

## ***EFFAT MODEL DIRECTIVE***

### **Proposal for a Directive laying down specific rules for fair working conditions with respect to subcontracting chains and labour market intermediaries**

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 153(2), point (b), in conjunction with Article 153(1), point (b), thereof,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Pursuant to Article 3 of the Treaty on European Union (TEU), the aims of the Union are, inter alia, to promote the well-being of its peoples and to work for the sustainable development of Europe based on a highly competitive social market economy, aiming to ensure full employment and social progress, a high level of protection and improvement of the quality of the environment, while promoting social justice and equality between women and men. Pursuant to Article 9 of the Treaty on the Functioning of the European Union (TFEU), the Union is to take into account, inter alia, requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, and the fight against social exclusion.
- (2) Pursuant to Article 8 of the TFEU, the Union, in all its activities, shall aim to eliminate inequalities, and to promote equality, between men and women.
- (3) Article 151 TFEU provides that the Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter (ESC), have as their objectives, inter alia, the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection and dialogue between management and labour.
- (4) Article 5 of the Charter of Fundamental Rights of the European Union (the 'Charter') prohibits forced labour and trafficking in human beings. Article 15 of the Charter provides that nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union. Article 20 provides for equality before the law. Article 27 of the Charter provides for the right of workers to information and consultation. Article 31 of the Charter provides for the right of every worker to working conditions which respect his or her health, safety and dignity.

- (5) The European Pillar of Social Rights (the 'EPSR'), proclaimed at Gothenburg on 17 November 2017, establishes a set of principles to serve as a guide towards ensuring fair working conditions. Principle No 5 of the Pillar recalls the principle of fair and equal treatment regarding working conditions, access to social protection and training. Employment relationships that lead to precarious working conditions shall be prevented, including by prohibiting abuse of atypical contracts. Principle No 6 of the Pillar reaffirms workers' right to fair wages that provide for a decent standard of living. Principle No 8 of the Pillar provides that the social partners are to be consulted on the design and implementation of economic, employment and social policies according to national practices and that they are to be encouraged to negotiate and conclude collective agreements in matters relevant to them, while respecting their autonomy and the right to collective action.
- (6) Abusive subcontracting practices and unregulated labour intermediation are increasingly used to reduce costs, escape employer liability, and circumvent applicable labour standards. The lack of effective labour inspections across the EU leads to insufficient compliance with, and enforcement of, existing rights.
- (7) To secure workers' rights across subcontracting chains the EU should set clear provisions to tackle abusive practices, strengthen liability and transparency, and ensure more robust individual and collective labour rights. Subcontracting should be driven by the need for specialised expertise or technical skills that are not available within a company, or to delegate non-essential tasks outside the main scope of its business. However, there is growing evidence that subcontracting is increasingly used to carry out core business operations. Examples include housekeeping or reception services in hotels, as well as deboning, cutting or slaughtering in slaughterhouses or subcontracting in construction and transport. The result is that these core activities are often performed on-site at the client's premises by workers of contractors or subcontracting firms that experience lower standards and more precarity.
- (8) After consulting with management and labour at EU level in accordance with Article 154(2) of the TFEU on the course of action to be adopted at EU level with regard to fair working conditions in subcontracting chains, the role of labour market intermediaries, and the frequency and effectiveness of labour inspections, the Commission considered that EU action was advisable.
- (9) 'Subcontracting' should be given a broad understanding so as to encompass any contractual arrangement whereby one undertaking entrusts to another the manufacture of goods, the supply of services or the performance of a given activity, to be provided by relying on the subcontractor's own business organisation. Therefore, the subcontractor must bear such risks and responsibilities as well as exercise the employer's powers of control and direction over its workforce.
- (10) Having evaluated the effectiveness and efficiency of the current Union social legislation, certain loopholes in the existing provisions and deficiencies in their enforcement have been identified, such as those concerning equal treatment for work of the same value at the same workplace.
- (11) The reduction of employer's responsibilities is a key factor in an undertaking's decision to have recourse to subcontracting arrangements. The separation of strategic decision-making from risks and responsibilities can facilitate the abuse or circumvention of applicable labour standards. Workers across subcontracting chains often perform the same tasks in the same workplace as directly employed workers. However, subcontracted workers tend to work longer hours, at a lower remuneration and under more precarious contracts. Working conditions at the bottom of long subcontracting chains are particularly exploitative, where the financial stability of economic operators is usually more fragile.

