions is considered to be grave misconduct and is punishable.

Spain

Key point/background – Limitation of subcontracting chain

The signatories of the general construction industry agreement expressed to the parliamentary groups and the government the need to regulate outsourcing in the construction sector. This consultation resulted in the Act 32/2006 of 18 October, which regulates this subject matter.

Description of the measure in discussion/already in place

The measure is twofold: On the one hand, it limits the subcontracting chain to maximum two levels of companies. The main contractor can subcontract any work package such as for example shuttering, provided that the subcontractor has a company structure (offices), equipment, tools and machinery, as well as offers training for his employees

On the other hand, it establishes a minimum percentage (30%) of workers to be employed with permanent contracts at every level of the subcontracting chain. These provisions showed a practical improvement as to workers´ conditions and a significant reduction of risks resulting from the mere fact of temporary employment.

5.4. Strengthening of main contractor´s liability

Austria

Key point/background - **Liability of general contractor with reference to public procurement** (§ 7 c of Austrian labour contract alteration act)
This legislation aims at resolving the problem that public contracts, mainly in the construction sector, are awarded to companies, which at the end of the day do not carry out the contract by themselves but shift at least parts of the works to be carried out by other companies. Those companies often do not fulfill their contractual obligations by paying the wages, taxes and social security contributions for their workers but go bankrupt. The payment obligation is shifted to the Insolvency-Compensation Fund. The final result is that the client contractor earns the reward for its performance whereas society bears the cost.

Description of the measure in discussion/already in place
indent 2 of § 7 stipulates the main contractor´s liability as follows:

- The main contractor is liable as guarantor for all wage claims of workers. The main contractor´s liability only comes into being if the obligation has been claimed unsuccessfully against the primary debtor before court.
- The same is valid in cases that the subcontractor passes the whole or part of the contract to further subcontractors against contractual agreement.

Indent 3 refers explicitly to the construction sector without special reference to public procurement law. The main contractor is generally held liable as deficiency guarantor. This means that the guarantor can be held liable in the first place, even if insolvency proceedings relating to the main debtor (e.g. the subcontractor) has not been opened. The same is valid in case that the main contractor is of unknown current location at the maturity of the payment.
This general liability is limited insofar as the workers´ claims for remuneration have to be asserted by judicial procedure within 6 months after having accomplished their performance, otherwise the main contractor´s liability expires.

However, the main loophole is opened be the provision that the liability of the main contractor expires in case of judicial declaration of bankruptcy of the subcontractor. A case of legislative contradiction!
In conclusion, it has to be stated that the aim of the above mentioned provision is well intentioned, however, it still needs improvement:

First of all it takes for granted that the workers concerned know that their production site has been established within a public procurement contract. Secondly, they have to know their client contractor. But even if they have this information, they lack the right of access to the public procurement contract. There is no transparent, freely accessible register in Austria, which offers information about public contracts, which main contractor has been awarded and which subcontractors were assigned. Hence, it is impossible to establish if incompetent or insolvent subcontractors have been contracted. As this is the pre-condition for the main contractor´s liability according to indent 2, it is practically unenforceable.

The second alternative in indent 3 is limited to the construction sector. The systematic social dumping within this sector is based on the establishment of an opaque chain of subcontractors, at the end of which is to be found a company established for the only reason to make workers work without payment and to transfer the payment obligation to the insolvency-compensation fund. If the direct liability access to the main contractor is excluded in case of insolvency of the subcontractor, then in most of the cases the - at first sight straight forward and efficient - liability proves to be quite powerless.

Therefore, an expert group „combat of social dumping“ has been established which also aims at the improvement of the main contractor´s liability, as the current legal situation provides for the total elimination of responsibility in case of the insolvency of the subcontractor. Hence, the system still relies on the last piece of the chain. Until the workers have obtained all necessary information, insolvency of the subcontractor occurred and the main contractor´s liability expires. The positive side of a new proposal is the information obligation. According to this, the company has to inform the workers within 14 days about all subcontractors and passed on construction works. In case of deficiency, the main contractor is held liable for all passed on construction works, until he provides the information requested.

France

Key point/background – Joint liability of client contractors and subcontractors for the compliance with minimum wages

Article 5 of the law of 10.7.2014 imposes a joint obligation to abide by the payment of minimum wages based on law or collective agreements.

Description of the measure in discussion/already in place

In case that the building contractor or the contracting authority is informed about any non-payment of the due wages by the client contractor or subcontractors, they are obliged to immediately put an end to this situation. They have to provide a written prove to the administrative authority that the wages have been paid. At the same time, the responsible control agent has to be informed. In case that the contracting authority respectively the building contractor breaches this obligation, he is held jointly responsible with the subcontractor to pay the salary, penalty and contributions.

Germany

Key point/background – Liability for minimum wage throughout the subcontractors´ chain

Often the main contractor offers calculation details within his bid that covers the wages as set by collective agreements. However, by employing sub-contractors, in many cases these wages are not paid at all or a much lower salary is offered. In many cases, the workers on the site are not employed but act as bogus self-employed contractors on whom collective agreements, minimum wages and minimum health and workers´ protection rights do not apply.

To combat these unfair practices, many German Länder introduced the liability of the main contractor to pay minimum wages or wages as set in collective agreements, if the subcontractor fails to do so.

Description of the measure in discussion/already in place:

§ 14 Arbeitsentgeltgesetz (Act on the Work´s Remuneration – relating to sector specific tariff minimum wages) and § 13 Mindestlohngesetz (Act on Minimum Wages – relating to the newly introduced minimum wage applicable in the whole country) stipulate that the legal minimum wage is owed throughout the subcontractor chain and regardless of culpability by the main contractor. From this follows that in case of bankruptcy of one of the sub-contractors, the workers can ask regress from the main contractor. The same accounts for the payment liability for social contributions. This liability brings about the obligation of the contracting authority to carry out a plausibility assessment of the bid, the requirement of a guarantee of the client contractor for regular and timely payment of the minimum wage, as well as the obligation of the main contractor to undertake all measures to oblige his subcontractors to undertake the same obligations. This guarantee further includes the agreement on an information or even necessity of consent by the contracting authority if subcontractors are employed. Additionally, enforceable securities to mitigate the liability risk of the contracting authority

are often agreed on, as well as the right of the contracting authority to step back from the contract in case of non-payment of the minimum wage.

Switzerland

Key point/background – Joint liability of contractors´ chain; compulsory control of negative list
This measure includes a twofold aim: Firstly, to avoid the shifting of risks from the client contractor to the weakest part of the contracting chain. Secondly, to oblige the main contractor to undertake certain control steps prior to any employment of sub-contractors.

Description of the measure in discussion/already in place
The client contractor is held jointly and wholly liable for the non-payment of minimum wages and non-compliance with working conditions by the sub-contractors. Moreover, sub-contractors that are enumerated on the black list are to be excluded from any contract. The sub-contractor has to prove the compliance with working security and working conditions.
However, the client contractor is held reliable on basis of civil law only in case that the subcontractor was sued without success or cannot be sued. The client contractor can free himself from liability if he is able to prove he undertook a due diligence assessment of the subcontractor´s application of minimum wages and legally binding working conditions. This he can achieve by providing convincing evidence by relevant documents.

5.5. Most economically advantageous price – lowest price

Austria

Key point/background – Initiative "Fair Procurement"

This initiative originates from the construction sector, where the social partners – companies of the construction sector and the trade union of the construction sector (Gewerkschaft Bau Holz) – decided to take decisive steps against:

- on the one hand unfair competition by companies not abiding by legal standards and collective agreements;
- on the other hand wage dumping and non-compliance with workers´ rights.

The success of the initiative until now – public procurement, normally considered to be a boring issue for specialised lawyers, was made presentable for Joe Citizen – is to be explained by the joint action between representatives of companies and the sector-specific trade union.

Description of the measure in discussion/already in place

In its article 67 indent 2 the new EU Procurement Directive paves the way for mandatory application of the most economically advantageous price in a specific sector. Implementation into national legislation implies that the contracting authority is not allowed to refer to price only as a criterion but has to establish at least one more quality criterion. This seems at first sight simple and an easy way to achieve better working conditions and to reduce predatory price competition on the workers´ shoulders. However, a lot of fine tuning is necessary in order to avoid bogus criteria, like for example a longer time of guarantees or other so called "zero-criteria". With a view to the strong opposition of the contracting authorities, it seems even to be necessary to establish a list of criteria that are deemed to be valid in order to establish the best price-quality ratio within the meaning of article 67 indent 2 EU Procurement Directive.

Of course, the initiative also tackles the issue of sub-contracting chains by proposing a) the limitation to maximum two levels b) the equation of personnel leasing agencies and affiliated companies with sub-contracting companies.

Moreover, the initiative proposes a ban from procurement procedures for a period of 12 months in case of legally binding statement of infringement of labour rights.

By now, the Austrian government has forwarded a draft which includes the main demands of the initiative for public consultation.

Bulgaria

Key point/background – Award criterion "most economically advantageous tender"; metro Sofia

Bulgarian public procurement is characterised by price dumping often resulting in the bankruptcy of the bidder, followed by non-payment of sub-contractors and their workers involved.

Therefore, when the expansion of the metro network in Sofia was decided, a combination of strong exclusion grounds and award criteria to prevent social dumping where set by the contracting authority.

Description of the measure in discussion/already in place

At the specification stage, strong exclusion grounds and clear contract performance conditions were determined ex-ante. The most economically advantageous price was set as award criterion. Sub-contractors had to proof their economic and technical performance capacity. The final payment of the contracting authority was only to be effected after the written proof of the client contractor that he has paid all sub-contractors, as well that all public debts (social security, taxes) have been cleared. Moreover, in 2006 a Chamber of Builders has been established. Any company that intends to

participate in a public tender has to be registered with this Chamber. Prerequisite to its registration is the fulfilment of a number of social criteria requirements.

Italy

Key point/background – Award criterion "adequate and sufficient" labour cost

In order to avoid that the contract is awarded to a contractor on the basis of the lowest price on the shoulders of the workers´ wages, a new mechanism hast been introduced in order to ensure that the wages of the most representative collective agreement are paid.

