# Towards an EU Strategy to Combat Trafficking and Labor Exploitation in the Supply Chain. Connecting Corporate Criminal Liability and State-Imposed Self-Regulation Through Due Diligence?

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**Abstract** The distinction between voluntary and coerced labor has never been more blurred than today, with the supply of willing workers that find themselves in a grey zone between the choice for certain work and the borderline-coercive reliance on malafide employers, traffickers or the like. Policy makers are desperately seeking new ways to eradicate trafficking for labor exploitation. A shift in focus is currently happening, towards the demand-side of exploitative labor. This chapter examines approaches of dealing with the responsibility of the private sector for trafficking and labor exploitation in their supply chains. The issue is currently being dealt with in a variety of ways, such as through labor law, civil law, criminal law and through self-regulation of companies, be it sate-induced or fully voluntary. This chapter focuses on severe cases of trafficking or labor exploitation, committed by a subcontractor of a company bearing guilty knowledge of the exploitation. It will be examined in this chapter how the EU can take legislative action in the sphere of criminal law, to deal with the issue. Two possible approaches will be discussed: the creation of a new crime of "knowingly using the services of victims of trafficking" or the adoption of a European concept of participation in crime, specifically for trafficking and labor exploitation. It will become clear from this analysis that doing business with due diligence plays a crucial role for the conclusion to corporate criminal liability, as it is a vital aspect of concluding to guilty knowledge by companies, or the lack there-of, of malafide practices in the supply chain.

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## 1 Introduction

With the EU's *Strategy towards the Eradication of Trafficking in Human Beings 2012–2016*,[1] the European Commission seeks to focus on concrete measures that will support the transposition and implementation of the 2011 Trafficking Directive. Focus is being put on stepping up the prevention of trafficking in human beings. A preventative measure that is increasingly being put forward as a powerful tool in the fight against trafficking is the reduction of demand for services by victims of trafficking in human beings. The *Strategy* emphasizes the important role of the private sector and even announces the planned establishment of a European Business Coalition against trafficking in human beings for the improvement of cooperation between stakeholders and companies.[2] An important joint future goal identified for this Coalition is the development of models and guidelines on reducing the demand for services provided by victims of trafficking in human beings, in particular in high-risk areas. Another priority identified is increasing knowledge of and effective responding to emerging concerns related to all forms of trafficking in human beings, with a special focus on trafficking for labor exploitation. The Strategy mentions the differences in approaches of Member States when addressing trafficking for labor exploitation, hampering international cooperation. More future goals are being put forward relating to better cooperation of the Commission with for example social, labor, health and safety inspectors in the fight against trafficking for labor exploitation. From these and other elements of the *Strategy,* a change in attitude in the context of trafficking for labor exploitation can be derived. It seems that it is now being acknowledged how multi-disciplinary of a problem trafficking for labor exploitation is, and that the fight against it entails a lot more than the national criminal law of member states. The role of the private sector is being emphasized, together with solutions from other spheres of the law such as social and labor law. The relevance of these focuses is undeniable in the light of well-known cases of large multinationals appearing in headlines for practices of labor exploitation in their supply chains. Large brands like Zara and Apple have received especially bad press for being "involved" in (trafficking for) labor

[1] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. The EU Strategy towards the Eradication of Trafficking in Human Beings 2012–2016. Brussels, 19.6.2012, COM(2012) 286.

[2] For a broad overview of general mechanisms for creating corporate social responsibilities: *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts. Report of the Special Representative of the UN Secretary-General on business & human rights*, UN Doc. A/HRC/4/035 (United Nations Human Rights Council, 9 February 2007); OECD guidelines for multinational enterprises: Text, Guidelines, Commentary, DAFFE/IMZ/WPG (2000) 15final; Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, ILO 16 November 1978 and amended in November 2000, *Official Bulletin* 1978, vol LXI, Series An, no 1 and *Official Bulletin* 2000, vol LXXXIII, series A, no. 3 and the UN Global Compact; ILO Declaration on Fundamental Principles and Rights at Work, 86th Session, June 1998.

exploitation[3] due to its presence in their supply chains. The collapse in May 2013 of the Bangladeshi Rana Plaza building, resulting in the death of over a thousand textile workers, yielded bad publicity for clothing chains such as Primark and Mango for having suppliers that were exploiting their workers in this unsafe building. The broad *rationale* behind targeting the demand-side is to be put in the light of supply and demand: If companies risk some sort of penalties or loss for their involvement in exploitative labor practices, they will become extra cautious as to who they do business with, therefore the demand for unusually cheap service-provision will drop. As logical and straightforward a reasoning this may seem, putting it into practice poses several serious problems, which will be the center of attention in this contribution. On a European level, a suggestion was made, first on the level of the Council of Europe[4] and later on the level of the EU,[5] for Member States to consider criminalizing those that knowingly make use of the services of victims of trafficking in human beings. From the explanatory reports[6] of these pieces of legislation it seems that not only clients of prostitution are envisaged with this suggestion, but also businesses who knew or should have known that they were using the services of victims of trafficking for labor exploitation somewhere in their production process. Furthermore, the legal construct of participation in crime will be discussed, and it will be shown how this approach may be the preferable option over the creation of a new crime. This contribution thus attempts to assess the role that criminal law can play in the issue of "user"-accountability.[7] Special focus will be placed on the perks and pitfalls of self-regulation by companies against labor exploitation in their supply chains. It will be shown how doing business with due

[3] For the purpose of this chapter, all forms of labor exploitation are considered relevant, even those forms that may not entail a clear-cut trafficking in human beings-element. As will be clear from the analysis made in this contribution, the envisaged end-goal of exploring the possibilities of user-accountability should be the possibility of tackling labor exploitation, by making it more attractive for users to choose for clear-cut voluntary labor provision. Whether or not a certain exploitative situation is 100 % sure to be a trafficking case, is less relevant for the purpose of this particular analysis because we are analysing the accountability of those at the receiving end of the exploitative labor circumstances that are not directly involved in the exploitation or trafficking-crimes. What is relevant for this analysis is the final stage of trafficking, being the labor exploitation-phase. This is why the prefix of "trafficking in human beings for the purpose of" labor exploitation was put between brackets in the entire contribution.

[4] Article 19 of the Council of Europe Convention against Trafficking in Human Beings, ETS no. 119, 03.05.2005.

[5] Article 18.4 of the Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims, and replacing Council Framework Decision 2002/629/JHA, O.J. L. 101/1, 15.04.2011.