- (12) Member States should take appropriate steps to secure equal treatment for equal work and to promote direct employment, limiting subcontracting by prohibiting it for companies core activities.
- (13) Member States should define core business functions for each economic sector following an individual or joint request by the sectoral social partners, as agreed between the social partners or by agreement with the sectoral social partners.
- (14) It is urgent to replace the current fragmented approach to subcontracting chain liability with a general EU system of joint and several (full chain) liability covering both cross-border and domestic situations. The system should apply in full respect of existing, stricter national liability regimes.
- (15) In cases where accommodation is provided by a subcontractor or an intermediary, it should be organised independently from the employment contract to avoid any associated further dependency on the employer. Equally, Member States shall ensure that the termination of one contract does not automatically entail the termination of the other contract. Accommodation should respect quality standards and the related costs should remain limited.
- (16) Gangmaster practices and illegal labour intermediation are a major source of exploitation particularly in fraud sensitive sectors of the EU economy and need to be tackled.
- (17) Labour market intermediaries should be defined as a natural or legal person which provides services for matching offers of and applications for employment, without the labour market intermediary becoming a party to the employment relationships which may arise therefrom. These services include any activities relating to job seeking aimed to facilitate, inform, or regulate how workers are matched to employers, how work is accomplished, and how conflicts are resolved. The ILO Convention 181 on Private Employment Agencies should be considered a reference.
- (18) The creation of a community licence together with national registers for labour intermediaries helps in establishing fairer recruiting processes and tackle discrimination. Member States should require intermediaries to treat all workers involved in a recruiting process without discrimination based on nationality, sexual identity and orientation, religion, political opinion, or any other form of discrimination covered by international human rights instruments, as well as national laws and practices.
- (19) In order to act as labour market intermediary in the EU, labour market intermediary's directors should have not been convicted of a criminal offence relating in particular to exploitative working conditions, gangmaster practices and other forms of illegal labour intermediation or human trafficking. Moreover they should genuinely perform substantial activities, other than purely internal management and/ or administrative activities, in the Member State of establishment.
- (20) Evidence shows that labour enforcement authorities across the EU are understaffed and are low on resources. This means that controls occur less frequently and are not effective, particularly in certain sectors of the economy. Complaint mechanisms are an important tool to ensure targeted inspections and hold employers accountable, but they remain under-used and inaccessible, particularly by mobile and migrant workers.



PROPOSES THE ADOPTION OF THIS DIRECTIVE

## Chapter I.

### GENERAL PROVISIONS

#### *Article 1*

##### **SUBJECT MATTER**

With a view to achieve equal treatment at the workplace and tackle social dumping and labour abuses the purpose of this Directive is to:

- a. Improve working conditions in subcontracting chains across the European Union and promote direct employment relationships;
- b. Regulate the role of labour market intermediaries;
- c. Strengthen the frequency and bolster the effectiveness of labour inspections and control systems in the field of social and employment legislation and applicable labour standards.

This Directive shall be without prejudice to the full respect for the autonomy of the social partners, as well as their right to negotiate and bargain collectively.