Description of the measure in discussion/already in place

When the awarding criterion is based on the criterion of the lowest price, the contracting authority has to assess that the economic value of the tender is "adequate and sufficient to cover the labour and safety measures cost" and if it is "reasonable compared to the size and characteristics of the works". The adequate and sufficient labour cost is calculated on the basis of tables that are periodically collected by the Ministry of Labour, based on economic values of welfare and social security rules provided by collective agreements signed by the comparatively most representative trade unions.

Poland

Key point/background - Abnormally low tender

Lowest price is usually a reason for distortion of competition and cause of social dumping. Reliable companies cannot be competitive in circumstances when other companies are offering abnormally low tenders. This is the reason, why exclusion of bids with an abnormally low price is such an important tool for contracting authorities. However, as experience in Poland shows, this can only be a first step to prevent social dumping.

Description of the measure already in place (since October 19, 2014)

According to Public procurement law article 90.1., the bid has to be assessed if the price of a tender appears to be abnormally low in relation to the subject matter of a contract and raises doubts of the contracting authority as to the possibility of performing the subject matter of a contract .This clarification is mandatory, if the price is lower than 30% of the contract value or the arithmetic average of prices of all submitted tenders. The clarification obligation includes the submission of evidence in particular as regards: the economic method of contract performance, technical solutions chosen or the exceptionally favorable conditions for performance of contract available to the economic operator, the originality of the economic operator's design, and finally labour costs, the amount of which may not be lower than the minimum wage established.

Serbia

Key point/background – ILO Convention 94; scoring of social award criteria

After the ratification of the ILO Convention 94 (Convention concerning labour clauses in public contracts) in the National Assembly of the Republic of Serbia which made its provisions part of the national legislation, and thanks to the initiative made by the Autonomous Trade Union of Road Maintenance Workers of Serbia, the creation of the conditions for the application of the provisions and the spirit of this Convention was launched.

Description of the measure in discussion/already in place

Within these efforts the following activities and measures were taken: The Autonomous Trade Union of Road Maintenance Workers of Serbia and the Ministry of Construction, Traffic and Infrastructure agreed to form a Working Group that would take measures to provide for the application of the provisions of the ILO Convention 94.

In accordance with this agreement and the decision of the Ministry issued on 2.10.2014, this Working Group was formed, comprising representatives of the Ministry of Construction, Traffic and Infrastructure, Central Registry for Mandatory Social Insurance, Ministry of Finances (The Tax Administration), Ministry of Labour (Labour Inspectorate), Agency for Business Entities and Autonomous Trade Union of Road Maintenance Workers of Serbia. The working group was endowed with the following tasks:

- To determine criteria to set the level of compliance of business entities with the legal obligations undertaken through contracts in the field of traffic infrastructure, as well as in relation to the design, construction and supervision of standards and recommendations of good practice set by the ILO, and as to the monitoring of financial, business, technical, and human resource capacities;
- To create a preliminary list of business entities and other organizations which abide by the established criteria.

According to these tasks, the Working Group established the following criteria:

- Criterion that indicates the number of persons employed for an indefinite period of time, for a fixed period of time and the number of persons hired on the basis of contracts for temporary and occasional jobs;
- Criterion that indicates the frequency of light and heavy injuries at the workplace;
- Criterion relating to "undeclared work",
- Criterion relating to the indebtedness of the business entity and to the contribution to the public revenue (taxes, contributions for mandatory social insurance – retirement and disability insurance, health insurance and insurance for the case of unemployment).

These criteria correspond to a „scoring", that is processed by an index. Certain criteria have positive implications while the others have negative implications. Multiplying the values of the criteria with the index, one manages to achieve the equalization of values of all criteria in order to avoid the dominance of certain criteria over the others.

Assessment example for the number of points based on a specific case:

1. The Company has 759 permanently employed workers, multiplied by the factor 3 leads to 2277 points;
2. There are 236 employees working for a fixed period of time which is multiplied by the factor 2 scoring 472 points;
3. There was one serious occupational injury, multiplied by the factor 500, thus scoring 500 points;
4. There happened 5 smaller injuries which are multiplied by 100, scoring 500 points;
5. There was no undeclared work reported;
6. Debt based on public revenues is 2.912.407.170,06 dinars, divided by the index 100.000 scores 29.124.07.

Adding the points for positive criteria and then reducing them by the points for the negative criteria sums up to **27.375,07** which is the number of points relevant for the awarding procedure.

According to the above mentioned criteria a list has been established, containing about 540 business entities out of which almost one half have negative results.

In the next period the Working Group has the task to quarterly update the list.

At the same time, starting with the second half of 2015, the „Central Registry for Mandatory Social Insurance" has the obligation to start updating and sending monthly data about the type of employment relation of hired people and data about the basis (paid salaries and wages) on which contributions are paid as well as the amount of these contributions.

The Working Group made a recommendation for amendments of the Law on Public Procurement in accordance with the previously mentioned criteria.

In any case, already the adoption and publishing of this list has had a positive effect on the behaviour of the contractors and subcontractors especially when it comes to the public contracts, or labour clauses in public contracts. This activity, for example, led to the improvement as to the regularity in payments of salaries and contributions, as well as with regard to the type of employment of people hired leading to the predominance of permanently employed workers.

It is obvious that there is still a lot of work ahead of trade unions, however, it is certain that they will manage to establish a system where the public contracts will be awarded only to such employers, who respect labour clauses, or to those, who regularly pay salaries and contributions for mandatory social insurance and whose employees have a permanent contract, as well as those who do not have reported labour related injuries.

Switzerland

Key point/background – Mandatory inclusion of quality criteria in the awarding procedure

According to the demand of the Swiss trade unions, the bids have to be assessed not only on the basis of the price but also on quality criteria. This is necessary to secure that the contracting authorities can fulfil their tasks relating to social policies. Such provisions already exist in some "Kanton" and shall be introduced on federal level. Moreover, criteria that aim at releasing the pressure on workers by employing them on normal contract conditions, thus not passing on the risk, shall account for additional points in the award weighting.

Description of the measure in discussion/already in place

The relevant provision (art 31 the Interkantonale Vereinbarung über das öffentliche Beschaffungswesen IVÖB which is under reform process) shall be amended in such a way that the bids have to be assessed on the basis of price and quality criteria. The quality criteria are cited in the legal provision and comprise amidst others life cycle costs, delivery conditions, sustainability, client-related service. The public authority awards the contract only to such companies that guarantee the compliance with minimum working conditions at the location of performance. These include minimum tariffs regardless of whether they have been declared binding, the standard working conditions and, where such provisions do not exist, the factual working conditions according to the principles of the relevant profession and location of performance. If necessary, equally represented entities have to be heard. Such entity could be a "Tripartite Commission" as it has already been established by the legislation on dispatched workers on basis of the relevant EU directive (art. Art. 5 Entsendegesetz).

In case the contracting authority does not use capacity oriented variable working times, this fact qualifies for a positive award criterion (new Art 31). Moreover, any company that employs apprentices shall be awarded with extra points within the awarding procedure, as Trade Unions have demanded.

5.6. Social Considerations

Austria

Key point/background – Joint consideration of social aspects in contract conditions; City of Vienna
The Vienna administrative body (Magistrat der Stadt Wien) regularly sets the conditions and modalities for all its subordinate contracting authorities. These conditions are established according to the result of a coordination procedure between subordinate authorities as well as its outsourced companies under public ownership. These conditions and modalities ("general procurement conditions of the City of Vienna) explicitly refer to the application of certain social clauses, control mechanisms and right of withdrawal in case of violation of contractual clauses. This set of rules is declared mandatory by ordonnance of the chief civil servant of City of Vienna.

Description of the measure in discussion/already in place
The first relevant clause refers to the ban of exploitative child labour which opens the right of withdrawal from the contract. The client contractor is held liable for all subcontractors and providers. The second set of clauses refers to subcontracting, causing the major problem with regard to the contract performance. The general conditions establish a ban to subcontract the whole subject matter of the contract. Subcontracting is only admissible after the explicit consent of the contracting authority. The same accounts for the change of the subcontractor. The contracting authority has the right to refuse a change in case of lacking qualification or violation of the ban of exploitative child labour.
Moreover, the liability for the contract performance remains with the main contractor. The same accounts for personnel leasing.
Although the City of Vienna could have included many more social and vocational aspects into these general contracting conditions, they are a good basis to agree on more in the future.

Austria

Key point/background – Apprenticeship; Guidelines – City of Vienna
At the beginning of 2013, City of Vienna started a pilot project aiming at setting priority to companies offering training for young people when directly awarding public contracts. This measure emphasizes the willingness of the City to give preferential treatment to such socially responsible companies. To support its tendering entities, City of Vienna devised a so called "work tool".

Description of the measure in discussion/already in place
The pilot project takes into consideration that not all Member States offer "dual" training like it is typical for Austria and Germany and therefore refers to a wider definition, taking also into consideration also comparable methods of training. Those companies, which have trained at least one apprentice for at least three months within the last three years shall achieve special points within the award evaluation.
Also, the measure only applies in the construction sector when direct award is possible, that is with tendering limits below the thresholds of the EU Procurement Directive and with no relevance for the internal market.
In order to alleviate the burden on the contracting authority, the register of client contractors (Auftragnehmerkataster Österreich) reports the apprentices of the registered companies on a yearly basis and makes it evident for the contracting authorities.

Belgium

Key point/background – One specialised regional helpdesk 'RenoWatt'
Basic aim is to assist local initiatives in the field of energy friendly procurement that focus on the creation of long-term and sustainable employment.

Description of the measure in discussion/already in place
Starting point of the project was the creation of the GRE (Groupement Redéploiement Economique) in 2004 after the announcement of the closure of an Arcelor Mittal plant. Basic reasoning is that with a large majority of the public building stock dating back 20 years, there is a lot to win with an ambitious energy saving renovation project (of 60% of the existing stock) that targets the decrease of the total of the energy consumption. In total 10 regional organisations in the Liège region participate. A unique helpdesk has been created. Important earmarks are the social responsible procurement of the different sites and the recreation of jobs. The trade unions back up this project and participate in the working group that looks after sustainable and socially responsible procurement (for instance, with long-term employment perspectives).

