



SECURING WORKERS' RIGHTS IN SUBCONTRACTING CHAINS

LABOUR IS NOT A COMMODITY



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There is a crucial need to strengthen workers' rights in subcontracting chains. Over the last decades, we have witnessed the European Union prioritising market liberalisation and business interests over the well-being of workers. The lack of dedicated regulation allows businesses to circumvent national legislation and workers' rights by unconditionally relying on the economic freedoms of the internal market.

This development is even more visible in the field of subcontracting, which has become THE business model in certain sectors. Businesses have perfected their techniques to externalise risks and responsibilities while maximising power and profit. Logically, this imbalance exposes workers to insecure, unsafe or even exploitative conditions. Not only has this precarisation of labour allowed businesses to make ever-more profits, but the violation of human rights has even become part of day-to-day business in certain sectors. It is unacceptable that workers in the EU are made subject to the same market dynamics as other factors of production, which can be negotiated for the highest profit or the lowest price. This is diametrically opposed to the principle of the ILO: 'labour is not a commodity' – workers should be treated as human beings with dignity and respect!

We need stronger protection of workers with an adequate legal framework for subcontracting. Liability schemes need to rebalance employers' power and responsibilities, including in the digital economy. The ETUC project 'securing workers' rights in subcontracting chains' conducted in 2018-2021 has built a case and evidence base to why such regulation is needed.



POLICY RECOMMENDATIONS FOR TACKLING ABUSIVE SUBCONTRACTING

To secure workers' rights in supply chains, the ETUC is calling for a general legal framework on subcontracting, with a view to strengthening liability and transparency, and to ensure equal treatment, decent work and effective enforcement throughout the chain.

An EU legal framework on subcontracting should comprise, in particular:

1 Measures for enhanced liability

- ▶ mandatory joint and several full chain liability of contractors should strengthen compliance with legal obligations and labour standards, including applicable collective agreements;
- ▶ such liability schemes should cover both domestic and cross-border subcontracting situations, including in the context of public procurement;

2 Practices for ensuring decent work

- ▶ workers' rights to information, consultation and participation at board-level should be guaranteed as a means for strengthening workers' influence on corporate behaviour;
- ▶ alert systems, control and audit measures and compliance monitoring procedures, such as e.g. codes of conduct or international framework agreements need to be established in collaboration with workers' representatives and trade unions;
- ▶ subcontracting arrangements to circumvent collective agreements or opt for less favourable ones in the same sector of activity must be tackled. Collective bargaining and applicable collective agreements must be enforced throughout the subcontracting chain.
- ▶ the principle of equal treatment and its practical implementation in terms of equal pay for equal work in the same place should be ensured, independently of where the workers come from or how they are contracted;

3 Standards for increased transparency

- ▶ a limitation of the number of subcontracting levels and a prohibition of further subcontracting as soon as labour-only subcontracting enters into a chain should be introduced;
- ▶ mandatory non-financial reporting initiatives should be made more effective through the formulation of more precise and binding indicators, asking to 'comply and explain' instead of to 'comply or explain';
- ▶ a binding duty of investigation and verification by the main contractor or leading undertaking of the genuine activity of the subcontractor, its social record and compliance with applicable regulation should be established;

4 Tools for effective enforcement and access to justice

- ▶ solvency guarantees that secure the payment of wages, social security payments and other social obligations must be (re)installed;
- ▶ accessible mechanisms for legal redress and recovery should be available for all workers and their representatives to report abuses and enforce their rights;
- ▶ dissuasive and effective sanctions and compensations including back payments in case of non-respect of the applicable legislation and/or collective agreements.



1.

SECURING WORKERS' RIGHTS IN SUBCONTRACTING CHAINS

To secure workers' rights in supply chains, the ETUC is calling for a general legal framework on subcontracting, with a view to strengthening liability and transparency, and to ensure equal treatment, decent work and effective enforcement throughout the chain.

An EU legal framework on subcontracting should comprise, in particular:

In certain sectors – such as food and agriculture, the garment industry, road transport and construction – subcontracting practices are widespread, and abuse of workers' rights is frequent. For companies in these sectors, subcontracting has become a strategy to increase their profit and competitiveness in the market.