#### *Article 2*

##### **DEFINITIONS**

For the purposes of this Directive, the following definitions apply:

- a. **‘subcontractor’** means any natural or legal person in the subcontracting chain including the main contractor and any sub-contractor, with exception to the client;

- b. **‘subcontracting’** means the arrangement under which a natural or legal person, called ‘the client’, entrusts to another natural or legal person, called ‘the subcontractor’, the manufacture of goods, the supply of services or the performance of a given activity, to be provided to the client or performed on his behalf by relying on the subcontractor’s own business organisation and workforce; for the purpose of this directive subcontracting covers also the relation between the client and the contractor;
- c. **‘subcontracting chain’** means a sequence of contractual arrangements in which a client engages one or more subcontractors. A subcontracting chain includes all tiers of subcontractors from the first tier subcontractor engaged by the client down to any lower tier subcontractors engaged by other subcontractors;
- d. **‘core business function’** means the activity of an undertaking that is central to its business operations and/or form part of its main production process or of the services it provides;
- e. **‘support business function’** means an ancillary or peripheral task or function that supports core business functions;
- £. **‘labour market intermediary’** means a natural or legal person that provides services for matching offers of and applications for employment, without the labour market intermediary becoming a party to the employment relationships which may arise therefrom; these services include any activities relating to job seeking aimed to facilitate, inform, or regulate how workers are matched to employers, how work is accomplished, and how conflicts are resolved.
- g. **‘Labour inspectors and controlling bodies’** means a natural or legal person, authorities and bodies responsible for compliance and enforcement of workers’ rights resulting from social and employment legislation and collective agreements.

### *Article 3*

#### **SCOPE**

This Directive applies to undertakings with operations in the internal market.

## Chapter II.

### SUBCONTRACTING CHAINS

#### *Article 4*

##### **PROHIBITION OF SUBCONTRACTING FOR CORE BUSINESS FUNCTIONS**

1. The subcontracting of undertakings' core business functions shall be prohibited.
2. Member States shall define the core business functions by sector following an individual or joint request by the sectoral social partners, as agreed between the social partners or by agreement with the sectoral social partners. The definition of core business functions per sector shall be reviewed at least every five years.
3. Core business functions shall be exclusively performed by workers in a direct employment relationship with the undertaking's owner.
4. Member States shall ensure that third parties or self-employed workers do not perform tasks directly related to a core business function.

#### *Article 5*

##### **SUBCONTRACTING OF SUPPORT BUSINESS FUNCTIONS AND LIMITATION OF THE SUBCONTRACTING CHAIN**

1. This Directive shall not preclude the subcontracting of support business functions if:
  - (a) the subcontracting is justified by the need for specialised skills or equipment, and;
  - (b) the subcontracting is not directly related to the performance of a core business function.
2. The performance of work by self-employed workers or any third parties shall be considered as subcontracting for the purpose of this Directive.
3. Member States shall ensure that, in the case of support business functions, the subcontracting chain should not be longer than two tiers.
4. Member States shall ensure that, for each and every subcontractor of a same client, the following information is publicly available and provided to workers' representatives:
  - (a) the full name, place of registration and legal representatives of the subcontractor, and;
  - (b) the nature of the business function performed by the subcontractor.

5. The information provided under paragraph 4 shall be updated with any changes that may occur during the period of subcontracting, such as a change in the identity of the subcontractor or a modification in the nature of the subcontracted business function.

#### *Article 6*

### **JOINT AND SEVERAL LIABILITY IN THE SUBCONTRACTING CHAIN**

Where the employer is a subcontractor, Member States shall ensure that the client and any subcontractor are jointly and severally liable to pay, at least:

- a. any sanction arising from a violation of the obligations imposed under this Directive, and;
- b. any back payments and compensation due to workers in application of national and EU law and/or applicable collective agreements including in case of unpaid wages, circumvention and evasion of social security contributions and taxes, violation of health and safety standards, violation of the rights to organise and bargain collectively.

#### *Article 7*

### **EQUAL TREATMENT FOR EQUAL WORK IN THE SAME WORKPLACE**

1. The working and employment conditions of workers employed along the subcontracting chain shall be, at the minimum, those that would apply if these workers had been recruited directly by the client to perform the same or similar tasks.
2. This Article is without prejudice to national and Union provisions and/or collective bargaining agreements reclassifying bogus self-employment into dependent employment relationships.
3. Without prejudice to Directive 2018/957, the applicable working and employment conditions of workers employed along the subcontracting chain are those laid down by law and/ or by collective agreement in the sector of reference and/or place where the work is carried out.