Belgium

Key point/background – Prioritise social responsible procurement
The (regional or national) government formulates a policy that prioritises social issues in procedures and provisions.

Description of the measure in discussion/already in place
The council of the Brussels region formulated already in 1998 the obligation to include social and employment concerns in the procurement regulation (for projects of 750,000 euro and beyond). It created an intermediary office (Actiris). Actiris is engaged as a coordinator that has the task to promote and control the use of social clauses in the procurement of works and services.
Between 2008 and 2013, thirty educational and informative campaigns have been launched for tendering authorities in order to promote social clauses. A helpdesk was financed to assist with eventual barriers in the formulation of social and sustained conditions. In participating communities the future procurement plans were assessed with a view of tracing possibilities for responsible procurement. The regional authority installed also an Alliance for Employment – Environment – Sustainable construction. An assessment of the functioning of the helpdesk led to an update of the circular that illustrated and explained the possibility to work with social clauses.

Denmark

Key point/background - Fight against social dumping, fair wage.
In June 2014 a Circular on Labour Clauses in Public contracts was presented. The circular states that all central authorities (ministries, executive agencies etc.) must apply labour clauses in accordance with ILO Convention no. 94 ensuring that employees of enterprises that provide services to public authorities and contracting entities are granted common pay and working conditions.

Description of the measure already in place (since July 1, 2014)
More specifically, the circular states that the contracting authority must set requirements in the contract to ensure that workers employed by contractors and sub-contractors who contribute to the performance of the contract receive due payment (including special allowances), hours of work and other working conditions which are not less favourable than those established for work of the same character under a collective agreement, contracted by the most representative organisations of

workers and employers in Denmark in the trade or industry concerned and being applicable throughout the Danish territory.

The contract must include provisions that specify the documentation requirements to be met by the contractor. Furthermore the contracting authority is obliged to carry out the necessary control of whether the contractor and any sub-contractors comply with the labour clause.
A part of the Circular recommends that also all local councils and regional authorities apply labour clauses in construction and civil engineering contracts. This is also reflected in the agreement of 3rd June 2014 between the government and the municipalities (LGDK) regarding the finances for 2015, where it says that "The government and Local Government Denmark (LGDK) … agree that labour clauses must be expanded to all local supply contracts regarding construction work…".
The Circular has resulted in a more positive climate as to labour clauses in connection with public clients, and since last summer many local governments have introduced such clauses – both labour and training clauses.

Denmark

Key point/background – Labour Clauses, enforcement control
The Danish trade unions in BAT are working closely with local governments and the public authorities in order to prevent social dumping. We try to influence the decision makers where ever we can and have representatives in several governmental working groups regarding social dumping.

For some time BAT has been pushing for the implementation of the circular on Labour Clauses that was presented in June 2014. It continuously tests the ability of the clauses to enforce fair wage and working conditions and prevent social dumping. For the time being the challenge now is the enforcement of the clauses and the control of the demands in the clauses. BAT´s assessment is that this part is totally up to the unions.

Description of the measure in discussion/already in place
The Danish construction unions in BAT have initiated a project focusing on the building projects with construction costs of more than 65 mio. Euro. The project consists amongst others to contact the clients in order to start a dialogue and a corporation regarding a forthcoming building project. BAT offers support regarding a range of issues, e.g. input regarding labour clauses, information about bidding companies, exchange of information regarding legal cases and incidents with contractors and subcontractors. It also provides information for foreign companies regarding the Danish model.
BAT has a website that focus on exchange of information among all the local unions in Denmark. Here we can tell good stories regarding the contact to clients, health and safety, successful ways of organising etc. We have plans about expanding with experience regarding foreign companies that may benefit others. It is an easy way to get in contact with colleagues around the country (http://batkartellet.dk/Overblik-og-inspiration.asp)
At another website BAT has collected information about labour clauses for the benefit of politicians, local unions, public authorities etc. Here the best examples of labour clauses around the country can be found (http://arbejdsklausuler.dk/)

France

Key point/background – Joint liability of client contractors and subcontractors; alarm mechanism concerning the sleeping facilities at the site

Articles 4 and 5 of the law of 10.7.2014 impose an alarm obligation on the building contractor ("maitre d´ouvrage") and the contracting authority.

Description of the measure in discussion/already in place

Both, client contractor and the building contractor have to immediately inform the labour inspectorate if they get aware of the breach of rules concerning the workers´ sleeping facilities, thus breaching "the human dignity" as defined in the Penalty Code. The administrative authority imposes on the client contractor and all subcontractors the obligation "to achieve a result". The addressees of this injunction are jointly liable. In case of non-compliance the administrative authority is in charge of providing decent sleeping facilities at the expense of the client contractor and subcontractors.

Ireland

Key point/background – Social clauses project group; Grangegorman Development and Developed Schools Build Programme; enhancement of apprenticeship; reintegration of unemployed

Irish public procurement policy tends to be more concerned about 'levelling the playing field' for small and medium size enterprises ("SMEs"). The vast majority of the government guidance documents encourage the use of social clauses which promote the participation of SMEs in tender competitions. By contrast, the State has been reluctant, to date, to use public procurement to prevent social dumping and to ensure compliance with sub-contractors rights.

Prior to the establishment of the OGP (Office of Government Procurement), public procurement policy did not encourage the inclusion of social clauses in public contracts.

Description of the measure in discussion/already in place

Within six months of its establishment, the OGP created a "Social Clauses Project Group". The aim of the pilot project is to identify public contracts where social clauses could be deployed to contribute to employment or training opportunities for long term unemployed. The project is concentrating on examining the use of social clauses in contracts where employers are likely to be employing additional workers to deliver the contract. The project is in particular reviewing the use of social clauses in two current contracts: Grangegorman Development (The Grangegorman Development Agency is a statutory agency established in 2006 by the Irish Government under the Grangegorman Development Agency Act 2005 to redevelop the former St. Brendan's Hospital grounds in Dublin City Centre) and Developed Schools Build Programme. In the Developed Schools Build Programme, the social clauses included in the Public Works contracts require that:

- "10% of the aggregate time worked on site to have been undertaken by individuals who have been registered on a national unemployment register within the EU for a continuous period of at least 12 months immediately prior to their employment on the project,
- 2.5% of the aggregate time worked on site to have been undertaken by individuals who are employed under a registered scheme of apprenticeship or other similar national, accredited training or educational work placement arrangement. The Department of Social Protection, through its Intreo offices, is providing support to the contractors in meeting their obligations under the contract by providing suitable candidates to match the skills requirements from those long-term unemployed construction workers (Government Speech, 17th October 2014 by Minister Simon Harris, Second Stage Speech – Social Clauses in Public Procurement Bill 2013; available at: http://www.per.gov.ie/minister-simon-harris-td-second-stage-speech-social-clauses-in-public-procurement-bill-2013/).

Early results indicate that approximately 48 long term unemployed people have been hired across fifteen sites out of a total workforce of 440.

Ireland

Key point/background – Joint liability; Health and Safety

The Safety, Health and Welfare at Work Act 2005 places responsibility on all stakeholders (employers, temporary work agencies, contractors, designers, suppliers) for the protection of health and safety at the workplace.

Description of the measure in discussion/already in place

The employer-employee relationship arises if an employee is working in the capacity of an employee, regardless of whose employee he or she is and if he or she is under an employer´s direction and control. The employer´s duty of care cannot be passed to another party in order to discharge it. Thus, when a worker is dispatched by his or her employer to work for another party (including an independent subcontractor) the general employer´s care to the workers remains. The same accounts if a subcontractor comes onto the employer´s property and negligently causes injury or loss to the employer´s workers, the general employer retains liability.

Ireland

Key point/background – Joint liability; Health and Safety

For the time being, Ireland chose the option to make use of 'model' contracts (with labour law compliance clauses) which is not a lega/ obligation imposed on public procurers, but rather is Government policy and advised as best practice (Circular 1/11 from the Department of Public Expenditure and Reform, Circular 1/11: Model Tender and Contract Documents for Public Service and Supplies Contracts (http://www.procurement.ie/sites/default/files/PER%20%20Circular%201%20of%202011-1.pdf) makes it clear that the new suite of standardised documents for public procurement is provided as an aid to contracting authorities and, whilst their use is recommended as good practice, the documents and explanatory notes (including the Circular itself) are not intended to confer rights on third parties. However, this set of model contract could serve as a basis for further legal steps into the direction of mandatory compliance.

Description of the measure in discussion/already in place

A suite of 'Standard Forms of Contracts' were launched in 2011 (See the website of the National Procurement Service; www.procurement.ie). In essence, the new public contracts contain model labour law compliance clauses, which make it the responsibility of the principal contractor to ensure that all its representatives and subcontractors:

- Comply with appropriate rates of pay and conditions of employment;
- Apply the terms of any applicable Registered Employment Agreement for the sector;
- Make appropriate deductions from payments to workers required by law;
- Keep proper records (including time sheets, leave records, wage deductions, wage books and copies of pay slips) and produce these records for inspection and copying by any persons authorised by the client;
- Respect the right under law of workers to be members of trade unions;
- Observe, in relation to the employment of workers on the site, the Safety, Health and Welfare at Work Act 2005 and all labour legislation, codes of practice and legally binding determinations of the Labour Court.

The contracts provide that where non-compliance occurs, contracting authorities can take whatever corrective action is considered necessary and appropriate, within the terms of the contract, including the proportionate withholding of payments to ensure compliance. Contracting authorities may also provide in their contracts for random checks of the records of contractors and subcontractors to assess compliance with the requirements of labour law, as appropriate. The construction contracts require mandatory checks to be completed in cases where the contract sum is expected to exceed €30 million; and the duration of the work is expected to exceed 18 months (Guidance Note for Public Works Contracts, published on 30.4.2007 by the National Public Procurement Policy Unit of the Department of Finance).
It should be emphasised, however, that the use of these 'model' contracts (with labour law compliance clauses) is not a legal obligation imposed on public procurers, but rather is Government policy and advised as best practice. Circular 1/11 from the Department of Public Expenditure and Reform makes it clear that the new suite of standardised documents for public procurement is provided as an aid to contracting authorities and, whilst their use is recommended as good practice, the documents and explanatory notes (including the Circular itself) are not intended to confer rights on third parties.