[6] Explanatory report to the Council of Europe Convention against Trafficking in Human Beings, ETS no. 119, 03.05.2005, Point 229–236.

[7] The term "users" is used, as the accountability of those who knowingly "use" the services of victims of labor exploitation is explored. With "users", all companies from large multinationals to small corporations (even to one-man businesses) are meant, that are not the direct employers of victims of labor exploitation but that do business with these employers somewhere in their supply chain.

diligence is a vital factor for the conclusion to guilty knowledge of users of trafficking in human beings by their subcontractors.

## 2 Criminal Accountability of Companies for a Separate Crime of Knowingly Using Trafficking Victims

### *2.1 Introduction*

The issue of user-accountability is not an untouched one. In different spheres of the law, examples of ways of dealing with this form of demand-reduction can be found. Existing approaches for user-accountability could be discussed along the lines of the following structure: for severe cases of labor exploitation, with proven knowledge of the "user", criminal law should be able to play its part. For cases of violations of labor standards, however not amounting to slavery-like conditions, social law comes in play.[8] Lastly, there is also a role for the non-interference of the law, when discussing due diligence and self-regulation of companies to keep their supply chains exploitation-free. The focus of this contribution will be put on cases of severe exploitation, spurring the interference of criminal law and the role that self-regulation can play for the determination of guilty knowledge of users. In other words, cases of violations of labor standards which can better be placed in the sphere of labor law will not be discussed here. On EU level, a general legal basis for criminalizing users can be found in current anti-trafficking instruments prescribing that countries must adopt provisions for "discouraging demand" for trafficking in human beings.[9] Such a measure is criminalizing users who knowingly make use of the services of victims of trafficking in human beings, which was for the first time recommended in the 2005 Council of Europe anti-trafficking Convention[10] and later repeated in EU-anti-trafficking instruments. The 2011 EU Trafficking Directive states in its article 18.4 that

> In order to make the preventing and combating of trafficking in human beings more effective by discouraging demand, Member States shall consider taking measures to establish as a criminal offence the use of services which are the objects of exploitation as referred to in Article 2, with the knowledge that the person is a victim of an offence referred to in Article 2.[11]

[8] See also Skrivankova (2010).

[9] The most recent EU-anti-trafficking instrument, the 2011 Trafficking Directive, prescribes in its article 18 that *Member States shall take appropriate measures, such as education and training, to discourage and reduce the demand that fosters all forms of exploitation related to trafficking in human beings.*

[10] Council of Europe Convention against Trafficking in Human Beings, ETS no. 119 and its explanatory report, 03.05.2005; see Gallagher (2006).

[11] Article 2 being the definition of trafficking in human beings.

The explanatory report of the Council of Europe Trafficking Convention offers a basis for better understanding of the idea and the motivation behind the adoption of this provision today.[12] The explanatory report emphasizes that the main consideration for the adoption of such a provision was the desire to discourage the demand for exploitable people that drives trafficking in human beings.[13] The report further explains who should be perceived as "a user" and offers the example of a business owner who knew or should have known that he or she was working with trafficked people. The report underlines that in such a case the user could not be treated as criminally liable as a trafficker because he or she has not him/herself recruited the victims of the trafficking nor has he or she used any of the means referred to in the definition of trafficking. The user would however be guilty of a separate criminal offence.[14]

## *2.2 Discussion*

The practical problems for Member States to answer to this solution are manifold: First, as mentioned above, how are they to define "knowingly"? How will authorities prove that users knew full well that they were dealing with exploited victims in their supply chain? Also, in today's globalized world, the distinction between forced, exploitative and free labor is not so clear-cut, making it even harder for users to decide on the *bonafide* character of their partners.

### 2.2.1 The Difficult Distinction Between Voluntary and Forced Labor

A significant issue to preliminarily discuss is the difficult distinction between voluntary and coerced or exploited labor on today's market. It is not so self-evident for which market segment the EU suggests to consider criminalizing "users". More than a decade after the Palermo Protocol,[15] we have learned a lot on the actual face of trafficking in human beings for labor exploitation. We have gained insights into migrant workers traveling to another country searching for a better life, well-aware of the line of work they will end up in and even possibly aware of the fact that they will earn less than the legal minimum wage and enjoy less rights than what they are legally entitled to. Sometimes however, they are surprised by the conditions of work, the level of control by their employers, or the

[12] Point 229–236.

[13] Point 230.

[14] Van Damme and Vermeulen (2012), pp. 205ff.

[15] The 2000 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing The United Nations Convention Against Transnational Organized Crime.

small share of pay they get to keep.[16] Even if no actual use of force or threat there-of is used, the fact that workers have no viable alternative than to accept certain bad conditions may be enough to conclude to (psychological) coercion. Also, ambiguous cases are being treated as trafficking-cases, where workers voluntarily work under the set labor standards of a country but still under humane conditions, but who do not consider themselves victims at all as they are able to provide for their families, and as they are generally a lot "better off" than at home. The question that has already been asked in a vast amount of (academic) research[17] is where voluntariness ends and coercion begins? It is important to contextualize the free choice for exploitative work when faced with broader social, economic, political and ideological conditions that workers have not chosen.[18] Besides some vague "indicators of likely exploitation" neither the academic world nor the policy makers seem to have a waterproof approach for making a clear-cut differentiation between voluntary and forced labor. How then would main contractors be able to make a difference between good or bad subcontractors' behavior? It seems rather unfair and even unacceptable that a user would be criminalized for making use of the services of a victim of (trafficking for) labor exploitation, if for example the worker does not even consider herself or himself to be a victim or if the situation is unclear even to authorities. When examining user-accountability in the criminal law-sphere, it must first be determined that a case actually entails clear-cut, severe labor exploitation. After establishing this, the second step is to demonstrate the guilty knowledge of the user.[19] This two-step-procedure is the only manner in which criminalization of users should pass the test of proportionality, legality and the presumption of innocence. But how then to conclude to clear-cut exploitation? Only focusing on "worst forms" of labor exploitation for certain policy purposes, is not a novelty. The ILO Worst Forms of Child Labor Convention of 1999, is a good example of this.[20] This convention describes four types of child labor that it considers a priority on the international agenda to tackle. This also means that certain forms of child labor that are not listed, even though child labor should be prohibited in any case, are deemed less of a priority than the "worst forms". For the topic of this contribution and the suggested two-step procedure, namely that first a clear-cut, worst form of labor exploitation must be established before investigating

[16] Vermeulen (2005).