*Article 8*

**INFORMATION AND CONSULTATION RIGHTS**

1. Member States shall ensure that subcontractors inform their workers of the essential aspects of the employment relationship guaranteed by the client to its direct workers;
2. Member States shall ensure that subcontractors and labour market intermediaries inform workers of the essential aspects of the employment relationship that will apply to them at the workplace.
3. The information shall be provided in the worker's own language or a language they understand.
4. For the purposes of this Article, essential aspects of the employment relationship as well as timing and means of information shall at least be those laid down by Directive 2019/1152.
5. Without prejudice to applicable rights to information and consultation, Member States shall ensure that clients inform and consult workers' representatives in due course before finalising a decision to have recourse to subcontracting, on the circumstances justifying recourse to subcontracting, the intended duration of the subcontracting arrangements, the working conditions of workers employed across the subcontracting chain, the kind of activities and volume of the operations concerned and the number of workers involved.
6. Workers' representatives shall be entitled to hold at least one information and consultation session directly with the intended subcontractor(s).



## Chapter III.

### LABOUR MARKET INTERMEDIARIES

#### *Article 9*

#### **COMMUNITY LICENCE**

1. Labour market intermediaries providing services to one or several undertakings operating in the internal market shall have an effective and stable establishment in a Member State.
2. Labour market intermediaries shall be in possession of a valid Community licence. The Community licence shall be issued by the competent authorities of the Member State of establishment for a renewable period of up to 5 years and in accordance with at least the conditions laid down in Article 10.

#### *Article 10*

#### **MINIMUM REQUIREMENTS FOR ENGAGEMENT IN THE OCCUPATION OF LABOUR MARKET INTERMEDIARY**

1. Member States shall issue community licenses to labour market intermediaries established and/or operating on their territories only when at least the following cumulative conditions are fulfilled:
  - (a) the labour market intermediary has not been convicted for serious and/ or repeated infringements of:
    - i. applicable labour standards resulting from national and EU laws or collective agreements;
    - ii. social security contributions;
    - iii. tax law.
  - (b) the labour market intermediary or one or several of its directors have not been convicted of a criminal offence relating in particular to:
    - i. exploitative working conditions;
    - ii. gangmaster practices and other forms of illegal labour intermediation;
    - iii. human trafficking within the meaning of Directive 2011/36;
  - (c) the labour market intermediary genuinely performs substantial activities, other than purely internal management and/or administrative activities, in the Member State of establishment.

2. In order to determine whether a labour market intermediary genuinely performs substantial activities other than purely internal management and/or administrative activities within the meaning of subparagraph 1 (c), Member States shall make an overall assessment of all factual elements characterising those activities. Such elements shall include in particular:
  - (a) the place where the labour market intermediary uses office space, pays taxes and social security contributions;
  - (b) the place where workers are recruited and the Member State in which they perform their tasks;
  - (c) the number of contracts performed and/or the size of the turnover realised in the Member State of establishment.

#### *Article 11*

### **NATIONAL ELECTRONIC REGISTERS**

1. For the purposes of the implementation of this Directive, each Member State shall keep a national electronic register of labour market intermediaries in possession of a valid Community licence. The data contained in that register shall be processed under the supervision of a public authority designated for that purpose.
2. National electronic registers shall contain at least the following data:
  - (a) the name, the legal form of the labour market intermediary and the sector of activity;
  - (b) the address of its establishment, or in case the address of a natural person carrying out the activity of labour market intermediary;
  - (c) as appropriate, the names of its directors and the name of a legal representative;
  - (d) the number of people employed in the undertaking;
  - (e) the date of delivery and the date of expiration of the Community licence;
  - (f) the risk rating of the labour market intermediary pursuant to Article 18;
  - (g) the data referred to in points (a) to (f) shall be publicly accessible, in accordance with the relevant provisions on personal data protection.
3. Member States shall take all necessary measures to ensure that all data contained in the national electronic register are kept up-to-date, are accurate, accessible for other Member States and shared with the European Commission.