Initially foreseen as a temporary solution to flexibly adapt to the market or to perform tasks that do not belong to the company's core business, subcontracting nowadays can concern almost the entire production process. Sometimes, even the core activities of a company or sector are carried out by subcontracted workers, who perform the same tasks in the same workplace as employees directly employed by the client company or main contractor. The more complex a subcontracting chain, the higher the probability that workers' rights are abused along the chain.

In a project co-financed by the European Commission, the European Trade Union Confederation has built a case for a more consistent EU approach towards subcontracting. There is a need to create better tools and conditions for workers' and their representatives to know about their rights and to be informed and consulted about the practices of their company along its subcontracting chain. Strengthening the legal framework on subcontracting and making trade unions' and workers' representatives' involvement an essential part of it would help improving the working conditions for millions of workers in the EU.

To this purpose, the ETUC project has gathered evidence from example cases characteristic for subcontracting in the food, transport, construction and garment sectors. The full case studies can be found at https://www.etuc.org/sites/default/files/2021-10/Securing%20workers%20rights_EN_LR.pdf. In addition, the project has set out the consequences of the lack of regulation at EU level, particularly in terms of joint and several liability, due diligence, transparency and reporting requirements. An analysis of existing legal provisions at national and European level regarding subcontracting can be found at https://www.etuc.org/sites/default/files/2021-10/Subcontracting%20and%20social%20liability_EN.pdf.





2.

SUBCONTRACTING AS A PROFITABLE BUSINESS MODEL FOR EXTERNALISING RISKS AND RESPONSIBILITIES

Evidence shows that subcontracting is used as a risk management strategy: it allows (usually) large companies to separate power and profits, on the one hand, from risks and responsibilities, on the other. In fact, the client and the main contractor(s) keep a certain control on their subcontracting chain, deciding the conditions that must be respected in the production of goods or the provision of services (e.g. the price, the timing, the technical requirements, the volume of production).

The risks and the responsibilities linked to the economic activity are instead externalised to subcontractors – usually smaller companies. To comply with the conditions imposed by the client or the main contractor, they are often pushed to infringe applicable labour rules in terms of working time, occupational health and safety, wages, etc. The workers employed by the last tier of subcontractors usually experience the worst working conditions.

In some cases, subcontracting entities are only created by the main contractor for subcontracting purposes. Sometimes, subcontractors are letterbox companies, i.e. companies that do not perform any substantial economic activity, but are created for the purpose of lowering labour costs or setting up fiscal optimisation strategies. These kinds of artificial arrangements also allow the client or main contractor to interchange the subcontractors and keep the same model running even after the detection of fraud or labour violation. Easily established, dissolved or liquidated, letterbox companies can also be used to escape liability, especially in a transnational context.

The ETUC project has identified how subcontracting may be used to profit from workers' exploitation through various practices ranging from a legal grey zone to outright forms of forced labour, gangmaster practices and human trafficking.

2.1 Cutting labour costs and boosting a race to the bottom

Subcontracting allows the client and the contractor(s) to cut labour costs with a view to reduce the price of the goods or services provided. This outcome is particularly evident in global supply chains, where subcontracting facilitates regime competition among states wishing to offer the most favourable conditions to foreign investors. This process pushes states in a constant race to the bottom, which sometimes can even take the form of free trade zones (FTZs) or special economic zones (SEZs) with particularly business-friendly regulations. Subcontracting is a major source of social dumping and unfair competition across borders with major consequences on jobs and working conditions.



H&M CASE

Hennes & Mauritz (H&M) is a clothing retailer that defines itself as the “employer to 177,000 colleagues” in 59 countries. The case illustrates labour relations at H&M in Bangladesh and the dubious reporting by the company on working conditions along the supply chain. It also shows the deterioration of working conditions in the absence of trade unions and workers' representatives, the race-to-the bottom of social rights by states to attract foreign investors as well as the impunity in cases of human rights' violations committed by transnational corporations.



LABOUR ABUSE
EVEN AFTER
LABOUR
INSPECTION



FORMAL DECLARATIONS AND
ASSESSMENTS BY CLIENT INSTEAD
OF PUBLIC AUTHORITY



FREE TRADE ZONES (FTZS) OR SPECIAL
ECONOMIC ZONES (SEZS) WITH
BUSINESS-FRIENDLY REGULATIONS

2.2 A prosperous environment for violations of workers' rights

Subcontracting might involve illegal practices, ranging from severe crimes, such as trafficking of human beings, to social fraud involving e.g. bogus posting of workers, bogus self-employment and bogus workers' cooperatives and other forms of labour exploitation. The more fragmented the production process, the more difficult it is for workers to identify a violation of their rights and the responsible employer. Sometimes, these violations are so common they become part of the business culture in the sector.

