

## focus RECHT

# The Liability of the Principal pursuant to the German Minimum Wage Act (Mindestlohngesetz; "MiLoG")

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In order to enforce the statutory minimum wage in practice, the legislator has introduced in Sec. 13 MiLoG, by referring to the provisions of Sec. 14 Posting of Employees Abroad Act (“AEntG”), an element of **strict** liability burdening the principal:

*“A business placing an order with another business for the provision of work and labour and/or services shall be **liable** for the duty of such contractor, or any subcontractor, or any supplier of labour commissioned by that contractor or subcontractor to pay the minimum wage to workers or to pay contributions to a joint establishment of the collective-bargaining parties pursuant to Sec. 8 **as would be a grantor** who has waived its right to the benefit of discussion. The minimum wage within the meaning of the first sentence refers only to the amount payable to workers after deduction of taxes and contributions for social security and promotion of labour or corresponding social-security expenses (**net wages**).”*

Hence, the following persons may bring forward claims against the principal:

- workers of its **contractor**;
- workers of **subcontractors** used; and
- **temporary workers** used by a contractor or the subcontractors.

These workers do not have to approach their own employer first, they are actually entitled to choose to claim from the principal(s) directly.

It is currently being discussed whether the provisions of Sec. 14 AEntG could be applied in a more restrictive manner, taking into account prior rulings of the Federal Labour Court<sup>1</sup> and the Federal Constitutional Court<sup>2</sup> when assessing a businesses’ liability to pay the minimum wage. This would mean that liability might apply only in the event that a business fulfils its performance obligations **towards a third party** not by using its own workforce, but through downstream businesses.

Then, liability would not extend to contracts for the fulfilment of so-called own purposes (*e.g. office cleaning, canteen, maintenance of own machinery and equipment*).

Even the Federal Ministry for Labour and Social Affairs, BMAS, assumes that the provisions regarding the liability of the principal in connection with the payment of the minimum wage could be interpreted quite narrowly and that a claim could be asserted only if

- 1 a business
- 2 undertakes to fulfil an own contractual duty to perform work or services for a customer and
- 3 in order to fulfil this duty places an order with another business.

**Yet, this plausible and logical view has not yet been finally confirmed by the courts.**

And the principal will, in the event that it indeed incurs liability, be interested in claiming back from the respective contractor any net wages paid. The rule contained in Sec. 14 AEntG refers intrinsically to the bases of the laws on guarantees (“as would be a *grantor*”).

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<sup>1</sup> cf. German Federal Labour Court (BAG) judgment dated 28 March 2007, ref.: 10 AZR 76/06

<sup>2</sup> cf. Federal Constitutional Court (BVerG), decision of 20 March 2007, ref.: 1 BvR 1047/05

When a principal incurs liability through a claim of a worker from a hired contractor, Sec. 774(1) of the German Civil Code, BGB, applies, according to which a worker's claim regarding the payment of the net remuneration is transferred to the principal **by operation of law**. Hence, the principal is entitled to have recourse to the contractor in question. If, however, the contractor is insolvent, such remedy will be unavailable in practice.

Furthermore, if necessary, it is recommended to adopt similar measures as in the case of issues related to adherence to collective-bargaining agreements, and limit the liability risk, whereas the suggestions mentioned will be difficult to implement entirely due to the contrary views of the negotiating parties.

- When choosing the contractor, only offers should be considered that take into account the duty to pay the minimum wage. The services should also be offered at an economically reasonable price, even when the subcontractor pays the minimum wage.
- These might be agreements between the principal and the contractor according to which further subcontractors can only be included if the principal so agrees beforehand.
- The principal could demand from the contractor in the contract that its subcontractor, and any subcontractors of the subcontractor, would pay the minimum wage. At the same time, the contractor may also be obliged to provide monthly evidence on the payment of the minimum wage by its own business and its subcontractors, if any, including the right to inspect anonymized payroll excerpts. Non-compliance with these accountability requirements could be made subject to a contract penalty. But it is then also necessary to regularly inspect and examine the records provided, which in practice will be limited to spot checks only.
- Other terms may provide for a contract penalty or damages, hold-harmless clauses and the principal's right to terminate the contract.
- The liability risk can be further contained if a collateral is provided e.g. as retention of monies and bank bonds.

Yet, the ensuing administrative expense must be kept at bay.

**And it is also necessary to assess whether one would be prepared to accept the same obligations towards one's own principals as one would readily impose on own contractors.**

**In addition, it has to be taken into account that any contractual obligation accepted in the position of contractor is often only reasonable if suchlike conditions can also be imposed on subcontractors.**

Yet it is important to know that the responsibility pursuant to Sec. 14 AEntG **cannot be excluded** by way of contract between the businesses concerned. Such an agreement would be unreasonable for potential claimants within the meaning of Sec. 3 MiLoG as they would be deprived of a statutory right to recourse.

The same applies with respect to **waivers** from the contractor's staff. Such declarations are **prohibited** pursuant to Sec. 3 first sentence MiLoG.

In this connection, the principal will not only be responsible, but will, in addition, face tough **fin**es of up to EUR 500,000. Sec. 21(2) MiLoG provides, among other things, that a **principal acts illegally** if it commissions extensive works or services by placing an order with a business from which it **knows or negligently does not know** that the business does not pay, or does not pay in due time, the minimum wage when the order is executed and/or uses subcontractors that would not comply, or would not comply in due time, with their duty to pay the minimum wage. Also in this respect, principals may wish to provide for clarity in the contract.

Finally, much will depend on the development of case law to be able to answer other questions that may occur.