[17] Vermeulen (2005), Smit and Boot (2007), Council of Europe (2007), Munro (2008), Brooks-Gordon (2010), Davidson (2010), and Skrivankova (2010).

[18] Phoenix (2009), p. 6.

[19] It is important to stress that it is not automatically so that a client's guilty knowledge is certain simply because of the fact that exploitation has taken place. It may be so that despite exploitation, the client could in no way have been aware of it. Therefore the guilty knowledge must be examined separately after demonstrating exploitation, before concluding to criminal accountability of the client.

[20] Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (Entry into force: 19.11.2000) Adoption: Geneva, 87th ILC session, 17.06.1999.

a user's (possible) knowledge there-of, the "worst form"-notion is particularly relevant. Not all cases of labor exploitation should be labeled a "worst form"-case. Also, certain cases may start off as clearly being a case where only a small level of coercion is being imposed, to later develop into a case of severe exploitation. Skrivankova[21] argues that in order to understand situations of coercion into a certain form of work,[22] these need be understood through the lens of what she calls a *continuum of exploitation*. She justly argues that the absence of a clear definition of exploitation in anti-trafficking and forced labor-instruments makes it difficult to draw the line between exploitation in terms of violation of certain labor rights and extreme exploitation amounting to forced labor. The continuum of exploitation is a concept that enables the identification of a remedy for any situation in which someone might find himself or herself that differs from what she calls "decent work".[23] She notes that labor exploitation entails a continuum ranging from the positive extreme of "decent work" to the negative extreme of forced labor. Skrivankova further notes that while the continuum should not be perceived as a replacement for the definition of exploitation, it is a *proxy relevant to all possible modes of exploitation. Using the continuum in practice means that all situations that are not decent work are redressed, contributing to the heightening of standards and eliminating the environment conducive to forced labor*.[24] Different responses, going from criminal justice responses for the worst forms of exploitation to labor law responses for mere violations of labor standards, fit different stages of the continuum. This could mean that criminal justice responses should be reserved for the negative extreme of forced labor. Inspired by the ILO's Worst Forms of Child Labour Convention, we can conclude that the negative extreme of the continuum can be defined as "all forms of slavery or practices similar to slavery, such as the sale and trafficking of workers, debt bondage and serfdom and forced or compulsory labor". Applied to the topic of this contribution, the criminalization of users is an example of a criminal justice response that should be reserved for the worst forms of exploitation, and moreover it should only be used in certain cases of demonstrable knowledge of the user of this exploitation, representing the two-step-procedure as mentioned earlier. As difficult a policy option this suggestion may be, as will become more clear from the other obstacles identified below, it is more than reasonable and justifiable to severely penalize companies that knowingly did business with suppliers that exploit workers in the worst conditions as defined above. Focusing on the worst forms of labor exploitation is a recommendation for a solution for the first problem with this approach, being the difficult distinction between voluntary and forced labor. It however does not solve the two other major challenges of this approach which will be discussed below.

[21] Skrivankova (2010).

[22] The study mainly focuses on labor exploitation but is nonetheless interesting and useful for sexual exploitation as well.

[23] Skrivankova (2010), p. 16.

[24] Skrivankova (2010), p. 18.

### 2.2.2 The Difficult Establishment or Proof of Guilty Knowledge of Companies

Known cases contextualize the question of guilty knowledge of users. A good example is the 2011 spate of suicides of Chinese workers producing Apple iPads under exploitative working conditions at the Foxconn factory in Shenzhen, China, despite Apple's public commitment to fair labor in their entire supply chain.[25] Apple suffered considerable reputation-damage, even amounting to attempted boycotts, while continuously claiming that they were not aware of the working conditions in far-away subcontracting-factories. The best recent example of questionable user-accountability is of course the Bangladesh-tragedy of May 2013, where over a 1,000 textile workers were killed after an unsafe building collapsed, that housed a number of textile factories, some of which were supplying well-known Western retailers. Supply chain-"contamination" obviously doesn't only happen with large, multinational and well-known brands. In March 2013 a case of exploitation of Romanian construction workers in Germany was publicized, in which 50 Romanian workers were promised a good salary and all social rights by a Romanian employment agency, ending up in empty apartments, with no significant salary or any other remuneration. The construction consortium that was the main contractor of the project, denied all responsibility for the workers, claiming to be able to demonstrate no delays in the payments of their subcontractors nor any other irregularities in their contracts. Countless other similar cases exist and they all document the difficulty of determining the extent to which those in another than the direct employer-node of the production process were aware, should have been aware, or could have been aware of exploitative circumstances in their supply chain.[26] In today's economy subcontracting- or supply chains are becoming larger and larger, increasing the distance to the main contractors, in turn making it easier for them to claim being horrified by exploitation scandals while denying all responsibility. An important question when addressing the possible added value of user-criminalization is what moral and ethical restraints exist with users resulting in not wanting to engage in exploitative contracts. Is there such a thing as an inherent moral restraint within the minds of companies, offering a worthy counter-balance for the purely economic assessment of a purchase?[27] If inherent moral restraint to be an actor on a criminal market is not present or insufficiently present due to the overweight of the pursuit of "profit" in the form of the best service for the least amount of money, resulting in willingly "turning a blind eye", an external drive to refrain from contributing to these processes may be in order. This external drive could be an increased risk of criminal liability and subsequent

[25] Foxconn suicides highlight China's sweatshop Conditions, John Chan (2010), http://www.wsws.org/ (9.4.2013).

[26] Romanian workers deceived and exploited at Bostalsee construction site, International Trade Union Confederation, http://www.ituc-csi.org/ (9.4.2013).