Undertakings tendering for public contracts for services, therefore, in line with the EU Directives, must supply a statement confirming that they have 'taken account' of their obligations relating to employment protection and working conditions (Circular 1/11: Model Tender and Contract Documents for Public Service and Supplies Contracts:
(http://www.procurement.ie/sites/default/files/PER%20%20Circular%201%20of%202011-1.pdf)

However, how compliance with labour law requirements is to be monitored is not stated.
Contracting authorities may prescribe special conditions relating to the performance of a public contract that is to be awarded, provided that those conditions are compatible with EU Law and are specified in the relevant contract; in particular, those conditions may deal with social and environmental matters (Circular 1/11: Model Tender and Contract Documents for Public Service and Supplies Contracts:
(http://www.procurement.ie/sites/default/files/PER%20%20Circular%201%20of%202011-1.pdf).

Italy

Key point/background – Health and safety; identification card
Italian law prescribes specific obligations for the client and the contracting authority or to improve health and safety conditions of the workers. Both are responsible for the coordination and implementation of prevention and protection measures.

Description of the measure in discussion/already in place
The client contractor is in charge of all preliminary checks on the reliability of the contracting undertaking and of its compliance with its obligations for workplace safety. All employers involved in the subcontracting chain must cooperate in the activities informing each other.
To this end, the client contractor is required to prepare the single document of the follow-up risks assessment (DUVRI), which lists all measures taken to combat the risk of interference to be adjusted in the light of the development of the ongoing works. The DUVRI has to be attached to the contract agreement. The client contractor and subcontractor must then equip workers executing the contract with a special identification card.

Lithuania

Key point/background – Social considerations

A working group composed of 21 members has been established by the Ministry of Economy of Lithuania on 18 April 2014. The Lithuanian Trade Union Solidarumas is represented in this group by its vice-president. It has the task to submit proposals for the implementation of the EU Public Procurement Directives into Lithuanian Law.

Description of the measure being discussed

According to the draft Law on Public procurement, the principal award criteria shall be the most economically advantageous, rather than the lowest price.

According to the group´s opinion, the lowest price does not represent the most desirable result from a societal perspective as it often brings about social dumping at the expense of workers, hence the lowest price is not considered to be a socially responsible policy.

Moreover, the draft foresees the obligation of the contracting authority to check if the due minimum wage is paid and if part of the salary is paid "under the desk".

The Lithuanian Trade Union "Solidarumas" organised a round table discussion on social economy on 24 April 2014 in Vilnius in cooperation with the European Economic and Social Committee and the Ministry of Social Security and Labour. The main purpose of this conference was to initiate a discussion and dissemination of information on social enterprises, social economy and social entrepreneurship, and encourage involvement of social partners in Lithuania.

Netherlands

Key point/background - Contracting of 'social return on investment'; apprenticeship and unemployed workers

A case in the city of Dordrecht that started in the late 1990 shows how local authorities can work with social criteria. By the end of the 1990s the city had an unemployment rate that was substantially higher than the national average. The local government decided for a program that was called 'social return on investment' (SROI). Key principle in all procurement procedures (exceeding 50,000 euro) became that bidders had to spend at least 5% of the tender price for the creation of apprenticeship places or the contracting of unemployed. At the beginning this principle was legally challenged by one contractor, but the arbitration council for the building sector backed up the local community policy.

Description of the measure in discussion/already in place

Since then the city has used the SROI-principle (on average 40-50 projects a year). From 2000-2010, the principle has been also used in larger projects of urban development and social housing. Part of these projects were based on private capital, with no or just a minority participation of the community. The local community decided to impose the same principle to private property developers. Over the years, this initiative has created a large impact. The unemployed are contracted by institutes specialised in training or reintegration for a period of two years. These institutes provide the contractor with staff. Their payment is based on the collective agreement for the construction sector. In one project it was estimated that with this approach an additional 350 unemployed (for a period 5 to 6 years) could be engaged.

The SROI-method has become popular all over the country and has expanded from the tenders for construction and infrastructure sectors to other tenders. In fact, a whole new 'industry' of offices specialised in assisting in SROI-methods came into being. The success of the SROI-approach was completed with an official statement of the central government in 2011. As of 1 July 2011, the government ordered the application of a 5% social return on investment in all governmental tenders (works and services) beyond a threshold of 250,000 euro.

Norway

Key point/background – Health and safety measures

Local and regional measures introduced in public procurement are plentiful. One of the most talked of is a model which has been introduced in Skien municipality. The mayor of Skien stated the following when asked to justify this comprehensive regulatory framework:

"We could no longer sit still and observe such serious social dumping, work site crime and black market development at construction sites of municipal contracts. We have had too many scandals"

Description of the measure in discussion/already in place

Skien has taken advantage of all legal possibilities offered by legislation and regulations to stop social dumping and crime on work sites of public contracts. The model serves as an example for different measures introduced at local level all over Norway. The following obligations are put on contractors:

- Work is to be performed by the contractor and his employees or subcontractors and its employees. A contractor has to prove by documents that a majority of his workers have a certificate of completed apprenticeship.
- The main contractor demands a written justification for the necessity of the use of self-employed, subcontractors and hired-in work force
- Norwegian is the main language on all work sites on public contracts. This means that at least one person of each work team has to speak Norwegian in order to ensure the technical quality and security of the working place.
- The contracting authority does not allow the employment of more than one level under the main contractor in the contract chain
- The company has to be a training company and all major contracting partners have to employ apprentices
- All workers are registered in all public records, also foreign workers
- Wages and other pecuniary benefits shall be paid out to a Norwegian bank account
- Documentation is required that no worker is granted wages and working conditions less favorable than what follows from a national collective agreement or what is the norm for the specific place and occupation
- In breach of the regulation, where self-cleaning is not possible, the contract may be terminated and the company will be banned for two years from public procurement contracts or works for the municipality.

Norway

Key point/background – Compulsory vocational training - Registered training companies

The obvious motivation for the subsequently described measure is to secure access to apprenticeships in industry, which in turn strengthens skill training in Norway, which in turn strengthens the competitive position.

Even more important for the trade unions, the results of such legislation improve the trustworthiness and standing of the companies. To become a training company requires to prove training competence within the company. Having apprentices implies regular evaluations in a timely manner. All experience shows that companies, which employ apprentices, are more reliable companies within a socio-economic aspect.

Description of the measure in discussion/already in place

Current national legislation comprises a provision, which opens the possibility to oblige a contracting company taking part in a public procurement procedure to be an approved/registered training company according to the Education Act.

In Norway, precondition to become a skilled worker is the accomplishment of two years of school education and two years as an apprentice in a training company. To be able to provide such education, a company has to prove that it is capable of securing the necessary vocational content. As a consequence, it then becomes a certified company.
So far, the request to employ apprentices on construction sites within the context of a public contract and the application of the legislation on approved training companies has been voluntary for local and regional authorities.
However, the government announced its intention to make the relevant legislation compulsory. This means that any company wishing to bid for a public procurement contract has to be approved as a training company according to the law.
Moreover, the government aims at introducing legislation to secure that any contracting company winning a public bid employs apprentices on site if the construction work or service refers to a branch in need of apprenticeships.

Poland

Key point/background - Inclusion of social aspects
To provide contracting authority with a tool for socially responsible public procurement the criterion of social aspects was explicitly included into the legal provisions. However, practice shows that Article 91.2 is only the first tool to raise awareness of this aspect by contracting authorities. A lot of action has to be undertaken by trade unions in order to bring this provision to life.

Description of the measure already in place (since October 19, 2014)
According to article 91.2 of the Public Procurement Act, contract award criteria shall be the price or the price and other criteria linked to the subject matter of a contract, in particular quality, functionality, technical parameters, environmental aspects, social aspects, innovative aspects, service, period of contract performance and operating costs.

Poland

Key point/background - Minimum salary, safety and health conditions
During construction, especially if work is carried on for long time periods, the minimum requirements for safety and health, the minimum wage and different tax rates may increase. Therefore the contracting authority is obliged to adapt and pay its open debts accordingly.

Description of the measure already in place (since October 19, 2014)
According to article 142.5 of the Public Procurement Act, a contract concluded for a period longer than 12 months shall contain provisions for a suitable modification of remuneration rates payable to the economic operator, in case of change in:
1) the rate of tax on goods and services,
2) the amount of minimum wage determined under Art. 2 para. 3-5 of the Act of 10 October 2002 on minimum wages,
3) the rules on social insurance or health insurance or the rate of social security or health insurance contributions,
if these changes will affect the cost of contract performance by the economic operator. This legal provision was stipulated in order to ensure that price increases will not be rolled over to the workers as the weakest part of the chain and that they profit from eventual wage increases.

Sweden

Key point/background – fight against regional unemployment; Örebrö
The area of Örebrö is characterised by a high unemployment rate. Therefore, when in 2013 it came to the renovation and reconstruction of regional infrastructure, it introduced social considerations to be respected when awarding public procurement contracts.

Description of the measure in discussion/already in place
These social criteria comprised: The proof of an effort of regional employment of 15%. One third of the involved workers should come from the sub-regional area and at least 50 to 80 persons should have regular employment at the contractor´s or sub-contractor´s level.
Moreover, further award points were foreseen for the employment of long-term unemployed people and the development of the workers, trainees as well as other forms of education on the job.

Sweden

Key point/background – centralised procurement company setting social criteria, Göteborg
Goteborg Municipality has established a procurement company that manages the process of stipulating social criteria for public procurement contracts. Its task is to support the municipal administration and companies in procurement procedures.
Since 2014, 7 municipal companies in Göteborg included social criteria in 25 procedures which resulted in 40 new jobs.

Description of the measure in discussion/already in place
The procurement company established a control system that verifies that the supplier paid taxes and has not been involved in tax fraud. Moreover, the contract performance is monitored by regular inspections and on-site visits.

Sweden

Key point/background – fight against regional unemployment; Göteborg
In order to prevent increasing unfair competition by not complying with legal provisions aiming at the workers´ protection, Sweden has introduced stricter obligations on persons hiring workers.

