

JUSTICE

Severe labour exploitation: workers moving within or into the European Union

States' obligations and
victims' rights



EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS



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States' obligations and victims' rights

Foreword

The term ‘severe labour exploitation’ refers to all forms of labour exploitation that are criminal under the legislation of the European Union (EU) Member State where the exploitation occurs. The EU already has a solid legal framework that clearly proscribes labour exploitation, but implementation lags far behind. Article 5 of the Charter of Fundamental Rights of the EU prohibits all forms of slavery or forced labour, while Article 31 stipulates that every worker has the right to ‘fair and just’ working conditions. The research for this report was undertaken to identify the barriers to workers’ enjoyment of the fundamental right to decent working conditions in the EU.

Worker exploitation is not an isolated or marginal phenomenon. Consumers may come into contact with the results of severe labour exploitation when they buy potatoes or meat in a supermarket, stay at a hotel or eat in a restaurant, or drive past a construction site. Nevertheless, the phenomenon of worker exploitation in general has to date been the subject of less research than related phenomena, such as trafficking or forced labour. There is therefore scant evidence of the vast number of people who move from one EU Member State to another or migrate into the EU and are forced by their economic and social circumstances to accept working conditions far below recognised legal standards.

The extensive fieldwork and desk research conducted for the report aim to fill this knowledge gap, thus challenging the current climate of implicit acceptance of severe labour exploitation. The report identifies risk factors contributing to such exploitation and discusses means of improving the situation. These include prevention strategies such as increased workplace inspections and greater efforts on the part of EU institutions and Member States to tighten public procurement procedures to avoid inadvertently funding exploiters. There is also an urgent need for more targeted monitoring, as well as improved criminal justice responses, to reduce the number of ineffective investigations that do not result in prosecution. In addition, closer cooperation between institutions involved in monitoring, inspections, law enforcement, victim support and public prosecution is indispensable to tackle the challenges presented by worker exploitation. The report also stresses that greater efforts are necessary to enable and encourage victims to report cases of labour exploitation, for example by encouraging trade unions to take an active role in informing and assisting persons who move to work into the EU or to another EU Member State.

The media, politicians and other opinion makers also need to recognise their responsibility in shaping public discourse about labour exploitation. They should state that labour exploitation is a violation of human dignity and hence unacceptable, whether for their compatriots, for citizens of other EU Member States or for third-country nationals. This sense of responsibility can be encouraged among all citizens through initiatives such as branding products and services that meet certain labour standards, thus allowing consumers to assess the likelihood of their purchases having been produced under exploitative work conditions. Creating a climate of zero tolerance is an essential first step in combating severe labour exploitation, as the combination of current failings can lead to a situation of endemic impunity for exploiters, resulting in a systemic failure to acknowledge victims and redress violations of their fundamental rights.

By allowing severe labour exploitation to spread across broad areas of the economy, from agriculture and construction through domestic work and the cleaning sector to tourism and catering, the EU not only tolerates serious violations of fundamental rights, but ultimately allows them to have a negative impact on the labour standards of all industries. The work of the national rapporteurs or equivalent mechanisms against trafficking in human beings in EU Member States, together with that of the EU Anti-Trafficking Coordinator, has done much to address the phenomenon of trafficking in human beings for the purpose of labour exploitation – as it relates to trafficking. To this end, their work can be further bolstered to enable them to combat severe labour exploitation. If the EU and its Member States are serious about maintaining national and international labour standards, accepting systemic labour exploitation is not an option.

Constantinos Manolopoulos

Director a.i.

Country codes

Code	EU Member State
AT	Austria
BE	Belgium
BG	Bulgaria
CY	Cyprus
CZ	Czech Republic
DE	Germany
DK	Denmark
EE	Estonia
EL	Greece
ES	Spain
FI	Finland
FR	France
HR	Croatia
HU	Hungary
IE	Ireland
IT	Italy
LT	Lithuania
LU	Luxembourg
LV	Latvia
MT	Malta
NL	Netherlands
PL	Poland
PT	Portugal
RO	Romania
SE	Sweden
SI	Slovenia
SK	Slovakia
UK	United Kingdom



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Acronyms

CEPOL	European Police College (an agency of the European Union)
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ESC	European Social Charter
EU	European Union
EU-OSHA	European Agency for Safety and Health at Work
Europol	European Police Office
Eurojust	the European Union's Judicial Cooperation Unit
FRA	European Union Agency for Fundamental Rights
HEUNI	European Institute for Crime Prevention and Control, affiliated with the United Nations
ICMPD	International Centre for Migration Policy Development
ILO	International Labour Organization
ITUC	International Trade Union Confederation
OHCHR	United Nations Office of the High Commissioner for Human Rights
OSCE	Organization for Security and Co-operation in Europe
TFEU	Treaty on the Functioning of the European Union
UNODC	United Nations Office on Drugs and Crime

Glossary

access to justice	This concept, introduced by Article 47 of the EU Charter of Fundamental Rights, means that the victim of a rights violation is entitled to an effective remedy and a fair trial. Access to justice must not be theoretical or illusory but practical and effective. The concept covers all forms of legal redress provided by both criminal and civil justice services. In particular, the concept of 'justice' includes compensation from offenders, state compensation and back payments to be made by employers.
decent work	This term refers to fair and just working conditions, as protected under Article 31 of the EU Charter of Fundamental Rights.
domestic worker	The term is used to refer to housekeeping and caring for dependents, such as children, older persons and persons with disabilities (FRA (European Union Agency for Fundamental Rights) (2011), <i>Migrants in an irregular situation employed in domestic work: fundamental rights challenges for the European Union and its Member States</i>).
due diligence	For the purposes of this research, this means that if persons are at a serious risk of being exploited, then the relevant authorities are under an obligation to adopt protection measures.
forced or compulsory labour	All work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself or herself voluntarily (International Labour Organization (ILO), Forced Labour Convention, 1930, Article 2 (1)).
gangmaster	A 'labour provider' who provides workers to the following sectors in the United Kingdom: agriculture; forestry; horticulture; shellfish-gathering; and food processing and packaging (for a full definition and description, see Gangmasters (Licensing) Act 2004, Section 4).
irregular situation of residence	This term is used to refer to situations where a person resides in an EU Member State in violation of national legislation.
migrant worker	<p>This term means a person who migrates or who has migrated from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant worker (Article 11 of the ILO Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)).</p> <p>This research focuses on the exploitation of workers who have moved either within or into the EU, regardless of whether they are EU or third-country nationals and regardless of their residency status.</p>
particularly exploitative working conditions	A striking disproportion between the working conditions, including those resulting from gender based or other discrimination, where there is a striking disproportion compared with the terms of employment of legally employed workers which, for example, affects the worker's health and safety, and which offends against human dignity (Article 2 (i) of the Employer Sanctions Directive).
Palermo Protocol	Protocol to prevent, suppress and punish trafficking in persons, especially women and children (2000), supplementing the United Nations (UN) Convention against Transnational Organized Crime (the EU and all Member States are parties to the protocol).
posted worker	'A worker who, for a limited period, carries out his work in the territory of a Member State other than the state in which he normally works' (Article 2 of the Posted Workers Directive).
risk factor(s)	Factors that render workers more vulnerable to labour exploitation.

seasonal worker	<p>A third-country national who retains his or her principal place of residence in a third country and stays legally and temporarily in the territory of a Member State to carry out an activity dependent on the passing of the seasons, under one or more fixed-term work contracts concluded directly between that third-country national and the employer established in that Member State, Article 3 of the Seasonal Workers Directive.</p> <p>Throughout the report the term is used to also refer to EU citizens carrying out seasonal work in another EU Member State.</p>
servitude	<p>A particularly serious form of denial of freedom: ‘servitude’ means an obligation, imposed by the use of coercion, to provide one’s services. The notion includes, in addition to the obligation to perform certain services for others, the obligation for the victim to live on another person’s property and the impossibility of altering his or her condition by stopping work or leaving the premises (see European Court of Human Rights (ECtHR), <i>Siliadin v. France</i>, No. 73316/01, 26 July 2005, paragraphs 123–124).</p>
severe labour exploitation	<p>The term ‘exploitation’ denotes work situations that deviate significantly from standard working conditions as defined by legislation or other binding legal regulations, concerning in particular remuneration, working hours, leave entitlements, health and safety standards and decent treatment.</p> <p>The term ‘severe’ refers to forms of exploitation of workers which are criminal under the legislation of the EU Member State where the exploitation occurs. Hence, severe labour exploitation includes coercive forms of exploitation, such as slavery, servitude, forced or compulsory labour and trafficking (Article 5 of the Fundamental Rights Charter), as well as severe exploitation within the framework of an employment relationship, in particular employment situations covered by Article 9 (1) of the Employer Sanctions Directive.</p>
slavery	<p>‘The status or condition of a person over whom any or all of the powers of the right of ownership are exercised’ (1926 Slavery Convention).</p>
trafficking	<p>Throughout the report, the term ‘trafficking’ refers to ‘trafficking in human beings’, which is defined as: ‘The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation’ (Article 2 of the Anti-Trafficking Directive).</p>
victim	<p>Persons who claim or could potentially claim that their rights protected under criminal law have been violated.</p> <p>In the context of this project, the term relates to victims of all forms of exploitation that are criminal under national legislation or where there is an obligation under EU legislation to criminalise (for example, under Article 9 of the Employer Sanctions Directive).</p>
working conditions	<p>This term covers all essential aspects of the employment relationship, including remuneration and other returns on the employee’s work, working hours, paid annual leave, and occupational health and safety. In this broad sense, Article 23 (1) (a) of the Seasonal Workers Directive refers to working conditions, including pay and dismissal, working hours, leave and holidays, as well as health and safety requirements at the workplace.</p>



Executive summary and FRA opinions

What this report is about

- A number of Lithuanian citizens worked on farms as pickers in the Lincolnshire area of the United Kingdom, a region well known for its agriculture. They were subjected to very poor living and working conditions by a Latvian gangmaster, including living in 'sheds' with limited access to hygiene facilities and limited contact with the outside world. The victims came from severely impoverished backgrounds. The situation was being monitored by the Gangmasters Licensing Authority (GLA), as it was clear that exploitation was being carried out. No criminal charges were, however, brought against the offenders and there was no redress for the victims, as they were not found to have been trafficked and so had no access to justice or support through the National Referral Mechanism.
- In 2007, a group of 68 men and women from China were recruited through a Finnish recruitment company on behalf of a Finnish cleaning business. A Chinese recruitment company was also involved in the process, which collected €8,300–€13,000 in recruitment fees. The workers did not speak Finnish or English and so did not understand the contracts they signed. The perpetrators were finally prosecuted on extortionate work discrimination and aggravated usury. Charges were, nevertheless, dropped as there was a lack of evidence and the recruitment company was found not to have acted on behalf of the employer. The victims did not receive any compensation and had to pay part of the legal fees.
- A Bulgarian couple worked on a farm in France picking fruit and vegetables. They were posted by a Bulgarian employer, lawfully employed by means of a labour contract in their native language, and had a lawful residence and employment status in the receiving country. Nonetheless, they were subject to extremely exploitative conditions of work and living. Although they worked for five months, they were paid for only six weeks. They worked for 15–16 hours daily. They were made to pick vegetables in the cold rain; they did not have the means to buy warmer clothes to suit the weather, and were not given any. The price of their return flight tickets was deducted from their salaries. On their return to Bulgaria, the victims reported their case to the National Commission for Combating Trafficking in Human Beings, which wrote to the local branch of the Bulgarian Ministry of the Interior's Central Office for Combating Organised Crime in Sliven, asking it to investigate the case further and prevent future cases of labour exploitation by the same Bulgarian employer.

- A third-country migrant of eastern European origin came to Belgium in 2013 to work in construction in an irregular situation of residence. He had to endure poor working conditions, such as long working hours and significant underpayment. With little knowledge of the local language and Belgian institutions, he refrained from reporting his employer for fear of losing his job and his income, and getting into trouble with the authorities because of his irregular status. Social workers were aware of his situation but for reasons of confidentiality they did not report to the police without his consent. Victim support is, however, only available for recognised victims of trafficking in human beings who assist the investigation.

These are only four of the 217 case studies identified as part of the European Union Agency for Fundamental Rights (FRA) project on severe labour exploitation of workers moving within or into the European Union (EU), indicating the many faces and forms of severe labour exploitation.

The term 'severe labour exploitation' refers to all forms of labour exploitation that are criminal under the legislation of the EU Member State where the exploitation occurs. A key focus of this report is exploitation at work and the risks surrounding it. The report does not analyse the preceding process of workers moving or being moved from their home countries into a situation of exploitation. It focuses on less well-known areas of EU law, which – along with the Anti-Trafficking Directive – can be used to deal with the phenomenon of severe labour exploitation.

Charter of Fundamental Rights of the European Union

Article 31 – Fair and just working conditions

1. Every worker has the right to working conditions which respect his or her health, safety and dignity.
2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

This FRA report is about the human dignity of workers moving to another country in the hope of making a living, but ending up in situations of severe exploitation. It is often about workers who are ready to accept working conditions that are far below legal standards in the country where they work but still better than the situation of poverty and unemployment from which they fled. It is about workers who have moved to a different country – both EU citizens and third-country nationals – who are severely exploited in the EU in many sectors of

the economy, such as citizens from Romania gathering potatoes in Hungary; women from sub-Saharan countries exploited as au-pairs in France; Portuguese men recruited for road construction projects in the Netherlands; North Korean men working as unskilled labourers at a shipyard in Poland; and fruit pickers from Bangladesh and Pakistan working in southern Greece. What these workers in different geographical locations and sectors of the economy often have in common is a combination of factors: being paid €1 or much less per hour, working 12 hours or more a day for six or seven days a week, being housed in harsh conditions, and not being allowed to go on holiday or take sick leave.

Severe labour exploitation of workers who have moved within or into the EU is common, although it often remains invisible to the public. In most cases, consumers are not aware that the oranges, wine, meat or potatoes they purchase in a supermarket, the shirt or shoes they buy in a shop, or the services they receive when in a hotel or restaurant may be produced by workers who have been or are being exploited.

Despite its pervasiveness in everyday life, severe labour exploitation and its adverse effects on third-country nationals and EU citizens – as workers, but also as consumers – have to date received little attention from researchers, except for specific forms of exploitation that involve a high level of coercion by the offenders.

Trafficking consists in taking certain actions (recruitment, transportation, transfer, harbouring, reception) using illicit means (such as threat or use of force, abduction, deception, abuse of power) for the purpose of exploitation. However, while severe labour exploitation may be the result of trafficking, this is not always the case. Nor have victims of severe labour exploitation necessarily been coerced into working; they are victims of severe labour exploitation because their experience of work encompasses working conditions that extend far below what can be considered acceptable in law.

Public awareness of the phenomena discussed in this report results from incidents that attract media attention, for a short period of time. Such attention does, however, not usually lead to a wider discussion of what would need to be changed to prevent severe labour exploitation from penetrating labour markets and to ensure a level playing field in terms of labour costs in sectors affected by labour exploitation.

Severe labour exploitation affects both EU and non-EU citizens, regardless of their legal residence status. Article 31 of the EU Charter of Fundamental Rights recognises a worker's right to fair and just working conditions regardless of his or her status as an EU citizen or a third-country national and of whether the worker is in a regular or an irregular situation of residence.

This report focuses on the severe labour exploitation of workers moving within or into the EU, as moving country – generally – creates or exacerbates a situation of social and economic vulnerability. Social isolation resulting from not knowing the language of the country of destination, not having contacts among people outside the workplace and not being aware of local legal standards or where to turn when help is needed increases the risk of labour exploitation.

What at a macro level drives the severe labour exploitation of those who have moved to a new country for work is the combination of gross global economic disparities on the one hand and increasing global mobility on the other. As a result, growing numbers of people work abroad, driven by the economic situation in their home country. Sometimes, these workers feel that if they accept conditions that are exploitative, judged by the standards of their country of destination, they and their families may still be better off compared with the living conditions in their country of origin. Thus global disparities impact on local labour markets.

Severe labour exploitation and the law

The term 'severe labour exploitation' refers to all forms of labour exploitation that are criminal under the legislation of the EU Member State where the exploitation occurs. Hence, what constitutes severe labour exploitation in one EU Member State may not in another.

Charter of Fundamental Rights of the European Union

Article 5 – Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. Trafficking in human beings is prohibited.

The various forms of labour exploitation form a continuum of severity of abuses spanning from slavery to relatively less serious forms of exploitation which fall short of constituting severe labour exploitation and a criminal offence. The term 'severe labour exploitation' also covers situations referred to by Article 9 (1) of the Employer Sanctions Directive – the employment of a worker in an irregular situation under 'particularly exploitative working conditions'. This means – according to Article 2 of the directive – working conditions 'where there is a striking disproportion compared with the terms of employment of legally employed workers which, for example, affects workers' health and safety, and which offends against human dignity'. This



wording reflects Article 31 of the EU Charter of Fundamental Rights, according to which workers have a right to working conditions which respect their health, safety and dignity. In other words, the term ‘severe labour exploitation’ denotes work situations that deviate significantly from standard – fair and just – working conditions as defined by labour laws and other binding legal regulations concerning, in particular, remuneration, working hours, leave entitlements, health and safety standards, and decent, respectful treatment of workers. Hence, they violate a worker’s right under Article 31 of the EU Charter of Fundamental Rights to fair and just working conditions, and they are thus criminalised.