[27] Haynes (2009).

sanctioning.[28] If such an external drive exists, choosing the "lawful" option becomes more attractive.[29] This reasoning obviously goes back to the (deterring) function of criminal law and the rational choice theory. However, if we are considering criminalizing them, we must know how to prove that they knew or should/could have known what was going on in their supply chain. Some sort of punishment or sanctioning of users that gain considerable profit from doing business with partners of whom they know, or could have had a logical suspicion due to certain circumstances, that they are *malafide*, seems more than just. Users that could in no way have known about exploitative circumstances, despite their best efforts to keep their supply chains clean, should in no way be held criminally liable due to a lack of a constitutive element for a crime to take place.[30] We have already established above that guilty knowledge should be proven after the first step of determining a "worst form" of exploitation is fulfilled. The question remains: how? The drafters of the user-criminalization-approach have left this difficult issue open. In the explanatory report of the 2005 Trafficking Convention,[31] a practical solution for the issue of proving guilty knowledge is left open in such a way by stating that

> Proving knowledge may be a difficult matter for the prosecution authorities. Similar difficulty arises with various other types of criminal law provision requiring evidence of some non-material ingredient of an offence. However, the difficulty of finding evidence is not necessarily a conclusive argument for not treating a given type of conduct as a criminal offence.[32]

The issue of proving guilty knowledge of a subcontractor's "worst form of exploitation" could be solved by existing alternatives for clear-cut *mens rea*. Examples are: the legal construct of *negligence*—a failure to take reasonable precautions against foreseeable harm in violation of a duty of care—resulting in criminal liability. Or should the issue of guilty knowledge be solved by inferring the perpetrator's intention from the factual circumstances, as is offered as a solution by the explanatory report of the 2005 Trafficking Convention?[33] Or should liability

[28] This is not the place to elaborate substantially on types of sanctions that can be imposed on legal persons (see extensively Vermeulen et al. 2012). However, it must be noted that administrative sanctions against legal persons, that know many different legal frameworks throughout the EU, should definitely not be forgotten when speaking of effective sanctions against legal persons, as they can also, as can criminal sanctions, consist of high pecuniary fines that can impact severely on the company.

[29] Van Damme and Vermeulen (2012).

[30] Which does not mean that they should not in any other way be held liable.

[31] Point 234.

[32] In point 236, the explanatory report states that the difficulty of collecting evidence is the reason why the measure was formulated as a recommendation without making it a binding provision.

[33] In point 235. For instance, Article 6(2)(c) of the *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* (ETS No.141) states that "knowledge, intent or purpose required as an element of an offence set forth in that paragraph may be inferred from objective, factual circumstances". Similarly Article 6(2)(f), on criminalizing the laundering of the proceeds of crime, of the *United Nations Convention against Transnational Organized Crime* states: "Knowledge, intent or purpose required as an element of an offence set forth in paragraph 1 of this article may be inferred from objective, factual circumstances".

be construed through more general notions like *drawing profit from* or *inducing* the human rights violation?[34] This is not the place for a thorough analysis for all legal instruments or alternatives for *mens rea*. In the following sections of this contribution however, solutions for the difficult issue of proof of guilty knowledge will be offered.

## 3 Criminal Accountability for Participation in the Crime of Trafficking in Human Beings

Another way, besides considering it as a separate crime, of perceiving the role of a knowing user and his or her subsequent criminal liability, is through participation in crime. Indeed, if a company knew about the illicit activities of a subcontractor, but still chose to uphold the business relation, it is relevant to ask whether the company is not simply an accomplice to the criminal subcontractor. The solution of "participation in crime" should be further examined in this context. An example to introduce participation of crime in the context of the topic of this contribution, can be found in Belgium. In the Carestel case,[35] Belgium convicted a large roadside-restaurant chain for being accomplices to trafficking in human beings due to a contract with a German cleaning company-subcontractor that exploited its personnel in Carestel restrooms, after their knowledge thereof was considered proven from factual circumstances. In other words, Carestel was not convicted for a separate crime, as suggested by the EU, but directly for complicity to trafficking. The Belgian criminal law[36] does not require for an accomplice to have the specific intent which is required for the crime he is involved in. What is required, is that he knowingly grants assistance to the crime the actual perpetrator commits. In other words, the intent of the accomplice, in this case of the user, can be isolated from the required intent as a constitutive element of the main crime, *in casu* trafficking in human beings.[37] To conclude that an accomplice had the intent to participate in a crime it is required that the accomplice knew what he was participating in. This requirement does not differ much from the creation of a new crime-approach, where it is also required that a user *knowingly* made use of a victim of trafficking. However, applied to the Belgian legal construct of the accomplice, this knowledge means being criminally liable for the same crime as the actual perpetrator, instead

[34] Van Hoek (2008).

[35] https://www.law.kuleuven.be/arbeidsrecht/pdf_documenten/nieuwsbrieven2012/def-carestel-kronos.pdf (12.2.2014).

[36] Article 66.

[37] For Belgian jurisprudence in this regard see for example Cass 9 oktober 1990, Arr. Cass. 1990–1991, nr. 69; Cass. 13 mei 1998, Arr. Cass. 1999, nr. 248; Cass. 22 juni 2004, Arr. Cass. 2004, nr. 344; Cass. 26 februari 2008, Arr. Cass. 2008, nr. 128.

of a separate crime.[38] Moreover, and even more interestingly for the topic of this contribution, in Belgian criminal law the required intent or moral element of a crime is also concluded to when the perpetrator knowingly behaves in a certain way without intending to participate in a certain crime with this behavior, but however being aware of the risk that this behavior could contribute to a crime and when he accepts this risk.[39] Specifically for the Carestel case, the company had been informed of a previous investigation against the German subcontractor for violations of labor standards, which was enough for the court to conclude that Carestel was aware of the risk but chose to accept it, as they did not act on this information but still chose to continue the contract. Furthermore, there was other factual evidence to conclude to the "knowledge" of Carestel, such as the extraordinarily low cost of the contract which did not fit Belgian wage norms, email-traffic of Carestel management indicating a certain worry of the company with regards to the subcontractor, etc. In other words, participation in crime, to a certain extent, solves the issues of the creation of a new crime-approach and attains its goal in its own manner, as it criminalizes those who knew, should, or could have known that they were doing business with *malafide* subcontractors.[40] It is interesting to ask if this is not a more logical, easy and problem-solving solution than creating a new crime, as the EU suggests member states to do? On EU-level, generally speaking, Union law leaves the definition of modes of participation to a crime to the member states.[41] The landscape in the EU with regards to participation to a crime is scattered, and it is not so that all member states would be able to treat such cases like Belgium can.[42] In other words, it is certainly not so that we can conclude that the creation of a new crime-suggestion and the whole discussion are obsolete as the issue can easily be solved by member states' national criminal law due to the legal construct of participation. The question at hand is thus: instead of suggesting the creation of a new crime, would it not be more useful for the EU to create a new provision of substantive criminal law, in that it harmonizes member states' provisions on participation in crime, subsequently having a meaningful impact on the issue of criminal accountability of "knowing users"? As Keiler duly notes after researching the different models for participation in member states of the EU: *the approaches taken regarding participation in crime in different Member States are diverse and can lead to varying scopes of liability, a situation which is undesirable in a*

[38] It is necessary to add that Belgium knows two kinds of accomplices (art. 65&66): one that has provided essential assistance to the perpetrator and who is considered on the exact same level as the actual perpetrator, and one that has provided secondary, non-essential, assistance who is still prosecuted for the same crime but as an accomplice, resulting in lower sentencing. In this case, Carestel was prosecuted as an accomplice of the first kind thus on the same level as the trafficker.