Description of the measure in discussion/already in place
The temporary work agency is obliged to assess the work environment at the construction site. The hirer has to assume the same responsibility as for his own workers, that is to say he has to undertake the same safety measures for the agency workers as he would have done for his own employees. This responsibility applies regardless of the length of the assignment.

UK

Key point/background – Social covenant (apprenticeship, approved labour supply companies, principle of direct employment)
UK plans the construction of a new reactor at the nuclear power station Hinkley Point. As the construction and the involved feed-in tariffs guaranteed for 30 years to the private company operating the power station was not undisputed, the client company and its contractors agreed with a covenant including several social considerations.

Description of the measure in discussion/already in place

The client and its contractors are committed to a fair and transparent recruitment policy. All parties to this agreement will actively ensure that the engagement of labour is based on the individuals´ ability to meet the needs of the project and to undertake the work for which they are being recruited. Contractors are expected to be thorough and rigorous in making selection decisions (e.g. by holding competence-based interviews). Contractors should provide unsuccessful candidates with the reasons for their non-selection. Successful candidates are offered training support for the acquisition of the necessary skills. The delivery of the skills development programme will be monitored with the engagement of the accredited Union representatives. Moreover, the primary contractors and the trade union will develop a plan for the employment of a significant number of traditional and adult apprentices to improve regional socio-economic benefit. The commitment amounts to at least 500 persons.

The client contractor committed himself to the principle of direct employment, which means employment under an employment contract with the associated income tax.

In case of recurrence to a labour supply company, these workers must also be employed under the terms and conditions of the social covenant. The labour supply company must be drawn from a list of supply companies approved by the competent body (JPB) and their engagement must be agreed by the JPB in advance of them coming onto site. No payroll companies or other organisations with an equivalent purpose are to be used on the construction site.

Finally, all parties agree that it is unlawful and unacceptable for any party to use or make any reference to any form of blacklist.

UK

Key point/background – Contract notices that refer to living wage payments

Public sector employers have taken a variety of approaches to inserting living wage considerations into contract notices when services are put out for tender. An accreditation process has been put into place by Living Wage Foundation. It requires the employer to submit a written plan to the foundation which sets out how they intend to implement the living wage among their contractors. If the employer satisfies the criteria set out by Living Wage Foundation, he qualifies for a “living wage employer”.

The branches of the trade union UNISON can request a copy of the plan and if not satisfied with the employer´s progress in complying with the plan, a complaint can be sent to the Living Wage Foundation.

Description of the measure in discussion/already in place

The contract of London Borough (LB) of Camden for architectural, construction, engineering and inspection services stipulates that bidders need to be aware that, should they be short-listed, they will be asked to propose solutions to deliver the social, economic and environmental benefits specified in the invitation to tender and to pay the National or London Living Wage to employees including their sub-contractors working on LB Camden contracts in accordance with the criteria established by the Living Wage Foundation.

5.7. Exclusion grounds

Austria

Key point/background – Lack of confirmation of payment of social security contributions
Strong exclusion grounds are a good measure to control the compliance with the most important legislative provisions referring to social aspects. To this end, normally an in depth assessment is necessary, a self-declaration by the client contractor and sub-contractors is not sufficient.

Description of the measure in discussion/already in place
Draft Section 19 indent 1 of the Federal Act on Public Procurement stipulates that contracting authorities are only allowed to assign the contract to authorised, qualified and reliable (sub)contractors. Reasons for exclusion are, among others: serious professional misconduct, especially non-compliance with tax, labour and social law. The bidders have to prove that they have fulfilled their obligation to pay the social security contributions in their home state by presenting a confirmation of the social security bodies or by an affidavit. The contracting authority has to obtain this information from the central Administrative Penalty Register of the Federal Ministry of Finance. This screening relates to the entire subcontracting chain. The subcontracting of the entire construction work is illegal and subcontracting is only permitted when the subcontractor also holds the legally required authorisation, qualification and reliability. The consequences for a tenderer who does not comply with these provisions are extensive: The exclusion of a tenderer is justified if his quote is based on a calculation for staff costs which is not in line with the regulations which apply in Austria regarding for example the payment for overtime.

Finland

Key point/background – Exclusion of companies from bidding process
The protection of workers´ rights in subcontracting chains is foreseen in the "Liability Act". The Act is seen as a means to combat undeclared work. Within this context, the social partners proposed to amend the existing rules by excluding a company from public procurement procedures, which has seriously neglected the below mentioned liability , and to increase resources for monitoring and control.

Description of the measure in discussion/already in place
The client contractor has the obligation to undertake an in depth assessment on the reliability of a candidate subcontractor or temporary work agency before concluding a contract with them. This check includes also the information on the applicable collective agreement, as well as the fulfilment of obligations with regard to social security and fiscal law. This liability is also valid in case that the subcontractor is a foreign company. In case of breach of this obligation to check, a negligence fee is imposed amounting from 1600 euro up to 16 000 euro.

France

Key point/background – Combat of unfair competition
Article 14 of the Law of 10.7.2014 foresees that any company which wants to participate in public procurement procedures in France has to provide the proof that it concluded an insurance contract covering the relevant risks. This is seen as a measure to fight unfair competition caused by companies that do not conclude such a contract to cover their 10 years´ responsibility after completion of construction works.

Description of the measure in discussion/already in place
Any bidder has to provide the proof that it concluded a 10 years´ insurance contract. The 10 years´ responsibility coverage by the insurance must be provided during the awarding procedure. In case the projected bidder cannot provide this proof he has to be discarded.

France

Key point/background – Preclusion for future procurement procedures for a certain time span
Article 10 of the Law of 10.7.2014 foresees the temporary exclusion for a company that has been held liable for the breach of certain legal provisions relating amongst others to bogus working contracts.

Description of the measure in discussion/already in place
In case of a breach relating to bogus working contracts, temporary employment, employment of illegal workers or of foreign workers without work permit by administrative act, the administrative authority may establish a temporary exclusion from public procurement procedures not exceeding 6 months. The timespan has to be fixed according to the gravity of the breach.

Latvia

Key point/background - Exclusion ground – employment of illegal workers
In the construction sector the practice of shadow economy including payment under the table and unregistered employment is widespread. Black economy in Latvia amounts to around 23% and in construction it amounts to approximately 48%, of which a big part is to be attributed to the construction sector. Public authorities, however, shall not show any tolerance for economic operators who are active in the hidden economy or who are practicing any illegal activities.

Description of the measure already in place
According to Public procurement law (article 39) 2) b), an economic operator can qualify as candidate for public procurement tender only after having submitted an extract from the police penalty register to the contracting authority, confirming that in the last year before the contract award the relevant company did not make use of unregistered employment.

5.8. Control

Austria

Key point/background – Interconnection of data banks

In Austria, some data-banks about different violations of provisions relating to working conditions in the construction sector exist. Besides the general register concerning administrative penalties and the register relating to convictions according to the Foreign Employment Act, two further evidences have been established: the register relating to wage and social dumping convictions (Lohn- und Sozialdumping-Verwaltungsstrafevidenz (LSStE; § 7l AVRAG) and the registration office of the Construction Workers' Holiday and Severance Pay Fund (BUAK, Bauarbeiter-Urlaubskasse). The latter has been assigned by law the task to collect all data of foreign and local construction companies maintaining construction sites on the Austrian territory. This data bank offers the possibility to provide all declarations regarding official registration, payment performance and employment structure of the workers on a concrete construction site on a daily basis.

Description of the measure in discussion/already in place

Within the ongoing discussion as to the recast of the Austrian Public Procurement Act, it has been proposed to impose a legal three-fold obligation on the contracting authority:

1.) Pre-qualification confirmation – ex-ante: The qualification of the bidder including his subcontractors is only assumed if – in addition to the confirmation of payment of social security contributions and of absence of convictions according to the LSStE - the BUAK confirms that all obligations have been fulfilled by the bidder. In case that the bidder cannot provide such confirmation, the company has to be excluded from the tendering procedure.
2.) Contract performance – request of registration confirmation: The contracting authority shall inquire every three months at the BUAK, if the registration of all workers has been effected by the client contractor for the relevant construction site. In case of non-compliance, the contracting authority has to undertake administrative and civil proceedings.
3.) Request of registration and payment confirmation prior to the payment of works´ compensation: Only after confirmation by BUAK that all wages have been paid, the contracting authority shall be allowed to pay the agreed fee to the client contractor.

Austria

Key point/background - On-site access control and principle of building contractor

Vienna Lines is a publicly owned company, 50% it is owned by the City of Vienna, 50% by the Federal Government. Its competence is the construction of new subway lines and its extensions. Its annual investment put to tender amounts to 700 million Euro. When executing constructions, Vienna Lines acts as building contractor and does not employ a general contractor. Thus, responsibility is not watered down.

Description of the measure in discussion/already in place

The design and management remains with Vienna Lines during the whole construction process. For each construction section, a project team is appointed which is responsible for the supervision of quality, costs and construction time on site. All sub-contractors employed are checked, they have to fulfil all technical and economic specifications as set out in the tender. If a new sub-contractor is proposed, he has to apply for a permit by Vienna Lines. Moreover, Vienna Lines checks if the sub-contractor has been condemned for illegal employment of foreign persons or wage dumping.
By daily site inspections, Vienna Lines project team can identify illegal sub-contractors.

Belgium

Key point/background – Establishment of a data bank; cross-border control

With the enlargement of the European Union and the establishment of a huge internal market of cross border workers without harmonised working conditions, Belgium decided to introduce flanking measures to secure as much as possible a level playing field for workers from which ever jurisdiction they are sent to work. They aim at finding a balance between the free movement of services and the obligation to guarantee posted workers a minimum level of social protection by means of efficient enforcement measures. Apart from a new cooperation agreement for the inspections services and a joint and several liability for principal contractors and clients, it also provides for the introduction of LIMOSA (http://fr.workpocket.be/1/3/declaration-obligatoire-limosa/), a computerised system on cross-border employment.

