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The Effects of EU Law on the Social and Economic Goals of Europe 2020: A Decision Theoretic Approach to Wage Liability Regimes in Modern Europe

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A. Introduction

In the current European social and political climates there is much focus on forming the European Union into a more integrated, sustainable, and globally competitive economic market. This ideology is especially reflected in the aims of the EU 2020 agenda. With regards to these economic goals, it is very important that European law protects the economic freedoms of all participants in the internal market. Considering the alternative and concurrent 2020 goals of social integration, social cohesion, and human rights protection, EU law is also bound to protect the rights of workers and the public interest.

Sometimes these two proposed sets of goals give rise to conflicts in the political, economic, and legal spheres. On the one hand, with the aim of furthering the proposed political goals of economic sustainability, economic integration, and competitive economic growth on the world stage, it is certainly important to protect the economic freedoms of internal market agents. To this end, proper legislative structures should impede economic liberties as little as possible. On the other hand, paying mind to the concurrent aims of social integration, public good, and basic worker rights, legislation should promote the protection of liberties through normative standards. Directly at the intersection of these issues are cross-border service providers, posted workers, national authorities of EU Member States, and the respective representatives of these stakeholders in the context of subcontracting processes.[1] In cross-border contexts the principal contractor or part of its subcontractors are based in a foreign Member State and often employ posted workers.[2] It is in these

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[1] The practice of subcontracting is sometimes referred to as outsourcing. The process involves three principal partners: (1) The client who orders the work; (2) the principal contractor who in part performs some work and in part outsources part or all of the work from the client; and (3) the subcontractor who receives the work from the contractor, and then either performs that work or in part outsources it to another lower tier of subcontractor.

[2] It is helpful to think of subcontracting as links in a chain. The client resides at the top of the chain. The client, either an individual or a business entity, is the ultimate recipient and beneficiary of a contracted-for work.

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situations, where (sub)contractors post workers to other Member States, that we are interested in. More accurately, we are interested in the legal structures that bind these situations.

Within the political, economic, and legal spheres there are two primary ideals for which EU law is clearly obligated to uphold: (1) It must guarantee and foster the economic freedoms of business, and (2) it must protect the basic rights of workers.

While these concepts are pragmatically at the roots of the social, political, and economic mechanisms with which legislative bodies create and enforce law, they also bear significant relation to the philosophical underpinnings of rational and moral decision-making. The egalitarian ideals on which legislative structures are built—justice, fairness, and equal access to rights and freedoms—all have a tenable basis in moral philosophical discourse. Within this discourse, more recently, there has been much work in decision theory to link the fields of normative philosophy, rationality, and economic strategy.[3] It is in this same decisional theoretic vein that this essay will draw its conclusions. By linking worker's rights to minimum wages, and using wage liability (further explained below)[4] as a vehicle to enforce such rights, we can adequately illustrate a *rights based* model of preference. At the same time, focus on wage liability from the contractor's perspective will provide a platform for an *economic freedoms based* viewpoint. With these two perspectives and their basic assumptions, we can frame the discussion of a worker's rights, or an economic agent's freedoms, more generally in terms of the preference structures they generate within a strategic game model. The aim is to use these general preference structures and the game model as a backdrop for a more concrete discussion of the interplay between freedoms and rights, specifically within wage liability legislation.[5]

Typically, the client contracts with a principal contractor, the next link in the subcontracting chain, for work to be done. Any further links are merely sub or intermediary contractors or temporary work agencies. *See infra* Part C.

According to EU Law, a posted worker is defined as a person who is employed in one EU Member State but sent by his employer on a temporary basis to carry out his work in another Member State. For example, in situations where a service provider wins a contract in another Member State and sends his employees there to carry out the contract. It is always in the framework of a transnational provision of services, where employees are posted, or sent to work, in a Member State other than the one they usually work in. Posted workers are seen as a distinct category not including migrant workers who go to another Member State to seek work and are employed there.

[3] *See, e.g.*, Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979); BRIAN SKYRMS, EVOLUTION OF THE SOCIAL CONTRACT (1996); CRISTINA BICCHIERI, THE GRAMMAR OF SOCIETY: THE NATURE AND DYNAMICS OF SOCIAL NORMS (2005).

[4] *See infra* Part C.

[5] Traditionally, the strategic game model is focused on what we refer to in this essay as the *economic freedoms based perspective* and certainly there is a wealth of literature linking economics, and economic theory, to the strategic model. However, we felt that connecting game theory to a broader scope of social contexts provides a more integrated approach. Because of this, we have devoted more attention to the *rights based perspective* and

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Hence, in an effort to find a tangible link between EU law and the possible points of conflict between economic freedoms and worker rights, this essay focuses its analysis on wage liability structures in the context of cross-border subcontracting processes. Due to the steadily evolving integration and enlargement of the internal market, leading to a greater movement of capital and labor across countries, the EU Member States have witnessed a rapid growth of subcontracting as a method for firms and organizations to externalize certain tasks, resulting in increasingly long and sometimes parallel chains of interconnected companies. In particular, the practice of subcontracting to companies based in countries with lower wage levels and weaker labor regulations, who then post their workers to sites established in countries with higher wage levels, has led to significant geographical labor mobility across the EU, as well as pressure on existing social and labor standards in the host states. In response to this outsourcing of tasks by businesses, and in an attempt to guarantee decent employment conditions and security for workers, eight EU Member States,[6] and Norway, have introduced provisions relating to (joint & several and/or chain) liability in the subcontracting chain.[7]

The interplay between economic freedoms and workers rights in the context of cross-border subcontracting chains is possibly best exemplified by the 2004 *Wolff & Müller* judgment of the European Court of Justice (CJEU).[8] The *Wolff & Müller* case involved a posted worker making claims for unpaid wages from a German institution that was not the worker's employer. The CJEU's judgment helped frame the legal limits of German wage liability legislation in cross-border situations of subcontracting, and the case itself focused precisely on the conflict between the economic freedoms of businesses and the rights of workers. Essentially, under German legislation the worker has the right to make such a claim because of the German chain liability structure enshrined in the *ArbeitnehmerEntsendeGesetz* [Posting of Workers Act.][9] The liable institution—a company named *Wolff & Müller*—rejected the claim because they felt the German legislation was unfair and restrictive on their economic freedoms with regards to wage liability. In the end,

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its corollary literature. This will hopefully not be seen as biased, but rather as an explanation of less established or unfamiliar viewpoints.

[6] That is Austria, Belgium, Finland, France, Germany, Italy, the Netherlands, and Spain. In half of the countries, the Sectoral Social Partners have played a significant role in the law making processes.