[39] Vanheule (2009).

[40] It is important to stress that this conclusion only concerns trafficking for labor exploitation, this does not mean that the analysis made automatically concerns other forms of trafficking, such as for sexual exploitation, which is also envisaged in the EU suggestion of the creation of a new crime.

[41] Klip (2009), p. 206.

[42] Keiler (2013).

*"Common Area of Freedom, Security and Justice"*.[43] However different, Keiler has extracted one clear paradigm shift towards what he calls a normative concept of participation, meaning that to conclude to participation, across the EU it must be somehow investigated if the "participator" had a duty to control or prevent a potentially criminal conduct. In other words, commitment of crime is not viewed as restrictive anymore, however, the notion of participation is increasingly interpreted normatively in order to respond to contemporary challenges in criminal law, such as organized and white collar crime.[44] This tendency coincides with what has already been discussed for Belgian criminal law. Considering the potential of "participation in crime" for the problem at hand, it is at the very least as interesting to look at the potential of a European concept of participation in crime as a solution for the matter, as it is to analyze the potential of the creation of a new crime. Even though the EU, in its instruments, does not explicitly regulate participation in a consistent manner, some traces there-of can still be found.[45] It is, for example, interesting to note that the EU Court of Justice, in its case law on competition law and the prohibition to form cartels, takes a stance on "intent" when it comes to participation that is highly similar to the Belgian example. According to the Court, to conclude to the intent to participate in certain prohibited behavior, in this case anti-competitive conduct, it is necessary to establish that the undertaking intended to contribute through its own conduct to the common objectives of the cartel and that it was aware of the anti-competitive conduct of the other participants, or could reasonably have foreseen that conduct and was ready to accept that risk.[46] From the tendency in national criminal laws and European tendencies such as the one in competition law, preliminary suggestions can be made when discussing the possibility of establishing a European framework of participation in crime, which, when adopted, could be applied as a solution for user's criminal accountability for knowingly making use of the services of victims of (worst forms) of trafficking for labor exploitation. Briefly put, criminal liability should be imposed when there is a link between a certain criminal outcome and an actor, and this should be the case in any member state. The question remains, especially when applied to the topic of this contribution: is there a clear enough link between the criminal outcome of labor exploitation on the one hand, and the knowing user in the broadest sense, on the other hand? The European Court of Human Rights' case law should be born in mind in this regard too. In the 2005 Göktepe-case,[47] for example, the Court considered it to be a violation of the right to a fair trial that aggravated

[43] Keiler (2013), p. 296.

[44] Keiler (2013), p. 311.

[45] See extensively Keiler (2013).

[46] 8 September 2010, Case T-29/05, *Deltafi na SpA v European Commission*, [2010] not yet reported, para 62. See also: 7 January 2004, Joined Cases C-2004 P, C-205/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aaborg Portland and others v Commission of the European Communities*, [2004] ECR I-00123, para 83 (Keiler 2013).

[47] Goktepe v. Belgium (no. 50372/99).

circumstances to a certain crime were attributed to all participators of the crime, irrespective of the participator's direct involvement in the acts that constituted aggravating circumstances. The Court found that for a court not to take into account arguments on a vital issue that entailed severe consequences was incompatible with adversarial process and therefore contrary to the notion of a fair trial. Keiler justly notes that the link between a criminal outcome and its author(s) *must be established by analysing the behaviour of every participant in the context of the realisation of a criminal wrong in a co-operative manner. If such a connection can be established, the person arguably bears substantial responsibility for the criminal outcome and imposing liability as a principal seems justified*.[48] Social norms and reasonable expectations are important concepts to establish this link, which is why Keiler speaks of "the social theory of conduct".[49] In other words, this stance clarifies or even solves both the obstacle of the material and the moral element of the crime of (trafficking for) labor exploitation, when speaking of the commitment of this crime by the user. It is in a way a contra-solution for the creation of a new crime, in that in this approach, the user does not commit trafficking in human beings, be it as an accomplice, while the starting point of the creation of a new crime-approach is exactly that the user does not commit trafficking and therefore there is a need for the creation of a separate crime. The question is, is this necessary? Is it not easier and more of an attainable goal to solve the issue through participation in crime? In general, when asking the question of the usefulness of a European concept of participation in crime in this kind of broad, normative sense, one must recall the general focus of European criminal law on crimes such as trafficking in human beings, organized crime in general, corruption, money laundering, etc. It is rare that these prioritized crimes are committed by one single actor, rather they are committed in a complex framework of multiple actors, all bearing a different level of responsibility for the criminal outcome but often however knowing a direct link there-to. This is why EU harmonization instruments such as the EU's Trafficking Directive usually hold provisions regarding participation. Article 3 of the Trafficking Directive proscribes that *Member States shall take the necessary measures to ensure that inciting, aiding and abetting or attempting to commit an offence referred to in Article 2 is punishable*. Of course, this provision is rather vague and leaves it up to the member states to decide how this "aiding and abetting" is defined and made punishable in practice. Should the EU not create a substantive norm of European criminal law for participation in crime, adopted according to the normative approach? As has been stated above, this would be more than justified as it more than fits the goals of European criminal law, especially in the context of the crimes the EU is focusing on the most such as organized crime. The question is if the EU has the competence, according to its own Union law, to clearly decide on the framework of participation, instead of formulating vague provisions and leaving it up to the member states? This is not an easy matter, as in fact this is quite the

[48] Keiler (2013), p. 313.

[49] Weiner (1995).