How the data for the report were collected

This report is the first of its kind, since it comprehensively explores all criminal forms of labour exploitation of workers moving within or into the EU, using both desk and field research. Desk research into the legal and institutional framework of severe labour exploitation was conducted in all 28 EU Member States, while field research was carried out in 21 EU Member States (the research was unable to cover Denmark, Estonia, Latvia, Luxembourg, Romania, Slovenia and Sweden, partly because of resource limitations). Member States were selected to ensure coverage of different geographical regions, as well as diverse economic situations and legal traditions. The fieldwork involved a total of 616 expert interviews with various professional groups working in the field of labour exploitation, such as labour inspectorates, the police, judges and representatives of workers and employers, as well as 24 focus group discussions that involved mixed groups of different practitioners. In addition, as part of the fieldwork, 217 case studies of examples of severe labour exploitation were collected. These were based on information supplied by experts at Member State level.

The case studies reflect real stories and focus on workers’ experience of exploitation. Due to the lack of comprehensive information, the legal categorisation of the situations described in the case studies is in most cases not possible. Several instances, however, could amount to trafficking in human beings.

The fieldwork results supported the findings from the desk research, which were systematically analysed to identify recurrent themes that can be considered risk factors for the existence of and insufficient responses to severe labour exploitation.

The report does not give an account of the situation from the victims’ perspective, as victims were not interviewed in the project. The decision not to interview victims directly as part of the field research, but to focus

instead on the knowledge and experiences of different groups of stakeholders, resulted from difficulties concerning the feasibility of reaching out to a sufficient number of severely exploited workers who would be willing to take part in the research and who would represent a reliable cross-section of victims. As is highlighted later, victims of labour exploitation often work in isolation, in the fields, in domestic households or on construction sites, where they are fairly difficult to approach, not least because of the potential adverse reactions of exploiters, who may oppose such approaches or even retaliate against victims if they provide information. At the end of their employment, victims often leave the country to return home and are then difficult to trace. However, the traces they sometimes leave behind are the experiences of practitioners who work with victims of severe labour exploitation, a number of whom shared their knowledge and expertise in interviews with FRA, by participating in focus groups discussions or providing case studies. To better understand the experiences and needs of victims, further research with victims is needed to complement the findings presented here.

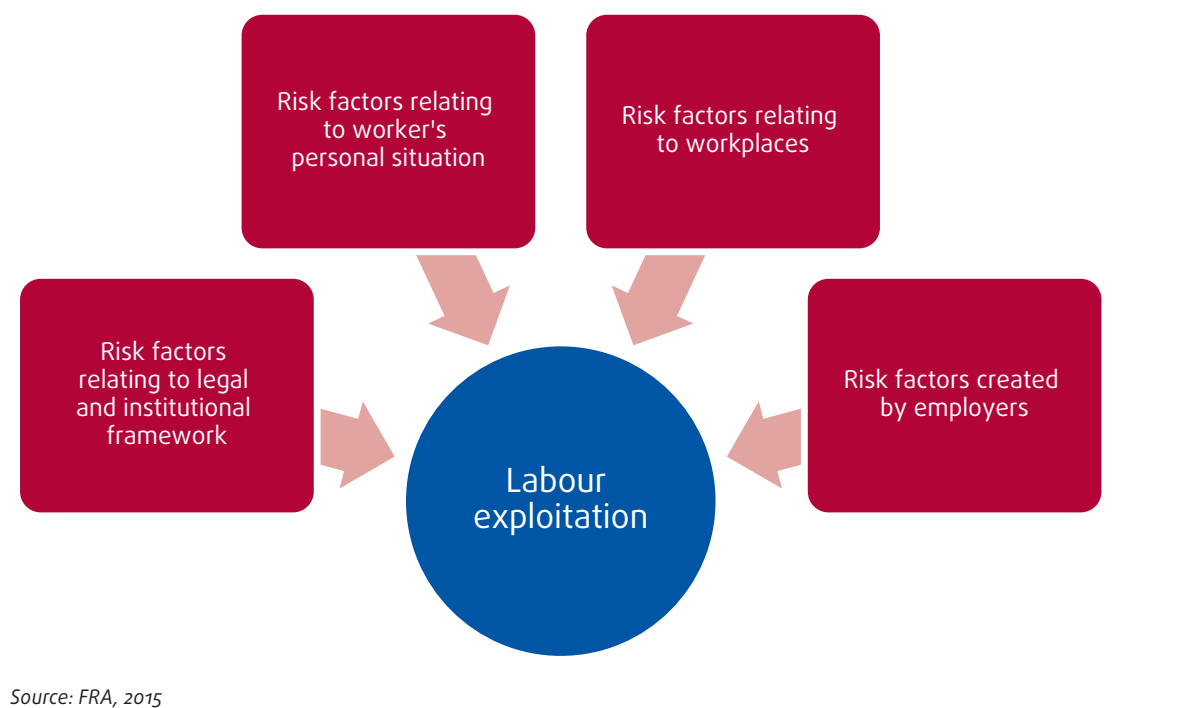
Research objectives: focusing on risk factors

This report aims to support EU institutions and Member States in preventing severe labour exploitation, monitoring situations where severe labour exploitation occurs and making victims’ right to have access to justice a reality. More specifically, it aims to identify:

- factors that put workers who have moved within or into the EU at risk of severe labour exploitation in the country where they work (**risk factors**);
- how EU institutions and Member States respond to these risk factors by measures of
 - o **prevention** or
 - o **monitoring**, including the legal and institutional framework in place to trace cases of labour exploitation, in particular through workplace inspections carried out by labour inspectors or other public authorities;
- measures enabling, once an incidence of severe labour exploitation has been detected, **victims to access justice**, such as targeted support services, the provision of information about the case and victims’ rights, effective investigations and prosecution, and dissuasive sanctions.

One focus of this report is risk factors and EU Member States’ obligations to take these factors seriously. The report aims to comprehensively assess and analyse various risk factors, which are grouped as relating to the legal and institutional framework, to the situation of the worker, to specificities of the workplace or to employers’ behaviour (see **figure** on next page).

Figure: Risk factors for labour exploitation



Risk factors relating to the legal and institutional framework include:

- deficiencies in the structures established to monitor working conditions of workers who have moved within or into the EU;
- a lack of effective investigations resulting in a situation of widespread impunity for exploiters;
- legislation rendering the situation of workers from third countries irregular and hence making them more vulnerable to severe exploitation.

Risk factors concerning workers' personal situations include:

- difficulties in communication;
- a low level of education;
- extreme poverty experienced by workers in their country of origin.

Risk factors relating to workplaces include:

- working in a sector of the economy that is particularly prone to severe labour exploitation;
- working in isolation, with little contact with customers or the outside world;
- precarious situations of employment, such as bogus self-employment.

Risk factors created by employers include:

- workers not having a contract written in a language they understand or not having a written contract at all;

- workers not being informed of their entitlements;
- employers exacerbating the dependency of workers, for example by providing accommodation or transport or by employing other family members.

Given the dangers of exploitative working conditions, EU Member States have obligations of due diligence. This means that if workers from another country face a serious risk of being severely exploited – as a result of an accumulation of risk factors – they are entitled to protection measures adopted by the competent authorities. Hence, where risk factors accumulate, Member States have duties, stemming from EU law, to carry out inspections aimed at identifying cases of labour exploitation, to protect victims, to establish redress mechanisms and to avoid impunity. This report is therefore based on the assumption that EU institutions and Member States have to apply due diligence in preventing and monitoring the severe exploitation of workers, and that in cases where such exploitation is suspected they must ensure that victims are provided with access to justice.

The report does not aim to estimate numbers of victims of severe labour exploitation. It should be recalled, however, that what triggers Member States' obligations of due diligence is not a certain number of cases but risk factors concerning labour exploitation, to which they are obliged to react. Therefore, an in-depth analysis of risk factors as highlighted by experts in interviews and focus group discussions, and which surfaced again in the case studies, forms a central part of the research presented here.

FRA opinions and key findings

Prevention

Awareness raising and promoting a climate of zero tolerance of labour exploitation

The practitioners interviewed during the fieldwork perceived an attitude among the general population in European societies of tolerating labour exploitation of workers from other countries. Such workers are seen as voluntarily accepting – albeit because of their poverty and marginalisation – work under conditions that are exploitative. A lack of clear understanding of severe labour exploitation by practitioners who intervene in relevant situations also contributes to exploitative situations not being perceived or prioritised.

This tolerance towards labour exploitation stands in marked contrast to the legal situation. Severe forms of labour exploitation are extensively criminalised under EU and Member States' laws – although arguably not comprehensively and consistently enough. According to the field research – in particular expert interviews and case studies – the exploitation in the domestic work sector, for example in cleaning and caring for children or the elderly, has emerged for the general public as a grey area, potentially blurring the line between morally acceptable and unacceptable practices.

FRA opinion

EU Member States should increase awareness among the general public of the existence of severe labour exploitation of people moving either within or into the EU and increase efforts to promote a climate of zero tolerance of exploitation of such workers, including exploitation in private households.

Targeted awareness raising and training

Experts in several EU Member States reported that because of the multiplicity of forms of labour exploitation and legal provisions relevant to it, it is not clear what precisely constitutes a criminal form of severe labour exploitation. They pointed to difficulties in applying the various legal categories and in understanding the various forms of severe labour exploitation of workers from other countries and their root causes. Better knowledge and awareness of the many forms of such exploitation would help labour inspectors and police officers identify such cases.

Expert interviews pointed out that the tasks of public authorities in controlling migration on the one hand and acknowledging and supporting victims of severe exploitation on the other can lead to conflicting roles and requirements. Labour inspectors and police officers

should be briefed and trained to give priority to the fundamental rights of victims over issues of public order when confronted with a situation of severe exploitation of third-country nationals in an irregular situation.

Experts interviewed highlighted the need for close cooperation between public authorities and non-governmental organisations (NGOs). Such cooperation should be based on a shared understanding of severe labour exploitation and the legal framework.

FRA opinion

EU Member States must ensure that staff members of organisations who come across labour exploitation are aware of the various forms of severe labour exploitation and their root causes, and are trained to react in an appropriate manner. Labour inspectors and police officers should be briefed and trained to give the rights of victims of severe labour exploitation priority over objectives relating to the management of migration.

The European Police College (CEPOL) and the European Agency for Safety and Health at Work (EUOSHA) are invited to support Member States in implementing training programmes strengthening the capacity of law enforcement officers and labour inspectors to identify and investigate cases of severe labour exploitation and to intervene in a spirit respecting the fundamental rights of exploited workers moving within or into the EU. Such initiatives could be supported by the work of the EU Anti-Trafficking Coordinator.

Effective cooperation between public and private organisations is essential and should be based on a shared understanding of the problems caused by labour exploitation, of the fundamental rights at stake and of the interventions required.

Encouraging trade unions and civil society organisations to reach out and provide information to workers moving within or into the EU

Many respondents considered it essential for workers to know about working conditions and their rights before their arrival in their country of destination, or to be given such information on their arrival. In this respect, the important functions performed by trade unions and NGOs that come into contact with workers moving within or into the EU – for example in Austria, Germany, Ireland and the Netherlands – should be acknowledged as a promising development.

There is also a clear – and positive – trend for embassies of EU Member States to inform foreign nationals intending to move to their country, or their own nationals when they arrive to work in a host country,

about their employment rights. It should also be noted that Article 11 of the Seasonal Workers Directive will make it compulsory for Member States when issuing third-country nationals with an authorisation for the purpose of seasonal work to also provide them with information in writing about their rights and obligations under this directive, including complaint procedures.

FRA opinion

EU Member States should encourage trade unions and other private organisations to provide information to workers before their departure, as well as when they arrive in their country of destination.

The role of embassies in providing information before departure or on arrival should be considered.

Transparent employment relationships

Interviewed experts saw the lack of transparency of employment relationships as a factor adding to the risk of labour exploitation. Often, workers do not have a contract written in a language they understand, or do not have a written contract at all, or they may lose count of the wages owed to them because of the complex legal situation involved – for instance involving labour brokers or subcontracting – or because of practices of employers that obscure the situation. Awareness of the absence of transparent employment relationships as a ‘red flag’ indicating the potential for severe labour exploitation should be raised, for example through campaigns or via embassies issuing visas to third-country nationals.

FRA opinion

EU Member States should ensure that the basic terms and circumstances of an employment relationship are transparent, well documented and comprehensible throughout the term of employment. In particular:

- *all workers should be given a written contract in a language they can understand, at least as regards the basic terms of their employment;*
- *wages should be paid in a transparent manner and at regular intervals but at least once per month and not only at the end of a season or project.*

Consumers’ ‘right to know’ and companies’ duty to disclose information

In EU Member States where product branding is common, the views of experts are mixed as to the merits of such practices. While many believe that enabling consumers to make informed decisions is a means of effectively

preventing labour exploitation, others emphasised that such labelling is not always trustworthy and hence needs to be improved. Under Article 5 of the Consumer Rights Directive, consumers should be provided with information concerning the main characteristics of the goods or services they purchase or use. Consumers who are concerned about humane working conditions should have a right to know when they buy a product that comes with a serious risk of having been produced in exploitative conditions.

This relates to obligations on undertakings to disclose information allowing consumers to assess the impact of business activities on fundamental rights. One important step towards improving the transparency of companies’ ‘non-financial information’ is the amendments to the Disclosure Directive, which Member States are required to transpose by 6 December 2016. Large companies and groups are obliged to report on ‘employee matters’, including a description of policies pursued and their outcomes, risks and risk management, and relevant key performance indicators. Under Article 2 of Directive 2014/95, the Commission ‘shall prepare non-binding guidelines on methodology for reporting non-financial information, including non-financial key performance indicators, general and sectoral, with a view to facilitating relevant, useful and comparable disclosure of non-financial information’.

FRA opinion

EU institutions and Member States are encouraged to enable consumers to better assess the risk that a product or service offered was created involving severe labour exploitation. The provision of such information could include:

- *effective and reliable systems of certification and branding for products of companies that respect the rights of workers;*
- *public registers of employers and recruiters convicted of labour exploitation, unless they have adopted sufficient measures to reliably prevent further cases of exploitation from occurring.*

In providing guidance and in reporting on the implementation of the amended Disclosure Directive, the Commission could pay due attention to the disclosure of policies concerning equality of working conditions for workers and safeguards countering risk factors for exploitative working conditions, both general and sectoral. Particular attention could be paid to those sectors of the economy that are particularly prone to labour exploitation.

Safeguards in public procurement procedures

Interviewed experts recalled cases in which labour exploitation occurred during projects commissioned by public institutions. Such situations also surface in a number of case studies. This points to the responsibility

of EU institutions, bodies, offices and agencies, as well as Member States, to avoid contributing financially to exploitative practices. Under Article 31 of the Charter, EU actors have an obligation to respect the rights of workers moving within or into the EU to decent working conditions, in particular in all public procurement procedures with regard to contractors and subcontractors. In particular, when EU Member States implement the legislative package adopted in February 2014 concerning public procurement procedures, they are bound by the Charter, including Articles 5 and 31.

FRA opinion

When implementing the legislative package adopted in February 2014 concerning public procurement procedures, EU Member States are called on to pay particular attention to the necessity of avoiding supporting labour exploitation by contracting companies engaged in – or subcontracting enterprises involved in – the exploitation of workers.

EU institutions, bodies, offices and agencies implementing public procurement procedures are encouraged to lead by example and to pay due attention to preventing labour exploitation committed by subcontracted companies.

Monitoring and workplace inspections

Comprehensive and effective systems of inspections and monitoring

Across all professional groups, the respondents saw a lack of effective monitoring as an important risk factor contributing to severe labour exploitation. Representatives of organisations promoting the rights of workers and of employers' organisations and judges considered the lack of sufficient monitoring to be the most significant institutional risk factor leading to severe labour exploitation. As indicated by experts in the research interviews, one important factor contributing to the present situation of widespread impunity for labour exploiters is a lack of reporting by victims, who are either prevented from reporting or do not wish to come forward, as they would risk losing their job. As a consequence, Member States must be prepared to proactively carry out more workplace inspections, and improve their effectiveness, paying due attention to risk factors for labour exploitation, as outlined in the results of the field research. In addition, experts interviewed in the fieldwork highlighted the importance of cooperation between workplace inspectors and the police.