[7] *See* MIJKE HOUWERZIJL & SASKIA PETERS, EUROFOUND, LIABILITY IN SUBCONTRACTING PROCESSES IN THE EUROPEAN CONSTRUCTION SECTOR: NETHERLANDS (2009), *available at* http://www.eurofound.europa.eu/publications/htmlfiles/ef08877.htm. *See also* European Commission, *Study on the Protection of Workers' Rights in Subcontracting Processes in the European Union: Final Study*, Project DG EMPL/B2 - VC/2011/0015 (2012) (by Yves Jorens, Saskia Peters & Mijke Houwerzijl).

[8] Case C-60/03, Wolff & Müller v. Pereira Félix, 2004 E.C.R. I-9553.

[9] *See* WOLFGANG KOBERSKI, GREGOR ASSHOFF & DIETER HOLD, ARBEITNEHMER-ENTSENDEGESETZ (2002).

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the CJEU ruled that the German legislation should not be precluded as a viable structure for recovering posted workers' wages.

As we can see from the CJEU's ruling in this case, the interaction between EU and national legislation can have far reaching systemic consequences. This essay will return to this case with added detail below. Before delving further into *Wolff & Müller*, we first need to establish if, and how, wage liability, and the closely related concept of minimum wage, is within the legal scope of EU law regarding both economic freedoms and basic worker rights.

This paper will proceed as follows: In section B, the authors establish the relevant EU law and its scope with regards to wages and wage liability for posted workers. In section C, our focus turns to the wage liability structure itself. Here we use the German system as an example through elaboration of the *Wolff & Müller* case to delineate the views and motivations of the actors involved.[10] Additionally, we briefly contrast this with the liability structure created by the Austrian posted worker legislation. In section D, we introduce and use the strategic game model to discuss how the interplay between EU and Member State laws affects the choices of participants by changing the liability structure itself. Finally, we will use this discussion and resulting model to shed light upon how the underlying interplay between rights and freedoms can be expanded to the EU 2020 economic and social goals.

B. EU Legislation and Cross-Border Situations of Wage Liability

The study of wage liability regimes will hopefully present a clear example of how we can map the preferential changes of various actors affected by regulation and analyze the outcomes for these actors within the internal market. Following this method, we may be able to see how specific European laws and their interpretations can be helpful, or obstructive, to the proposed EU 2020 goals of economic sustainability, global competition, economic and social integration, and social cohesion.

To accomplish this task we need to look at the relevant EU legislation involved in cross-border situations of wage liability. One may wonder if wage liability, and the closely related concept of minimum wage, is within the legal scope of EU law regarding both the economic freedoms of employers and the basic rights of posted workers. The first of these connections is certainly less contentious. It seems fairly straightforward to say that regulation on wages, and any legislation reinforcing a business's liability to pay those wages, directly influences certain economic freedoms of that business. Specifically, in the case of the minimum wage, legislation generally restricts a business's contractual freedom to pay its workers for work rendered, insofar as employers are not free to pay a worker below some mandatory equitable minimum rate of pay. As applied to the EU legislation for

[10] Below, we will use the terms *actors*, *agents*, participants, and *stakeholders* more or less as synonyms.

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cross-border posted workers, Article 3 (1)(c) of the Posting of Workers Directive 96/71/EC (PWD) clearly extends the scope of Member State law or generally binding collective labor agreements regarding minimum rates of pay.[11] Article 3(1)(c) PWD, in essence, states that there is an obligation on the part of Member States to enforce such mandatory minimum wages for posted, cross-border workers. Some view the PWD as unduly restrictive on the free movement of services in the internal market because it reduces the natural competitive advantage of businesses from low wage Member States and saddles them with an unfair burden.[12] In this line of reasoning, any of such restrictions on the freedom to provide services in another Member State enshrined in Article 56, of the Treaty on the Functioning of the European Union (TFEU), impede the economic integration of the internal market.[13] Others argue that eliminating mechanisms to maintain host state minimum wage schemes could destabilize local economies, diminish posted workers' protection and distort fair competition within the internal market.[14] These two views exemplify the friction between economic freedoms and worker rights. Regardless of which stance one takes, it is quite clear that in the case of posted workers, wage liability and minimum wage restrictions are at least handled by EU law from the perspective of economic freedoms.

Although perhaps an obvious connection, the link between mandatory minimum wages, wage liability, and basic worker rights is less straightforward. Interestingly, there is no *explicit* mention of wage setting or minimum wage requirements in the Charter of Fundamental Rights of the EU (the Charter).[15] Therefore, for the circumstances of cross-

[11] Council Directive 96/71, 1997 O.J. (L 18) 1 (EC).

[12] In Germany especially there was a fierce debate between the "free market advocates" and defenders of "social Europe." *See, e.g.*, Paul Davies, *Posted Workers: Single Market or Protection of National Labour Law Systems?*, 34 COMMON MKT. L. REV. 571, 572–73 (1997).

[13] *See, e.g.*, Brigitte Steck, *Geplante Entsende-Richtlinie nach Maastricht ohne Rechtsgrundlage*?, 5 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 140, 141–42 (1994).

[14] Däubler added to these arguments. *See* Wolfgang Däubler, *Posted Workers and Freedom to Supply Services: Directive 96-71-EC and the German Courts*, 27 INDUS. L. J. 264, 266 (1998).

> Competition based on better performance and competition based on worse working conditions are two different things in the meaning of the Treaty; they are not on an equal footing. The first one is a fundamental principle of the Community, the second one is potentially in contradiction with legal principles of the EC and therefore a "revocable" phenomenon.

Id.

[15] *See* EU Charter of Fundamental Rights, 2000 O.J. (C 364) 1. For criticism of this omission, see Jeff Kenner, *Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility*, *in* ECONOMIC AND SOCIAL RIGHTS UNDER THE EU CHARTER OF FUNDAMENTAL RIGHTS 1, 17 (Tamara Hervey & Jeff Kenner eds., 2003).

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border workers, there seems to be no direct connection between wages and worker rights in EU legislation beyond that of the PWD. In fact, all of the minimum core worker rights conveyed by the PWD are more or less represented in the Charter *except for* rates of pay.[16] One could still build an argument for the inclusion of equitable remuneration as a basic right of workers based on the *implicit* nature of wage reference contained within parts of the Charter, and by comparing the Charter with other nonbinding but socially accepted accords where wages and minimum wage requirements are *explicitly* stated as worker rights.

The wealth of soft law sources in support of this connection include the Community Charter of the Fundamental Social Rights of Workers 1989,[17] the European Commission's Opinion on an Equitable Wage,[18] the European Social Charter (ESC),[19] and the conventions of the International Labor Organization (ILO). The Community Charter and the EC Opinion are enveloped in EU legislation, as they are considered contributing documents to the Charter. The ESC, on the other hand, has its origins in the human rights documentation laid down by the Council of Europe, and hence has no direct import into the legislative dealings of the CJEU.[20] Similarly, the ILO conventions are agreed upon and largely accepted by EU Member States, but formally hold even less direct contact with EU legislation. Nonetheless, all of these sources will prove to be helpful in support of the arguments in this essay in virtue of the fact that they embody the underlying structure of normative standards needed for proper legislation.

