




Principal contractor liability for subcontractor debts involving wage payments & social insurance contributions

Germany

	<p>Summary</p> <p>With the introduction of a chain liability instrument, main contractors in all sectors are liable regardless of fault for the debts of subcontractors in the payment of minimum wages. In addition, there is a chain liability for social security contributions in three sectors, the construction industry, the meat industry and the courier, express and parcel delivery sector (CEP). The main legal bases are the Posted Workers Act (§ 14 AEntG), the Minimum Wage Act (§ 13MiLoG) and the Fourth Book of the Social Security Code (§ 28e SGB IV).ⁱ</p>
<p>Title of the practice in original language</p>	<p><i>Nachunternehmerhaftung für Mindestlöhne und Sozialversicherungsbeiträge</i></p>
<p>Name(s) of authorities/bodies/ organisations involved</p>	<ul style="list-style-type: none"> ▶ The Federal Ministry of Labour and Social Affairs;ⁱⁱ ▶ The customs authorities, specifically the Financial Control of Undeclared Work Unit (Finanzkontrolle Schwarzarbeit; <i>FKS</i>);ⁱⁱⁱ ▶ Labour Courts (Application <i>AEntG/MiLoG</i>); ▶ SOKA-BAU (Application of <i>AEntG/MiLoG</i> regarding leave scheme which is part of minimum wage in the construction sector); ▶ German Pension Insurance (Application § 28e <i>SGB IV</i>).
<p>Sectors</p>	<ul style="list-style-type: none"> ▶ Minimum Wage: <ul style="list-style-type: none"> ▷ MiLoG: all sectors; ▷ AEntG: all sectors with sector-specific minimum wage. ▶ Social Insurance Contributions: <ul style="list-style-type: none"> ▷ SGB IV: construction and courier, express and parcel delivery (CEP); ▷ GSA Fleisch in conjunction with SGB IV: meat industry.
<p>Target groups</p>	<ul style="list-style-type: none"> ▶ Minimum Wage:

	<ul style="list-style-type: none"> ▷ Main contractor and all subcontractors (directly targeted); ▷ All workers employed by a company established in Germany, as well as posted workers (indirectly targeted). ▶ Social Insurance Contributions: <ul style="list-style-type: none"> ▷ Sector-specific employer's direct contractor and subsidiary main contractor or other intermediate subcontractors (directly targeted); ▷ Sector-specific workers employed by a company established in Germany, as well as posted workers (indirectly targeted).
Purpose of measure	Prevention

	<p>Aims and objectives</p> <p>The legislation was put in place to protect workers from abusive employment practices and to ensure fair competition.^{iv} According to the legislator, the regulations are intended to strengthen the actual effectiveness of the minimum wage and the payment of social security contributions.</p>
<p>Background context</p>	<ul style="list-style-type: none"> ▶ Against the backdrop of illegal activities in the construction industry, German liability law was introduced in the early 2000s, which originally only applied to the construction sector. In 2002, Germany therefore adopted Section 28e of the Fourth Book of the German Social Security Code to "combat illegal employment and undeclared work" and ensure "that the main contractor ensures that subcontractors meet their obligations to pay social security contributions". The so-called joint and several subcontractor liability for social security contributions was extended to the meat industry in 2017 and to courier, express and parcel delivery (CEP) in 2020;^v ▶ In 2015, the Minimum Wage legislation was implemented, making the contracting company (i.e. the main contractor or the company receiving the services) liable for infringements of minimum wage regulations by subcontractors/service providers. If the latter do not pay their employees the minimum wage, it follows from the provision of § 13 MiLoG in conjunction with § 14 AEntG that a contractor who commissions another contractor to provide services is liable for the obligation of this contractor, another subcontractor or a commissioned hirer to pay an employee the collectively agreed minimum wage like a guarantor who has waived the defence of advance action.



Key objectives of the measure

General Objective:

- ▶ To prevent the abuse of workers' rights and prevent unfair business competition.

Specific Objectives:

- ▶ To deter infringements of minimum wage and social security payment legislation;
- ▶ To encourage main contractors in their own interest to ensure that the subcontractor fulfils its obligations regarding payments when selecting a subcontractor (joint and several liability).