According to experts, complexities arise when certain areas of work, such as agricultural labour carried out on private property or domestic work, are totally exempt from inspections. A report published by FRA in 2011, *Migrants in an irregular situation employed in domestic*

work, highlighted the necessity that the 'legal framework should provide for labour inspection to the workplaces of domestic workers in order to ensure safe and decent working conditions'.¹

In light of the risk factors that emerged in the field research, monitoring should focus on groups at an increased risk of exploitation, such as persons in an irregular situation of employment, seasonal workers, temporary agency workers, workers hired through recruitment agencies, those in bogus self-employment and posted workers. The field research found that, rather than focusing on groups at an increased risk of exploitation, monitoring is often limited to certain economic sectors that are viewed as particularly prone to labour exploitation. While risk factors related to economic sectors provide important guidance in carrying out inspections, they should not be interpreted as indicating that areas in which incidents of labour exploitation are less frequently reported need not be monitored. Research findings on the relevance of various risk factors should be used in designing more effective and targeted strategies to detect cases of severe labour exploitation.

The field research identified risks of labour exploitation arising where workers are not directly employed by the enterprise for which they work but through a recruitment agency or subcontractor (i.e. any natural person or any legal entity to whom the execution of all or part of the obligations of a prior contract is assigned). According to the experts interviewed, complex legal situations make it more difficult for workers who have moved within or into the EU to understand their rights or the remedies available to them and hence increase the risk of being exploited. This is particularly the case when companies based in different Member States are involved. Furthermore, under these conditions, assessing violations of workers' rights becomes more challenging. Efforts to monitor such complex situations and to investigate in cases of suspicion need to be stepped up and may require effective cooperation among public authorities from more than one Member State.

According to Article 1 (3) of the Council of Europe's revised European Social Charter (ESC), the right to work implies the obligation of States Parties to 'establish or maintain free employment services for all workers'. Accordingly, Article 29 of the EU Charter of Fundamental Rights grants to everyone the right of access to a free placement service. As regards private employment agencies, Article 7 (1) of the International Labour Organization (ILO) Private Employment Agencies Convention² establishes the clear rule that such 'agencies

¹ FRA (2011), pp. 9 and 30.

² C181, Private Employment Agencies Convention, 1997 (No. 181), adopted in Geneva on 19 June 1997 at the 85th International Labour Conference (ILC) session.

shall not charge directly or indirectly, in whole or in part, any fees or costs to workers'. Hence it is the employers who should bear the costs of employment services. Exceptions to this rule for workers seeking jobs that neither require sophisticated skills nor entail managerial responsibilities are hardly acceptable. However, expert interviews and case studies point to situations where recruiters charge workers exorbitant fees, subjecting them to a situation of debt bondage and making them particularly vulnerable to severe exploitation. Therefore, the activities of employment agencies require the particular attention of monitoring bodies.

FRA opinion

EU Member States must ensure a comprehensive system of inspections of working conditions that is effective enough to comply with recognised standards.

- *To this end, legislation must be in place clearly tasking a public authority with monitoring the working conditions of workers moving within or into the EU and with carrying out a sufficient number of inspections.*
- *This authority must be staffed and trained to carry out inspections in a targeted and effective manner, including having the means to overcome language barriers. It should either have its own powers and means of securing evidence relevant in criminal proceedings or be in a position to rely on effective cooperation with the police.*
- *Staff engaged in monitoring must be trained to understand and assess risk factors for severe labour exploitation in practice, should adjust and organise their work in line with these risk factors and should regularly review their system of risk management. The strategic orientation of workplace inspections should be based on all available evidence concerning relevant risk factors.*
- *EU Member States should revise regulations that have the effect of exempting workplaces entirely from inspections, in particular as concerns private farms and domestic work.*
- *EU Member States should design more effective and targeted strategies to bring cases of severe labour exploitation to light and offenders to justice.*
- *EU Member States should enhance the monitoring of recruitment agencies and ensure that legal regulations prohibiting the collecting of fees from the workers are enforced.*
- *EU agencies including EU-OSHA, Europol (the European Police Office) and Eurojust (the European Union's Judicial Cooperation Unit) are invited to contribute to enhancing cross-border cooperation among Member State authorities tasked with monitoring, investigating and prosecuting in cases of labour exploitation involving more than one Member State.*

Victims' access to justice

Criminal law provisions protecting workers moving within or into the EU from severe labour exploitation

Desk research into the legal situation in EU Member States revealed that the categories of individuals protected by criminal law provisions against severe exploitation in employment relationships vary widely among Member States, ranging from protecting only third-country nationals in an irregular situation to providing such protection equally to all individuals. What is decisive from a human rights perspective is that the right – under Article 31 of the Charter as well as under Article 2 of the revised ESC – to just working conditions requires workers' effective protection against severe violations. Given the right to equality before the law – Article 20 of the Charter – it is questionable why, in some cases, the right of third-country nationals in an irregular situation to decent working conditions is protected by criminal law provisions while the equivalent right of third-country nationals in a regular situation of residence or of EU citizens is not. Likewise, the protection of children from severe labour exploitation should not be reserved to third-country nationals in an irregular situation.

The legislation of some EU Member States criminalises the employment of third-country nationals in an irregular situation regardless of whether these workers are severely exploited or not. This legislation treats situations which are essentially different on an equal footing. Thus the right of workers not to be subjected to severely exploitative working conditions is not acknowledged or protected.

In five EU Member States, the offence of employing a third-country national in an irregular situation under particularly exploitative working conditions is punishable with a maximum sentence of less than two years. Such a penalty does not reflect the gravity of violations of fundamental rights encountered by victims of severe labour exploitation. In other EU Member States, penalties threatening imprisonment for a term not exceeding three or five years are common.

According to the Employer Sanctions Directive, Member States are obliged to ensure that legal persons may be held liable for employing third-country nationals in an irregular situation under particularly exploitative working conditions where such an offence has been committed for their benefit. A similar provision is included in Article 5 of the Anti-Trafficking Directive. Penalties for legal persons should be effective and dissuasive. However, the views of the experts interviewed were that the sanctions imposed in practice on enterprises (as legal persons) do not reflect the severity of the

rights violations involved. Thus the effectiveness of the Employer Sanctions Directive in practice could be further explored. In addition, the Employer Sanctions Directive points to the possibility that exploitative employers be publicly blacklisted (Article 12 (2)), but only a few EU Member States implement this practice.

FRA opinion

EU institutions and Member States should review relevant EU directives and criminal law provisions with a view to granting to all workers equal and effective protection against severe labour exploitation.

Comprehensive and effective criminal law provisions should ensure the responsibility of business enterprises as legal persons acting as employers; sufficiently dissuasive sanctions against legal entities should be stipulated by national law and effectively implemented. In addition, EU Member States should review the effectiveness of legal provisions allowing for:

- *the closure or the withdrawal of licences of establishments that have been convicted of severe labour exploitation;*
- *the possibility of publishing a list of employers convicted of severe labour exploitation.*

Extending the mandate of institutions dealing with trafficking to include all forms of severe labour exploitation

Findings from the field research clearly indicate that institutions involved in monitoring, carrying out inspections, law enforcement, victim support and public prosecution need to invest more resources in tackling the challenges identified in this report. However, such investments in the institutional framework should not target a particular form of labour exploitation. Rather, they should aim to address, in a broader perspective, the entire spectrum of criminal forms of labour exploitation, which can range from slavery to severe labour exploitation in the sense of the Employer Sanctions Directive. Given the scale of severe labour exploitation there is a pressing need to extend the mandate of institutions dealing with trafficking.

Both expert interviews and case studies point to the difficulties arising in situations where support services, specialised police units or specialised public prosecutors are available to deal with trafficking cases but not with cases of severe labour exploitation, in particular as regards forms of exploitation occurring in employment relationships covered by Article 9 of the Employer Sanctions Directive. In the area of victim support, for example, in two thirds of the EU Member States in which fieldwork was carried out experts view victim support services as lacking or ineffective in practice, with very

few services dedicated to victims of labour exploitation specifically, and many services outright excluding them unless trafficking or violence is involved.

Based on this evidence, it can be suggested that the mandate of organisations countering trafficking at EU or Member State level should be extended to cover all criminal forms of exploitation of those persons who have moved from a different country. This would include exploitation carried out under particularly exploitative working conditions, exploitation of victims of trafficking by an employer not involved in the trafficking process and the illegal employment of minors (Article 9 (1) (c) to (e) of the Employer Sanctions Directive).

FRA opinion

EU institutions and Member States should review the mandate of institutions tasked with addressing trafficking or coordinating such action with a view to extending their tasks to address other offences, including those covered by the Employer Sanctions Directive.

Instruments and mechanisms established to address trafficking – such as referral mechanisms or temporary residence permits – should be reviewed with a view to broadening their scope of application to cases of severe labour exploitation that do not involve trafficking.

Encouraging victims to report by granting residence permits

Research findings show that victims of severe labour exploitation who are in an irregular situation of residence are discouraged by their status from reporting to any public authority. Experts identify fear of having to leave the country as the primary reason why victims do not report their exploitation to the police. According to Recital 10 of the Victims' Directive, the right of victims to be acknowledged as victims and to have access to justice should not be made conditional on their residence status. In reality, however, the right of irregularly residing victims of severe labour exploitation to have access to justice remains only theoretical as long as they are not offered a safe option of regularising their residence status. Such an option would at the same time improve the functioning of the criminal justice system and counter the climate of impunity for perpetrators of severe labour exploitation.

Article 11 of the Anti-Trafficking Directive obliges EU Member States to 'take the necessary measures to ensure that assistance and support are provided to victims', enabling them to exercise their rights as victims of crime, and specifies that Member States must ensure that such assistance and support is not premised on the victim's willingness to cooperate in the criminal

investigation, prosecution or trial. However, this claim is made 'without prejudice' to the Residence Permit Directive. This is a far-reaching qualification. In practice, the Residence Permit Directive, by premising the granting of residence permits to victims of trafficking on the demonstration of a clear intention to cooperate with law enforcement, considerably interferes with victims' rights to have access to support services and justice. It should be noted that the Council of Europe Convention on action against trafficking in human beings (CETS No. 197), which all EU Member States but the Czech Republic have ratified, takes, in Article 14, a more rights-friendly stance, by also including situations in which the 'competent authority considers that their stay is necessary owing to their personal situation' among those where a renewable residence permit should be issued to victims.

In addition, according to the European Commission Communication of October 2014 on the application of the Residence Permit Directive, six EU Member States do not make permits conditional on the victim's cooperation and another seven Member States allow for exceptions.

Obviously, there are also tensions between the Residence Permit Directive and Member States' obligations under the Charter. The right of victims of trafficking and of other forms of severe exploitation under Article 47 of the Charter to be provided with effective access to justice – and, to this end, to be empowered, encouraged and supported according to their needs – corresponds to unconditional obligations of EU Member States, which cannot be premised on the victim's cooperation. The onus should be on public authorities to enable access to justice, not on victims to first earn the privilege of being supported and allowed to participate in proceedings. The practical effectiveness of these rights must not be made conditional on the willingness or ability of the victim to support the police or any other authority in carrying out their tasks. Because of this conflict, it could be maintained that the entering into force of the Charter invalidated the Residence Permit Directive. In the interest of the rule of law and legal clarity, this issue is waiting to be settled.

In its communication to the Council and the European Parliament of October 2014 on the application of the Residence Permit Directive, the European Commission tentatively envisaged an evaluation of the necessity of amending the Residence Permit Directive.³

3 European Commission (2014a).

FRA opinion

EU Member States should adopt measures encouraging victims of severe labour exploitation to come forward and to report – without risk of expulsion – to a monitoring authority or to the police. This should include measures allowing EU Member States to grant, in the event of serious violations of the worker's rights, a residence permit, on the basis of clear legal terms.

In addition, Member States should consider the suggestions on how to encourage victims and witnesses to report a crime without fear of being apprehended included in point 9 of the 2012 FRA guidance on 'Apprehension of migrants in an irregular situation – fundamental rights considerations'.

EU institutions are called on to consider revising Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate irregular immigration, who cooperate with the competent authorities. The rights of individuals to be effectively protected from trafficking under Article 5 of the Charter as well as the right of victims of trafficking to have access to justice under Article 47 of the Charter impose unconditional obligations on EU Member States which are in no way premised on the victim cooperating with the police, supporting investigations or performing any other services in the public interest. Such change would also require adaption of the wording of Article 11 (6) of the Anti-Trafficking Directive and of Article 13 (4) of the Employer Sanctions Directive.

Providing targeted victim support services

While support for victims of severe labour exploitation is limited, research published in 2014 by FRA on support services in the EU for victims of crime shows that there are support services for victims of sex trafficking available in almost all EU Member States. In addition, the victim support situation differs significantly among Member States. FRA evidence shows that police and victim support services in most states have special measures in place to deal with at least certain categories of victims, such as victims of trafficking – where the focus has more recently addressed the needs of victims of labour exploitation. In general, however, there is a lack of comprehensive support service systems for victims of severe forms of labour exploitation, and many existing services exclude particular groups. Experts interviewed by FRA either for this report or for the report *Victims of crime in the EU: the extent and nature of support for victims* confirm that not all victims are treated equally. While some groups of victims are prioritised, others, such as migrants in an irregular situation, are in a disadvantaged position regarding access to effective support services and protection in criminal

proceedings. Under Article 8 of the Victims' Directive, all victims have a right to access support services in accordance with their needs. Victim support services must operate in the interest of the victim and be confidential and free of charge. If access is denied, Article 47 of the Charter requires that an effective remedy be available to the victim.

FRA opinion

EU Member States should ensure that:

- every victim of severe labour exploitation has targeted support services available to them, for example by extending the mandate of support services targeting victims of trafficking to include support service provision to victims of other forms of severe labour exploitation;
- mechanisms for the referral of victims to support services are available for victims of all forms of severe labour exploitation;
- victims of labour exploitation are not excluded from support services as a result of their irregular residence status;
- support services are equally accessible to EU and non-EU citizens.

Encouraging and enhancing third-party interventions

As experts indicated in the research interviews, given the reluctance of victims of severe labour exploitation to come forward and report to monitoring bodies or the police, as well as a lack of sufficient, proactive police investigation, private or public organisations acting in support or on behalf of victims of labour exploitation, including trade unions, could have an important function in light of Article 13 of the Employer Sanctions Directive. However, the research shows that third-party interventions and collective claims are rare and are often not allowed by law; where admissible, they are rarely applied in cases of labour exploitation. Third-party intervention could also be a means of enabling courts to deal more effectively with cases where a large number of workers have victim status and victims' rights. FRA research published in 2012 in the report *Access to justice in cases of discrimination in the EU* highlighted the advantages of third-party interventions. It should be noted that Article 25 of the Seasonal Workers Directive provides for third parties with a legitimate interest in ensuring compliance with the Directive to lodge complaints or engage civil or administrative proceedings on behalf of the seasonal worker.

FRA opinion

To enhance access to justice for all victims of severe labour exploitation, Member States should – within and beyond the scope of the Employer Sanctions Directive – enable third parties, including trade unions and private associations that support workers who have moved either within or into the EU, to act in support of or on behalf of victims.

Providing compensation for damages and back payments to victims

To understand what is important to victims, their economic goals have to be taken seriously. The expert interviews revealed that compensation and back payments are seen as particularly important for victims and as having the potential to encourage more victims to report to the police and seek access to justice. However, the expert interviews and the case studies show that it is often very difficult for victims to obtain compensation from offenders, not least because a company that acted as an employer may prefer to declare insolvency or because responsible individuals disappear. For these reasons, compensation from offenders should be reinforced by state compensation funds.

However, at present Article 12 of the Compensation Directive provides for national compensation schemes only to the benefit of victims of violent intentional crime and hence will very rarely cover cases of severe labour exploitation. Reacting to this deficit, Article 17 of the Anti-Trafficking Directive obliges Member States to ensure that victims of trafficking have access to existing state compensation schemes. In contrast, the Employer Sanctions Directive includes no similar provision. In relation to victims of crime, however, states have an obligation to ensure that they have access to justice. Hence victims of severe labour exploitation – in the sense of Article 9 (1) (c) to (e) of the Employer Sanctions Directive – should not be treated differently from victims of trafficking.

Article 16 of the Victims' Directive recognises the right of victims to obtain in the course of criminal proceedings a decision on compensation from the offender. While Member States' legislation may allow for exceptions, Article 47 of the Charter mandates that a criminal court's refusal to decide on compensation claims must be open to review by another court.

FRA opinion

EU institutions should consider amending the Employer Sanctions Directive to include a provision similar to Article 17 of the Anti-Trafficking Directive, according to which Member States shall ensure that victims of trafficking in human beings have access to existing schemes of state compensation.

EU Member States should ensure that criminal courts decide on all civil law claims of victims of severe labour exploitation, including claims for back payments, instead of referring victims to civil courts. Member States should consider the possibility that where judges lack the experience to decide on civil law claims they could consult civil law judges instead of referring the victim to civil court proceedings.

Upholding victims' right to effective police investigations

The research found that specialist police units, trained and experienced in trafficking as well as severe labour exploitation, would most probably respond more effectively than the general police force to workers moving within or into the EU in situations of exploitation. Such units would often be more willing to treat the exploited workers as potential victims of crime, even in cases of irregular residence status. While specialised units tasked with investigating trafficking cases exist in many EU Member States, police units that also deal with severe labour exploitation exist in Spain and Belgium and can be considered as providing examples of promising practices.