Description of the measure in discussion/already in place

The use of LIMOSA is twofold:

First, it comprises a general ex-ante registration obligation for posted workers, self-employed persons and trainees. The registration can be undertaken electronically prior to the employment at the National Social Security Office by the employer, who will receive an electronic receipt as proof of registration. In order to improve the enforcement of this obligation, not only the employers, but also the end users and clients must control the compliance with the registration obligation. The company for whom the posted workers shall carry out a job must also electronically register the identification details of the posted worker or self-employed as well as of the posted worker´s employer. Only having complied with this task, the user is able to release himself from joint liability.

Second, it is a central registry containing information for the benefit of the inspection services and other governmental services and hence a useful tool to be further developed for control purposes. Moreover, it is proposed to use LIMOSA for further purposes, especially with regard to the control of compliance with minimum wages. If the contractor or subcontractor does not pay the minimum wage, the fellow contractor is obliged to withhold an amount and to transfer it to the Federal Public Service Employment. The observation of the procedure could be effected by existing entities, which are the National Social Security Office, the social inspectorate or the PDOK (Employers´ Service for the Organisation and Control of the Social Security Schemes).

Belgium

Key point/background - Individual on-site registration

The construction sector is confronted with a huge number of fraud cases. Unreliable market players are infiltrating the construction market in such a way that it becomes disrupted and reliable undertakings are confronted with a level of unfair competition which makes it nearly impossible for them to survive.

Description of the measure in discussion/already in place

An agreement of the social partners proposes an obligation of individual registration to achieve a traceable identification of all persons working on the construction site. This should be combined with a withholding obligation and the liability for wages. Any person present at the site needs to be in possession of a badge, which at the same time serves as a pre-condition for entry onto the site. Thus, the badge should allow to determine who has worked when on the site. In case that the badge is not used, the contractor is threatened by a penalty.

France/Netherlands

Key point/background – Coordinated control actions; Labour Agency Atlanco-Rimec

Three years after the European Federation of Building and Woodworkers launched a forceful campaign against Irish temporary work agency Atlanco Rimec to protest against its exploitation of thousands of foreign workers from various Eastern European countries, the first results are visible.

Description of the measure in discussion/already in place

On 14 March 2015, the French construction company Bouygues, as the main contractor of Atlanco Rimec, was summoned to pay damages of €150,000 and pay back €22 million to the French social security and tax authorities. The judgement in the first instance referred to the deliberate creation of complex, cross-border structures with the aim of illegally employing some 500 Polish and Romanian workers over a period of several years. This social fraud took place at a construction site in Flamanville.

On 18 March 2015, an interlocutory judgment in the Netherlands ordered Atlanco to pay €500,000 to a blocked account as an advance on the final claim. Atlanco must also make all the requested documents available immediately and comply with the collective labour agreement for the Dutch construction sector. The final Judgement is expected in June 2015. The sentence was handed down in respect of the illegal posting of 180 Portuguese and 25 Polish workers to a Dutch construction site, Avenue 2 in Maastricht. In its defence, Atlanco attempted to apply pressure by trying to have Dutch union leaders held personally accountable for 'damaging the image of Atlanco'. This claim was dismissed.

Although this is an example for successful cross-border cooperation, sadly enough, Atlanco Rimec's social fraud is just the tip of the iceberg. Every day, thousands of workers are exploited as cheap labour, with no form of social protection.

Ireland

Key point/background - In depth assessment of specification criteria

Recent guidelines on facilitating SME participation in public procurement set out, as one of the guiding principles, that contracting authorities should allow tenderers at the time of tendering only to declare that they have the relevant and proportionate capacity (as specified in the contracting authority's tender documentation) necessary to undertake the contract (Circular 10/10 Facilitating SME Participation in Public Procurement: http://www.procurement.ie/publications/circular-1010-facilitating-sme-participation-public-procurement).

Description of the measure in discussion/already in place

When suppliers have passed this first stage and have been shortlisted to the tender award stage, the contracting authority should seek verification or evidence of the tenderer´s financial and technical capacity to fulfil the contract. Suppliers will be requested to provide the necessary documentation, such as bank statements, audited accounts, proof of professional indemnity, etc. If a contracting authority is using the one-step Open Procedure, only the selected winning tenderer will be requested to provide their financial and professional information.

Although labour law compliance is not yet mentioned here - tax compliance is emphasised- this can be a starting point of assessment of social and labour criteria within the implementation of the new EU directives.

Ireland

Key point/background - Data sharing, joint liability and exclusion

Labour inspectorate statistics point to a significant continuing compliance problem in relation to public works sites. In the first half of 2010, for example, the Labour Inspectorate (NERA) carried out 191 inspections in the construction sector and found a labour law compliance rate of just 43 per cent.[19] It is felt that public procurers tend to see these as 'box ticking' exercises and no real effort is made at enforcement.[20] The problem, it seems, whilst general, is particularly acute in the construction sector. At the awarding stage, the informants were of the view that public authorities are concerned almost exclusively with price and undertake no real checks on how the tenderer intends to account for its labour law obligations. This problem has intensified in recent years given the harsh economic climate. Thus, it appears that, although Irish public procurement practice is to include labour law compliance clauses in public contracts, the extent to which these are effective in enforcing labour standards is questionable.

Description of the measure in discussion/already in place

The Irish Congress of Trade Unions therefore has suggested that companies must be required to demonstrate their track record and monitored for continued compliance, and enforcement mechanisms must be strengthened and included in contracts.

It also proposed the exclusion of companies that consistently breach legal obligations including employment rights obligations from tendering for public procurement contracts.

In that regard, a provision for data sharing between those responsible for public procurement contracts and Revenue, Social Protection, the Health and Safety Authority and the Labour Inspectorate (NERA) should be included as part of the transposition process.

An additional tool within this context is the provision for a system of joint and several liability throughout the subcontracting chain as the only effective way to ensure compliance

Sweden

Key point/background – Compliance control with working conditions

The Swedish trade unions hold the opinion that the new directive implies an obligation of the purchaser to take measures in order to ensure that the supplier respects labour legislation and the conditions of the collective agreements that normally apply to the current work at the place where the work is performed. This means that the contracting company is obliged to either abide by collective agreements or otherwise shows that it offers at least equivalent levels of wages and employment conditions. As to works performed outside Sweden, which in practice concerns mainly supply contracts, the contracting authority is obliged to undertake measures to ensure that ILO core conventions are respected and that labour regulations and collective agreements are in force, where the work is applied. Today, the situation has gone so far that trustworthy companies abiding by collective agreements are not participating in public procurement procedures, because of unfair competition practices of other companies that for example have no costs for contractual pensions for their employees. It is absolutely unacceptable that society contributes to those wages and employment conditions and that employees are dismissed without retirement insurance and other benefits.

[19] The figures do not relate solely to public works sites, but according to the NERA representative, the vast majority of inspections were carried out at such sites.
http://www.employmentrights.ie/en/media/NERA%20Quarterly%20Update%20-%20June%202010.pdf.

[20] Indeed, the guidelines for contracting authorities published on the national public procurement website make no reference at all to labour law compliance; http://www.procurement.ie/sites/default/files/Public-Procurement-Checklist.pdf

Description of the measure in discussion/already in place

Where a collective agreement with a Swedish trade union exists, the contracting authority may assume that the trade union as well as its members at the work-site exercise the control on working conditions. If the supplier (the awarded company) already has signed a collective agreement with a Swedish trade union, the latter will have access to the workplace and therefore can control the working conditions. The right to exercise control over working conditions in favor of trade unions derives from the collective agreement with the supplier. With regard to the stipulations of the new EU-Directive, in future, the contracting authority has to undertake action against the supplier in case of violation of agreed working conditions. This is already the case now, if the competent trade union officially reports such breaches.

When no collective agreement between a Swedish trade union and the contracting company or supplier exists, the exigencies as to control by the contracting authority increase. The contracting authority has to seek the appropriate documentation to verify that the conditions as set by collective agreements are met. When the work is done abroad, an effective control is naturally more difficult to achieve. It can be achieved by joint actions between the trade unions of the two countries as has been successfully done in the Atlanco-Rimec case.

However, in Sweden itself the problem remains that a "two class society of workers" exists: If works are performed by posted staff, pursuant to the Laval judgement, only the minimum conditions stipulated in the Posted Workers Directive apply on them. Should domestic workers perform the works, it goes without saying that all provisions as set in collective agreements have to be applied. From this derives an inacceptable discrimination of workers depending on the origin of their employer. This problem derives from the fact that in Sweden most of the provisions referring to working conditions are set in individual collective agreements which are not binding all over the territory. Therefore, the Swedish trade unions demand that at the occasion of the implementation of the new EU-Directive, the legislator should clearly stipulate that the contracting authority has to ensure that the suppliers are applying working conditions according to those stipulated in collective agreement. By such legislation, the provisions become binding all over the territory, thus satisfying the pre-conditions of the Laval-judgement.

Switzerland

Key point/background – Two level control mechanism

In order to prevent unfair competition based on circumvention of compliance with minimum working conditions as well as minimum wages, efficient control mechanisms have to be established.
This is envisaged to be done in Switzerland by a mandatory two-level control.

Description of the measure in discussion/already in place

The client company has to be obliged to undertake regular controls relating to the compliance of all relevant legal provisions on the location of the contract performance.
The contracting authorities have to ask regularly for appropriate proves of compliance and to undertake on-site controls.

In case the companies do not undertake their control obligations themselves, they have to convey these obligations to an equally represented control entity or the competent authority ("Tripartite Commission", art. 7 Entsendegesetz and art. 360 Obligationenrecht). The federal government and each canton established such a "tripartite commission", which is composed of an equal number of employers´ and employees´ representatives as well as representatives of the state.

In order to allow the control entity to fulfil its tasks, the contracting authority has to refer all necessary information and provide all documents. The bidder has to prove the compliance with workers´ protection provisions and working conditions. The control authorities regularly refer their results and measures undertaken to the contracting authority. Should any violations occur, they have to be reported in the negative list.

UK

Key point/background – Gangmasters Licensing Authority (GLA)

The introduction of one liaison office on the basis of article 4 of the Posting of Workers Directive as one single contact point for cooperation between the competent authorities of the various Member States is held as an important first step to improve the tracing of infringements of minimum labour standards.