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[16] This reflects the state of affairs in secondary EU employment law. As was observed during the adoption process of the PWD, apart from minimum wages, all other issues were already covered by minimum harmonization at the EU level. *See* Wolfgang Däubler, *Der Richtlinien-vorschlag zur Entsendung von Arbeitnehmern: Ein Mittelzur Abwehr von Sozialem Dumping?*, 4 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [EUZW] 370, 373 (1993).

[17] Community Charter of the Fundamental Social Rights of Workers, Dec. 9, 1989, http://www.aedh.eu/The-Community-Charter-of.html.

[18] *Commission Opinion on an Equitable Wage*, COM (1993) 388 final (Sept. 1, 1993).

[19] European Social Charter, Feb. 26, 1965, C.E.T.S. 35.

[20] This is in contrast to the European Convention of Human Rights (ECHR). European Convention of Human Rights, Apr. 4, 1950. The Lisbon Treaty provided for the accession of the EU to the ECHR (Article 6(2) TEU). Treat of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities, Dec. 13, 2007, art. 6(2), 2007 O.J. (C 306) 135 [hereinafter Lisbon Treaty]. Protocol No. 8 sets forth that the agreement relating to the accession of the Union to the ECHR provided for in Article 6(2) TEU shall make provision for preserving the specific characteristics of the Union and Union law. *Id.* The negotiations for the accession started in Spring 2010 and are still underway. Cross-references between Luxembourg and Strasbourg have been increasing over time. Moreover, the need for the CJEU to take into account the ECHR for the interpretation of the Charter has been enshrined in Article 52(3) of the Charter. Charter of Fundamental Rights of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 406. [hereinafter the Charter]. Over 2010-2011, according to the CURIA database, the ECJ has mentioned the ECHR in 57 judgments. *See* ALEJANDRO SAIZ ARNAIZ & AIDA TORRES PÉREZ, EUR. PARLIAMENT, MAIN TRENDS IN THE RECENT CASE LAW OF THE EU COURT OF JUSTICE AND THE EUROPEAN COURT OF HUMAN RIGHTS IN THE FIELD OF FUNDAMENTAL RIGHTS (2012).

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Article 5 of the Community Charter of 1989 states, "[a]ll employment shall be fairly remunerated. And to this effect, in accordance with arrangements applying in each country, workers shall be assured of an equitable wage."[21] This is one of many references in the literature to fairness and equity being involved in the evaluation of rates of pay. These terms are important because they are normative in nature; that is to say, fairness and equity involve evaluative judgments of, say, right and wrong. The normative and evaluative nature of this terminology will provide a strong link to similar terms used in the Charter.

To extend this idea, the Opinion on Equitable Wages focuses on exactly what it means for a wage to be "equitable." The European Commission's conclusion was that an equitable wage, "means that all workers should receive a reward for work done which in the context of the society in which they live and work is fair and sufficient to enable them to have a decent standard of living."[22] Again there is an appeal to the normative idea of fairness, but further than this, there is a more tangible appeal to the social norm of a decent standard of living. That is to say, the Commission's prescription for equitable wage fixing is that wages should be based on fairness and standards of living, but also that these concepts are to be taken relative to the social conventions and standards of individual Member States. In line with this mode of thinking, Article 4(1) ESC recognizes "the right of workers to a remuneration such as it will give them and their families a decent standard of living."

These three sources refer to equitable wages, rather than minimum wages. It seems that the thought behind this terminology is that since wage levels are relative to national social conventions and standards, wage fixing should be left to Member State legislation, national or local employers, and worker organizations, rather than EU-wide rules of governance.[23] This rationale seems prudent given the large disparity between standards of living and what may be considered fair within individual Member States. Still, if wages are fixed normatively, there will be a minimum acceptable level of remuneration for each national context respectively, and it is in this way one should view the term *minimum wage*. Based on this common reading, we should define minimum wage as a minimum equitable wage given the normative constraints of a particular national system. If we accept this *normative constraints* line of thinking, then it is a small step to extend the equitable wage description in Article 4 ESC to include the descriptions of minimum wages contained in the ILO conventions, which suggest that minimum wage levels should be

[21] *See supra* note 17, at art. 5.

[22] *See supra* note 18, at 2.

[23] Please note that Art. 153(5) TFEU does not give any competence to the EU to support and complement the activities of the Member States in the field of "pay." Consolidated Version of the Treaty on the Functioning of the European Union art 153(5), Mar. 30, 2010, 2010 O.J. (C 83) 116 [hereinafter TFEU].

determined by the needs of worker and their families, the general wages of a country, the cost of living, relative living standards, and national economic factors.[24]

While the ESC explicitly talks about worker rights, the Community Charter 1989, the EC Opinion, and the ILO Conventions imply these rights through Member States obligations. Using these examples, one might argue for the inclusion of minimum wages as fundamental worker rights within the EU. We will call this line of reasoning *the argument from dignity*, since the definition and interpretation of dignity plays a large role in its formulation. This argument begins with Article 31 of the Charter, which addresses fair and just working conditions and proclaims, "Every worker has the right to working conditions which respect his or her health, safety and *dignity* (emphasis added by the authors)."[25] General use of the word *dignity* holds that there is some intrinsic property of being worthy of some honor, or worthy of some respect. That is to say, dignity is an evaluative term, and aims to assign inherent worth or value to human beings or aspects of their lives. In being evaluative, dignity seems to tether our legal sensibilities to the concept of normative values in the same way as the terms equality, fairness, or justice. Similarly, as in the previous examples, appeals to equitable wages based on standards of living and fair remuneration are exactly that; they are appeals to evaluative concepts that assign value based on normative rules.

If we take this description of dignity and further refine it to the economic sphere, it quite easily translates to imbuing workers and their labor with some inherent value, and this value is set by means of normative and often moral concepts. Although normative standards with such moral basis are not explicitly contained within the concepts of economics, if we accept the above argument, then these kinds of normative and evaluative ideas are well placed within the scope of law. It follows from this that if these types of normative evaluations are seemingly presupposed within the legislative structure, then we should interpret the "dignity" of Article 31 of the Charter to include the economic ramifications of dignity's evaluative nature. This does not seem a large step since there already exists a strong connection between the evaluative and normative implications of the terminology in the supporting evidence and the implications of the term dignity as it is used in the Charter. If this connection is accepted, then we should also accept the intrinsic value of labor and its normative assessments within EU legislative matters based on the inclusion of the term dignity—and all it entails—within Article 31 of the Charter. Specifically, the inclusion of the word dignity should allow Article 31 of the Charter to be

[24] *See* International Labour Organization, Convention Concerning the Creation of Minimum Wage-Fixing Machinery, June 16, 1928, C026, *available at* http://www.ilo.org/dyn/normlex/en/f?p=1000:12000:0::NO. *See also* International Labour Organization, Convention Concerning Minimum Wage Fixing, with Special Reference to Developing Countries, June 22, 1970, C131, *available at* http://www.ilo.org/dyn/normlex/en/f?p=1000:12000:0::NO.