Specialised police units would be particularly beneficial in cases requiring the cross-border cooperation of police services. Often the authorities of more than one EU Member State are required to intervene in situations that involve subcontracting, posted workers, agency workers or recruiters, or when victims or witnesses have returned to their countries of origin before their statement was taken. While experts from Spain and Belgium stressed the challenges faced in cross-border investigations, surprisingly few experts had experienced such cases.

Victims are entitled to thorough and effective investigations capable of leading to the identification and punishment of offenders. To avoid widespread impunity for perpetrators of severe labour exploitation of workers who have moved within or into the EU, the police need to respond to indications of labour exploitation in a manner that effectively pursues the objective of bringing offenders to justice and at the same time is sensitive to the rights and the precarious situation of victims.

FRA opinion

As a means of improving the effectiveness of police investigations, EU Member States should assess the possibility of creating specialist police units and of establishing close links of cooperation between the police and monitoring authorities, such as labour inspectorates and financial police.

In addition, the cross-border cooperation of law enforcement agencies should be enhanced and brought to the level of cooperation that has been achieved in other areas of organised crime.



Introducing the research in the context of international and EU law

Background to FRA's project on severe labour exploitation

Expansion of a shadow economy

"Growing demand for cheap products and services stimulates the expansion of a shadow economy in which migrant labour is exploited. Irregular migrants arriving in destination countries often have no choice but to accept exploitative conditions and working practices [...]. Exploited workers are paid less and work harder making them attractive to unscrupulous employers who are seeking to decrease production costs."

Europol (2013), SOCTA 2013: EU Serious and Organised Crime Threat Assessment, The Hague, Europol, p. 12

In certain sectors of the economy, the exploitation of workers who move within or into the EU has become business as usual. Workers coming from other Member States or from third countries perform labour in conditions that offend against human dignity. This happens in agriculture, forestry, fishery, construction, catering, the textile industry, domestic work and other sectors. As one expert interviewed in the fieldwork commented:

"I think that institutions are aware that these persons meet the needs of a part of the economy and everyone knows it. I think there is a sort of pact of silence; in this way exploiters continue exploiting and administrations, in order to cover their own back, make a number of inspections." (Representative of a workers' organisation or trade union, Spain)

A 2013 Europol report on organised and serious crime in the EU⁴ highlighted the growing demands of labour markets and the particular vulnerability to labour exploitation of migrants in an irregular situation. While this points to the necessity of protecting the rights of workers, the Commission's communication on the application of the Employer Sanctions Directive⁵ found that some Member States 'have yet to implement the protective elements of the Directive in a satisfactory manner' and 'are likely to need to make substantial efforts to improve not only their reporting on inspections, but also the inspections themselves and their prioritisation efforts through systematic identification of sectors at risk'.⁶

This coincides with the mounting concern of organisations working at the international level concerning the rights of workers moving within or into the EU in times of increasing labour migration under conditions

of economic crisis. Addressing an area of particular concern, ILO's Domestic Workers Convention – Convention concerning decent work for domestic workers – entered into force in September 2013. A 2014 ILO report on *Fair migration* submits that, while 'migration has moved centre stage in national, regional and global policy agendas', it is 'still too frequently associated with unacceptable labour abuses in the face of which inaction is an abdication of responsibility'.⁷ In June 2014, governments, employers and workers decided at the ILO International Labour Conference to step up the global fight against forced labour, including slavery-like practices and labour trafficking, by adopting a protocol⁸ and a recommendation⁹ to supplement the Forced Labour Convention of 1930. The protocol, among other topics addressed, obliges members to 'take effective measures to prevent and eliminate its use [*the use of forced labour*], to provide to victims protection and access to appropriate and effective remedies, such as compensation, and to sanction the perpetrators of forced or compulsory labour' (Article 1, paragraph 1). It also emphasises the necessity of strengthening labour inspection services (Article 2) and ensuring that victims have access to appropriate and effective remedies (Article 4).

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Gap between labour demand and supply

Member States should be aware of the gap between labour market needs and the available workforce in the domestic work sector. When filling this gap, migrants should not be exposed to abuse and exploitation. Situations of irregularity are a potential source of fundamental rights violations and should therefore be avoided, including, where relevant, through policies to prevent irregular labour migration, together with the introduction of targeted legal migration programmes.

For further information, see: FRA (2011), Migrants in an irregular situation in domestic work: fundamental rights challenges in for the European Union and its Member States, Luxembourg, Publications Office of the European Union (Publications Office), p. 9

In the same vein, the International Trade Union Confederation (ITUC) declared in December 2014 that tackling labour exploitation in global supply chains

⁴ Europol (2013), p. 12.

⁵ Employer Sanctions Directive (2009/52/EC), OJ 2009 L 168.

⁶ European Commission (2014), Section IV.

⁷ ILO (2014), p. 3.

⁸ PO29, Protocol of 2014 to the Forced Labour Convention, 1930, adopted in Geneva on 11 June 2014 at the 103rd ILC session.

⁹ R203, Forced Labour (Supplementary Measures) Recommendation, 2014 (No. 203), adopted in Geneva on 11 June 2014 at the 103rd ILC session.

and campaigning against modern slavery will be the 'frontlines' for their action in 2015.

Context and objectives of the project

This research is the first to look comprehensively into various criminal forms of labour exploitation of workers across the EU who moved from one EU country to another or from a third country. The report bases its findings on both desk research and various methods of social field research. The project is based on the assumption that existing legal categorisations come with a risk of missing out on the wide range of forms of severe labour exploitation, for example those situations covered in Article 9 (1) (c) of the Employer Sanctions Directive. Perhaps one of the most disturbing findings of this research is that many workers moving within or into the EU are ready to accept almost any working conditions as long as they expect to receive some payment in return, even if their working conditions are appalling and their wages far below regular standards.

Restricting the project to criminal forms of labour exploitation ensures that the research examines only severe human rights abuses within the ambit of Article 31 of the Charter, which grants every worker the right to fair and just working conditions. In addition, this limitation brings all victims to the level of having, in principle, as victims of crime, the same rights under the Victims' Directive, including the right to be acknowledged as a victim, the right to be informed, heard and provided with opportunities to actively contribute to criminal proceedings, and the right to have access to support services and to an individual assessment of one's protection needs. This focus on criminal forms of labour exploitation does not, however, exclude claims of victims of severe labour exploitation to compensation within criminal proceedings under civil or labour law. Article 16 of the Victims' Directive entitles, in principle, all victims of crime to a decision on compensation from the offender in the course of criminal proceedings.

In addition, Article 6 of the Employer Sanctions Directive – 'Back payments to be made by employers' – requires employers to pay any outstanding remuneration to third-country nationals, even after they have left the EU.

One particular difficulty relates to the fact that victims of severe labour exploitation are very often either not in a position – for example because of constraints imposed by employers or because of victims' lack of awareness of their rights – or not willing to come forward and report to the police. The principal and obvious reason is that they fear that if they report their situation, this will result in them losing their job and having to leave the country. To understand the situation of victims, it is crucially

important to realise that many victims of severe labour exploitation, despite the violations of their rights to decent working conditions, are nevertheless convinced that they are better off within the exploitative employment situation than if they had no employment at all. Their situation reflects the vastly different standards of living and of labour across EU Member States and, to an even greater degree, throughout the world. Therefore, when it comes to implementing criminal law provisions and avoiding systemic impunity for labour exploiters, authorities cannot rely on victims reporting to the police. They have to set up proactive mechanisms for ongoing and comprehensive monitoring of the working conditions of migrants. Having an effective system of inspections in place is key to identifying victims and offenders, and to avoiding a climate of impunity.

"They [the offenders] are not threatened because nobody monitors them. There are no monitoring mechanisms for this."
(Representative of a victim support organisation, Greece)

Context

Among the many instruments of secondary EU law that apply in the context of this research, the Anti-Trafficking Directive, the Employer Sanctions Directive and the Victims' Directive are perhaps the most significant in this area. The research findings feed into the European Commission Strategy towards the Eradication of Trafficking in Human Beings 2012–2016 and complement the Commission's Communication of May 2014 on the application of the Employer Sanctions Directive. The findings, in turn, inform the last phase of the implementation of the Victims' Directive, highlighting the complexities of getting access to justice for some victims and the need for targeted measures to provide information, legal advice and support. A more comprehensive list of the relevant directives can be found in Annex II of this report.

The project builds on previous FRA research, in particular on the reports concerning:

- *The impact of the Racial Equality Directive* (2010);
- *Migrants in an irregular situation employed in domestic work* (2011);
- *Poverty and employment: the situation of Roma in 11 EU Member States* (2011a);
- *Migrants, minorities and employment* (2011b);
- *Access to justice in cases of discrimination in the EU – Steps to further equality* (2012);
- *Fundamental rights of migrants in an irregular situation in the European Union* (2013);
- *Criminalisation of migrants in an irregular situation and of persons engaging with them* (2014);
- *Victims of crime in the EU: the extent and nature of support for victims* (2015);
- *Freedom to conduct a business: exploring the dimensions of a fundamental right* (forthcoming).

In addition, FRA published in 2013 its *Opinion on the situation of equality 10 years on from initial implementation of the equality directives* (2013a), which highlighted discrimination based on perceived ethnicity in the employment sector.

Objectives

Thus, the project's overall objective of exploring the effectiveness of the right of victims to have access to justice breaks down into several components:

- factors that put workers moving within or into the EU at risk of severe labour exploitation (**risk factors**);
- how these factors are responded to by measures of
 - **prevention** or
 - **monitoring**, including the legal and institutional framework in place to trace cases of labour exploitation, in particular through workplace inspections carried out by labour inspectors or other public authorities;
- all aspects of criminal proceedings that foster or hinder **victims' access to justice**, including measures raising the awareness of victims of their rights, targeted support services, thorough and effective investigations, court procedures and sufficiently severe sanctions that reflect the seriousness of the violations of their rights encountered by victims.

Analysis of risk factors

The identification of circumstances that increase the likelihood of exploitation of workers who have moved within or into the EU (risk factors) forms a core component of this project. Questions about experts' assessment of factors that increase the risk of labour exploitation were in the forefront throughout the fieldwork phase.

There are many reasons for this strong focus on risk factors.

The first is that under human rights law, EU Member States are obliged according to the principle of due diligence to protect the rights of workers from other countries to decent working conditions from being violated by employers. However, this obligation does not mean that Member States are obliged to prevent, under all circumstances, any incidence of labour exploitation. It is not an obligation of result but of means and of best endeavour. Member States have to react to situations where the rights of workers who have moved within or into the EU to fair and just working conditions are in peril. While Member States are not in a position to safeguard each and every worker in all circumstances, they have to intervene and carry out a control function when there is a clear risk of a violation of workers' rights. Hence the findings from this project give concrete shape to standards of due diligence.

Secondly, and as a consequence of what has just been explained, these findings can serve to provide public authorities with practical information on fulfilling monitoring functions, and in particular carrying out workplace inspections. Effective monitoring is premised on an analysis of risk factors, which can direct the attention of authorities to workers facing a particular risk of labour exploitation. The findings from this project offer a tool that can be used in shaping inspection strategies and in countering risks. Article 14 of the Employer Sanctions Directive obliges Member States to 'ensure that effective and adequate inspections are carried out' to control the employment of third-country nationals in an irregular situation and specifies: 'Such inspections shall be based primarily on a risk assessment to be drawn up by the competent authorities in the Member States.' The risk assessment referred to by this provision should take into account all rights safeguarded by the Employer Sanctions Directive, including the right of third-country nationals in an irregular situation, protected by Article 9 of the Directive, not to be subjected to 'particularly exploitative working conditions'.

Thirdly, the ILO estimates that 'some 20.9 million people, or around three out of every 1,000 persons worldwide, were in forced labour at any given point in time' over a 10-year period from 2002 to 2011.¹⁰ However, such estimates should be treated with utmost care.¹¹ While this project does not aim to provide quantitative estimates of the number of workers from other countries severely exploited in the EU, highlighting the areas of high risk, where it can plausibly be expected that workers who have moved within or into the EU are severely exploited, is arguably the best way to enable an appraisal of the quantitative dimension of labour exploitation. Where significant risk factors – in terms of the personal situation of the workers, of the workplace, of the legal and institutional framework, and of practices of employers in the particular sector – coincide, it would be careless to assume that exploitation does not occur. The project's findings suggest that at least agriculture, forestry, fishing, construction, accommodation and food service activities, domestic work and some forms of manufacturing have to be considered sectors of high risk.

Assessment of institutions and measures involved in preventing and monitoring the severe labour exploitation of workers moving within and into the EU

For the rights of victims of labour exploitation to be practically effective, it is not sufficient to trust that victims will report their situation to the police, as they are often unable or unwilling to come forward. The

¹⁰ ILO (2012), p. 13.

¹¹ Goodey (2008), pp. 424–426.

European Court of Human Rights (ECtHR) has consistently held that when victims are in a situation controlled by the offender, 'the existence of useful detection and reporting mechanisms are fundamental to the effective implementation of the relevant criminal laws'.¹² Member States therefore need to adopt a proactive approach by monitoring the labour conditions of workers who have moved within or into the EU and reaching out to victims. In this respect, labour inspection services and other services responsible for implementing and monitoring standards of decent work fulfil a crucial function. If Member States fail to provide effective monitoring structures, there is a serious risk that the rights of victims will not be upheld and that offenders will not be held to account. This can lead to endemic forms of severe labour exploitation gradually infiltrating sectors of the economy, thereby invalidating labour standards for workers moving within and into the EU and, in the longer term, having a negative impact on the rights of all workers. As one of the interviewed experts put it:

"[T]his sense of impunity makes them ever more defiant of the rules and more exploitative of people who cannot defend themselves." (Representative of a workers' organisation or trade union, Greece)

Therefore, this project aims to make an in-depth assessment of the authorities tasked with monitoring the working conditions of workers moving within and into the EU, as well as the methods applied to that end.

Assessment of institutions and measures involved in facilitating victims' access to justice

Under EU law, victims of crime have the right to be protected from further victimisation, to be given appropriate support and to be able to participate in criminal proceedings (Article 1 of the Victims' Directive). This report identifies factors that make it easier and more attractive for victims of labour exploitation to report to the police and to play an active role in criminal proceedings. These factors include targeted victim support services, legal aid and the regularisation of the victim's situation of residence.

Victims' access to justice is premised on effective investigations and prosecution. Law enforcement agencies sometimes fail to carry out thorough and effective investigations capable of leading to the identification and punishment of employers who are responsible for severe labour exploitation, and this raises issues relating to victims' right to access to justice under Article 47

12 ECtHR, *Juppala v. Finland*, No. 18620/03, 2 December 2008, para. 42; ECtHR, *O'Keefe v. Ireland*, No. 35810/09, 28 January 2014, para. 148; the need for a proactive approach is stressed also in ECtHR, *T.M. and C.M. v. The Republic of Moldova*, No. 26608/11, 28 January 2014, para. 46.

of the Charter and Article 13 of the European Convention on Human Rights (ECHR).

FRA SELECTED CASE STUDY

Access to justice

Up to 30 men from Pakistan were exploited in several pizzerias in Bologna. They had entered Italy in an irregular manner. One of the victims decided to report the case to the police, as he knew about the social protection and residence permit available under Article 18 of the Immigration Law. Six of the victims were then provided with assistance and the perpetrators were charged with forming a criminal organisation and engaging in irregular immigration and labour exploitation.

Labour exploitation in the context of international and EU law

International standards

At the international level, laws created in the framework of the ILO are of crucial importance, including the Forced Labour Convention of 1930 and the Domestic Workers Convention of 2011. Significant Council of Europe treaty law includes the revised ESC¹³ and the Anti-Trafficking Convention.¹⁴

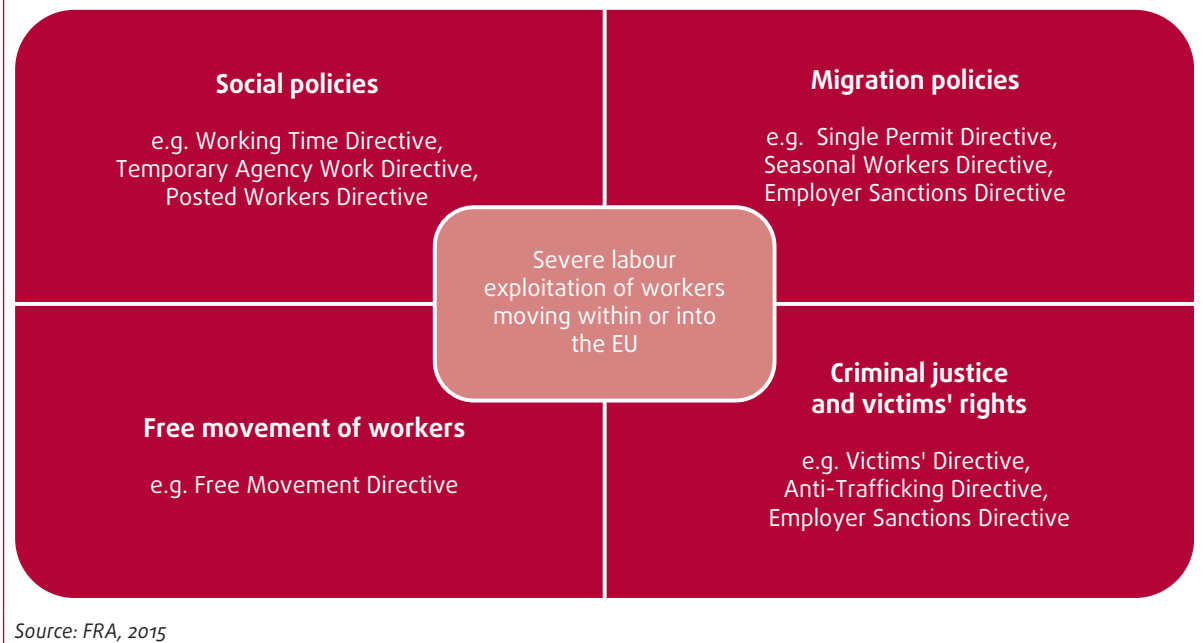
EU law

To position and contextualise the phenomenon of severe labour exploitation in the framework of EU law, at least four different aspects have to be taken into account. The severe exploitation of workers who have moved within or into the EU is located at the intersection of social policies, freedom of movement, migration policies, and criminal justice and the rights of victims of crime (Figure 1).