EU-intrusion on the national criminal law of its members. Article 2 of the Treaty on the functioning of the European Union sets out the Union competence in general, while article 4(j) specifically states that matters of security and justice, under which criminal law should be perceived, are a shared competence of the EU and its member states. Furthermore, to clarify this shared competence, we need to turn to article 5 of the Treaty on the European Union (TEU) which proscribes the principles of proportionality and subsidiarity for EU-interference. Article 5.3 and 5.4 TEU states that in non-exclusive competence matters, such as criminal law as this is a shared matter, the EU should only act if the EU is better placed than the member state to take certain action and achieve the goals of the envisaged actions. Stating that on the basis of these articles, the EU would have the competence to give substance for all member states to a general principle of criminal law such as "participation in crime", would be taking it a step too far. However, the EU giving substance to general principles of criminal law in a certain matter or in a certain instrument is not completely unseen. In the Trafficking Directive for example, the EU has intervened in the matter of jurisdiction, which can also be seen as a general principle.[50] It would therefore be anything but unthinkable that the EU would adopt a provision in the EU Trafficking Directive, as it has for jurisdiction, which sets out the specific and clear rules for participation in crime, along the lines of what has been discussed above. This is especially so because of the potential of the use of participation in crime for the specific issue of this article. However, it must also be noted that this attribution of criminal liability to participators must not be without limitations, to not pose procedural rights-problems. Keiler notes that a limitation can be found in the harm principle, in that the distance between the occurrence of harm and the conduct of the actor cannot be too big.[51] A second limitation in the context of the principle of legality should be found in the principle of guilt, in that only freely and intentionally chosen harmful conduct must give rise to criminal liability. Thirdly, the concept of foreseeability plays its part, in that the consequences of the harmful conduct of the participant must have been reasonably foreseeable. Lastly, an important tool for this safeguarding, must be the concept of due diligence, which will be discussed further on in this contribution. For a user to be considered a participator to the crime of (trafficking for the purpose of) labor exploitation, or for any serious crime, it must be proven beyond reasonable doubt that he did not do anything in his power to prevent his participation.[52] This is where the link between criminal law and self-regulation becomes apparent. All of these general principles of law must guarantee that the decision on collective wrongdoing is kept within reasonable boundaries, no matter which broad national or European provision on participation in crime is maintained. As enough has been written on the principle of legality in general, and to remain on topic, the focus of this contribution will now turn to the concept of due diligence as a limitation to the

[50] Preamble point (16) and article 10 of the 2011 Trafficking Directive.
[51] Keiler (2013), p. 505.
[52] Gritter (2007) and Keupink (2011).

proof of "knowledge" of the user of doing business with traffickers or exploiters. This issue plays an important role both in the suggestion of the creation of a new crime, as in the better option to harmonize the rules on participation in crime for trafficking in human beings.

## 4 Due Diligence

This section will deal with due diligence, or "the duty of care", which should first be seen as a tool for companies to prevent (trafficking for) labor exploitation in their supply chains in general, as without a "user" for his victims, the criminal market becomes a lot less attractive for traffickers and exploiters that cannot directly exploit them themselves. Companies often adopt certain company strategies, adhere to certain standards and even employ certain "compliance officers" to make sure that suppliers and their products keep the company's supply chain "clean", without this necessarily being induced by fear of prosecution. However, and more importantly in the light of the topic of this contribution, due diligence can also be seen as a means for users to avoid accountability in the sense of the discussion above. Concepts such as corporate governance, due diligence, corporate social responsibility, social compliance programs etc., fall under this larger scope of self-regulation, as they all entail some sort of voluntary commitment by companies to abide by certain standards.[53] These actions, in the context of labor rights-safeguarding in subcontracting chains, can be seen as a voluntary commitment by contractors to manage their relationships with subcontractors in a responsible way.[54] After the legal analysis made above and especially, after the problems detected for the fight against (trafficking for) labor exploitation resulting in the preliminary conclusion that demand-reduction is all but easy, we should explore if and how self-regulation can be useful tool, both in general and as a tool to decide on the actual liability of a user, for a new crime or as a participator. Much has been written on corporate social responsibility, corporate codes of conduct and subsequent compliance programs.[55] In the following paragraphs, self-regulation as a voluntary commitment by companies is discussed for its pro's and con's in the fight

[53] Self-regulation and quality labelling, in brief, means that actors on a market commit and organise themselves to abide by certain sector-specific good standards, and for doing so they can obtain and portray a form of certificate showing to others that they abide by these standards of for example quality, safety and reliability (Vermeulen 2007, 2008).

[54] Jorens et al. (2012). It must be emphasised that this section will only deal with self-regulation in the context of subcontracting schemes, and not with self-regulation of companies to themselves abide by certain standards regarding the respect for laborers rights, which would lead us to far away from the core topic of this article.

[55] See, for example, Jenkins and Unies (2001); Kolk and Van Tulder (2002); Tanger (2006); Du et al. (2007); Chesterman (2008); Grieser (2008), pp. 285 ff.; Reuland (2010); Vogel (2010); Konov (2011); Pierce (2011); Todres (2012).

against (trafficking for) labor exploitation. Then, self-regulation that is somehow demanded in national and international legislation will be discussed, again for its advantages and challenges. Finally, the question will be put in the context of self-regulation or "due diligence" serving as a tool for escaping criminal accountability for knowingly using the services of victims of severe cases of trafficking in human beings, or precisely, when lacking, to conclude to it.

## *4.1 Voluntary Self-Regulation*

As business and its effects have greater global impact, corporations are expected to bear greater responsibility for the consequences.[56] Corporate codes of conduct are individual company policy statements that define a company's own ethical standards.[57] This is not the place to offer a complete theoretical framework on all kinds of self-regulation by corporations, but in brief, there can also be codes of conduct established on a sectorial level, by non-governmental organizations, between two key market players, etc. Indeed, due to its voluntary nature, it can take any form. Of particular interest in the context of the recent disaster in Bangladesh, are industry-specific codes of conduct. Good examples in the garment-industry are the Fair Labor Association (FLA), initiated by (mostly) major clothing firms in response to rising concerns about sweatshop scandals, and the Clean Clothes Initiative which was one of the driving forces behind signing of the Accord on Fire and Building Safety[58] in Bangladesh after the disaster took place. This Accord is a binding contract between 70 apparel brands and retailers, international and local trade unions and NGOs. Its aim is to ensure sustainable improvements to working conditions in the Bangladesh garment industry.[59] More and more, (mostly) large transnational companies choose to abide by certain standards and seek to transpose their own codes of conduct to their suppliers. Larger multinationals sometimes (claim to) go further than simply stating that they themselves abide by certain

[56] International Labor Organization, Corporate Codes of Conduct, http://www.actrav.itcilo.org/actrav-english/telearn/global/ilo/guide/main.htm#New%20social%20responsibilities%20for%20liberalized%20global%20business/ (9.7.2013).