## Chapter IV

# FAIR RECRUITING, DECENT ACCOMODATION AND DATA PROTECTION

### *Article 12*

#### **FAIR RECRUITEMENT**

1. Member States shall ensure that employers, including subcontractors, labour market intermediaries or any other natural or legal person shall not impose fees nor costs on workers during the recruitment process or during the performance of the work activity. Prohibited fees, costs or wage deductions shall include but are not limited to:
  - (a) recruitment fees for job placement services;
  - (b) payment for application processing, interviews, or any other stage of the recruitment process including travel;
  - (c) fees for training programs as a condition for job placement;
  - (d) travel costs;
  - (e) costs or deductions for uniforms or working tools;
  - (f) or any other fees, such as transport, service provision, etc.
2. Member States shall ensure that employers, including subcontractors, labour market intermediaries or any other natural or legal person treat workers involved in a recruiting process without discrimination based on nationality, sexual identity, religion, political opinion, or any other form of discrimination covered by international human rights instruments, as well as EU and national laws, collective agreements and practices.

### *Article 13*

#### **DECENT ACCOMODATION**

1. Where, in accordance with national law and practice, an employer, including a subcontractor, a labour market intermediary or any other person provides accommodation to workers away from their regular place of residence, Member States shall ensure that the conditions of accommodation respect the quality standards in force in the Member State in whose territory the workers perform their tasks and that the costs remain limited, and respect the principles of non-discrimination and proportionality.
2. The contractual arrangements governing worker accommodation shall be kept legally distinct from the employment contract so that the termination of one contract does not automatically entail the termination of the other contract.

*Article 14*

**DATA PROTECTION RIGHTS**

1. Member States shall ensure that employers, including subcontractors, labour market intermediaries or any other natural or legal person:
  - (a) inform workers when data relating to them is recorded or is planned to be forwarded to third parties. The information provided shall specify the identity of the authority responsible for processing the data, the type of data processed and the reasons for such action;
  - (b) all workers have a right of access to data relating to them held by the authority responsible for processing those data. That right shall be exercisable at no cost, without constraint and at reasonable intervals;
  - (c) all workers whose data are incomplete or inaccurate have the right to have those data rectified, erased or blocked;
  - (d) all workers have the right to oppose, on legitimate grounds, the processing of data relating to them. Where there is justified opposition, the processing may no longer involve those data;
  - (e) undertakings comply, where applicable, with the relevant provisions on the protection of personal data.
2. This Directive shall be without prejudice to Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.

*Article 15*

**PLACEMENT BY PUBLIC EMPLOYMENT SERVICES**

1. Member States may determine, following the consultation with sectoral social partners, that the placement of certain categories of workers shall only be carried out by public employment services.
2. Member States may consider that placement and recruitment services constitute a service of general economic interest justifying a restriction of competition in accordance with Article 106 of the Treaty on the Functioning of the European Union.

## Chapter V.

### EFFECTIVE LABOUR INSPECTIONS

#### *Article 16*

##### **FREQUENCY OF LABOUR INSPECTIONS**

1. Member States shall take the necessary measures to ensure adequate funding and resources for effective labour inspections and controls on working conditions.
2. Member States shall ensure that at least 8 % of employers in each economic sector are inspected or controlled every year on aspects concerning working and employment conditions.
3. This article shall not create any prejudice to those Member States where inspections are carried out by social partners or with the involvement of social partners.