13 Council of Europe, European Social Charter (revised) of 1996, CETS No. 163; for an overview of EU Member States' acceptance of ESC provisions, refer to <http://fra.europa.eu/en/publications-and-resources/data-and-maps/int-obligations/esc>; for an assessment of conformity of national law and practice to ESC provisions, refer to <http://fra.europa.eu/en/publications-and-resources/data-and-maps/int-obligations/conformity-esc>.

14 Council of Europe Convention on action against trafficking in human beings of 2005, CETS No. 197.

Figure 1: Relevant policies relating to severe labour exploitation in the framework of EU law



Source: FRA, 2015

The topic touches on other policy aspects, including consumer protection and public procurement, which are particularly relevant when it comes to designing prevention measures.

Social policy

Working conditions are a matter of social policy and of the protection of social rights, which are part of the competences shared between the EU and its Member States. Title X of Part Three of the Treaty on the Functioning of the European Union (TFEU), which deals with social policy, begins by acknowledging the importance of fundamental social rights and lists the improvement of working conditions among the relevant policy objectives.

According to Article 153 of the TFEU, the EU shall support and complement the activities of Member States in, among other fields, the improvement of working conditions, in particular the working environment, to protect workers' health and safety, and conditions of 'employment for third-country nationals legally residing in Union territory' (Article 153 (1) (g) of the TFEU). Whether or not this restriction of the legal basis of secondary law to the conditions of employment of *legally residing* third-country nationals implies that the rights conferred exclude third-country nationals in an irregular situation was the issue dealt with in 2014 by the Court of Justice of the European Union (CJEU) in the *Tümer* case.¹⁵ The CJEU was asked whether Council

Directive 80/987/EEC, which aims to protect employees in the event of the insolvency of their employer, is to be interpreted as allowing Member States to exclude third-country nationals in an irregular situation even in a case where the worker is recognised under civil law as having the status of an 'employee' with an entitlement to pay. The Court made it clear that secondary law instruments need to be interpreted in line with their social policy objective.

FRA PUBLICATION

Fair working conditions

A legal framework applicable to all domestic workers, including those in an irregular situation, would improve legal clarity on issues such as minimum pay (including a maximum ceiling for payments in kind for board and lodging), sick leave, compensation for work accidents, rest periods and adequate accommodation standards. Such a legal framework should provide for labour inspection of the workplaces of domestic workers to ensure safe and decent working conditions. Employers should be made aware of the obligation to treat their workers in accordance with existing labour law standards. Sanctions and penalties against employers responsible for the abuse or exploitation of domestic workers should be set forth in law.

For further information, see: FRA (2011), Migrants in an irregular situation in domestic work: fundamental rights challenges in for the European Union and its Member States, Luxembourg, Publications Office, p. 9

Hence national legislation adopted as a means of social policy may not exclude third-country national workers in an irregular situation from rights under such legislation merely on the basis of their irregular residence

¹⁵ CJEU, C-311/13, O. Tümer v. Raad van bestuur van het Uitvoeringinstituut werknemersverzekeringen, 5 November 2014.

status. From the *Tümer* judgment it can be concluded in more general terms that the rights of worker, which are an expression of societies' solidarity and the resolve to grant decent working conditions to every individual employed on EU territory, are not affected by the worker's residence status.

As concerns secondary law in the area of social policy, one of the main instruments is the Framework Directive on Safety and Health at Work, which, however, does not cover all aspects of decent working conditions and excludes 'domestic servants'.¹⁶

Mention should also be made of the Directive and the Framework Agreement on fixed-term work,¹⁷ which sets out in clause 4 the 'Principle of non-discrimination' according to which fixed-term workers shall not be treated in a less favourable manner in respect of their employment conditions than comparable permanent workers solely because they have a fixed-term contract.

FRA PUBLICATION

Freedom to conduct a business versus rights of workers

A new FRA report, while focusing on the freedom to conduct a business, one of the rights in the Charter of Fundamental Rights of the European Union, also identifies issues of concern in an ever more market-oriented Europe. For instance, the relationship between the freedom to conduct a business and the rights of employees is complex, which is partly reflected by the different approaches to labour market flexibility in the legislation of individual EU Member States. One example is the treatment of employees as 'independent contractors', which is legal in some Member States (such as in the form of 'zero-hour contracts' in the United Kingdom) but has been outlawed in others (such as the 'Svarc system' in the Czech Republic) because of its adverse effects in the area of social security and in distorting and unbalancing employment relationships.

For further information, see: FRA (forthcoming), Freedom to conduct a business: exploring the dimensions of a fundamental right, Luxembourg, Publications Office

Of particular relevance to the subject matter of this report are the Working Time Directive,¹⁸ which entitles workers to minimum periods of daily rest, weekly rest and annual leave, breaks and maximum weekly working time, and the Temporary Agency Work Directive,¹⁹ which establishes the principle of equal treatment for temporary agency workers with regard to their basic

employment and working conditions compared with directly employed workers.

The role of employment and recruitment agencies remains a matter of concern. It has consistently been highlighted – for example by the United Kingdom's Equality and Human Rights Commission²⁰ and by researchers from the European Institute for Crime Prevention and Control, affiliated with the United Nations (HEUNI)²¹ – that agency workers are exposed to a heightened risk of exploitative working conditions.²² With the progressive globalisation of labour markets, it can be expected that the role of intermediaries will increase rather than decrease in importance, and so too will the need for effective monitoring of their functions. In 2013, the European Commission published guidance – drafted by Shift and the Institute for Human Rights and Business – for the employment and recruitment sector on meeting the corporate responsibility to respect human rights under the United Nations (UN) Guiding Principles on Business and Human Rights.²³

Another highly relevant instrument of EU secondary legislation is the Posted Workers Directive,²⁴ which concerns situations where workers, for a limited period, carry out their work in the territory of a Member State other than the state in which they normally work. The posting of workers follows from the freedom enjoyed by an undertaking to provide services in a Member State other than the state of its registration. Member States are obliged to ensure that posted workers enjoy the minimum standards set out in Article 3 of the directive, which has recently been complemented by the Enforcement Directive.²⁵ This directive emphasises the obligation of EU Member States to perform effective inspections (Recital 27 and Article 10) and to ensure 'that sufficient staff are available with the skills and qualifications needed to carry out inspections effectively' (Recital 29). In addition, Article 10 (1) of the Enforcement Directive provides, among other things, that:

'Notwithstanding the possibility of conducting random checks, inspections shall be based primarily on a risk assessment by the competent authorities. The risk assessment may identify the sectors of activity in which the employment of workers posted for the provision of services is concentrated on their territory. When making such a risk assessment, the carrying out of large infrastructural projects, the existence of long chains of subcontractors, geographical proximity, the special problems and needs of specific sectors, the past record of infringement, as well

16 Safety and Health Directive (89/391/EEC), OJ 1989 L 183, p. 1.
17 Fixed-Term Work Directive (1999/70/EC), OJ 1999 L 175, p. 43.
18 Working Time Directive (2003/88/EC), OJ 2003 L 299.
19 Temporary Agency Work Directive (2008/104/EC), OJ 2008 L 327.

20 Equality and Human Rights Commission (2012).
21 Jokinen et al. (2011), p. 66; Jokinen and Ollus (2013), p.17; Sorrentino and Jokinen (2014), p. 22.
22 Andrees (2009), pp. 93 and 109.
23 European Commission (2013).
24 Posted Workers Directive (96/71/EC), OJ 1997 L 18.
25 Enforcement Directive (2014/67/EU), OJ 2014 L 159.

Figure 2: Overview of relevant EU directives

Social policy	Posted Workers Directive Directive 96/71/EC 16 December 1996 Transposition deadline 16 December 1999 (EC report by 16 December)	Working Time Directive Directive 2003/88/EC 4 November 2003 Entry into force 2 August 2004 (EC report by 23 November 1996 (and every 5 years); MSs every 5 years)	Temporary Agency Work Directive Directive 2008/104/EC 19 November 2008 Transposition deadline 5 December 2011 (EC report by 5 December 2013)	Enforcement Directive Directive 2014/67/EU 15 May 2014 Transposition deadline 18 June 2016 (EC report by 18 June 2019)
	Consumer Rights Directive Directive 2011/83/EU 25 October 2011 (amending 93/13 and 1999/44) Transposition deadline 13 December 2013 (EC report by 13 December 2016)	Public Procurement Directive Directive 2014/24/EU 26 February 2014 Transposition deadline 18 April 2016 (MSs stats by 18 April 2017)	Disclosure Directive Directive 2014/95/EU 22 October 2014 (amending 2013/34) Transposition deadline 6 December 2016 (EC guidelines by 6 December 2016; review by 6 December 2018)	
Transparency	Free Movement of Citizens Directive Directive 2004/38/EC 29 April 2004 Transposition deadline 30 April 2006 (EC report by 30 April 2006)	Free Movement of Workers Regulation 2011/492 5 April 2011		
	Employer Sanctions Directive Directive 2009/52/EC 18 June 2009 Transposition deadline 20 July 2011 (EC report by 20 July 2014 (and every 3 years); MSs stats for EC report)	Single Permit Directive Directive 2011/98/EU 13 December 2011 Transposition deadline 25 December 2016 (EC report by 25 December 2016; MSs stats by 25 December 2014)	Seasonal Workers Directive Directive 2014/36/EU 26 February 2014 Transposition deadline 30 September 2016 (EC report by 30 September 2019; MSs stats by 30 June 2018)	Past transposition deadline Adopted DK not taking part UK not taking part IE not taking
Residence Permit Directive Directive 2004/81/EC 29 April 2004 Transposition deadline 30 April 2006 (EC report by 6 August 2008 (and every 3 years))	Anti-Trafficking Directive Directive 2011/36/EU 5 April 2011 Transposition deadline 6 April 2013 (EC report by 6 April 2015 and by 6 April 2016)	Victims' Directive Directive 2012/29/EU 25 October 2012 Transposition deadline 16 November 2015 (EC report by 16 November 2017; MSs stats by 16 November 2017 (and every 3 years))		
Migration policy				
Criminal justice				

Note: EC, European Commission; MSs, EU Member States
 Source: FRA, 2015

as the vulnerability of certain groups of workers may in particular be taken into account.'

This report provides indicators of risk factors that could inform a system of risk management and targeted inspections taking into account the prevalence of risks.

Free movement

Article 45 of the TFEU guarantees workers the right to move freely within the EU and to be protected from discrimination on the ground of their nationality. Similarly, Article 15 of the Charter grants every EU citizen the right to seek employment and to work in any EU Member State.

Charter of Fundamental Rights of the European Union

Article 15 – Freedom to choose an occupation and right to engage in work

1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.
2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.
3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.

Conditions for and limitations on the right of EU citizens to move and reside freely within the EU are set out in the Free Movement Directive;²⁶ specific workers' rights are set out in the Free Movement of Workers Regulation, which in Article 7 restates workers' right to equality of treatment compared with local workers in respect of any conditions of employment and work in a Member State other than that of their nationality.²⁷

Migration policy

Provided certain conditions are fulfilled, the Single Permit Directive acknowledges the right of certain categories of third-country national workers to equal treatment (Article 12 of the directive) concerning 'working conditions, including pay and dismissal as well as health and safety at the workplace', and also freedom of association and membership of trade unions.

Treaty on the Functioning of the European Union

Article 45

1. Freedom of movement for workers shall be secured within the Union.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
3. [...]

As concerns the exploitation of third-country nationals, the Seasonal Workers Directive²⁸ is of the utmost relevance. It relates to areas of the economy – such as agriculture, horticulture and tourism – that are considered by interviewed experts to be among the sectors most prone to labour exploitation. As has been highlighted by previous research,²⁹ the status of seasonal workers is burdened with circumstances that increase their risk of exploitation, such as the fact that the worker is tied to – and in practice often at the mercy of – one employer or one temporary work agency, and the fact that seasonal workers are barred from any recourse to social assistance systems. This legal status creates a situation of vulnerability to labour exploitation. Member States ought, therefore, to counter this risk by monitoring the working conditions of seasonal workers and harvest helpers with particular care, undertaking a high volume

of inspections. Unfortunately, the findings from this research project indicate that this is not what happens.

The Employer Sanctions Directive has already been mentioned above as a main point of reference. Its primary objective is to counter irregular immigration by targeting employment of third-country nationals in an irregular situation, which is seen as a significant pull factor in irregular migration.

Criminal justice and victims' rights

The Employer Sanctions Directive also relates to the fourth policy aspect, namely criminal justice and victims' rights. The right of workers moving within or into the EU to decent working conditions is protected by law, and, as regards severe forms of labour exploitation, by both criminal and civil law provisions.

While severe labour exploitation concerns labour migration both within and to the EU and although the results of the project do not allow us to determine which form is more frequent, it appeared from the case studies collected in this project that third-country nationals are overrepresented in cases of particularly severe forms of labour exploitation. This could suggest that third-country nationals face especially serious violations of their rights as workers relatively more often than EU nationals moving to another Member State.

In addition, experts maintained that third-country nationals are particularly vulnerable to labour exploitation if their residency status is irregular. Hence it can be concluded that the Employer Sanctions Directive, which focuses on the employment of third-country nationals with an irregular residence status, concerns a group of workers who face a particularly high risk of labour exploitation and hence are 'vulnerable to further

Commission report on the implementation of the Employer Sanctions Directive

In 2014, the European Commission issued a communication on the application of the Employer Sanctions Directive, providing an overview of, for instance, the financial and criminal sanctions that a chain of employers may incur across the EU for hiring third-country nationals in an irregular situation; setting out how protective measures for third-country nationals were enacted in national legislation; and describing how Member States have transposed mechanisms to effectively detect and penalise illegal employment, including an assessment of Member States' inspection reports. This communication is referred to throughout this report.

European Commission (2014), Communication from the Commission to the European Parliament and the Council on the application of Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, COM(2014) 286 final, Brussels, 22 May 2014

26 Free Movement of Citizens Directive (2004/38/EC), OJ 2004 L 158.

27 For the CJEU's rich case law, refer to Lenaerts and Van Nuffel (2011), p. 240.

28 Seasonal Workers Directive (2014/36/EU), OJ 2014 L 94.

29 Ollus and Jokinen (2013), p. 78.

victimisation' in the sense of the Victims' Directive. In particular, Article 22 of the Victims' Directive obliges Member States' competent authorities to assess on an individual basis the risk to a victim of further victimisation, as well as the need for protection measures. Generally speaking, risk factors for exploitation are relevant not only for labour inspections but also for an assessment – possibly carried out by the police, a public prosecutor or a judge – of the protection needs of victims of severe labour exploitation in the sense of the Victims' Directive.

While trafficking is listed in Article 83 (1) of the TFEU – in the list of so-called Euro-crimes – the criminal offences established by Article 9 of the Employer Sanctions Directive are not. They may have their basis in Article 83 (2) of the TFEU, which enables directives to establish minimum rules concerning the definition of criminal offences if the approximation of criminal laws is essential to ensure the effective implementation of an EU policy. The definitions provided by Article 9 of the Employer Sanctions Directive are essential tools for achieving the goals of the immigration policies under Article 79 of the TFEU, as well as – as concerns Article 9 (1) (c) to (e) of the Employer Sanctions Directive – of social policies relating to the protection of essential aspects of the rights of workers.

The focus of the Employer Sanctions Directive is a general prohibition on the employment of third-country nationals who do not have the right to reside in the EU, underlined by various sanctions against employers who infringe that prohibition. However, a second component of the Employer Sanctions Directive emphasises the rights of workers to back payments to be made by employers (Article 6) and to the facilitation of complaints (Article 13). Thus, its intentions go beyond enforcing public order and include elements of the protection of worker's rights, including the right not to be subjected to particularly exploitative working conditions.