[25] *See supra* note 17, at art. 31.

admitted as legitimate EU legislation in support of minimum equitable rates of pay as basic worker rights.[26]

Existing commentary supports the view that worker entitlement to minimum wages is also a foundation for enforcement mechanisms such as wage liability. If minimum equitable rates of pay are included as basic worker rights, then Member States must have enforcement mechanisms to ensure that these rights are not being infringed upon. In fact, within most Member States there are sufficient enforcement mechanisms regarding the payment of wages and hence providing some baseline of justification for liability mechanisms. Currently, the European Commission is struggling over the adoption of the proposal for a so-called "Enforcement Directive of the Posting of Workers Directive."[27] This Directive should fill in the lacunae of the current PWD when it comes to monitoring, control, and enforcement and hence lead to better interpretation, clarification, and enforcement of the PWD.

According to the Explanatory Memorandum to the proposal, "[as] highlighted in the Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, people must be able to effectively enjoy their rights enshrined in the Charter when they are in a situation governed by Union law."[28] Actually, this "effective enjoyment of rights" may also be acknowledged as a fundamental right in itself, covered by Article 47 of the Charter.[29] The proposed Directive embraces a so-called comprehensive approach to enforcement. According to the Explanatory Memorandum this means that:

> [The Directive] include[es] awareness raising (better information), state enforcement mechanisms (inspections and sanctions) and private law

[26] Actually, in the pending case, Sindicatos dos Bancários do Norte v. Banco Português de Negócios, the CJEU is asked, in question four, to clarify whether the right to working conditions that respect dignity, laid down in Article 31(1) of the Charter, may be interpreted as meaning that employees have the right to fair remuneration which ensures that they and their families can enjoy a satisfactory standard of living. 2012 O.J. (151) 35. *See also* 2012 O.J. (209) 9 (posing a similar question).

[27] *Proposal for a Directive of the European Parliament and of the Council on the Enforcement of Directive 96/71/EC Concerning the Posting of Workers in the Framework of the Provision of Services*, COM (2012) 131 final (Mar. 21, 2012).

[28] *Id.* at 11. In this proposal for an Enforcement Directive of the PWD, a joint and several liability mechanism is included in Article 12. *Id.* at 36. Regarding illegal employment of third country nationals, such a liability mechanism is already ensured by EU legislation. *See* Directive 2009/52, of the European Parliament and of the Council of 18 June 2009 Providing for Minimum Standards on Sanctions and Measures Against Employers of Illegally Staying Third-Country Nationals, 2009 O.J. (L 168) 24.

[29] Article 5 of the PWD, according to which Member States shall take appropriate measures in the event of failure to comply with this Directive, may be seen as a translation of Article 47 of the Charter. The Charter, *supra* note 20, at 405.

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> enforcement mechanisms (joint and several liability). All aspects are deemed important for a balanced approach. Weakening one of the aspects would imply strengthening other aspects of enforcement in order to achieve a similar result.[30]

For the purpose of this essay, discussion of the normative and evaluative bases of wage rights is particularly relevant because wage liability legislation must ideally enforce these normative standards, and because, as the previous discussion alludes to, these normative and evaluative notions are particularly important for rights based perspectives that favor rights protection over economic freedom.

C. National Wage Liability Schema

Using both the rights based and economic freedoms based perspectives, we can study the effects of national legislation on the preferences of agents. In this section we will analyze national provisions that endeavor to ensure the payment of minimum wages to posted workers as is spelled out in Article 3(1)(c) of the PWD, by a liability mechanism. Specifically, we will focus on Germany's *Arbeitnehmer-EntsendeGesetz* (AEntG).[31] While there are several differences between the German national system and those of many other Member States, the most pronounced aspect, and the one we will spend much of our focus on, is the fact that Germany's AEntG produces a structure of chain liability for the client, the main contractor, and all subsequent subcontractors. Hence, in chain liability the aggrieved party can seek redress from any link in the entire chain, as opposed to a basic joint and several liability structure in which an action may be generally be brought only against direct links.[32]

As we will see, these two different liability structures interact differently with the relevant EU legislation. As mentioned before, it is our aim to use these structures as case studies to reveal the costs and benefits of these interactions in a strategic game model and to evaluate those results in light of the EU 2020's proclaimed goals. To this end, the current section aims to delineate the important differences and factors involved within these two legal structures. Particularly, we want to see the effects on the constraints and pressures of agent decisions. Before giving a concrete example of these pressures, we will quickly map the various roles that agents can assume and the relevant definitions of the two-liability schema we wish to compare.

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[30] *See supra* note 27, at 20.

[31] Arbeitnehmer-EntsendeGesetz [AEntG] [Posted Workers Act], Feb. 26, 1996, BGBL. I at 227 (Ger.).

[32] HOUWERZIJL & PETERS, *supra* note 7; *see also* European Commission, *supra* note 7 (providing more explanation and modalities).

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Firstly, agents can have many roles when it comes to contractual rights and obligations. In the context of subcontracting, roles include the client, the recipient, the provider, the principal contractor, any intermediate contractors, and the subcontractor, who also is the employer of the (posted) worker concerned. In addition to the roles in the chain of subcontracting, there are also the legal roles agents can play, such as, the guarantor, the debtor, and the creditor. The recipient is considered to be the person or company that receives a service and is often referred to in combination with the provider, who provides the service in question. Clients, principal contractors, and subcontractors can all be recipients of services and often on large multifaceted projects, all three will concurrently receive services from other companies or persons. For example, a client could receive building services from a principal contractor, who in turn may be subcontracting the cleanup of a project to another company, and hence is receiving services from that subcontractor. Additionally, subcontractors may enlist the help of further companies, making the subcontractors recipients of services as well. In cross-border situations, often the client is a company based in the host country, or possibly the local government of the host country itself, as is the case for public works projects. Generally speaking, the client is the last in the line of recipients, and it receives the cumulative work of a project and all of its sub-projects. Similarly, the principal contractor is the provider of services to the client, and in so being is responsible for the project as a whole. Subcontractors then provide to the principal contractor, or to other subcontractors under the principal contractor.