[57] See extensively Raiborn and Payne (1990); Kolk et al. (1999); Blackett (2000); Jenkins and Unies (2001); O'Rourke (2003), pp.10ff.; Grieser (2008), pp. 285ff.

[58] http://www.laborrights.org/creating-a-sweatfreeworld/resources/bangladesh-fire-and-building-safety-agreement/ (12.7.2013).

[59] http://www.cleanclothes.org/about/principles/ (12.2.2014). A said uniqueness of the Act is that it is a legally binding contract, in contrast to mostly voluntary adherences to certain codes of conduct. Section 5 of the Accord explicitly outlines the process of dispute resolution, in which the outcomes can be reinforced in the court of law. However, in essence the Accord's legal obligations do not differ that much from other business contracts that companies routinely close. Business contracts commonly include provisions proscribing that a supplier's violation of certain standards constitutes a material breach of the contract, resulting in the power of the main contractor to merely terminate the contract.

standards, but they develop sophisticated compliance programs and hire specialized compliance officers overseeing the program within the company itself and sometimes even with far-away suppliers. This requires a huge commitment from companies, especially in huge global supply chains. Smaller-scale companies lack the resources and power to self-regulate in such a way, while all together of equal impact on labor exploitation as the few large multinationals that take meaningful action in this regard. Other question marks should be put with purely voluntary self-regulation as a meaningful demand-reduction-tool in the fight against labor exploitation in global supply chains. Firstly, there is the question of legitimacy: have all key players such as the trade union been included in the determination of the standards? Secondly, does the company code meet international and local legal standards? Thirdly and of utmost importance in the light of the topic of this contribution, who is accountable if a standard is violated by the company itself or a supplier, and is the code being monitored in an independent and transparent manner?[60] Lastly, especially in cross-border subcontracting situations, are the standards at all attainable by suppliers in possibly less-developed countries and who meaningfully checks up on this before closing contracts? Also, it is mostly merely the case that there is a clause in the contract between the main contractor and his subcontractor stating that the contract will be terminated if the subcontractor proves to breach certain standards: first, how will these breaches be detected and secondly, will the termination of the contract result in anything good for the workers? It is safe to say that demand-reduction and user-accountability as a tool in the fight against (trafficking for) labor exploitation is too high of a "good" to be fully left dependent on the goodwill of a handful of large multinational and powerful companies. Smaller-scale companies lack the knowledge, power and resources to have a meaningful impact on global supply chains as they cannot do much more than merely expressing that they abide by certain standards. Also, the "reputational drive" behind self-regulation may have only limited importance for smaller firms and middle-men because they are less brand-dependent.[61] Furthermore, joining certain larger-scale initiatives such as the Fair Labor Organisation that does much of the work *for* its members, is of course a good alternative when lacking resources but as meaningful these initiatives and organisations may be, questions of independent monitoring and accountability in the case of violations remain. The picture should however not be painted as a completely negative story. Certain self-regulation initiatives do work well, especially when external monitoring is involved, such as the ISO international standards system.[62] It must also be noted that the main question of this contribution is: what to do with those users that knowingly do business with *malafide* market players? These users themselves can thus themselves be deemed *malafide* to some extent, placing them outside the playing field of those *bonafide* companies that choose to spend time, effort and

[60] O'Rourke (2003).

[61] Grieser (2008).

[62] See extensively on http://www.iso.org/iso/home/standards.htm/ (12.2.2014).

resources on self-regulation. The only link with the fully voluntary system of self-regulation is that certain companies may abuse the system for their own benefit. In other words, users may claim to self-regulate while in fact they only say so for reputational reasons, which is perfectly plausible in a fully voluntary system. The question thus surfaces: should the government play a role in all of this? Should self-regulation to abide by certain standards and choose suppliers that equally abide by these rules be made obligatory and enforceable for all companies? Most importantly: should the government control this and hold companies accountable for not self-regulating or acting with due diligence? In the following section, a more specific focus will be put on self-regulation-provisions *in* legal instruments.

## *4.2 State-Imposed Self-Regulation*

Corporations may often be more capable and better fit than governments to well-organize their own activities and have an impact on labor exploitation. However, as discussed above, they are often not willing to do so as this entails time, effort, and specially: money. Braitwaithe, already in 1982, proposed a model of enforced self-regulation where a compliance manager would be criminally liable if he or she did not report an overruling of compliance standards. Furthermore, he suggested that companies that regularly disregarded compliance directives would have to be the main focus of the government, in that the government would have to turn its prosecution resources towards these companies.[63] Examples can be found of current traces of self-regulation, specifically in the context of labor exploitation that is somehow being enforced in the law, therefore bearing similarities to the system that Braitwaithe suggested. Even though the concept of due diligence is anything but a straightforward concept, it has been attributed special value in relevant supra-national legislation. On a general level, amongst many others such as on UN- and ILO-level, the OECD Guidelines for Multinational Enterprises require companies to show responsible business conduct and governance and requires them to carry out risk-based due diligence when selecting subcontractors. The obligation for companies to act with due diligence can also be found in specific EU instruments. A good example is the Posting Directive,[64] where it is provided that certain main contractors[65] should not be held jointly and severally liable if they have acted with "due diligence" in a situation where without this due diligence, the main contractor would be jointly and severally liable for his subcontractor's

[63] Braithwaite (1982). This approach was also suggested by Van Damme and Vermeulen (2014) for self-regulation of the sex industry and consequent diverted prosecutorial attention to unwilling sex establishments.

[64] Directive 96/71/EC of the European Parliament and of the Council of 16.12.1996 concerning the posting of workers in the framework of the provision of services.

[65] See extensively Jorens et al. (2012).

disregard for certain labor rights of posted workers. Another example is the EU's Sanctions Directive,[66] where a similar provision is adopted. Other examples of instruments that foresee a great role for acting with due diligence can be found in the context of public procurement. Directive 2004/18/EC[67] and Directive 2004/17/EC as well as Convention No. 94 of the International Labor Organization (ILO) on labor clauses in public contracts[68] require provisions in government procurement contracts to ensure the compliance of subcontractors with labor standards. The goal is to ensure that competitive conditions imposed by public authorities in their role as clients-main contractors, such as low pricing policies or tight deadlines, do not undermine the capacity of subcontractors to comply with relevant labor and social standards.[69] On a national level, numerous traces of obligations to self-regulate can be found. The Finnish Liability's Act[70] is a good example. According to the Act, the client has an obligation to gather certain evidence proving the reliability of a candidate (sub)contractor or temporary work agency before concluding a contract with them. However, "reliability" is mainly assessed on the basis of social security and fiscal law-issues. When it comes to checking labor conditions, it is enough to merely gather some information on generally applicable collective agreement of the sector or profession or the principal conditions of work. The violation of this so-called "evidence-obligation" is sanctioned with a "negligence fee".[71] Many other examples of this kind exist, such as in the Irish Construction REA (collective agreement), according to which principal contractors must ensure that their

[66] Directive 2009/52/EC of the European Parliament and of the Council of 18.06. 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, *OJ L* 168, 30.6.2009.