The Employer Sanctions Directive is concerned with employment situations. The 'employment situation' is an autonomous concept of EU law – and hence not subject to restrictions by Member States' legislation³⁰ – and refers to any instance where a person performs services for and under the direction of another person in return for remuneration.³¹ This is stated in Recital 7 of the directive. An employment situation is premised on an economic logic – on a person working in expectation of remuneration (and not because they are forced to work).

The specific rights of victims of trafficking are highlighted by the Anti-Trafficking Directive³² – the first EU-level act to address trafficking in a comprehensive and integrated way, focusing equally on the protection of victims, the prosecution of traffickers and the prevention of the phenomenon in the first place³³ – and the rights of victims of crime in general by the Victims' Directive.

Both directives take a strong victim-centred approach with provisions aiming to ensure appropriate assistance, support and protection of victims, with special attention given to child victims and victims of gender-based violence. In addition, the Victims' Directive emphasises victims' rights to be informed and enabled to actively participate in criminal proceedings. Article 8 of the Anti-Trafficking Directive provides for non-prosecution of offences or non-application of penalties to victims for their involvement in criminal activities which they have been compelled to commit as a direct consequence of their being trafficked. This provision flags up the necessity of giving priority to the rights of victims over policing and prosecuting public order offences.

The EU 2012–2016 strategy on trafficking in human beings also puts protection and victims' rights at the forefront, setting out 40 concrete and practical measures against trafficking in human beings to help EU Member States implement the Anti-Trafficking Directive in a practical and effective way that can lead the way towards eradicating trafficking in human beings and ensuring that victims are enabled to access justice and support.³⁴

Promising practice

Enhancing undocumented migrants' rights in central Europe

This project involved research in the Czech Republic, Hungary, Poland, Romania and Slovakia to analyse the relevance of the Employer Sanctions Directive for migrants in these countries, with the aim of enhancing the protection of undocumented migrant workers from labour exploitation and increasing knowledge about the rights deriving from the directive. The project was funded by the European Programme for Integration and Migration.

For more information, see: www.epim.info/association-for-legal-intervention-stowarzyszenie-interwencji-prawnej/

30 CJEU, C-53/81, *Levin v. Staatssecretaris von Justitie*, 27 March 1982.

31 CJEU, C-66/85, *Lawrie-Blum v. Land Baden-Württemberg*, 3 July 1986.

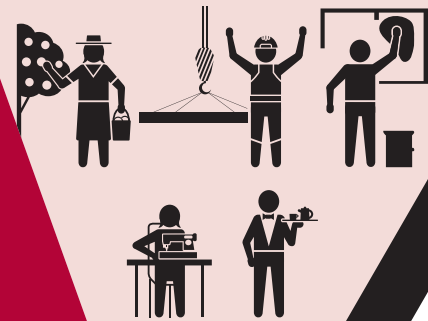
32 Anti-Trafficking Directive (2011/36/EU), OJ 2011 L 101.

33 European Commission (2014b), p. 4.

34 See European Commission, 'Trafficking in human beings'.

1

Severe labour exploitation and its forms



Historically, much attention has been devoted to looking at particular forms of severe exploitation, with a focus on the movement of people. For example, in the 1990s particular attention was paid to the trafficking of women into the EU from central and eastern European countries for purposes of sexual exploitation; as a result, this form of trafficking has been a priority for policy makers. More recently, the focus has broadened to recognise other forms of abuse, such as trafficking for the purpose of labour exploitation, which are encompassed under severe forms of labour exploitation.

This report, and in particular this chapter, set out to highlight areas of EU law which have not received so much attention and which through various means address different forms of severe labour exploitation, be this in regard to employment or migration law, for example.

There are different ways for people to end up in situations of severe labour exploitation. A person may by his or her own initiative move to another country and consequently be exploited. Other persons may have relied on the services of recruitment agencies, or may have been trafficked.

Under Article 2 of the EU Anti-Trafficking Directive, a person is trafficked when the following three conditions are met:

- one of the following actions are taken: 'recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons';
- illicit means are used: 'the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person';
- the action is carried out for the purpose of exploitation.

This last condition means that the offender has a specific intention to exploit the person, a circumstance that in practice may, depending on the case, be difficult to prove.

Anti-Trafficking Directive

Article 2 – Offences concerning trafficking in human beings

1. Member States shall take the necessary measures to ensure that the following intentional acts are punishable:

The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

2. A position of vulnerability means a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved.
3. Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs.
4. The consent of a victim of trafficking in human beings to the exploitation, whether intended or actual, shall be irrelevant where any of the means set forth in paragraph 1 has been used.
5. When the conduct referred to in paragraph 1 involves a child, it shall be a punishable offence of trafficking in human beings even if none of the means set forth in paragraph 1 has been used.
6. For the purpose of this Directive, 'child' shall mean any person below 18 years of age.

1.1. Forms and severity of labour exploitation

The various forms of labour exploitation form a continuum of severity of abuses spanning from slavery to relatively less serious forms of exploitation. While all cases of labour exploitation raise issues relating to civil and/or labour law, the present project deals exclusively with criminal forms of labour exploitation, as illustrated by the red box in Figure 3.

As Figure 3 illustrates, the three most severe forms of labour exploitation include slavery, servitude and forced or compulsory labour. These three forms are included in Article 5 of the EU Charter of Fundamental Rights, which corresponds in substance to Article 4 of the ECHR.

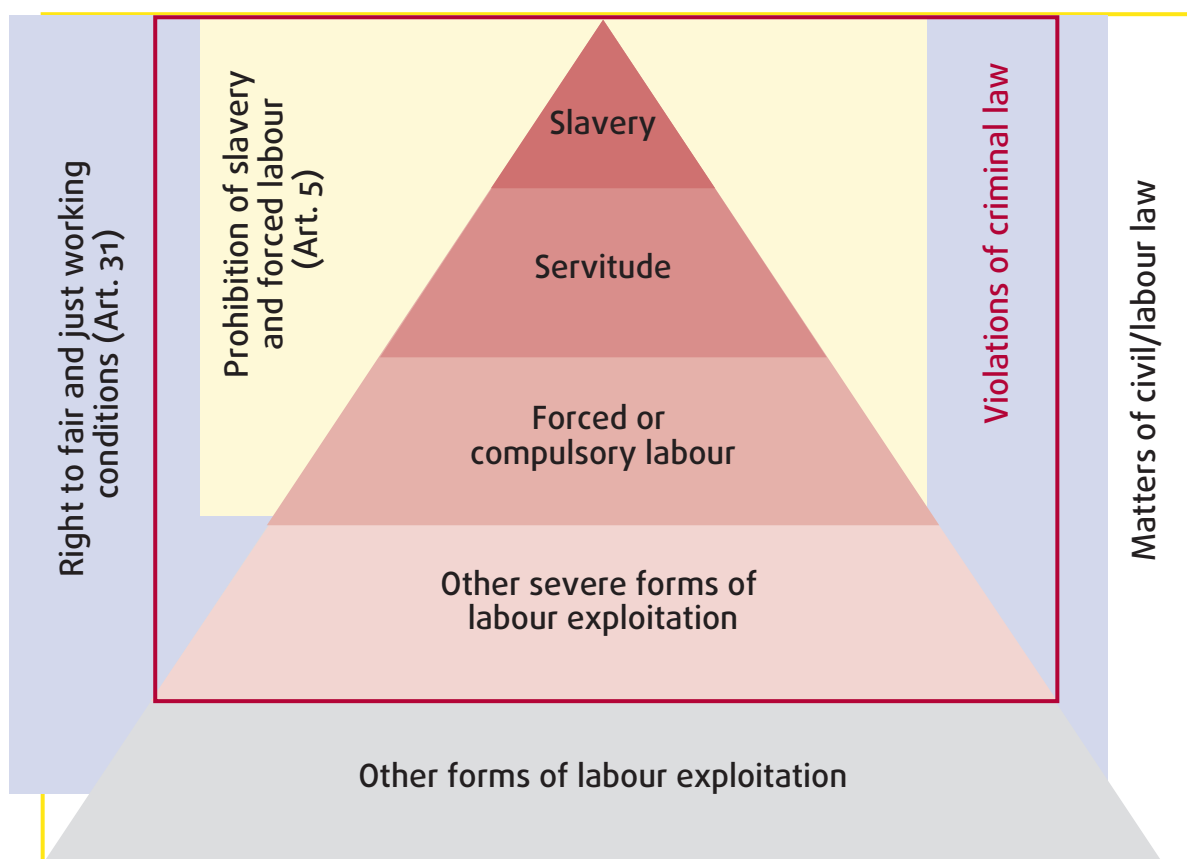
The EU Charter of Fundamental Rights, in Article 5, also includes trafficking under the heading of ‘Prohibition of

slavery and forced labour’. In this sense, EU institutions and Member States are, under Article 5 of the Charter, obliged to protect individuals against trafficking. Secondary EU law, as well as legislation at EU Member State level, must reflect this obligation.

In addition to Article 5, the Charter includes in Article 31 a right to fair and just working conditions. As shown in Figure 3, this right includes the most severe forms of labour exploitation listed in Article 5 of the Charter, but it is not limited to these. It also covers other forms of labour exploitation, including those envisaged in Article 9 (1) (c) to (e) of the Employer Sanctions Directive.

Article 9 of the Employer Sanctions Directive obliges those Member States which are bound by this directive – all except Denmark, Ireland and the United Kingdom – to criminalise certain forms of irregular employment of third-country nationals.

Figure 3: Forms and severity of labour exploitation



Note: Victims of all forms of exploitation set out in Figure 3 may also be victims of trafficking whenever the elements of the trafficking definition in Article 2 of the Anti-Trafficking Directive, as covered by Member State law, are met.

Source: FRA, 2015

Employer Sanctions Directive

Article 9 – Criminal offence

1. Member States shall ensure that the infringement of the prohibition referred to in Article 3 constitutes a criminal offence when committed intentionally, in each of the following circumstances as defined by national law:
 - (a) the infringement continues or is persistently repeated;
 - (b) the infringement is in respect of the simultaneous employment of a significant number of illegally staying third-country nationals;
 - (c) the infringement is accompanied by particularly exploitative working conditions;
 - (d) the infringement is committed by an employer who, while not having been charged with or convicted of an offence established pursuant to Framework Decision 2002/629/JHA, uses work or services exacted from an illegally staying third-country national with the knowledge that he or she is a victim of trafficking in human beings;
 - (e) the infringement relates to the illegal employment of a minor.
2. [...]

The first two categories of offences listed in Article 9 of the Employer Sanctions Directive concern cases of extensive violations of the prohibition of the employment of third-country nationals in an irregular situation. The remaining sub-paragraphs capture a particular severity of the offence that results from the violation of rights of the worker. This is the case firstly when workers are employed under ‘particularly exploitative working conditions’ and secondly when they are particularly vulnerable because they have been trafficked or are children. Article 9 (1) (d) – the employment of a victim of trafficking – reflects the fact that employers who exploit workers knowing that they have been trafficked are not punishable as traffickers, as the act of exploiting a victim of trafficking is not covered by Article 2 (1) of the Anti-Trafficking Directive but only by Article 9 (1) (d) of the Employer Sanctions Directive.

The phenomenon of exploitation of workers moving within or into the EU illustrates the consequences of an increasingly globalised labour market. The readiness of a worker from another country to accept exploitative working conditions reflects the personal situation of that worker who is – or believes they are – better off in a situation of labour exploitation in the destination country than in enduring unemployment or even in regular work in their country of origin. Global differences in terms of wealth, income and standards of living are powerful factors that make work that fails to meet the standards of the country of the workplace nonetheless

attractive to workers from other countries and thus drive these workers into irregular labour markets.

From a fundamental rights perspective, the fact that a worker consents to exploitative conditions does not alter their right to decent working conditions, nor does it alter the fact that employment under severely exploitative conditions constitutes a fundamental rights violation and a criminal offence. The necessity of upholding a fair balance between the interests of employers and the rights of workers is underlined by Article 31 of the Charter, which protects the rights of workers to fair and just working conditions. The particular complexities resulting from the globalisation of labour markets add to the importance of policies and strategies that enforce Article 31 of the Charter.

That the cases covered under Article 9 (1) (c) to (e) of the Employer Sanctions Directive specifically recognise and aim to protect the rights of victims is reflected, for instance, in the provision according to which victims may be granted, under conditions defined more specifically in national law, a residence permit of a limited duration.

Of crucial importance is the term ‘particularly exploitative working conditions’ used in Article 9 (1) (c) of the Employer Sanctions Directive. This term demarcates the borderline between criminal offences and violations of a worker’s rights that are dealt with merely under civil and labour law, and is defined in Article 2 of the same directive as covering conditions marked by ‘a striking disproportion compared with the terms of employment of legally employed workers’, a discrepancy which in particular ‘offends against human dignity’.

Employer Sanctions Directive

Article 2 – Definitions

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

- (a) [...]
 - (i) ‘particularly exploitative working conditions’ means working conditions, including those resulting from gender based or other discrimination, where there is a striking disproportion compared with the terms of employment of legally employed workers which, for example, affects workers’ health and safety, and which offends against human dignity; [...]

The reference made by Article 2 of the Employer Sanctions Directive to human dignity – the concept that forms the very basis of the entire system of fundamental rights – provides a clear indicator. What all criminal forms of labour exploitation have in common is the abuse of a worker’s social situation by an employment

relationship that fails to respect the dignity of the individual worker. The employer violates the worker's autonomy by exploiting a social and economic situation of poverty and social exclusion that does not allow the worker to act in real freedom. Thus, the employer exploits the particularly forceful power imbalance which generally exists in these forms of employment relationships and which calls for clear limitations and effective protection of the rights of workers to decent working conditions.

From the field research, interviewees identified various combinations of the following circumstances which emerge as typical of situations of severe labour exploitation of workers moving within or into the EU in employment relationships:

- no salary paid or salary considerably below legal minimum wage;
- parts of remuneration flowing back to employer on various – and often unreasonable – grounds;
- lack of social security payments;
- extremely long working hours for six or seven days a week;
- very few or no days of leave;
- working conditions differ significantly from what was agreed;
- worker lives at the workplace;
- hardly any contact with nationals or persons from outside the company (or the family, in the case of domestic workers);
- passport retained, limited freedom of movement.

Worker is the weaker party to the employment contract, finds the CJEU

“That interpretation derives from the objective of Directive 93/104, which seeks to guarantee the effective protection of the safety and health of workers by ensuring that they actually have the benefit of, inter alia, an upper limit on weekly working time and minimum rest periods. Any derogation from those minimum requirements must therefore be accompanied by all the safeguards necessary to ensure that, if the worker concerned is encouraged to relinquish a social right which has been directly conferred on him by the directive, he must do so freely and with full knowledge of all the facts. Those requirements are all the more important given that the worker must be regarded as the weaker party to the employment contract and it is therefore necessary to prevent the employer being in a position to disregard the intentions of the other party to the contract or to impose on that party a restriction of his rights without him having expressly given his consent in that regard.”

CJEU, Joined cases C-397/01 to C-403/01, Bernhard Pfeiffer et al. v. Deutsches Rotes Kreuz, Kreisverband Waldshut eV., 5 October 2004, paragraph 82

1.2. Criminalisation of labour exploitation and trafficking at Member State level³⁵

Slavery, servitude and forced labour

FRA SELECTED CASE STUDY

Slavery

In 2010, a group of five men from Egypt were legally residing in Cyprus and working with a work permit tied to a specific employer who withheld their documents and payment and forced them to work under very harsh working and living conditions. This took place on a farm in the UN-controlled buffer zone, where Cypriot authorities do not carry out inspections. After the police received information from other farmers in the area, a large-scale investigation against the employer brought the situation to light. Concerted action was taken by the police and social welfare services to provide victim support. Victims were encouraged to testify in court, received residence permits and were supported in finding new jobs by NGOs, the Department of Labour Relations and the Ministry of the Interior. The perpetrator was found guilty of exploiting human beings under conditions of slavery.

Desk research revealed that at the level of Member State legislation the protection of workers against the most severe forms of labour exploitation is not as comprehensive and strong as could be expected. In half of EU Member States (Bulgaria, the Czech Republic, Denmark, Finland, Germany, Greece, Ireland, Latvia, Luxembourg, Malta, the Netherlands, Poland, Slovakia and Sweden) slavery, servitude and forced labour are criminalised only in specific contexts.

However, field research findings, and in particular the case studies collected, demonstrate that at present cases of slavery – including slavery-like practices – and servitude occur in EU Member States.

Trafficking

The concept of trafficking in human beings has undergone important developments following the adoption of the Palermo Protocol in 2000 in the framework of the United Nations. In 2005, the Council of Europe adopted its Convention on Action against Trafficking in Human

³⁵ Annexes III (criminal law provisions) and IV (Inspection authorities supporting victims) are available online at: <http://fra.europa.eu/en/publication/2015/severe-labour-exploitation>.

