

Liability in subcontracting processes in the German construction sector

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Introduction

My report identifies and describes regulation in liability in subcontracting processes in Germany

The focus is on liability arrangements concerning:

- wages and leave fund contributions,
- social security contributions,
- wage taxes.



Number of employees in the German construction sector with minimum wages

Approximate 700.000 employees in 70.000 firms in the building industry

Approximate 100.000 employees in 22.000 painting and varnishing firms

Approximate 52.000 employees in 11.500 roofing firms

Approximate 10.000 employees in 1.500 demolition firms

Approximate 270.000 employees in 78.000 electrical installation firms



Minimum wages for workers in the construction sector

building:

wage group 1*:	West-Germany	10,70 €/h
wage group 2:	West-Germany	12,85 €/h
wage group 1*:	East-Germany	9,00 €/h
wage group 2:	East-Germany	9,80 €/h

*simple unskilled manual labour

roofer:

10,40 €/h



Minimum wages

painter and varnisher:

wage group 1*:	West-Germany	8,05 €/h
wage group 2:	West-Germany	11,05 €/h
wage group 1*:	East-Germany	7,51 €/h
wage group 2:	East-Germany	9,65 €/h

electrician:

West-Germany	9,55 €/h
East-Germany	8,05 €/h



Sectors protected by the AEntG

- building industry (since 1999)
- building cleaning services (since 04/2007)
- postman/mailman services (since 12/2007)

In future:

- security services
- special miner work in mining
- laundry services for clients in objects (e.g. hotels)
- waste management including street-cleaning and street winter services
- services of vocational and further training



Chain liability

In Germany: rules on liability in a subcontracting chain cover the employers obligations to:

- withhold tax on remuneration for building service:
Art. 48, 48a EStG (Income Tax Act)
- pay social security contributions: Art. 28e par. 2 s. 2, par. 3a et seqq. SGB (Social Security Code) IV, Art. 150 par. 3 SGB VII
- pay minimum wages and leave fund contributions – Art. 1a AEntG (Act on the Posting of Workers)



Historical background: Art. 48, 48a EStG

Art. 48, 48a EStG were introduced in 2001 against the background of increasing illegal activity in the building industry. Reasons i. a.

- removal of internal frontiers of the European Union
- increasing permeability of external frontiers



Historical background: Art. 28e par. 3a et seqq. SGB IV

- introduced in the year 2002 against the background of the particular significance of illegal employment and illicit work in the building sector
- during the 1990s there had been a dramatic increase of illegal employment and illicit work in the building sector



***Historical background:
Social funds payments and wages including holiday payments***

Art. 1a AEntG was introduced in January 1999 to fight the tendency in the construction sector to prefer subcontractors who kept their costs down by, i. a., not paying minimum wages and leave fund contributions. The sanction of a fine (up to 500.000 €) under Art. 5 par. 2 AEntG was not considered sufficient since the required negligence often could not be proved.

The rules - objectives

Art. 48, 48a EStG

- aim at preventing distortions of competition through illegal activity in the building industry, safeguarding legal jobs and securing tax claims
- do not establish a real chain liability but only concern the relation of the contracting partners (contractual liability), irrespective of whether the parties are part of and on which level are part of a subcontracting chain



The rules - objectives

Art. 48, 48a EStG

- says that the recipient of the service is not liable if the provider has presented him an exemption certificate (issued by a competent German Inland Revenue office) in whose legitimacy he could trust.



Art. 48, 48a EStG: Instruments and provisions

Personal scope:

- Recipients (clients) of the building work/service carried out by the provider (contracting party), relative to the tax on wages of the employees of the provider
- All workers employed by provider
- Inland Revenue

Territorial scope:

Applies throughout the country (covers also foreign contractors when active in Germany)



Art. 48, 48a EStG: Instruments and provisions

Preventive measures:

Obligation to take due care:

- recipient contractor may require from the contracting partner a valid exemption certificate
- if no certificate is submitted, the recipient party has to withhold 15 % of the remuneration paid to the provider and is responsible for the tax withholding and transferring it to the Inland Revenue



Art. 48, 48a EStG: Instruments and provisions

Sanctions:

The recipient party is liable for arrears of withholding taxes. This is seen as an administrative offence (a fine up to 25.000 € is possible).