So what role does the worker, the employer, the client, or the contractor play with regards to liability and legal scope? In the wage liability schema, we will assume that the worker is considered a creditor, i.e., the one who is to be paid, while the employer—who is also the subcontractor in the chain—of that worker is the debtor. Yet depending on the specific liability schema in place, the role of guarantor could include the client, the principal contractor, and, or, the intermediate subcontractors. That is to say, if the employer (debtor) does not fulfill their wage obligations, the client, the principal contractor, or an intermediate contractor may be held responsible. Which agent or agents will be responsible as guarantor depends on which system of legislation is used to construct wage liability.

As stated, we will be considering two prominent wage liability structures of EU Member States. The first of these structures can be described as joint and several liability. Joint and several liability generally only applies at one level of the contractual relationship, that is, *there is only one guarantor*. So, when a service provider does not fulfill its obligations regarding worker payments, the direct recipient, together with the service provider, can be held liable by the creditor for part or the entire debt of the provider. This means that a worker may take legal action to seek reimbursement of unpaid wages against its employer and against the direct recipient of its employer's services, which could be the client, the principal contractor, or an intermediate subcontractor, depending on the legal scheme.

An example of such a joint and several liability structure would be the Austrian wage liability legislation.[33] Within the Austrian legislation, the term *contractual liability* of Article 7c(2) of the *Arbeitsvertragsrechts-Anpassungsgesetz* [Austrian Labor Contract Law](AVRAG) means that liability is restricted to the direct contracting party and therefore applies to only one level of subcontracting. In practice this means that the principal contractor is liable only for its direct subcontractors. Furthermore, according to Article 7c (3) of the AVRAG, this contractual liability is restricted to only the highest level in the subcontracting chain, that is, only to the principal contractor.[34]

In contrast, the German wage liability schema for posted workers is in the form of *chain liability*. Chain liability takes the basic idea of joint and several liability but applies it to all of the contractual links within a chain of contracts. In the chain liability structure, the employer, the principal contractor, any intermediary subcontractors, and often the client, are all held jointly and severally liable for unpaid worker wages. This means that while the employer is still the debtor, there are now *multiple guarantors*. The scope of liability is expanded from the employer and employer's direct recipient only, to the employer and all recipients in the subcontracting chain, beginning with the direct recipient and ending at the principal contractor, or in some cases the client. Within the German AEntG, the liability provision for minimum wages contains an unconditional chain liability, that is to say, a joint and several liability of multiple contract levels; hence, the principal contractor, any intermediary contractor, the employer, and the client are jointly and severally liable. To paraphrase Article 1(a) of the AEntG:

> An undertaking which appoints another undertaking to provide services is liable, in the same way as a guarantor who has waived the defense of prior recourse, for the obligations of that undertaking, of any subcontractor and of any hirer of labor appointed by that undertaking or subcontractor concerning payment of the minimum wage to a worker.[35]

This means that under the AEntG, workers have the right to choose to claim unpaid wages from the principal contractor, the client, an intermediary contractor, or their employer. This seems to be a clear advantage to workers, compared to the joint and several liability system, since an increase in guarantors is also an increase in the number of sources from

[33] *See* European Commission, *supra* note 7.

[34] *Proposal for a Directive of the European Parliament and of the Council on the Enforcement of Directive 96/71/EC Concerning the Posting of Workers in the Framework of the Provision of Services*, COM (2012) 131 final, at art. 12 (Mar. 21, 2012) (proposing something similar).

[35] HOUWERZIJL & PETERS, *supra* note 7; *see also* European Commission, *supra* note 7.

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which a worker can secure compensation for unpaid wages. This increased security for what we deem to be "a basic worker right" is an important factor that differentiates chain liability from the basic joint and several liability system. It is similarly important to note that because chain liability creates more guarantor obligations, it would also seem more restrictive on economic freedoms than the ordinary joint and several liability structure. These assumptions will be considered below in section D when we study how these two liability structures create unique pressures on the choices of the agents involved. We propose that the question of how the EU should engage with diverging national models of wage liability with regard to their cross-border implications can partially be answered by analysis of the effects of those models on the preference of the agents involved. Therefore, to properly assess chain liability within the scope of EU legislation, we now return to the *Wolff & Müller* case.

In the *Wolff & Müller* case, an employee, Mr. Pereira Felix, originally claimed that Wolff & Müller, as guarantor, was liable under Article 1(a) of the AEntG for wages owed to him from his employer.[36] As noted before, in line with the idea of strengthening the internal market, Article 56 of the TFEU makes claim that national restrictions on the freedom to provide services across borders shall be prohibited, and the provision in question may be justified in restricting these freedoms only where it meets overriding requirements relating to the public interest. Citing Article 56of the TFEU, Wolff & Müller opposed the claims of Mr. Felix, saying that the German AEntG liability structure imposed such a restriction through an increased cost to the client and provider, which impeded the provision of construction services in Germany from other Member States and rendered them less attractive. Their claim was that this was an infringement on the freedom to provide services, since it went beyond—was not proportionate to—what is necessary to ensure attainment of the objective pursued by the infringing measure—namely the guaranteeing of payment of minimum wages. Hence, Wolff& Müller felt that the AEntG chain liability structure was in direct violation of Article 56 of the TFEU.

The CJEU ruled that the liability structure provided CJEU ruled that the liability structure provided by AEntG supported worker rights, and was therefore justified because the provision related to the public interest, even though worker rights were not the primary aim of the provision.[37] The primary aim was stated as fair competition. This decision set an important precedent, not only by allowing restriction of the free movement of services in favor of worker rights, but also by establishing that the AEntG system was a legitimate and fair interpretation of the procedural constraints of Article 5 of the PWD. That is to say, the AEntG was competent in ensuring that workers and/or their representatives had adequate procedures for the enforcement of the obligations contained within the PWD, specifically concerning minimum wages under Art. 3(1)(c) of the PWD.

[36] Case C-60/03, Wolff & Müller v. Pereira Félix, 2004 E.C.R. I-9553, para. 10.

[37] *Id.* ¶ 45.

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The liability provision in the AEntG is still the subject of continuous debate with widely opposing views.[38] Many German employer organizations do not agree with the chain liability system. They consider it unfair that a guarantor maybe held liable absent culpable behavior. They think that the guarantor liability should result only from personal fault or negligence. After all, why should they be held responsible for the actions of some external and autonomous entity? Additionally, one might argue that the AEntG oversteps its bounds by applying German legislation to foreign service providers through the chain structure, in essence unjustifiably extending its scope to non-German entities. In contrast, the trade unions argue that the AEntG liability arrangement is effective and flexible exactly because it is not limited to blameworthy guarantors. Since chain liability makes guarantors of all parties involved, it is in everyone's best interest to choose safe and responsible partners.[39]

Of course, for the joint and several system, many of these arguments are reversed. That is, since the joint and several structure seems less restrictive on economic freedoms, it makes sense that proponents of economic freedoms will argue for a single guarantor obligation, if any. Conversely, those predisposed with more communal responsibility and a rights based view will argue that joint and several liability does not go far enough to ensure that fairness and justice are upheld for everyone involved. The burden of this essay is to show that by embedding the rights based and economic freedoms based perspectives into a strategic model, we can make sense of the conflict in a quantifiable manner and derive a method for evaluating divergent Member State models from the standpoint of EU policy. It is exactly this task that we will approach in the next two sections.