[67] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, *OJ L* 134, 30.4.2004; Directive 2004/17/EC of the European Parliament and of the Council of 31.03.2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors *OJ L* 134, 30.4.2004.

[68] ILO Convention nr 94 concerning Labor Clauses in Public Contracts, Geneva, 32nd ILC session, 29.06.1949, http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID:312239/ (12.7.2013).

[69] Jorens et al. (2012), p. 11.

[70] Act of the Contractor's Obligations and Liability when Work is Contracted Out, (1233/2006), 3.2007.

[71] Section 9 of the Finnish Liability Act states that clients shall be obliged to pay a negligence fee if the client has:

1) neglected the obligation to check referred to in Sect. 5; or
2) concluded a contract on work referred to in this Act with a trader who has been barred from conducting business under the Act on Business Injunctions (*Laki liiketoimintakiellosta* No. 1059/1985) or with an enterprise in which a partner, a member of the Board of Directors, the Managing Director, or another person in a comparable position has been barred from conducting business; or
3) has concluded a contract as referred to in paragraph 2, despite the fact that he must have known that the other contracting partner had no intention of discharging their statutory obligations as a contracting partner and as an employer. (see extensively Jorens et al. (2012), p. 90).

'approved' subcontractors, abide for example by certain social welfare legislation. However, the REA does not mention how confirmation that a subcontractor is 'approved' is to be demonstrated.[72] In brief, "enforceable" self-regulation in supra-national and national legislation is anything but an unknown concept. However, due to a lack of a clear or harmonized idea of what actually constitutes due diligence, the practical applicability of these provisions is deemed difficult.[73] Specifically in the context of this contribution, a system of government enforced self-regulation should also be discussed as a possibly useful strategy. In brief, the suggestion under scrutiny would be the already mentioned two-step procedure when deciding on user-accountability: first it should be established if it really concerns a case of severe, slavery-like exploitation. If not, other solutions such as the application of labor law must come in play. If yes, criminal law must come in play in that it must penalize guilty knowledge, in one of the two manners discussed, be it in the form of a new crime or in the form of participation in crime. To conclude to guilty knowledge, proof of a lack of due diligence by the user in doing business with a certain subcontractor/supplier, must be delivered, however all principles of law but most importantly the principle of legality must be respected. Differently put, for this issue, in some way self-regulation would enforced by criminal law. At the same time, self-regulation can play a vital part for criminal law as well. In other words, for the issue of guilty knowledge of users of the worst forms of (trafficking for) labor exploitation by their business partners, an interplay between criminal law and self-regulation must be suggested.

## 5 Conclusion: A two-Step Procedure with an Interplay Between Criminalization and Self-Regulation

From what is written in all previous sections of this chapter, it can be concluded that there is a need for the following solutions for the problems identified in- and outside the scope of the law regarding user-accountability. A tool is needed to establish guilty knowledge of the worst forms of labor exploitation by a subcontractor, and this tool could very well be proven by an obvious lack of due diligence by a user, such as in the Carestel case. Diverted attention in prosecution or inspection priorities of law enforcement to *malafide* market players or, as Braitwaithe suggested, to market players that are known to disregard certain compliance standards, is necessary for the promotion of the *bonafide* market. Abiding by quality standards must become the most lucrative and competitive option for all players on the market. This brings us back to the above-mentioned two-step-procedure suggestion: first, a worst form of labor exploitation needs to be established and only after this has been proven beyond reasonable doubt, guilty knowledge of users should be assessed. If

[72] Jorens et al. (2012).

[73] See also Jorens et al. (2012).

these two steps have successfully been concluded, users should be criminalized, either separately through a separate crime, either through participation. The EU must indeed take firm legislative action. One option is obliging Member States to criminalize knowingly using victims of severe trafficking in human beings-cases. However, the participation in crime-option may be a goal that is easier to attain, as there are clear parallel tendencies across the EU in this regard,[74] which may not be the case for a specific new criminalization. This is also the better option considering the relatively unproblematic competence the EU would hold in this matter. Guilty knowledge can, however with respect for the rule of law, be assessed along the lines of due diligence in business conduct of the user. This solves several of the detected issues mentioned above. This however must not be misunderstood: it is merely suggested that if after investigation, a worst form of labor-exploitation is clearly proven, it can be taken into account if the company could have known, amongst other factors due to the lack of due diligence, that the service might have been problematic, when deciding on guilty knowledge. This less definitive approach can thus solve some of the above-mentioned procedural rights-issues. The self-regulation system with fitting governmental responses in the sense that in severe cases, a user's criminal accountability can be on the line, does hold the power of promoting *bonafide* service provision, as users will specifically look for "un-risky" partners. This will even more be so if law enforcement attention is diverted to the segment that is known for risky behavior, in accordance with Braitwaithe's suggestion. Also, as we have clearly indicated that only for the worst forms the investigation into a user's criminal accountability is justified, considering the grey zone between voluntary and forced exploitative work. At the very least, the proposed "two-step-procedure" should work well enough to target those suppliers that are involved in slavery, forced labor, and other "worst forms" of labor exploitation, without this meaning that all forms of labor standards violations can be targeted with this approach. In time, the impact of the two-step procedure could indeed be noticeable in that users, or "main contractors", become more careful as to who they do business with, resulting in the overall better position of *bonafide* market players in terms of profit and competitiveness. Especially the combination between EU-action with regards to participation in crime, specifically for trafficking in human beings, combined with (state-induced) due diligence as the proposed tool for shedding a clearer light on guilty knowledge of "participators", can constitute a meaningful attack on the *malafide* segment of the market as in this system, being a *bonafide* market player is made a lot more attractive. This way, private power is, in the end, used for public good.

[74] Keiler (2013).

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