#### *Article 17*

##### **QUALITY OF LABOUR INSPECTIONS**

1. Member States shall ensure that labour inspectors and controlling bodies provided with proper credentials are empowered:
  - (a) to enter freely and without previous notice any workplace liable to inspection;
  - (b) to enter any premises which they may have reasonable cause to believe require inspection;
  - (c) to carry out any examination, test or enquiry which they consider necessary in order to ensure that the applicable labour standards are being strictly observed, and in particular:
    - i. to interrogate, alone or in the presence of witnesses, the employer or the workers on any matters concerning the application of the legal provisions and applicable labour standards;
    - ii. to require the production of any books, registers or other documents relating to conditions of work, in order to see that they are in conformity with the legal provisions, and to copy such documents or make extracts from them;
    - iii. to communicate with other authorities and bodies and to cross check also using digital tools relevant data with other public administrations, including social security contributions, production levels, or land extension in order to identify potential workers' rights violations where to concentrate controls efforts.
  - (d) to access national registers of other Member States where an inspection raises cross-border concerns, informing the European Labour Authority.

*Article 18*

**RISK RATING SYSTEM**

1. Member States shall introduce a risk rating system for employers, including subcontractors, labour market intermediaries or any other natural or legal person, based on the number, gravity and frequency of occurrence of infringements to collective agreements, labour law, health and safety standards, social security rules and tax law.
2. Employers and intermediaries with a high risk rating shall be inspected more closely and more often.
3. Member States shall communicate annually to the European Commission and to the European social partners at cross-sectoral and sectoral level the information contained in their national risk rating system.

## Chapter VI.

### FINAL PROVISIONS

#### *Article 19*

#### **PENALTIES**

Member States shall ensure that any infringement of the obligations laid down by this Directive are punishable by effective, proportionate and dissuasive sanctions.

Sanctions shall at least include:

- a. financial penalties that are proportionate to the nature, gravity and duration of the undertaking's infringement and which shall increase in amount according to the number of affected workers and the undertaking annual turnover;
- b. orders excluding the undertaking from an entitlement to some or all public benefits, aids or subsidies, public procurement procedures, EU funds managed by the relevant Member States, for a period of up to three years;
- c. orders excluding the undertaking from participating in a public contract as defined in Directive 2014/24/EU of the European Parliament and of the Council.

#### *Article 20*

#### **DEFENCE OF RIGHTS**

1. Member States shall ensure that judicial and/or administrative procedures for the enforcement of obligations under this Directive are available to all workers, including third country nationals workers, who consider themselves wronged by failure to apply the principle of equal treatment to them.
2. Member States shall ensure that trade unions and other legal entities, which have a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.
3. The central management shall bear the judicial costs incurred in carrying out the judicial and/or administrative procedures, the costs of legal representation and subsidiary costs.

4. Member States shall establish necessary measures to protect workers from retaliation or any other adverse consequences resulting from a complaint lodged with the aim of enforcing compliance with the rights provided for in this Directive. The measures shall include the creation of accessible and effective complaint mechanisms.
5. Labour inspectors and controlling bodies shall not report the identity and data of workers identified during controls to migration enforcement authorities.

#### *Article 21*

### **AUTONOMY OF SOCIAL PARTNERS**

This Directive is without prejudice to the full respect for the autonomy of the social partners, as well as their right to negotiate and conclude collective agreements.

#### *Article 22*

### **NON-REGRESSION CLAUSE AND MORE FAVOURABLE PROVISIONS**

1. This Directive shall not constitute valid grounds for reducing the general level of protection already provided to workers within Member States, in particular with respect to subcontracting, labour intermediation and controls on working conditions.
2. This Directive shall not affect Member States' prerogative to apply or to introduce laws, regulations or administrative provisions which are more favourable to workers, in particular in relation to subcontracting and licencing, registration or certification requirements.
3. This Directive is without prejudice to any rights conferred on workers by other legal acts of the Union.

#### *Article 23*

### **REPORTS**

Every three years, the European Commission shall submit a report to the European Parliament and the Council on the practical implementation of the provisions of this Directive, indicating the viewpoints of the social partners at national and European level.