D. The Strategic Game Model

First, we should provide some setup for a strategic game model, and spell out exactly how such a model should be implemented. The point of a strategic game model is to help sort and find optimal choices for all players involved. In this model, preferences can be seen as applying to *action profiles*. This means that when judging the preference of some action, a player must not only consider his or her action but also the current action of the other players involved. These preferences can be represented as payoff functions that calculate the benefits gained and costs incurred during some action.[40] Within these functions we will assign preference values using the concept of *expected utility*. *Expected utility* is a kind of

[38] *See e.g.*, European Commission, *supra* note 7.

[39] *Id.*

[40] More precisely, a payoff function *u(x)* represents a decision-maker's preferences if: For any available actions *a* and *b*, $u(a) > u(b)$, if and only if the decision-maker prefers *a* to *b*. *See* MARTIN J. OSBORNE, AN INTRODUCTION TO GAME THEORY (2004).

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cost-benefit analysis that can be easily adapted to map the various pressures of the legislative system. Essentially, the model breaks the expected value into two parts: The probability of some occurrence happening, and the cost or benefit associated with that occurrence.[41]

By accounting for all relevant factors involved, the model produces a fairly accurate map of each agent's preference structure. Of course this is easier said than done, so this essay will address generally net upward and downward pressures on the expected utility of some event, rather than assign explicit probabilities and values. Since we can assign our agents' preferences ordinally, we only need to show that the expected utility of an action is greater (or less) than the threshold of some compared action profile. By calculating agent preferences in this manner, player preference structures will begin to emerge. A key aspect of these preference structures is the idea of dominant strategies. A strategy is considered to be dominant if it is the preferred choice for an agent regardless of what the other players' choices are. The basic idea is that dominant strategies are strategies that are preferred by an agent in all possible action profiles; that is, they are preferred to all other options no matter what the other agents may do.[42]

Using the concepts of expected utility, action profiles, and dominant strategies, one can map the real world pressures within a liability system through the changes these pressures exert upon an agent's preference structure. As we will see with this approach, a correlation will emerge between *economic freedoms*/rights based perspectives, and the two main types of strategic game preference structures: Competitive games and cooperative games.

Of these two structures, the competitive game structure correlates to our earlier discussion of a purely economic view, and is defined by a preference schema that exhibits a dominant strategy of non-participation for all players. For the purposes of this essay, "non-participation" means that an agent ignores, rejects, or challenges any part of the relevant legislation.[43] In a competitive game structure this means that all agents prefer to

[41] We are using the term benefit to represent the satisfaction an agent assigns to the benefit in question. When considering an agent's preference for an action we must take the net expected utility for all of the relevant factors involved. Specifically, if we represent individual benefits with the variable B_n, individual costs with C_m, and the probability of B_n or C_m occurring as $Pr(B_n)$ and $Pr(C_m)$ respectively, then the proper formula for the payoff function for a given action profile a is: $u(a) = Pr(B_1)*B_1 + Pr(B_2)*B_2 + \ldots + Pr(B_n)*B_n - Pr(C_1)*C_1 - Pr(C_2)*C_2 - \ldots - Pr(C_m)*C_m$. This formula does not distinguish between mutually exclusive actions; therefore there is no restriction for the sum of all action probabilities to be equal or less than 1. However, care should be taken that if mutually exclusive events are considered, then the probability of those events *should be* equal to or less than 1.

[42] Dominant strategies are a result of the underlying assumptions of the strategic game model. In so being, they are not strictly abstractions of actual world circumstances, but have proven to be useful analytic tools for decision making nonetheless. *See also* JOHN VON NEUMANN & OSKAR MORGENSTERN, THEORY OF GAMES AND ECONOMIC BEHAVIOR (1947).

[43] It is worth noting that in some cases agents appear to not have a choice. For example, because wage liability is invoked by the worker, when hiring workers the employer is an implicit participant in wage liability schema. In

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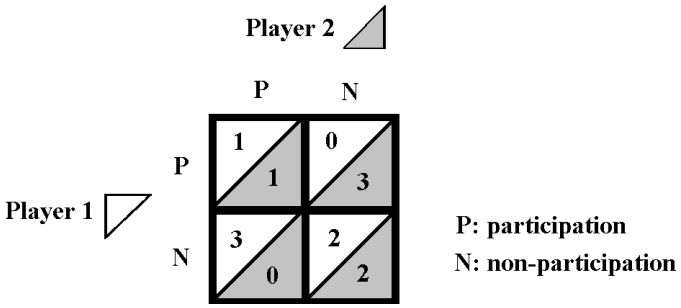
maximize their economic freedoms and minimize any legislative costs by choosing to not participate in legislation. That is to say, if participating in a legislative structure increases the costs for an agent—in the form of restricting or removing economic freedoms—then an agent with an economic freedoms based perspective will be strongly adverse to that option. Agents with this preference structure give great preferential weight to the loss of economic freedoms. So much so that they will prefer to forgo participation in a legislative system that restricts their freedoms. This point seems to be corollary to the reasoning behind Wolff & Müller's claim that the German chain liability model was too restrictive. Since the chain liability model constricted the economic freedoms of Wolff & Müller, the company asked the CJEU to reject applicability of the AEntG legislation to cross-border transactions.

If one views pure economic structures as a kind of Hobbesian state of "all against all," where individuals are only concerned with their own liberties, then any restrictions upon those liberties will be considered costly, while any increased freedom is a benefit.[44] Given this assumption and the previous discussion of the restrictive nature of legislation—based on its adherence to normative and evaluative ideals—pure economic agents will strongly prefer non-participation in such legislation. This preference structure can be pictured as follows.

Competitive Game Structure



In the competitive diagram above, where there are two agents, Player 1 and Player 2, and two possible actions with regard to restrictive legislation, both players have the same

such cases, non-participation cannot be the rejection or circumvention of legislation, but rather non-participation should be seen as an agent's challenging of, or objection to, the current legislation. This was exactly the action in the *Wolff & Müller* case. Case C-60/03, Wolff & Müller v. Pereira Félix, 2004 E.C.R. I-9553.

[44] *See* THOMAS HOBBES, LEVIATHAN: WITH SELECTED VARIANTS FROM THE LATIN EDITION OF 1668 (Edwin Curley ed. 1994).