The rules - objectives

Art. 28e SGB IV:

- aims at fighting illegal employment and illicit work
- joint and several liability only under certain conditions, like: the transaction aims at circumventing the law and only from a total value of building services of 500.000 € and above



The rules - objectives

Personal scope:

- principal and – under certain conditions – other contractors in the subcontracting chain
- all workers employed by provider
- competent health insurance collecting agencies



The rules - objectives

Territorial scope:

Applies throughout the country (covers also foreign contractors or agencies when they are active in Germany)

Preventive measures:

- Principal contractor may be exempted from liability if he shows to the competent authority proof of the reliability of the contracting party for instance by submitting valid certificates of good payment behaviour, contractual commitments or even own statements of the provider
- principal contractor has information obligation at request of the competent authority



The rules - objectives

Sanctions:

Recipient is liable for the social security contributions of the provider – subcontractor/temporary agency and also for delay-surcharges and interest.



The rules - objectives

Complaint mechanism for workers:

There is no complaint mechanism, but worker may inform the competent authority about the non-payment of social security contributions by the employer.



The rules - objectives

Problem 1:

The liability under Art. 28e par. 3a et seqq. SGB IV is ineffective and inefficient. Reasons are i. a.:

the limitation of the liability to building contracts with a value of more than 500.000 € (only 10% of the contracts in Germany) and the limitation of the liability to the immediate subcontractor, which could facilitate its circumvention, e. g. splitting the construction contract



The rules - objectives

Problem 2:

Jurisdiction of the Bundessozialgericht (Federal Social Court)
27th May 2008:

The rules of liability under **Art. 150 par. 3 SGB VII** concerning the personal accident insurance contributions are the same than under Art. 28e par. 3a et seqq. SGB IV

Conclusion:

The liability under article 150 par. 3 SGB VII shares now the inefficiency of the liability under Art. 28e par. 3a et seqq. SGB IV



The rules - objectives

There is hope:

The German Trade Union for the Building, Agriculture and the Environment (IG BAU) took the initiative for a reform of Art. 28e par. 3a et seqq. SGB IV and Art. 150 par. 3 SGB VII

Decision of the German Federal Government (18th Febr. 2009) on the basis of a compromise between **IG BAU** and the employers associations of the construction industry (**ZDB** and **HDB**):

- liability covers now building contracts with a value of 275.000 € and above



The rules - objectives

- Principal contractor may be exempted from liability only if the subcontractor is registered in the list of the „Verein für Präqualifikation in der Bauwirtschaft e.V.“ as a reliable enterprise, which includes a good payment behavior concerning the social security contributions, or if the subcontractor has presented valid certificates of good payment behaviour issued by the competent collecting agencies for social security contributions



The rules – objectives Art. 1a AEntG

Liability provisions for minimum wages and leave fund contributions

- Unconditional chain liability (i.e. joint and several liability)
- There is no need to first sue and try execution of rights against the direct contracting party

Art. 1a AEntG



The rules – objectives Art. 1a AEntG

Art. 1a AEntG stipulates:

„An undertaking which appoints another undertaking to provide work and services is liable in the same way as a guarantor who has waived the defence of prior recourse for the obligations of that undertaking, of any subcontractor and of any hirer of labour appointed by that undertaking or subcontractor concerning payment of the minimum wage to a worker or payment of contributions to a joint institution of the social partners under the second and third sentences of Art. 1 paragraph 1, Art. 1 paragraph 2, the second and third sentences of Art. 1 paragraph 3 or the fourth and fifth sentences of Art. 1 paragraph 3a.



The rules – objectives Art. 1a AEntG

Art. 1a AEntG stipulates (cont.):

The minimum wage for the purpose of the first sentence means the sum payable to the worker after deductions in respect of tax, social security contributions, payments towards the promotion of employment or other such social insurance payments (net pay).“



The rules – objectives Art. 1a AEntG

The AEntG should improve the carefulness of principal contractors when choosing their subcontractors, the protection of German SMEs against unfair competition by subcontractors from cheap-wage countries and combating unemployment on German labour market.