Description of the measure in discussion/already in place

The GLA is considered to be a best practice itself. The GLA maintains compliance with the licensing standards of the Gangmasters Licensing Act through a proactive enforcement approach, involving an exchange of information with government departments and inspection of companies, interviews with workers and the client contractors. Information to undertake this approach is received from trade unions, exploited workers etc. Were the non-compliance relates to the activities of a licensed labour provider, the appropriate solution will normally be to issue additional licence conditions. For more extreme non-compliance licence revocation may be considered by GLA. In the most severe cases, and for identified unlicensed labour providers and labour users using unlicensed providers, prosecution will normally be the consequence, followed by a criminal investigation. Should other offences be discovered by the GLA investigation, including a labour provider operating without a licence (GLA offence), but also operating false records in relation to his workforce (false accounting, no GLA offence), GLA investigates all offences and refers the case to Defra Legal, the Procurator Fiscal or Public Prosecution Service (NI) to consider bringing charges for both, the GLA and non-GLA offences.
As an example for cross-border cooperation, the case of poorly treated Bulgarian workers posted to the UK should be mentioned. The GLA identified bogus posted workers, who were employed by licensed and unlicensed Bulgarian recruitment agencies, together with the Bulgarian competent authority. This good practice was made part of a formal agreement between Bulgarian and UK authorities. The GLA bases its work on this partnership approach which allows it to discover instances of cross-border exploitation of migrant workers from other EU and third countries.

5.9. Role of trade unions

Netherlands

Key point/background – Agreement with the client (and/or the main contractor)

The trade unions have developed a strategy that focuses on negotiations in the preparatory stage of a project with the aim to conclude agreements on social issues, so-called 'covenants'. In these covenants the client (and/or the main contractor) and the trade unions settle rules and prescriptions with regard to compliance with collective agreements and labour legislation.

Description of the measure in discussion/already in place

Given the broad range of potential clients (local or regional governments, large contractors in utilities, like RWE, the national railways or the airports) the covenants cover a wide spectrum of different issues. Through negotiations the effort is made to come to tailor-made agreements. With local authorities (for instance the city of Rotterdam) the agreements usually cover all projects with the authority as main or partial customer. Most often the employers´ side is also included in the talks or as signatory. Examples of the issues covered are:

- Compliance with sector specific collective agreements and pay provisions in the whole chain of (sub)contracting,
- Respect for general labour legislation and in particular compliance with health and safety and other relevant legislation,
- Fight against practices with bogus self-employed or the use of fake subcontractors,
- Monitoring and close examination of abnormal low tenders,
- Restriction of the use of temporary workers; for instance only through registered recruitment agencies,
- More attention to the inclusion of vulnerable groups on the labour market and a stronger focus on (re)training.

The monitoring of the respect for the agreed rules is very often included in the agreement. This can be either done by specific rights for trade union officers (information rights, site visits, publications and office hours on site), or by the office installed by the social partners in construction that facilitates the implementation of the collectively agreed working conditions (Technisch Bureau Bouwnijverheid - TBB). The TBB has the right to visit the sites and contractors have the duty to cooperate with the office.

Portugal

Key point/background – Quadripartite commission

According to the most important construction trade union («Sindicato da Construção de Portugal», «SCP»), in principal, the characterization of the public procurement procedures is highly negative, especially regarding the workers' social rights and working conditions. The priority on the lowest price implies that subsequently the contracting company will put financial pressure on the subcontractors in order to meet with the planned costs by cutting expenditure in social facilities (overcrowding of sleeping sites, absence of canteens, etc.), security equipment, and health services. In some cases the workers must buy themselves the security equipment and pay for the accommodation. The priority on costs means that often the lowest tender «wins»: This implies the transfer of costs down alongside the «contractual pyramid». The subcontracting practices make the situation even worse since it promotes a higher invisibility and casualness.

Description of the measure in discussion/already in place

The trade union therefore put forward proposals aiming at a change in the construction panorama in Portugal within the context of the implementation of the new EU-Procurement Directives, pointing to the need of improving the control of transparency, enforcement and fulfilment of public contracts. In that sense, in particular three measures are suggested:

(a) the constitution of «quadripartite commissions», with members of the trade-union, the public work inspection service, the local municipality of the construction site, and the employer's association;

(b) to impose on the companies that want to apply for a public contract the pre-requirement of employing at least 50% of the necessary workforce for the accomplishment of the contracted construction; and

(c) a preliminary inspection that only enables the work to start when all the accommodations and social facilities for workers are in accordance with the number of workers and the legal regulations.

Spain

Key point/background – Improvement of safety, TPC (Tarjeta Profesional de la Construcción; professional construction card)

In the construction sector, questions of compliance with health and safety issues and its control is of utmost importance. The general construction industry agreement (CGSC), undertaken between the trade union and the industry, provides for mechanisms related to health and safety and includes trade unions into the control procedures.

Description of the measure in discussion/already in place

The measure is twofold: Firstly, the "TPC" (Tarjeta Profesional de la Construcción; professional construction card) was introduced, which includes basic training in occupational risk prevention and also requires a specific training for any employment in the construction sector in addition to the basic skills. Workers active in the construction sector and unemployed, who have worked in the sector over the last five years can take the TPC.

FLC (Fundación Laboral de la Construcción) is the responsible entity for the release of the TPC and for the selection of the companies, which can provide the necessary training for the TPC.

The FLC is a bipartite organism composed of employers (CNC) and trade unions (MCA-UGT and CCOO construcción y servicios), which are signatories for the 5th General Construction Industry Agreement, the most important collective agreement.

Secondly, trade unions together with employers´ representatives concluded agreements with various public authorities for joint monitoring to follow-up the execution of all types of public works with a view to secure the compliance with occupational safety and health issues.

There are to be distinguished two different types of agreements:

a) The agreements between Trade Union, employers´ associations and Building Ministry concern the possibility of the trade union to visit the major infrastructure projects (roads, bridges, airports, railway works) to check safety and health conditions.
b) The agreements between trade unions, employers´ associations and autonomous regions and city councils concern the right to visit civil works, i.e. construction sites of public housing and underground works.

Sweden

Key point/background – Negotiation and right to veto of trade unions

The Co-Determination Act provides that trade unions have the right to negotiate and to veto the employer´s plan to engage a certain (unreliable) contractor. This is based on the consideration that increased social and economic responsibilities of employers for employees bear also the risk that employers will try to evade the application of labour law and collective agreements by using other forms of contracts in order to evade their obligations. As ex-post control and legal disputes often prove to fall on stony ground, the government decided to opt for the trade union´s right to negotiate and veto which could help to prevent contract practices which aim at cutting workers´ rights.

Description of the measure in discussion/already in place

Section 38 (3) of the Co-Determination Act assigns trade unions the right to ask the employer for information about the envisaged subcontractor and the conditions under which his employees work, their education as to work environment issues, wages, tax conditions etc., which trade unions deem to be necessary to judge whether the future contractor is likely to fulfil his duties.

This way, the employer is automatically obliged to undertake an assessment of the envisaged contractor.

In sectors characterised by subcontracting, social partners developed simplified information procedures as an alternative to those foreseen by legislation, which can be implied on the condition that the employer is registered for income tax and VAT, as well as a company and that he is bound by a collective agreement. Having carried out this assessment, the employer establishes a list of the contractors he wants to use in future. In the absence of trade union´s dissent, the employer is then free to contract the companies of his list.

This negotiation and selection procedure is a useful tool to induce the employer to select reliable contractors, mostly such bound by collective agreements (if he wants to avoid the more burdensome procedure foreseen by law). To further simplify the procedure, the Swedish Construction Federation has elaborated standard contract conditions (UW 2004) for all works to be subcontracted in the construction sector.

Moreover, the client contractor often prefers to select subcontractors bound by collective agreement, because they are less likely to be exposed to industrial action.
Further to this information procedure, the Co-Determination Act stipulates a veto right in public procurement procedures covering all situations where the employer plans to engage workers without a permanent contract with his company. However, the trade union can veto against a tenderer only in such cases for which exclusion is foreseen in the EU-Directive. Moreover, the right to veto only applies if the employer is bound by a collective agreement covering the work performed and only at the level of client and first contractor.

Switzerland

Key point/background – Right of trade union to file law suits

In order to enforce the correct application of law it is useful and necessary to involve the parties concerned. Often, the individual workers are put under pressure and are generally in a weak condition to file law suits against the company for which they work and hope to further be employed. Therefore, it is necessary to enable the trade union to take action.

Description of the measure in discussion/already in place
In order to avoid that bids are awarded to client companies that proved to not comply with the relevant legal provisions relating to working conditions, such bidders must be discarded. The relevant legal legitimation to request such exclusion shall be established in favour of employees´ organisations for any public procurement award (whichever amount).

UK

Key point/background – Olympic Games Memorandum of Agreement
In the UK, alongside the outsourcing of orders to the private sector, a two-tier workforce emerged. In the absence of legally binding provisions, trade unions campaigned and negotiated the introduction of codes of practices from 2001 onwards to reverse this trend. The practice was reaffirmed an extended by the central government.

Description of the measure in discussion/already in place
These efforts culminated in the Olympic Games Memorandum of Agreement seeking to ensure direct employment and to guarantee minimum rates according to the collective agreements. The social partners and clients signed a Memorandum of Agreement which recognises the relevant collective agreements. This Agreement was regulated by the client (Olympic Delivery Authority), who was empowered to undertake a monitoring coordinating role, whilst the partners of the agreement were to periodically review the progress, identify areas of concern and agree on solutions. The Memorandum applied to all subcontractors.

UK

Key point/background – Inclusion of trade unions to control contract performance
In 2012, trade unions and employer representatives concluded the National Agreement for the Engineering Construction Industry (NAECI Agreement, http://www.njceci.org.uk/national-agreement/) for the time period 2013-2015.
The key objective of the NAECI is to continue to supply a modern, robust national employment relations structure in the construction sector that

- Enables the UK engineering construction industry employers and clients to remain competitive
- Provides attractive terms and conditions and greater security of employment for a competent, motivated , productive and competitive industry workforce and
- Establishes a sound foundation for further improvements to industry productivity, resourcing and employment relations.

