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LIABILITY OF SUBCONTRACTING UNDERTAKINGS

Introduction

As a result of international economic competition, companies are increasingly turning to subcontracting as a way to optimise their production cycle by focusing on what they do best. This has had a strong positive impact on Europe's prosperity. Against this background, calls for liability legislation to be introduced to ensure compliance with labour laws in subcontracting chains have grown louder.

Comments

1. Economic integration at both global and at European level has led to an adaptation of the way in which businesses operate worldwide, notably by having greater recourse to relocation, outsourcing and subcontracting.

2. Subcontracting has contributed to more growth and jobs in the European Union, thereby having a strong positive impact on Europe's prosperity.

3. Subcontracting is a key factor in the competitiveness of industrial processes. The underlying idea is to provide companies with the flexibility they need to optimise the production cycle by focusing on what they do best, whilst externalising parts of the production, which can be done more effectively and/or efficiently by other economic actors. Companies have recourse to subcontracting when they look for specialised competences or where they are confronted with capacity problems to produce goods and/or services, for example to respond to a sharp increase in demand. Subcontracting spreads the financial and organisational risks of projects which are especially important for SMEs.

4. Subcontracting creates very specific relationships between the subcontractor and the main contractor, who rapidly become interdependent as part of a same supply chain. This relationship involves contractual obligations of a commercial nature. However, there is no subordination between the client and the service provider and the employees of the latter have no contractual relationship with the main contractor and/or the client. All companies taking part in a subcontracting chain therefore have the duty to comply with the labour legislation, which applies to their employees.

5. It has been argued in recent years that an increasing use of subcontracting has had in practice a negative impact on the working conditions of some of the subcontractors' employees. In eight Member States, legislative measures establishing the liability of the main contractor for the respect of labour legislation in production chains have been put in place.



6. BUSINESSEUROPE believes that the introduction of liability legislation is the wrong solution to ensure compliance with labour laws in subcontracting chains. Companies cannot and should not assume responsibilities of public authorities to verify the application of labour laws or collective agreements by other companies. The main contractor is not in a position to monitor compliance in practice. It is the duty of all subcontractors to ensure compliance with relevant labour laws when dealing with their employees according to their national laws and practices. Moreover, the introduction of liability legislation could undermine, not enhance, compliance with labour laws in subcontracting chains as the incentive on the subcontractor to comply would be removed. In case of violations, labour inspectorates and/or other appropriate public bodies established in the Member States in accordance with national practices should be responsible for enforcing compliance in practice. Transferring the compliance responsibilities of companies, organisations and individuals from the state or other stakeholders would be a dramatic – and in practice unworkable - change.

7. On 19 February 2009, the European Parliament adopted a report on sanctions against employers of illegally staying third country nationals. In this report the European Parliament has decided to introduce a clause establishing the joint and several liability of the main contractor, who can be held liable to pay financial sanctions next to or in place of its direct subcontractor.

8. Another report concerns the social responsibility of subcontracting undertakings in production chains. Although the two initiatives pursue very different goals, the same solution has been proposed on the issue of subsidiary liability as a means to step up the social responsibility of subcontracting undertakings. In the latter report, the European Parliament also asks the European Commission to envisage the feasibility of a Community instrument on chain liability as a way of increasing transparency in subcontracting processes.

9. BUSINESSEUROPE is against the introduction of a new European legislation on the issue of liability in subcontracting chains. There is no evidence that a European initiative is needed. As a matter of fact, nineteen Member States have not seen a need to introduce legislation in this area either. Moreover, such an initiative could affect the role of social partners in some Member States. And in a cross-border context, the Posting of Workers Directive provides an adequate framework to ensure that the rights of workers are not violated in the cross-border provision of services.

10. In addition, the proposed introduction of a European instrument establishing joint and several liability for wages, social contributions, taxes and damages for accidents at work in all sectors will create excessively bureaucratic burdens for companies. In Germany, since the introduction in 2002 of an “unconditional chain liability” for social security payments in the construction sector, only six cases in which a liability notification had been issued have been identified, with an overall average liability amount of 13,000 euros. All the cases were due to bankruptcies of the sub-contractors. These cases have to be compared with the costs for contractors to fulfil all the administrative requirements imposed by the existing legislation, which are estimated to 22 million euros a year in administrative costs.



11. Europe is faced with a tremendous amount of challenges in order to recover from the current economic and financial crisis and to respond to the challenge of a rapidly increasing global competition. In this context, the better regulation agenda of the European Commission is more important than ever before and such measures would be completely at odds with it. It is essential to avoid the introduction of measures that could hamper the competitiveness of companies and therefore a rapid recovery of the European Union. The adoption of a new European legislation on the issue of subsidiary liability would clearly and profoundly undermine Europe's competitiveness in the global economy.

12. Only very limited knowledge exists regarding the social implications of subcontracting and the effectiveness of subsidiary liability as means to ensure compliance with labour laws. What is needed is therefore to analyse the benefits of subcontracting for European economies and at the same time looking at the social implications of this growing business practice. More research and statistics are needed to gain a clearer picture of the situation in all Member States and in all sectors before trying to identify appropriate remedies at European level. More specifically, the research could focus on the circumstances that led to the eight countries that have subsidiary liability legislation going down that path. The European Commission could therefore launch a study on this issue, which would need to be carried out jointly by DG Employment and DG Enterprise in order to yield useful results.

13. Member States should better inform each other in order to understand the reasons why they have different rules, for example regarding personal scopes of liability rules, which encompass in different countries the whole chain, a part thereof, or are limited to the direct subcontractor.

Conclusion

Subsidiary liability is not an appropriate means to ensure compliance with social legislation. BUSINESSEUROPE therefore opposes the introduction of liability legislation, in particular at European level. However, more knowledge and a better exchange of information between the Member States on this issue would be useful to better understand the economic benefits and the social implications of subcontracting.