Beings. At the EU level, developments culminated in the adoption of the Anti-Trafficking Directive in 2011, which includes a broad definition of trafficking - as referred to under Recital 11 - and promotes a victim-centered approach.

Interviews carried out in the context of this research consistently highlighted the complicated structure of trafficking definitions in Member State laws and the considerable difficulties involved in implementing the legislation. These difficulties persist, despite efforts to achieve convictions of traffickers (see [Section 5.9](#)).

At least four Member States (Belgium, Estonia, Germany and Poland) have adopted a broad definition of trafficking.

FRA SELECTED CASE STUDY

Labour trafficking

A number of men and women from Germany, Greece, Bulgaria, Moldova, Romania and Kazakhstan were employed as cleaners in a chain of roadside restaurants in Belgium. The workers had limited contact with the outside world, as any contact they had with the public was necessarily superficial. The staff were required to work for €45 a day, seven days a week, from 7 a.m. to 10 p.m. Following an anonymous complaint to the Inspection Service, the workers were acknowledged as victims of human trafficking by the magistrate and were referred to the relevant victim support services. The employer was prosecuted for labour trafficking and other criminal offences. The individual perpetrators were sentenced to between one and four years' imprisonment, while the companies were fined in excess of €18,000.

In Belgium, for example, Article 433*quinquies* of the Criminal Code, which defines trafficking, includes trafficking for the purpose of work or services 'in conditions contrary to human dignity.' According to the preparatory works, Article 433*quinquies* has a broader scope than the minimum obligation imposed by international instruments, which refer to forced labour or services, slavery or practices similar to slavery, and servitude.³⁶

It should be mentioned that Belgium is among the Member States with the highest numbers of prosecutions for labour trafficking.³⁷ The larger numbers of traf-

ficking cases would seem to reflect the wider scope of the criminal law definition.

The Polish Criminal Code, in Article 115 (22), includes a reference to 'other forms of abuse of human dignity'. The Estonian Code refers in Article 133 to work carried out under unusual conditions, and the German Criminal Code contains in Article 233 (1) a similar definition ('*Beschäftigung [...] zu Arbeitsbedingungen, die in einem auffälligen Missverhältnis zu den Arbeitsbedingungen anderer Arbeitnehmerinnen oder Arbeitnehmer stehen, welche die gleiche oder eine vergleichbare Tätigkeit ausüben*').

Compared with these four EU Member States, legislation in the Netherlands is more restrictive. However, the courts adopt an extensive interpretation of the scope of definitions.³⁸ With very similar results, the Supreme Court of Cassation in Bulgaria adopted in 2009 an interpretative decision explicitly widening the scope of the definition of trafficking under Bulgarian law (Article 159 (a) of the Criminal Code).³⁹ Again, it is worth noting that Bulgaria ranks among the few Member States that, according to statistics published by Eurostat, have prosecuted substantial numbers of labour traffickers.⁴⁰

Turning now to penalties, the penalty provided for in Article 115 (22) of the Polish Criminal Code is imprisonment from three to 15 years, and the German provision provides for a maximum penalty of 10 years. In the Netherlands, trafficking is punishable by imprisonment for a term not exceeding 12 years. These penalties may be appropriate in cases involving violations of Article 5 of the Charter, but they can appear to be harsh for conduct that does not and is defined as employing a worker under conditions that significantly deviate from normal standards. A penalty that assimilates coercive and non-coercive forms of severe labour exploitation could meet with the objection that it treats behaviours that are essentially different on an equal footing.

³⁶ Council of Europe, Group of Experts on Action against Trafficking in Human Beings (GRETA) (2013), para. 55.

³⁷ According to Eurostat (2014), pp. 120 and 126, in Belgium a total of 653 persons were prosecuted for trafficking in 2012, 41 % of whom (some 268 persons) were prosecuted for labour trafficking. However, only a total of 48 persons were convicted of (any form of) trafficking in Belgium in 2012.

³⁸ Heemskerk and Rijken (2011), p. 76.

³⁹ Bulgarian Supreme Court of Cassation, Interpretative Decision 2/2009 of 16 July 2009.

⁴⁰ According to Eurostat (2014), pp. 120 and 126, in Bulgaria a total of 109 persons were prosecuted for trafficking in 2012, 60 % of whom (some 65 persons) were prosecuted for labour trafficking. In the same year, a total of 105 persons were convicted of (any form of) trafficking in Bulgaria.

Exploitation in employment relationships

Other Member States have reacted to the complexities involved in the implementation of legislation in this field by adopting legislation that sets up a distinct 'second line of defence'. For example, in Austria a criminal law provision penalising the exploitation of a foreign national has been in place since 1 July 2000.⁴¹

This line of development gained momentum with Article 9 (1) of the Employer Sanctions Directive. According to the Commission's assessment, all Member States bound by the Employer Sanctions Directive have to date put criminal law provisions in place corresponding to Article 9 (1) (c) of the Employer Sanctions Directive, with the exception of Romania.⁴²

The range of individuals protected by criminal law provisions against severe exploitation in employment relationships varies considerably among Member States:

- Laws or case-law in Belgium, France, Germany, the Netherlands and Poland protect – within certain limits – *anyone* against exploitative working conditions that violate human dignity.
- Article 311 of the Spanish Criminal Code protects any worker from exploitation; the penalty is a prison sentence of between six months and three years; in addition, Article 312 (2) protects foreign workers in particular, if they are employed without a work permit; the penalty is imprisonment for between two and five years.
- Austrian law protects *all aliens* (nationals of another EU Member State or of a third country).
- The criminal laws of Croatia, the Czech Republic, Estonia, Italy, Portugal and Slovakia protect *all aliens* (third-country nationals and EU citizens from other EU Member States) *in an irregular situation of residence*.
- Hungarian law protects all third-country nationals *without a work permit*.

Bulgaria, Cyprus, Greece, Latvia, Lithuania, Luxembourg, Malta and Slovenia protect *only third-country nationals in irregular situations*.

However, in four EU Member States (the Czech Republic, Greece, Latvia, and Luxembourg) the offence of employing a worker in an irregular situation under particularly exploitative working conditions is punishable with a maximum sentence of less than two years. Such a penalty hardly reflects the gravity of violations of fundamental rights encountered by victims of such offences.

It should be observed that, overall, irregularly staying or working third-country nationals are protected from severe labour exploitation by means of criminal law provisions in almost all EU Member States, while nationals of the Member State in question enjoy this level of protection in only about four.

Lack of consideration given to victims of exploitation in some EU Member States

The crucial function of protecting the rights of workers who have moved within or into the EU to decent working conditions cannot be performed if the criminal code focuses only on the fact of illegal employment as a public order offence and fails to pay appropriate attention also to the severe exploitation of a worker and hence to the violation of the worker's right to fair working conditions. Under the criminal law of a small group of EU Member States, including Finland (Section 6 (a) of the Criminal Code), the Netherlands (Article 197 of the Criminal Code) and Sweden (Chapter 20, Section 5 of the Aliens Act), the employment of a third-country national in an irregular situation of residence constitutes a criminal offence without regard to the question of whether or not the worker was subjected to particularly exploitative working conditions. As a consequence, the potential penalty for severe exploitation is only imprisonment for up to one year.

A criminal law provision that does not take the exploitation of workers into account can hardly be understood as protecting workers from exploitation. The low penalty is not appropriate considering the rights abuses suffered by victims of severe labour exploitation. Hence such an approach comes with the risk that victims of severe human rights violations and their rights as victims of crime are neglected.

This is the case even when their exploitation is taken into consideration as an aggravating circumstance in sentencing. The acknowledgement of the victim as a party to criminal proceedings, or at least as having appropriate rights to participation in the proceedings according to a Member State's legal system and tradition, will usually depend on the type of offence prosecuted and on whether that offence with regard to its abstract definition is interpreted as protecting the rights of individuals or whether it primarily addresses public order.

1.3. Workers accepting severe exploitative working conditions: the no-name problem

Throughout the project, researchers encountered a remarkable discrepancy: the phenomenon of workers moving within or into the EU accepting, because

⁴¹ See Aliens Act in Austria, para. 105 *Fremdengesetz* 1997; after 1 January 2003, § 116 *Fremdenpolizeigesetz*.

⁴² European Commission (2014), Section I.1-b, p. 5.



of personal situations of poverty and marginalisation, work under conditions that are – judged by the standards of the country of their workplace – clearly irregular and exploitative has no label commonly attached to it and receives little attention. While the traditional categories of ‘slavery’ or ‘forced labour’ – which imply a lack of consent on the part of the worker – are common, the severe exploitation of workers from other countries in employment relationships lacks a categorisation and hence is often not perceived.

FRA SELECTED CASE STUDY

Severe exploitation in agriculture

Every year, between May and September, workers come from Romania to certain villages in Csongrád and Bács-Kiskun counties in the south-east of Hungary to do agricultural work (for instance collecting potatoes). Most of them are Roma men escaping from extreme poverty; some are accompanied by their family. They work in the fields under harsh conditions, sometimes 10–12 hours a day. Their average hourly wage is about HUF 400–500 (€1.5). The families generally live in the employers’ dilapidated farm buildings in total isolation, working for the rent. The mayors of the villages concerned have set up security forces to ‘preserve public order’ during the season concerned. When the workers enter a village to get in contact with local residents, they are ‘accompanied back’ to the farm by security guards.

On the other hand, in marked contrast to their initial tentativeness, probably stemming from these conceptual complexities, once the terms were clarified, respondents assessed the exploitation of workers from other countries in particularly exploitative employment relationships as in fact the most common form of severe labour exploitation. In 13 of the 21 EU Member States that were included in the fieldwork phase of the project – Austria, Croatia, Cyprus, France, Germany, Greece, Hungary, Italy, Lithuania, Malta, Poland, Portugal and Spain – it was perceived by experts as the most frequently occurring form of severe labour exploitation.

Respondents from several EU Member States (for example Belgium, the Netherlands and Slovakia) reported that because of the multiplicity of laws relevant to labour exploitation, it is not clear what precisely constitutes a crime of labour exploitation. The lack of clear and distinct concepts is reflected in officials’ lack of awareness of the various forms of severe labour exploitation and their significant differences.

In most countries, expert interviewed in this research appear to be relatively familiar with the concept of trafficking in human beings. However, only in rare cases would respondents spontaneously refer to cases

investigated under provisions corresponding to Article 9 (1) (c) to (e) of the Employer Sanctions Directive, covering infringements ‘accompanied by particularly exploitative working conditions’ or involving the illegal employment of a child. Often, it appeared that, for respondents, many cases of labour exploitation fell within an undefined and unexplored territory, between poor employment practices on the one hand and forced labour on the other. One respondent expressed the need for additional criminal law provisions to cover conduct falling within this grey area:

“What I would like is a kind of criminalisation of poor employment practices. That means you do not have to use that very heavy article [on trafficking], with maximum custodial sentence of 12 years, that really is quite something. But you also get a sort of fraud variant, for the people who are really [victims of] heavy underpayment, you could do something for them as well. The grey area would then become clear.” (Judge or prosecutor, the Netherlands)

However, this grey area is exactly what Article 9 (1) (c) of the Employer Sanctions Directive targets. By now, such exploitation – at least as concerns third-country nationals in an irregular situation – is criminalised in most EU Member States in a manner that allows criminal justice systems to protect the rights of these workers to decent working conditions.

Because the phenomenon of exploitative working conditions – and of foreign workers accepting work under such conditions – has not yet attracted an agreed, commonly used label, the phenomenon often remains hidden behind and general or familiar terms are applied, such as ‘modern (day) slavery’ and ‘trafficking’.

“We actually call all of this trafficking.” (Representative of a victim support organisation, the Netherlands)

Such terminology comes with the risk of masking important differences. In terms of the Charter, the distinction between violations of Article 5 (prohibition of slavery and forced labour) and of Article 31 (fair and just working conditions) is not just a matter of academic accuracy but reflects a significant difference in the nature and severity of the criminal conduct in question.

“Somebody who accepts such working conditions has indeed no other opportunities and of course needs to make a living. The lower my professional skills and job qualifications, the higher the possibilities that I will find myself obliged to accept exploitation. And, closely linked to that, if I find myself in a regular situation of work, I can expect my rights to be respected; instead, if I have an irregular status I can claim for this respect, but I will be much more afraid and that will keep me from doing it.” (Representative of a monitoring body, Spain)

In addition, the absence of a clear understanding of the exploitation of the unforced labour of workers moving

within and into the EU accounts for difficulties in clearly distinguishing between instances of poor employment practice and criminal forms of severe labour exploitation. The lack of a succinct concept and term impedes the drawing of clear boundaries, in relation both to distinguishing between different criminal offences and to differentiating between criminal and mere civil and labour law issues. The fact that case law on severe exploitation of migrants in employment relationships is scarce adds to the difficulties in understanding the provision in Article 9 of the Employer Sanctions Directive.

The fact that trafficking has taken centre stage for some time is reflected not only by the attention it receives from practitioners but also by an institutional situation where support services, specialised police units and public prosecutors, as well as national policy coordinators, are assigned to deal with trafficking cases and policies. Meanwhile, limited support is in place when it comes to labour exploitation in general.

Furthermore, as indicated in [Section 5.4.](#), victim support and temporary residence permits are often available only for victims of trafficking and not for other victims of labour exploitation. This creates the risk that victims benefit from certain advantages only as long as they are officially regarded as victims of trafficking. Hence, in some cases, the provision of support services and a temporary residence permit to the victim ends if the charges against the offender are changed, because only victims of trafficking are entitled to such support.

An obvious suggestion in this situation is that institutions commissioned to deal with trafficking should be encouraged to consider widening their mandate to allow them to deal with all criminal forms of labour exploitation; in addition, legal provisions targeting victims of trafficking should be extended to benefit all victims of severe labour exploitation.

1.4. Exploitation of children

According to the Charter, the employment of children under the minimum school-leaving age is prohibited, and young people admitted to work are entitled to working conditions appropriate to their age and to protection 'against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education'.

Respondents in the majority of EU Member States rarely indicated illegal forms of child labour as a common form of labour exploitation. When mentioned, labour exploitation involving children was linked to begging – for example in Austria, the Czech Republic, Greece, the Netherlands, Poland and Slovakia – while an expert in Portugal referred to cases of child labour involving

Charter of Fundamental Rights of the European Union

Article 32 – Prohibition of child labour and protection of young people at work

The employment of children is prohibited. The minimum age of admission to employment may not be lower than the minimum school-leaving age, without prejudice to such rules as may be more favourable to young people and except for limited derogations.

Young people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education.

Romanian children in olive picking. One interviewee from a victim support organisation in Bulgaria referred to girls aged 14–18 working in the kitchen of restaurants (allegedly with the agreement of their parents), and interviewees in France and the Netherlands had encountered child labour in households.

FRA SELECTED CASE STUDY

Child labour

In 1999, a 14-year-old boy was brought to the Netherlands by his uncles with a false passport and under the pretext of providing him with a better education. Instead, the boy had to work full time at a public market and was not allowed any contact outside the family. His story became public only 10 years later, when the police arrested him because of his irregular status during a routine check. With the help of a lawyer, he filed a complaint while in detention, the police launched an investigation and the victim received a residence permit on humanitarian grounds. The perpetrators were found guilty of trafficking in human beings and human smuggling and received prison sentences. They were also to pay compensation to the victim to the amount of €50,828 (€30,828 for material damage and €20,000 for immaterial damage).

In Poland, one labour inspector claimed that Ukrainian children are seasonally engaged by individual farmers to work in Polish agriculture, but the problem remains unrecognised since no institution is entitled to inspect the farms. Additionally, what makes the situation even more difficult is that children's work in agriculture is allegedly socially accepted in Poland, as an NGO activist noted (victim support organisation). The interviewees emphasised the lack of clear procedures for dealing with an exploited child when this situation is encountered. Taking into account the rarity of any related police actions, a police representative suggested that in each particular case the response was improvised:

“When it comes to our actions, it’s based on extinguishing fires rather than following procedures, because of how specific this subject is.” (Representative of the police, Poland)

The main problem that Polish interviewees pointed out relates to the child’s accommodation. Before 2011, when the Act on family support and the system of substitute care was introduced,⁴³ a childcare facility in Warsaw was contracted to provide care to unaccompanied children who have moved to Poland from another country. Currently, however, there are no provisions enabling such a contract to be put in place and it is not clear where such children should be referred to. In practice, the system for support is not coordinated, and no institution feels responsible for providing care to foreign children without a parent or a custodian:

“We have problems with children who are involved in the refugee procedure. The most conspicuous problem is where to place them. We have a problem with child victims of human trafficking, because there is nowhere we can place them, as no one feels responsible for this area and there are no facilities ready to do it. And usually we just grab a phone and force district authorities which coordinate the system to find a place. I suppose that in the case of labour exploitation of a child, we would face the same problems.” (National policy expert, Poland)

FRA PUBLICATION

Guardianship for children deprived of parental care

FRA, in a joint publication with the European Commission, designed and published in June 2014 a handbook to help standardise guardianship practice and better equip Member States to deal with the specific needs of child victims of trafficking. It provides guidance and recommendations to EU Member States on strengthening their guardianship systems, setting forth the core principles, fundamental design and management of such systems.