Workers are often unaware of their rights or how to claim them, or do not dare to sue their employer due to the cost and the length of the proceedings. Instead, they might end up tolerating a certain degree of violation of their rights just to be able to keep their job and income. The lack of workers' complaints is even more evident in transnational cases, when it is particularly difficult to press charges against an employer established in another country and to enforce imposed sanctions or damages.

2.3 Undermining workers' rights for increased competitiveness

Abusive subcontracting practices ranges from outright violations of workers' rights to legal grey zone practices. At national level, subcontracting practices may in some cases allow companies to exploit the benefits linked to a particular type of company (such as cooperatives) or to undermine applicable collective agreements. At EU level, companies operating in a cross-border context may use subcontracting arrangements to exploit the freedom to provide services. In practice, this entails e.g. the payment of social contributions under a more favourable national system or the circumvention of applicable collective agreements. Again, such efforts by the employers and subcontractors serve the only purpose of reducing labour costs and avoiding liability.



THE SPANISH MEAT INDUSTRY

Spain is the EU's second largest meat producer by number of tonnes produced, and the third largest by value of its production. The sector is known for its outsourcing and subcontracting practices. The companies that act as subcontractors in the meat industry are characterised by having different forms and legal status (multiservice companies, temporary work agencies, individual self-employed workers, etc.) but worker cooperatives stand out especially. The sector illustrates the concept of companies without workers which can fully exercise the functions of employers without assuming any obligations or responsibilities under labour law.



ILLEGAL WORKERS SUPPLY



LABOUR ABUSE EVEN AFTER LABOUR INSPECTION



BOGUS COOPERATIVES





3.

HOLDING CONTRACTORS ACCOUNTABLE

Even when labour inspectors or trade unions intervene to denounce workers' rights violations or other severe infringements, justice is not always done. Client companies and main contractors claim not to be responsible for any infringements in the subcontracting chain, but instead allocate the full liability to their subcontractors. They usually end the contract with the relevant subcontractor and consequently free themselves from legal responsibility.

Paradoxically, the persons that have managed the company whose contract has been terminated, can easily register a new company and sign a new subcontract with the same client or contractor. So, in the end, the business goes on with the same workers, the same model of subcontracting, the same exploitation of workers – but with another company name on paper.

Today, few member states regulate the liability in subcontracting chains. Rather, subcontracting practices tend to follow the principles of civil or business contracts instead of employment contracts. In other words, liability provisions relating to workers' rights or labour standards are still rare. Most often, separate legal entities such as parent and subsidiary companies are liable only for their own infringements. This exempts a parent company from liability for labour law infringements in the subcontracting chain – even if the parent company holds 100 percent of the shares of the subsidiary.

Some member states have introduced liability provisions regarding e.g. wages, occupational health and safety, social security contributions and taxes. However, these can easily be avoided through superficial 'due diligence' reporting schemes with wide margins of interpretation. In practice, such national reporting obligations without effective control mechanisms help companies improve their public image but fails to secure the wellbeing of workers in their subcontracting chain. Likewise, in cases where joint liability currently exists, it can easily be avoided in practice. For instance, once aware of the violations of workers' rights, the client and the contractor(s) may still be able to end the contract and thereby avoid joint liability.



RIVE GAUCHE CASE

Rive Gauche is a shopping centre close to Charleroi (Belgium), whose construction included several forms of workers' abuse. In this case, subcontracting practices combined with posting of workers had the effect of saving labour costs and hindered collective actions. It is an example of the worrying developments in the construction sector in Europe where well-known companies do not hire (almost) any construction workers but are capable of performing significant construction work; where subcontracting companies are easily created and replaced although they are managed by one and the same person. Workers' on site were hired by different employers for the same job and tasks and accommodation was allocated according to the workers' nationalities. Such business models divide the workforce and undermine the possibilities of collective action thus exacerbating the unequal treatment of workers in the same workplace.