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preference structure.[45] As pure economic agents, these players would prefer it best when they have total freedom—via non-participation in legislative restrictions, while the other player's freedoms *are* restricted by legislative participation—the 3-to-0 scenario. The second best outcome is non-participation for both agents, which produces totally unregulated free markets and maximizes the number of liberties for the group as a whole up to some Pareto optimal point—the 2-to-2 scenario.[46] The third best outcome is where all agents must restrict their own freedoms by participating in some legislative scheme—the 1-to-1 scenario. The least preferred outcome is where an agent's own freedoms are restricted by participating in some legislative scheme, while the other player's freedom is unrestricted—the 0-to-3 scenario.

It is important to take notice that this competitive preference structure results in a dominating strategy of non-participation. That is to say, the preferences of both Player 1 and Player 2 clearly favor non-participation. For example, compare Player 1's choices, the choice to participate, which results in scenarios 1-to-1 or 0-to-3, with the choice of non-participation, which results in scenarios 3-to-0 or 2-to-2. Hence, no matter what Player 2's action is, Player 1 will prefer the non-participation case. This example seems to accurately explain why an economic freedoms based perspective is always accompanied by pressure to avoid the costs of legislative restriction.

Conversely, in the cooperative game preference structure, all agents have dominant strategies to participate. The cooperative game can be seen as an extension to the pure normative ideals used as the basis for legislation. Fundamentally, a law applies equally to all members within its scope and encompasses the basic standards of fairness and justice. Embedded within this concept is the idea that rights are essentially interests that are protected from being infringed upon by the conflicting freedoms of other agents. This protection comes in the form of a normative rule that states that it is unfair, immoral, or unjust to favor one person's interests at the cost of another's. Hence, we will view the role of rights within the strategic game structure as interests protected by normative laws.[47] In this way, any agents who prefer protection of these rights will view legislative restrictions as a benefit—because it restricts infringement upon one's freedoms by other agents, while at the same time unlegislated liberties can be seen as costs, insofar as unabated freedom means less protection for an agent's rights. With these assumptions we have enough information to produce a cooperative game preference structure, as seen on the following page.

[45] Player 1's preferences (in the white triangles) are read from left to right, and Player 2's preferences (in the grey triangles) from top to bottom.

[46] *See* NICHOLAS BARR, ECONOMICS OF THE WELFARE STATE 43–46 (2012).

[47] Similar to the Hobbesian social contract, *see supra* note 44.

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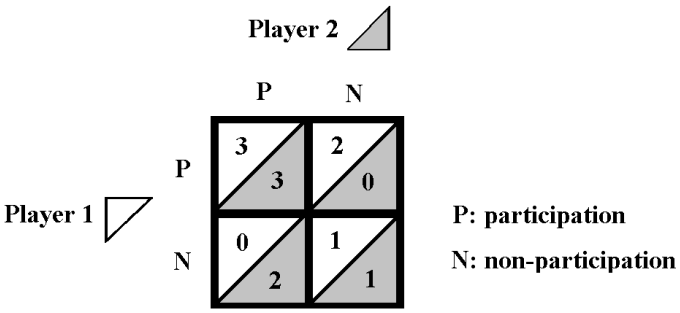
Cooperative Game Structure



In the cooperative game the preference structures have changed to represent the legislative focus of rights preservation. Agents will prefer it most, when both players are participating in the legislative system. The reasoning for this preference is mapped out in the previous section; essentially participation in the legislative system creates the highly valued benefit of protection for an agent's rights. When both players are participating, there is a maximum amount of right protection—as well as a maximum adherence to normative standards. Although seemingly unintuitive, agents who are concerned with the protection of rights will value any self-participation in legislation more than that of non-participation because participation is the only way to reap the benefits of rights protection. Only through mutual participation can an agent be assured that his or her rights will not be infringed upon by another agent's actions. The only way to obtain any protection benefits is to participate, regardless of what others are doing. If an agent does not participate, there is no possibility of any such assurances. Hence, the cooperative game preference structure is such that all agents have a dominant strategy to participate in the legislative system. This structure properly represents a rights based perspective since there is clear pressure on an agent's preferences to favor universal rights protection over individual freedoms.

Notwithstanding the above assessment, in the real world it is very unlikely that agents will adhere to a strict cooperative or competitive preference structure because in actual situations the interplay between these two views is more muddled. In real circumstances, legislation is almost always accompanied by a complex web of tensions between economic freedoms and rights protection. As referred to in section A of this essay, it is the job of proper legislation to find the correct balance between these two extremes. Hence, ideal

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legislation should be a system that maximizes agent participation, maximizes rights protection, but also minimizes the cost of legislative restrictions on economic freedoms.

E. Wage Liability Legislation and Strategic Games

To work the ideas of the strategic game model into the real world legislation on liability, we will focus on the guarantor–debtor distinction when assessing preferences for our agents. We will also assume that the choice to participate will coincide with adherence to the EU and national legislation set forth for wage liability in cross-border situations. The choice of non-participation will reflect the case when an agent ignores, rejects, or challenges any part of the relevant legislation. An agent's choice to participate may vary based on which liability system we are considering.[48] If we can find how the different liability schema affect our economic agents' decisions to participate in that system, this may entail interesting conclusions about how well that schema performs its role in furthering the goals and aims of the EU 2020 policy.

The "chain" and "joint and several" liability systems will often produce mixed game preference structures. For example, they will produce preference structures where there is no dominant strategy for all agents involved. Or, if dominant strategies are obtained, the best outcome for the group as a whole may not match the dominant strategies of individual agents.[49] This is an effect of the previously mentioned real world tensions between economic freedoms and rights protection in liability legislation. There are two main pressures that affect these tensions.

First, compared to joint and several liability, chain liability creates more pressure for agents to participate in legislation. Because everyone in a contract chain is liable as guarantor, clients will be more inclined to choose responsible service providers to reduce their own expected costs. If a provider does not have a good track record, they will often fail to obtain contracts because clients—as guarantors—will be apprehensive about taking on any risk involved with non-participating partners, i.e., those providers who choose not to abide by the minimum wage legislation. This is similar for joint and several liability, but it is much stronger in the case of chain liability because clients must consider the responsibility of not only a single contracting partner, but also the responsibility of all service providers along the contracting chain. In this way chain liability is self-reinforcing; everyone has greater incentive to comply with the law. This is not the case for joint and several liability, clients and providers are only concerned with the behavior of their immediate contracting

[48] *See* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008) (discussing more on how systemic structures can affect agent's preferences).

[49] Such mixed game structures, or structures with conflicting equilibriums, are often represented in prisoner's dilemma or stag hunt examples. *See* BRIAN SKYRMS, THE STAG HUNT AND THE EVOLUTION OF SOCIAL STRUCTURE (2004).

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partners, and hence providers who wish to avoid participation need to find only one single partner who is willing to take this risk.