Main activities


Minimum Wage:

- ▶ The principal contractor's liability applies to the entire subcontractor chain (joint and several liability).^{vi} This means that workers employed anywhere along the subcontracting chain can assert a wage claim against the main contractor. The employer, intermediary subcontractor, or main contractor cannot reject the worker's claim, and the worker can sue them simultaneously (unconditional liability)^{vii};
- ▶ There is no administrative procedure for enforcing a wage claim. It must be asserted by the employee before the labour court in a civil law proceeding;^{viii}
- ▶ The counselling service, Fair Mobility (*Faire Mobilität*^{ix}), provides multilingual legal consultation and litigation guidance to workers as often they are not familiar with German law or setting up a wage claim, especially posted workers. Legal representation, however, must be provided privately or by the trade union as Fair Mobility cannot represent workers in court;^x
- ▶ Any violation of the minimum wage obligations may result in administrative sanctions. Fines of up to EUR 500 000 can be imposed on the principal contractor by the public authorities, and companies can find themselves excluded from public projects and orders.

Social Insurance Contributions:

- ▶ The subcontractor liability for social insurance contributions was introduced in the construction (2002), meat (2017), and courier, express and parcel delivery (CEP, 2020^{xi}) sectors;
- ▶ It provides for liability of social security contributions against the employer's contractor and is enforced by the social

	<p>administration (for instance, the health insurance institution or pension fund), not privately enforced by the worker;</p> <ul style="list-style-type: none"> ▶ Unlike liability for the minimum wage, not every contractor in the subcontracting chain can be held liable for the payment of social insurance contributions - only the employer's direct contractor. As this is a subsidiary liability, the administration must first request payment from the employer and can only turn to the contractor if this fails.^{xii} As a consequence, the main contractor or other intermediate subcontractors can only be held liable in exceptional cases; ▶ The law also includes exemptions from liability through the issuance of a so-called clearance certificate (<i>Unbedenklichkeitsbescheinigung</i>), or by submitting a so-called prequalification (<i>Präqualifikation</i>) - see Article 28e subsection 3b and 3f of the SGB IV. Liability is waived if the general contractor proves, that they could assume through no fault of their own, that the subcontractor would fulfil its payment obligation.^{xiii}
<p>Funding/organisational resources</p>	<ul style="list-style-type: none"> ▶ State funded

	<p>Outcomes</p> <p>General contractor liability for social security contributions in the construction industry has proven to be an instrument for promoting compliance with statutory regulations in connection with the provision of construction services - particularly in terms of curbing undeclared work and illegal employment.^{xiv} A similar effect may be expected for other sectors.</p>
<p>Achievement of objectives</p>	<ul style="list-style-type: none"> ▶ So far there are no official figures on the effectiveness of the law but feedback from trade unions have confirmed an initial positive effect in the CEP sector; an evaluation of the regulations is planned as part of a report by the federal government on the impact of the measures by the end of 2023;^{xv} ▶ A report on the impact of the law in the construction sector concluded that it has prevented a rise in avoidance of payment of social security contributions;^{xvi}
<p>Lessons learnt and success factors</p>	<ul style="list-style-type: none"> ▶ Being able to hold the main contractor liable and having the possibility to use legal assistance was considered an efficient approach to enforce the minimum in subcontracting chains wages, especially for posted workers. It can therefore be



	<p>assumed that as a result of this approach, few cases end up in court as disputes are often solved beforehand;^{xvii}</p> <p>► A major challenge for the effectiveness of the legal regulations lies in informing employees - especially those posted from foreign companies - about their rights. Raising awareness and overcoming the language barrier is therefore seen as an important prerequisite for the effective implementation of the law.</p>
Transferability	<p>The practice is transferable. For effective implementation in other sectors or Member States, relevant legislation needs to be put in place.</p>