NO EXECUTION OF JUSTICE DUE TO TRANSNATIONALITY



BANKRUPTCY AND COMPANY CLOSURE



LABOUR ABUSE EVEN AFTER LABOUR INSPECTION



WASHOUT SOLUTION TO AVOID LIABILITY



VOLATILITY OF THE SUBCONTRACTING COMPANIES



ILLEGAL WORKERS SUPPLY



4.

REMEDIES FOR TACKLING ABUSIVE SUBCONTRACTING AND SECURING WORKERS' RIGHTS

The current mix of different legal provisions at EU level and national levels has resulted in a fragmented approach allowing the circumvention of workers' rights. An ambitious EU legal framework on subcontracting is therefore necessary to ensure the effective protection of workers and their rights, while ensuring full respect for stricter national regimes and national labour market models. To be effective, legal measures should aim at reconstructing the link between power and profits, on the one hand, and risks and responsibilities, on the other.

- ▶ **Joint and several full chain liability** is key to strengthening the respect for and enforcement of workers' rights in subcontracting chains. Introducing a full chain liability would promote diligent choices of subcontractors by companies and public entities and would provide workers with better possibilities to claim their rights in case of violations linked to the payment of wages, social security contributions and taxes, undeclared work, health and safety, and the rights to organise and bargain collectively. To be effective, rules establishing liability throughout the chain should avoid escape clauses building on vague reporting mechanisms which liberate the client and the contractor(s) from legal responsibility for the risks generated by their economic activities.
- ▶ **Workers' rights to information, consultation and board-level participation** should be strengthened in subcontracting chains, as it contributes to increased workplace democracy, through monitoring of and

influence on corporate behaviour. Given workers' expertise on site, their involvement is essential in the oversight of subcontracting supply chains. To be effective, these rights need to be complemented with accessible mechanisms for legal redress and recovery for workers and their representatives.

- ▶ **Limiting the length of the subcontracting chain** is crucial for ensuring more transparency and control. Limiting the possibilities for companies to contract out do not constitute unlawful restrictions of economic freedoms, but on the contrary are necessary to ensure the protection of workers and fair competition in the internal market.



RACING ARENA CASE

The Racing Arena case concerns a construction site for a rugby stadium in Nanterre (France). Workers posted to the construction site were not duly paid and had to do a considerable amount of extra-hours. In this case, the main issue concerned the role and the responsibility of the main contractor and the client. The French labour law establishes a monitoring system (*devoir de vigilance*) that, if respected, rules out any joint liability of the main contractor and the client. Consequently, the posted workers still struggle to receive their wages. The case illustrates the harmful effects of cascading subcontracting operations in which the instructing companies benefit from maximum flexibility while bearing no responsibility.