Description of the measure in discussion/already in place
The NAECI agreement comprises detailed provisions on

- Continuous education and training measures to improve workers´ and apprentices skills
- Safety issues set out in a separate booklet setting out detailed provisions on current industry good practice for employers, employees, trade unions and safety representatives
- Payment including pension, welfare benefits and bereavement leave, and working hours according to the sector specific collective agreements

Key element of the agreement are

a) NAECI being funded on the principle of direct employment
b) The establishment of two control mechanisms:
   Shop Stewards and statutory Trades Union Site Safety Representatives can request detailed documentation on the issues regulated under the agreement and access to the site
c) A dispute settlement by a formal, written grievance procedure (internal resolution)
d) On site meeting and dispute adjudication panel (external resolution)

The NAECI thus provides a sound basis for public procurement procedures: It ensures that client contractors and sub-contractors being signatories to this agreement will abide by the principle labour, health and safety issues and pay the minimum wages foreseen in the UK. It grants trade unions´ representatives the right to access to the construction sites. Therefore, they have the possibility to control the working conditions, supported by various dispute settlement procedures.

5.10. Outsourcing of workers

Finland

Key point/background – Posted workers and role of trade unions

So far, the majority of the posted workers in Finland have been Estonians and the most common sector where they work has been the construction sector.

In order to avoid social dumping and discriminatory treatment, several control mechanisms have been established.

Description of the measure in discussion/already in place

In the construction sector, every person, either Finnish or foreign, shall have a Finnish tax number and shall be registered to the public tax number register before starting work at site in Finland. If a worker´s tax number does not figure in the tax number register, the worker cannot start to work in Finland. According to the Finnish Occupational Safety and Health Act (738/2002), any person working at a construction site has to wear an identification card. The data content of the card is prescribed in the Act. Also, the worker´s tax number has to be printed on the identification car.

In order to support information exchange with other Member States, a Liaison Office was established. Additionally, in spring 2011, the IMI system has been put into operation. It is used if a posting company does not have a representative in Finland or if the representative neglects his obligations.

Finnish social partners do not have a role in the IMI information exchange process. However, in practice finish OSH (Labour) inspectors might need advice from social partners when IMI request relate to collective agreements. This is connected with the Finnish Employment Contracts Act (55/2001), according to which the regional occupational, safety and health authorities must act in close cooperation with the social partners in particular when supervising the observance of collective agreements. In addition, regular (2 to 4 times a year) meetings are held between the occupational, safety and health administration, the Confederation of Finnish Construction Industries and the Finnish Construction Trade Union, focussing on the combat of grey economy.

France

Key point/background – Law Relating to the posting of workers

The law **n°2014-790 (loi n°2014-790 du 10 juillet 2014) is the relevant piece of legislation regarding posted workers. It aims at reinforcing the controls and sanctions against companies that make use of posted workers in an abusive way.**

Description of the measure in discussion/already in place

The new element introduced into the legislation is the “joint liability”, allowing to declare responsible the client contractor for the abusive actions undertaken by one of his subcontractors. These comprise the employment of illegal workers, non-payment or partial payment of wages as wells as the use of letter-box companies located in other Member States with a view to employ French workers in France under the status of posted workers.

Ireland

Key point/background – Towards 2016

In order to combat bogus self-employment, agency work and so on, a number of labour law compliance measures were agreed by the social partners in “Towards 2016” mainly in response to two major disputes in 2005. The first involved the Irish subsidiary of a Turkish company, Gama Construction Ireland Ltd, which exploited Turkish workers posted to Ireland to work on public works

contracts. The second concerned Irish Ferries, which reflagged its vessels to Cyprus and sought to replace its Irish workers with temporary agency workers, primarily from Latvia and were to be paid less than half the Irish minimum wage. These two cases brought the problem of posted workers and migrant agency work onto national stage.

Description of the measure in discussion/already in place

By consequence, a new labour inspectorate was established, the national Employment Rights Authority NERA), with the special task to undertake regular controls on construction sites.

NERA was established to secure compliance with employment rights legislation and to foster a culture of compliance in Ireland through five main functions:

- Information
- Inspection
- Enforcement
- Prosecution
- Protection of young persons in employment

a) Inspection

Inspectors, duly appointed and authorised by the Minister for Jobs, Enterprise & Innovation, visit employers, carry out inspections of records and speak to relevant persons as part of their role of ensuring compliance with employment-related legislation. Any breaches of legislation identified will be explained and discussed with the employer, and he/she will be given a set time period within which to rectify these and to provide proof to the inspector that the issues have been resolved. Failure to comply with the legislation can result in prosecution and the NERA has a prosecution unit.

b) Enforcement Services Unit

The Enforcement Services Unit can seek to have a determination of the Labour Court or the Employment Appeals Tribunal enforced through the Courts Service in certain specific circumstances. Generally where such an award is made in favour of an employee, the employer has six weeks to implement it. If the employer fails to do so within this period, the employee or the employee's trade union may make an application to the Courts for an order directing the employer to carry out the determination. Where they are not in a position to do so, they can refer the matter to the Enforcement Services Unit, which may in certain circumstances, make an application to the Courts for an order on their behalf.

c) Protection of young persons

NERA also has rights in the protection of young persons in employment.

Norway

Key point/background – Trade union´s right of co-determination in case of outsourcing

In a number of collective agreements specific rights of co-determination were set for cases of hiring workers for a fixed term/specific task as well as hiring for labour with a view to give the employees´ representatives the opportunity to exchange views with the management. The agreements are complemented by law in order to combat social dumping especially by hired labour and involving subcontractors who do not pay the minimum wages.

Description of the measure in discussion/already in place

The basis of these agreements is to be found in the 2005 Act on working environment, working time and dismissal protection. This law leaves only a narrow scope for lawful hiring for a fixed term or specific task, including agency work. Thus, outsourcing of a work is only lawful if warranted by the nature of the work and if the requested works differs from the work ordinarily performed in the undertaking. Moreover, if the hiring of workers exceeds 10% of the hirer´s employees or if its duration exceeds one year, an agreement is required with the employees´ representatives. Thus, the control

of outsourcing beyond a certain limit is laid into the hands of trade unions´ representatives at the work place.

Further to this narrow scope left by legislation, based on collective agreements, the employer is required to inform and consult with workers´ representatives before making a relevant decision, to provide information on terms and conditions of the workers concerned. The client undertaking is obliged to ensure that the (sub)contractors are in line with the Posting Directive. The representatives have the right for information concerning the lodging and residence conditions for workers of a foreign (sub)contractor when staying in Norway.

Sweden

Key point/background – Certificate for compliance with ethical and professional standards

The social partners elaborated a private authorisation for such temporary work agencies that commit themselves to uphold high ethical and professional standards as employers and companies. In combination with the possibility to appoint a coordinator to improve work environment, this initiative based on private agreement proved to be efficient.

Description of the measure in discussion/already in place

The employer´s responsibility for the workers´ health and safety is one of the subject matters of the authorisation programme all companies have to participate in. Within this authorisation programme the client has to undertake all necessary precautions to protect the agency worker from health damages of accidents as well as to provide safety equipment. The agency and agency´s safety delegate are entitled to visit the client at any time during the assignment to check whether the work environment is acceptable. In the negative case, the agency is entitled to immediately withdraw the workers and terminate the contract after consultation with the client´s safety delegate.
Moreover, the "Work Environment Act" allows the appointment of a coordinator at construction sites whose task is to prevent the risks that can arise due to the specific risk that various companies with different skills work at the same site.

UK

Key point/background – Combat of false self-employment

The UK government announced that it would tackle the use of employment intermediaries facilitating false self-employment to avoid employment taxes, hence the introduction of new legislation in July 2014. The Finance Act 2014 includes this specific legislation relating to "On Shore Employment Intermediaries: False self-employment".

Description of the measure in discussion/already in place

The new legislation provides that agency workers of the employment business will be taxed as employees if they are subject to a right of direction, supervision and control by the client.
Under the new legislation the responsibility falls upon Employment Businesses to prove if a worker is employed or self-employed and will be liable for up to 6 years of unpaid tax and national insurance if a seemly self-employed worker is subsequently found not to be truly self-employed.

Chronologic list of judgements referred to in the text:

European Court of Justice rulings	
C-31/87 – Gebroeders BeentjesBV vs the Netherlands	Social criterion of contract performance relating to the employment of long-term unemployed persons is compatible
C-225/98 – European Commission vs France; Nord-Pas-de-Calais	Combat of local unemployment is admissible as an award criterion
C-513/99 - Concordia Bus Finland versus Helsingin (Finland)	Frame of reference for contracting authorities: quality criteria may be taken into account when the criteria are linked to the subject-matter of the contract
C-448/01 - Wienstrom vs Austria	Award criteria must not be purely economical
C-341/05 – Un Partneri Ltd v Svenska Byggnadsarbetareförbundet ;Sweden	Preclusion of application of more favourable conditions of non-binding collective agreements than those set by national law
C-438/05 - International Transport Workers Federation v Viking Line ABP; Sweden	Preclusion of application of more favourable conditions of non-binding collective agreements than those set by national law
C-346/06 – Dierk Rüffert vs Niedersachsen (Germany)	The obligation to pay wages set by regional collective agreements for posted workers is not admissible
C-532/06 – Lianakis, preliminary ruling (Greece)	Need to stipulate from the very outset the weighing of award and sub-criteria
C-368/10 – European Commission vs Netherlands; Max Havelaar	Economic and technical specification, contract conditions, award criteria - sustainability criteria in the form of quality labels are admissible
C-549/13 - BundesdruckereiGmBH vs Stadt Dortmund (Germany)	Minimum wages - applicability
C-396/13 - Satakunnan käräjäoikeus (Finnland); reference for a preliminary ruling	Mandatory pay clauses – posted workers
C 413/13 – Dutch union FNV KIEM (Netherlands); reference for a preliminary ruling	Collective agreements are applicable to „bogus self –employed workers“
C-115/14 – Regio Post GmbH vs Stadt Landau (Germany)	Pay clauses – posted workers

Europese Federatie van Bouw-

en Houtarbeiders (EFBH)

B – 1000 Brussel

Tel.: +32/2/227 10 40

Fax: +32/2/219 82 28

E-mail: info@efbh.be

www.efbww.org