Further information

Contact	<p>Florian Schierle, Head of Division, European Employment and Social Policy, Federal Ministry of Labour and Social Affairs</p> <p>Email: Florian.Schierle@bmas.bund.de</p>
Useful sources and resources	<p>The Minimum Wage Act (Mindestlohngesetz, MiLoG):</p> <p>https://www.gesetze-im-internet.de/milog/BJNR134810014.html</p> <p>National Posting of Workers Act (Arbeitnehmer-Entsendegesetz, AEntG):</p> <p>https://www.gesetze-im-internet.de/aentg_2009/_14.html</p> <p>Social Security Code (SGB) Fourth Book (IV) on payments of social security contributions by subcontractors:</p> <p>https://www.gesetze-im-internet.de/sgb_4/_28e.html</p>

ⁱ The key legislation includes Article 14 of the national Posting of Workers Act (Arbeitnehmer-Entsendegesetz (AEntG)) in conjunction with Article 13 of the Minimum Wage Act (Mindestlohngesetz (MiLoG)) and applies to all economic sectors. Article 28e of the Social Security Code (SGB) Fourth Book (IV) also ensures that principal contractors in three sectors, construction (since 2002), meat industry (since 2017) and courier, express and parcel delivery (CEP, since 2020) are held liable for unpaid social security contributions of subcontractors.

ⁱⁱ The Federal Ministry of Labour and Social Affairs website (BMAS homepage) is available at <https://www.bmas.de/EN/Home/home.html>

ⁱⁱⁱ The FKS pursues a holistic inspection approach, so that every inspection of a company includes a minimum wage inspection in accordance with the Minimum Wage Act in addition to the inspection of the payment of social security contributions. Available at:

<https://www.bundestag.de/resource/blob/656692/e0a3b5fe100e96c300da29aa7dee7fec/WD-6-060-19-pdf-data.pdf>.

^{iv} European Platform tackling undeclared work, *Innovative approaches to tackle undeclared work in the road transport sector: Report from the Platform webinar on November 29, 2022 of the European Labour Authority (ELA)*. Available at: <https://www.ela.europa.eu/sites/default/files/2023-02/Webinar-report-innovative-approaches-to-tackle-undeclared-work-in-the-road-transport-sector-%282022%29.pdf>.

^v *Ibid.*

^{vi} The basis of liability is the German general minimum wage and, where applicable, the sector-specific minimum wage. Cf. *European Platform tackling undeclared work (2022)*, *op cit.*

^{vii} *Ibid.*

^{viii} See https://www.zoll.de/DE/Fachthemen/Arbeit/Mindestarbeitsbedingungen/Klagerecht-Arbeitnehmer/klagerecht-arbeitnehmer_node.html.

^{ix} Fair Mobility is financed by the German Ministry of Labour and Social Affairs and operated by the German Trade Union Federation. See, <https://www.faire-mobilitaet.de/internationaler-strassentransport>; <https://www.faire-mobilitaet.de/kurier-und-paketdienste>.

^x *European Platform tackling undeclared work (2022)*, *op cit.*

^{xi} Law to introduce subcontractor liability in the courier, express and parcel industries to protect employees (Parcel Messenger Protection Act). Available at: <https://www.bmas.de/DE/Service/Gesetze-und-Gesetzesvorhaben/paketboten-schutz-gesetz.html>.

^{xii} *European Platform tackling undeclared work (2022)*, *op cit.*

^{xiii} In order to relieve main contractors without neglecting the obligations of subcontractors, health insurance funds can issue a clearance certificate to the subcontractor who has so far duly paid the social security contributions. Anyone who concludes a contract with a company that can produce such a certificate is exempt from liability for the social security contributions even if, contrary to expectations, this company does not pay the contributions after all. See, <https://www.bmas.de/DE/Service/Presse/Meldungen/2019/sozialer-schutz-und-faire-loehne.html;jsessionid=62A8ECC0D6655B4085052F3236C75774.delivery1-replication>.

^{xiv} Report of the Federal Government on the effectiveness and scope of general contractor liability for social security contributions in the construction industry (Bundestagsdrucksache 17/11920). See, <https://dserver.bundestag.de/btd/17/119/1711920.pdf>.

^{xv} See <https://dserver.bundestag.de/brd/2019/0453-19.pdf>.

^{xvi} *Ibid.*

^{xvii} *European Platform tackling undeclared work (2022)*, *op cit.*