Second, compared to several and joint liability, there is an upward pressure on the expected costs for clients and providers in a chain liability system. Even for reliable service providers, participation in this restrictive legislation increases the costs, because they have to prove to the client or any intermediate contractor with documents that they abide by the minimum wage legislation. For the client and intermediate contractors it also creates costs of checking the evidence, and the costs of labor in their project may increase if each provider pays his or her posted workers the minimum wage level applicable in the host state. If foreign service providers are mostly hired because of their lower costs, *Wolff & Müller* was right in its argument that the German chain liability scheme makes them less attractive.

For clients, expected costs seem to increase in chain liability situations because clients are potentially responsible for the unpaid wages of any provider in the contracting chain rather than a single contracting partner. Still, one might argue that these costs are mitigated by the chain liability structure itself. Indeed, an increase in the number of providers to which one is liable may bring increased potential cost for any one guarantor; yet the chain liability scheme also brings an increase in the number of liable guarantors, which in turn reduces the expected cost for any individual guarantor. Moreover, the potential liability risks can be further mitigated if a guarantor works with trustworthy contracting partners, again reinforcing the incentive to abide by the law—which is the ultimate goal of the liability scheme.

The amount of upward pressure for increased participation, and the increased costs involved in participation are the main contributing factors to the salient differences between the preference structure of a strategic model built upon chain liability and one built on a joint and several system. Whereas the joint and several liability system, with its lower pressures for participation and fewer restrictions on agents' freedoms, seems more likely to create a competitive game preference structure, it is quite clear that because of a large increase in participation pressures and a moderate increase in participation costs the chain liability system is far more probable to produce a preference structure of the kind appearing on the next page.

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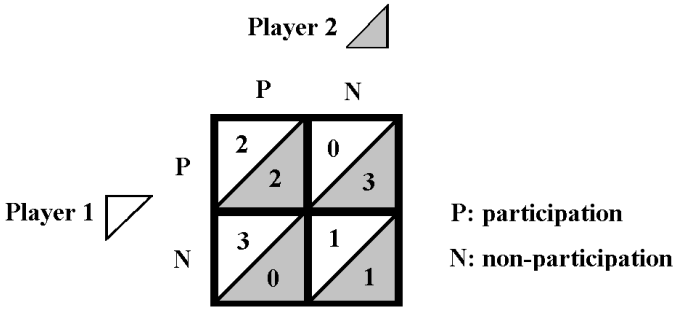
Prisoner's Dilemma Preference Structure



In this mixed preference structure, the dominant strategy for each individual agent is non-participation—1-to-1. Yet maximum aggregate utility is obtained when there is participation by both players—2-to-2. This preference structure seems to better reflect the levels of pressure involved in the chain liability schema. Increased participation costs are reflected in the individual dominant strategies, but the structural pressure for participation is revealed by the fact that the maximum expected benefit, holistically speaking (not for individual actors), comes from the action profile where all agents participate.

This preference structure also seems to accurately reflect the pressures on agents to give preferential weight to both economic freedoms, as well as protected rights, rather than the purely economic freedoms based or rights based perspectives—which produce strictly competitive or cooperative game preference structures. In doing so, the prisoner's dilemma preference structure properly maps out a legislative structure to best address the EU 2020 economic and social concerns of fostering a socially integrated, cohesive, sustainable, and globally competitive economic market. At the same time, it attends to the EU obligations of upholding basic economic freedoms and protecting basic citizen rights. Namely, this preference structure will be produced in systems that maximize overall participation in mandatory minimum wages regulation, while at the same time individual agents attempt to minimize restrictive costs. For this reason, we feel that the prisoner's dilemma preference structure should be the baseline for measuring a successful liability system.

F. Conclusion

Framing the two-wage liability schema as game models demonstrates that chain liability has more costs in terms of freedom restrictions compared to the joint and several system. As discussed, it is highly likely that these costs will be offset by the benefits of increased

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participation. Chain liability gives a strong incentive to increase agent participation, even when the agents are economically minded, and therefore it is more apt to produce a prisoner's dilemma style preference structure, while joint and several liability will more likely produce competitive game preferences. As alluded to earlier, the virtues of the prisoner's dilemma game structure promote the accomplishment of the aforementioned EU 2020 goals. For instance, compared to a competitive game structure, the increased number of participants ensures larger and more robust legitimate markets for stable and sustained economic growth on a global scale. At the same time, this increased participation also facilitates human rights protection and hence lowers societal "costs," since increased participation coincides with a rights based preference structure.

As stated before, proper legislation should find a balance between the promotion of economic freedoms and the obligation to uphold normative based rights for its citizens. Legislation that creates a prisoner's game preference structure gives a better opportunity to do exactly this. Since chain liability is more apt to create such a structure, we may conclude that chain liability seems to better promote the EU 2020 goals of stable economic growth and human rights protection.

With regard to the aims of economic and social integration, one may argue that while the prisoner's dilemma preference structure is in line with these goals, chain liability itself is possibly counterproductive. It is clear from the *Wolff & Müller* case that the restrictions imposed by German legislation could inhibit the comparative advantage of cross-border service providers by extending minimum wage liabilities to these foreign companies. Cross-border commerce and economic integration between Member States could accordingly be hindered in the short term, making the joint and several liability schema more attractive, or even better, result in no liability scheme at all. In the long run, the extension of national laws beyond their borders through these "chains of liability" can have positive and stable economic and social consequences by insuring that companies are adhering to higher minimum rates of pay. Theoretically this means increased wages for workers from traditionally lower wage Member States, as well as an increase in the total revenues of cross-border service providers. Again, these increases can provide stable and sustainable growth to the legitimate market,[50] and contribute to shrinking the disparity between Member States wage levels and standards of living.

[50] *But cf. Proposal for a Directive of the European Parliament and of the Council on the Enforcement of Directive 96/71/EC Concerning the Posting of Workers in the Framework of the Provision of Services*, COM (2012) 131 final (Mar. 21, 2012).

> Genuine SMEs will benefit from a fairer level-playing field, while some letter-box SMEs are likely to disappear. SMEs which have already had subcontractors abiding to minimum wage legislation and therefore had higher costs (in comparison to competitors with subcontractors not abiding the law) will benefit from a better level-playing field. SMEs that so far benefited from subcontractors not

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In the end, prisoner's dilemma preference structures have clear advantages in modeling real world situations by accurately representing both economic freedoms based and rights based perspectives rather than just one or the other. Through our discussion of cross-border wage liability schema, the authors conclude that this mixed preference structure is consistent with the EU 2020 goals of a sustainable globally competitive economic market, human rights protections, as well as economic and social integration. For this reason, though not without some detracting factors—i.e. increased restrictions on economic freedoms and possible short-term hindrances to an integrated market—it seems that the CJEU's decision to allow chain liability as a legitimate form of cross-border wage legislation was ultimately well justified.

abiding to minimum wage legislation will have to find new business models.

Id. at 11.

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