The AEntG wants to protect minimum wages and social funds payments (including holiday payments).



Collective holiday agreements of the German building industry protected by the AEntG

- Every worker in Germany is entitled to paid holidays (six weeks)
- The Federal Framework Agreement for the Construction Industry (BRTV-Bau) and the Collective Agreement on the Social Fund Scheme in the Construction Industry (Tarifvertrag über das Sozialkassenverfahren im Baugewerbe – VTV) are declared generally applicable
- These collective agreements respect the particular working conditions of construction workers (permanently changing building sites, dependence on weather conditions) which makes the work very different to the stationary industry.
- These particular collective agreements have to be observed by construction companies established in Germany and their workers



SOKA-BAU / AEntG

SOKA-BAU is a joint institution of the social partners of the German construction industry. The social partners and parties of the collective agreements are:

- Zentralverband des Deutschen Baugewerbes (ZDB)
- Hauptverband der Deutschen Bauindustrie (HDB)
- Industriegewerkschaft Bauen-Agrar-Umwelt (IG BAU)

SOKA-BAU has been entrusted with the responsibility to implement the holiday fund scheme on the basis of the AEntG and the collective agreements, BRTV-Bau and VTV



Personal scope:

- Principal and other contractors in the subcontracting chain (except private individuals, building owners and public institutions)
- Workers (also posted workers) employed by the subcontractor
- Joint institution of social partners regarding leave fund and holiday payments

AEntG

Territorial scope:

Applies throughout the country (covers also foreign contractors when active in Germany)



Preventive measures:

Obligation to take due care:

1. principal contractor should ask a written confirmation of the subcontractor that he and any other subcontractors in the chain will respect the sectors generally applicable collective agreement
2. in case of irregularities the principal contractor has an obligation to make further investigations
3. specific rules regarding public procurement
4. several self-regulatory instruments to limit the liability such as retainment of remuneration, declarations of workers concerned as evidence that subcontractor has paid the minimum wages etc.

Sanctions:

- Administrative fine up to 500.000 € for ignoring obligation to take due care (Art. 5 par. 3 AEntG)
- Principal contractor and any intermediary contractor above the defaulting subcontractor in the chain are jointly liable for back-payments to the workers concerned and/or to the leave fund (SOKA-BAU) (Art.1a AEntG)

Complaint mechanism for workers:

- Workers can sue the principal contractor or other contractors above the employer in the chain directly
- Trade unions and German labour court may provide legal aid/assistance
- The work council of the principal contractor has the right to inform the workers of the subcontractor about their rights

AEntG

Realized minimum wages/court proceedings 2004-2007

- European Migrant Workers Association (EVW) claimed minimum net wages with an amount of 1 Mio. € against the appointing contractors under Art. 1a AEntG
- IG BAU secured 200.000 €
- SOKA BAU asserted debts to the total amount of 18 Mio. €
- Thereof the guarantors paid about 10 Mio. € voluntarily
- 7,5 Mio. € had to be sued for in 625 court proceedings on the legal basis of Art. 1a AEntG



Summary AEntG

- According to Art. 1a AEntG all principal contractors in construction sector are directly liable for the payment of the minimum wages and the leave fund contributions by their direct subcontractors and further down the chain of subcontractors
- The worker and the leave fund can claim unpaid minimum wages/contributions directly from the principal contractors and do not have to start legal procedures against the subcontractor first
- The liability of the principal contractors is not based on fault and negligence



Summary AEntG

- The trade union IG BAU calls Art. 1a AEntG a best practice, employer associations would welcome a less far-reaching approach, namely a liability based on fault and negligence, but only concerning the leave fund contributions (will be solved by a reform this year)
- IG BAU, ZDB and HDB ask for a liability if construction service contracts are appointed by public institutions
- The ECJ and German Federal Courts have ruled that the AEntG liability provisions is not disproportionate and enhances, on an objective view, the social protection of (posted) workers