LABOUR ABUSE
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WASHOUT SOLUTION
TO AVOID LIABILITY



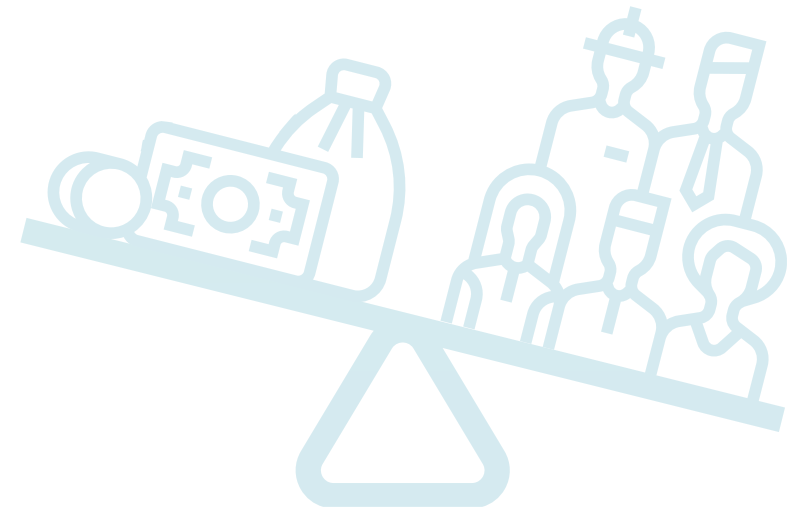
VOLATILITY OF THE
SUBCONTRACTING
COMPANIES



NO EXECUTION
OF JUSTICE DUE TO
TRANSNATIONALITY

- ▶ Subcontracting as a means to circumvent **applicable collective agreements** must be tackled to ensure all workers in the same workplace and in the same activity enjoy equal working conditions. A collective agreement that binds the main contractor or client company should be applied throughout the subcontracting chain, in particular where the collective agreement is universally applicable and the sector of activity of the contractor and the subcontractors is the same.
- ▶ **Mandatory non-financial reporting** should introduce a common reporting standard with minimum requirements. Standards should be well defined in law in line with the UN Guiding Principles on Business and Human Rights, ILO core labour standards and OECD Guidelines for Multinational Enterprises. They should be in full respect of workers' rights, as anchored in the European Treaty, the Charter of Fundamental Rights of the EU and the EU secondary legislation. Detailed reporting standards and practices should be developed with the involvement of trade union representatives.
- ▶ Prior to outsourcing work, the main contractor or leading undertaking should be obliged to verify the genuine **activity of the subcontractor**, its social record and compliance with applicable regulation. EU-wide blacklisting of unreliable subcontractors could facilitate such verification but would require detailed company information (e.g. on disciplinary or administrative actions, criminal sanctions, decisions on fraudulent practices, insolvency, bankruptcy) and a well-functioning system for data exchange.
- ▶ To fight letterbox companies and tactical insolvencies, compulsory **solvency guarantees** that secure the payment of wages, social security payments and other social obligations should be part of the framework regulating subcontracting;
- ▶ Another remedy to secure workers' rights is to **extend the circle of responsible employers**. Some member states hold a person who directs and controls the workers' activities accountable as a de facto employer. Consequently, whoever organises the production procedure can bear the duties linked to the contract of employment.

- ▶ Social clauses in **public procurement** must ensure that public money does not finance abusive subcontracting. Conditionalities should empower procuring entities to request indications from tenderers in their bids of any envisaged subcontracting, to impose limitations on the number of subcontractors, and to disregard bids from tenderers found to engage in artificial arrangements and social dumping.
- ▶ To fight workers' exploitation, it is necessary to **strengthen the capacity of inspections**, promoting cooperation among competent authorities at national and European level, including with the involvement of social partners. In transnational cases, the European Labour Authority must play an important role in enforcing workers' rights.





5.

THE ROLE OF TRADE UNIONS IN TACKLING UNFAIR SUPPLY CHAINS

The designation of workers' representatives in complex organisations is essential to securing workers' rights. The lack of workers' representatives in the subcontracting chain threatens the effectiveness of monitoring obligations imposed on the client and the contractor(s). In the absence of workers' control, employers can easily claim the fulfilment of such obligations through non-binding declarations and assessments carried out by the leading company.

There are positive examples at national level, where the role of workers' representatives in the organisation of the client or the contractor(s) has been strengthened either by means of legislation or sectoral collective agreements. This includes e.g. guarantees for these workers' representatives to obtain information about subcontractors and working conditions in the supply chain. The right of trade unions to access information on the subcontracting chain, combined with stronger provisions on transparency, can provide important safeguards for the respect of workers' rights along the subcontracting and supply chain.

Securing workers' rights in global supply chains requires both workers' representatives at company level and national trade unions, as well as workers' representatives at client or contractor level. In fact, trade unions on site are often weak or controlled by the company management, while the workers' representatives at client or contractor level are too distant from the country where the supplier is based. It is therefore important to support the role of European and global trade unions in monitoring and promoting

the respect of collective labour rights in supply chains. For instance, Global Framework Agreements (GFAs) negotiated with unions set fair standards and conditions workers along the subcontracting chain. They can also pave the way for stronger dialogue between the companies and workers.

As subcontracting is increasingly used as a business model to escape employer liability, reduce labour costs and increase profits, it is necessary to create better tools and conditions for workers' representatives and trade unions to secure workers' rights in subcontracting chains. Therefore, information, consultation and participation rights must be at the centre of a European framework on subcontracting.



ITALPIZZA

Italpizza is based in Province of Modena (Emilia Romagna, Italy) and produces frozen pizzas. Today, the company's entire production cycle has been outsourced as well as the packaging, the logistics and the cleaning. Nevertheless, the main company exercises considerable power over its subcontractors who are often pushed to infringe labour regulations on working time, occupational health and safety, wages, etc. in order to be able to meet with the conditions imposed by Italpizza. The Italpizza case sheds light on volatile subcontracting companies and company forms serving to avoid employers' responsibilities. It also illustrates how prior certifications have hampered effective labour inspection and prevented workers' access to justice.



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