For further information, see: FRA (2014a), Guardianship for children deprived of parental care: a handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking, Luxembourg, Publications Office.

In France, a few patterns were noted relating to children being exploited. Children can be viewed by exploiters as interesting persons to ‘invest in’ for long-term exploitation – including for the forced committing of criminal offences. One interviewee claimed that victims of domestic exploitation are often abused as children on arriving in France. This is confirmed by a number of French case studies submitted as part of the research. Experts also identified specific gaps in victim support services concerning children, in terms of effective

placement solutions and social and educational support. Interviewees also reported a lack of efficient responses within child welfare services, and a lack of adapted placement structures for migrant child victims of exploitation. There is reportedly a more general lack of programmes and space to create a relationship of trust with children, which is needed to ensure their protection and make them understand its importance. A solution under consideration is regionally coordinated follow-up on cases of exploited children, with placements in different regions, which would create the appropriate physical distance from exploiters or networks.

FRA SELECTED CASE STUDY

Labour exploitation of a child

A girl was brought from Mali to France in 1997, when her age was, according to different sources, 11 or 15 years. For eight and a half years she worked for a family of two parents and four children, every day from 7:00 until 22:00 or 23:00, carrying out multiple tasks: babysitting, housework, cooking, ironing, and washing the car. She did not have an employment contract, was not paid and has never gone to school in France. She shared her room with a child.

When the NGO *Comité contre l’esclavage moderne* learned of her situation in 2006, they alerted the police.

The Paris Court of Appeal made its decision in 2010. It sentenced both perpetrators to 24 months’ imprisonment (suspended) and to the payment of €63,000 for financial damage and €30,000 for moral damage. The Bobigny Labour Court passed its ruling in 2012. It recognised the existence of an employment contract from September 1997 until May 2006 and ordered the couple to pay the victim a total of €119,464.53 for unpaid work and holidays and €33,943.35 in damages. It also ordered that documents confirming the victim’s employment be issued and that her payslips be submitted.

Concerning children specifically, respondents argued that, while the social system is oriented towards protection, it proves inefficient and ill-suited for the protection of exploited foreign children. One law enforcement officer stressed the existence of protracted situations of severe exploitation and called for new measures to be experimented with, for example in terms of placement and social support: ‘Children are not served by interventions because basically nothing is done to allow them to get out [...] Because of this failure we allow painful situations to endure.’

⁴³ Poland, Act on family support and the system of substitute care (*Ustawa o wspieraniu rodziny i systemie pieczy zastępczej*), 9 June 2011.

1.5. Conclusions

A common denominator emerged from the expert interviews which cut across several professional groups. This is the difficulty in understanding, distinguishing and applying the various concepts of severe labour exploitation, ranging from slavery to particularly exploitative working conditions as per the Employer Sanction Directive. As a result, there is a tendency to apply one label – frequently the category of trafficking – to most forms of severe labour exploitation. This comes with the risk that investigations or prosecutions will fail, because all the elements of the crime of trafficking may not be present or may be difficult to prove.

- The concept of severe labour exploitation occurring within the framework of an employment relationship is not well understood. Interventions aimed at countering labour exploitation should be based on a profound understanding of the various forms of labour exploitation, ranging from slavery and servitude – for example in private households – to exploitation occurring in employment relationships. Staff of public authorities and private institutions need to be trained to recognise these different forms of exploitation and their root causes, including poverty, social exclusion and the impact of legal regulations on a person's status and situation. A lack of understanding of labour exploitation – in particular when it occurs within the contractual framework of an employment relationship – comes with the risk that cases of severe labour exploitation will be overlooked or not taken seriously.
- Desk research conducted by FRA shows that criminal laws in EU Member States protecting the right of workers not to be subjected to severe exploitation are still fragmented and piecemeal. Furthermore, there are vast differences among the legal situations in EU Member States. These differences cut across the entire range of forms of severe labour exploitation, as they concern slavery and forced labour as well as severe labour exploitation in employment relationships. Obviously, these differences impede cross-border cooperation between law enforcement agencies, public prosecutors and courts in cases involving several EU Member States, which is common when subcontracting, labour brokers or the posting of workers is involved. Therefore, the patchy coverage in criminal law of severe labour exploitation should be acknowledged as a risk factor impeding victims' access to justice.
- The findings from this project support the view that the offence of severe exploitation of third-country nationals in an irregular situation carried out within the framework of an employment relationship – under Article 9 (1) (c) of the Employer Sanctions

Directive – would, in theory, have the potential to fulfil more significant functions and cover a widespread phenomenon. However, in practice, it could not fully perform these functions because of a lack either of appropriate legislation or of awareness on the part of practitioners working with the legislation in place. This offence, as conceived by the Employer Sanctions Directive, targets situations that, on the one hand, do not constitute forced labour – in the meaning of Article 5 of the EU Charter of Fundamental Rights – but, on the other hand, still amount to very serious violations of a worker's right to decent working conditions under Article 31 of the Charter.

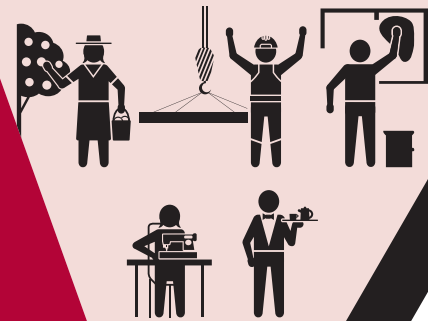
From the findings of the desk research, it can be suggested that, to provide appropriate protection of this right, an offence of 'medium severity' could be considered – both in legislation and as a matter of consistent implementation – where 'medium severity' would refer to a criminal law definition carrying a penalty threatening imprisonment for at least two years but not more than five years.

- While trafficking has attracted much attention, the severe exploitation of workers in employment relationships – which may or may not occur in a context of trafficking – has not. This difference in the level of attention is reflected by an institutional setting in which specialised actors are available to deal with trafficking cases but not with cases of severe labour exploitation.
- Some expert interviews and case studies indicate that efforts are needed to enable child welfare services to react to cases of child labour in a more effective and targeted manner. This also applies to the exploitation of children in situations of irregular residence within employment relationships, as addressed by Article 9 (1) (e) of the Employer Sanctions Directive.
- In conclusion, measures need to be adopted that aim to:
 - improve the legal basis of countering severe labour exploitation of workers who have moved within or into the EU;
 - raise the awareness of workplace inspectors, support service providers, law enforcement officers, prosecutors and judges of the various legal concepts and forms of severe labour exploitation;
 - enhance the capacity of these actors to intervene in a targeted and victim-friendly manner;
 - improve the cooperation of the relevant actors on the basis of a shared understanding of the legal framework, the phenomena to be addressed, the fundamental rights at stake and the strategy pursued.



2

Risk factors for severe labour exploitation and risk management



As explained in the introductory chapter, the identification and evaluation of factors increasing workers' risk of being subjected to severe labour exploitation forms a cornerstone of this report. Given that EU Member States have to meet standards of due diligence, what triggers their obligations to intervene – with a view of preventing severe labour exploitation or of bringing offenders to justice – is a situation of imminent danger of exploitation, resulting from a combination of risk factors. Hence, Member States have to ensure that their prevention, monitoring and investigatory measures reflect the findings of the assessments of risk factors.

To foster an analysis of risk factors, four categories of risk factors have been identified; those relating to:

- the legal and institutional framework;
- the worker's personal situation and background;
- the workplace;
- the behaviour of the employer.

Experts from several countries – including Austria, France, Germany, the Netherlands and the United Kingdom – emphasised that it is mostly a combination of different factors leading to severe exploitation, rather than one specific factor in isolation.

Figure 4: Risk factors for labour exploitation



Source: FRA, 2015

2.1. Legal and institutional risk factors

The first category of risk factors relates to the legal and institutional framework. According to interviewed experts, two factors stand out very clearly as increasing the risk of labour exploitation. The first is impunity – that is, the low risk to offenders of being prosecuted and punished or of having to compensate exploited workers. The second is the lack of institutions that effectively monitor the situation of workers moving within or into the EU. These two factors are linked to one another in the sense that impunity is a consequence of deficient monitoring: as investigations and prosecution depend on inspections capable of detecting cases of labour exploitation, widespread impunity is arguably the result of a lack of effective monitoring. Later chapters will discuss workplace inspections and monitoring, as well as the complexities faced by the police and public prosecutors as a result of deficient monitoring on the one hand and victims' reluctance to report on the other.

Impunity fosters severe labour exploitation

Three out of four respondents mentioned the low risk of prosecution as one of the three most important institutional risk factors. In addition, most of the professional groups identified the low risk of prosecution as the most relevant factor leading to exploitation. As one expert put it:

“The offenders are always going to carry on doing this to new people. Non-punishment reproduces exploitation.”
(Representative of a victim support organisation, Portugal)

It further appears that the substantial interest of victims in being compensated and receiving back payments is to a large extent frustrated by the fact that offenders run a very low risk of having to pay. This points to a vicious cycle: non-reporting causes impunity, and impunity discourages reporting.

Restrictions on regular employment

In addition to these factors, labour migration regimes that inhibit regular employment, especially of third-country nationals, contribute to the risk of exploitation and are an important source of vulnerability. Respondents in many countries – Austria, Bulgaria, France, Greece, Ireland, Italy, Malta, the Netherlands, Poland, Slovakia and Spain – identified working in an irregular situation as an important risk factor for exploitation. A respondent in Poland summarised the situation as follows:

“Who does not have the right to work is not protected by law. This is the truth.” (Judge or prosecutor, Poland)

The risk of being exploited is aggravated by labour migration regimes that link rights to residence to work permits. In Lithuania, for example, the worker has to leave the country if the employment contract is terminated.⁴⁴ The situation is similar in Cyprus and Malta.

FRA PUBLICATION

Regularisation

To reduce the exposure of migrant workers in an irregular situation to exploitation and abuse, consideration should be given to addressing protracted situations of irregularity, through regularisation schemes based on lessons learned from past experiences. Criteria and procedures for such schemes should be fair and transparent, and should be developed in collaboration with organisations representing the interests of the migrant workers concerned.

For further information, see: FRA (2011), Migrants in an irregular situation in domestic work: fundamental rights challenges in for the European Union and its Member States, Luxembourg, Publications Office, p. 9

Work permit schemes which bind the worker to one specific employer and permits which are granted to employers and not to employees create a dangerous dependency between worker and employer and constitute a risk factor of severe exploitation. They can lead to situations in which the worker will accept working conditions that are unacceptable, assessed by the legal standards of the country of work. In France, the worker depends on the employer, first of all to access a work-related residence permit and later to renew the permit. It should be noted that the Seasonal Workers Directive allows seasonal workers to change employers and that Recital 31 of the directive makes it clear that this serves “to reduce the risk of abuse that seasonal workers may face if tied to a single employer”.

Corruption as a risk factor

Corruption is described as law enforcement inaction, avoidance or delay in intervening in cases of labour exploitation. When asked whether corruption is an important risk factor, respondents in most Member States said that corruption within the police or in other areas of administration does not play a significant role. For example, in Finland, France and Hungary, corruption is not perceived as a factor contributing to exploitation at all.

⁴⁴ Lithuania, Seimas (2004), Law on the Legal Status of Aliens (*Užsieniečių teisinės padėties įstatymas*), No. IX-2206, 29 April 2004, last amended on 10 October 2013, No. XII-548. In Lithuania, the residence permit of a migrant worker is directly dependent on his or her work permit (issued for work at a specific company). If an employment contract is terminated, the migrant worker must leave Lithuania.

FRA SELECTED CASE STUDY

Police disregarding their duty to report

Two Bulgarian men were employed under severely exploitative conditions on a sheep farm in Greece and filed a complaint with the police. The police arrived at the farm, but, because of their close and familiar relations with the farmer, they threatened the workers with expulsion from the country. Later, the Bulgarian authorities investigated and prosecuted the case, which a judge of the Penal Law Division of the Sofia City Court heard. The Greek employer was sentenced to five years' imprisonment and a fine of BGN 10,000 (approximately €5,000). The Bulgarian recruiter was sentenced to three years' imprisonment as a suspended sentence, with five years' probation.

In Greece and Bulgaria, however, corruption is identified as one of the main legal and institutional risk factors. In Poland, it was suspected that bribery of the police was used as a means of covering up the extremely harsh working conditions of Vietnamese workers in a shopping centre.

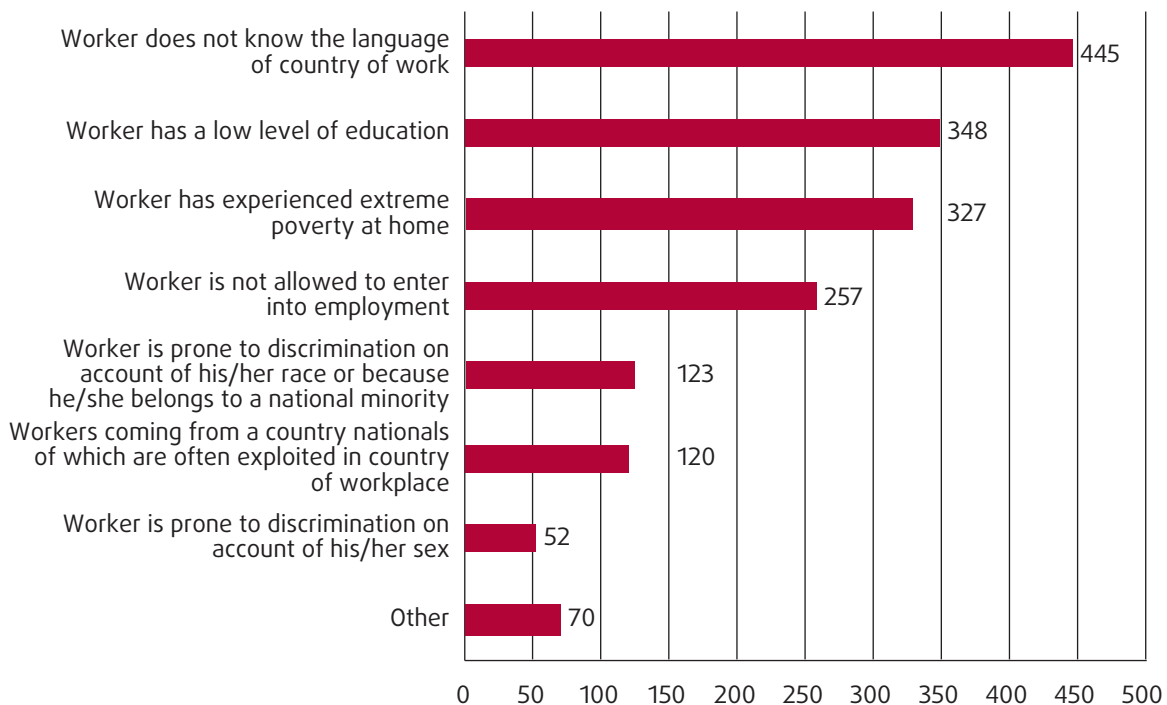
2.2. Risk factors relating to the personal situation of the worker

While the fieldwork in principle involved qualitative and not quantitative research, some selected questions were asked about the risk factors to complement – and provide a holistic overview of – the data gathered by the qualitative research components. One question concerned risk factors linked to the personal situation of victims (Figure 5).

Push factors

Push factors relate to workers' situations in their home countries and are circumstances that can induce them to seek employment abroad. Unsurprisingly, many respondents pointed to extreme poverty, harsh living conditions and a low level of education as forces driving them to find work in another country. In addition, some interviewees emphasised that workers move country because of a social situation of exclusion or discrimination. In this sense, an expert, interviewed in Bulgaria, while highlighting the fundamental fact that "victims perceive being

Figure 5: Personal risk factors



Question: Focusing on the personal characteristics and the initial situation of the migrant worker, which of the following are the three most important factors adding to the risk that migrant workers may be exploited?

Note: N = 608; DK = 8 (the graph summarises the answers given by 608 respondents; an additional 8 respondents selected the category 'don't know').

Source: FRA, 2015

jobless as worse than working in exploitative conditions”, also stressed that the vulnerable social status of individuals, leading to their moving country for work, often results from a combination of circumstances:

“It is important to note the profile of the blueberry pickers in Sweden. These are usually people with [a] low level of education and coming from Turkish and Roma ethnic minorities. In most of the cases these people are unemployed and have no income and are willing to work any kind of job. Blueberry pickers come mostly from the poorest regions in Bulgaria.” (National policy expert, Bulgaria)

As concerns exploited workers’ low level of education, some interviewed experts advised not to jump to conclusions, pointing out that one should not judge exploited workers’ level of education by the workplaces they occupy. As one practitioner from a monitoring body recalled:

“I have found a GP [general practitioner] picking strawberries in North Yorkshire, a brain surgeon packing meat in Sheffield.” (Representative of a monitoring body, United Kingdom)

Pull factors

The term ‘pull factor’ relates to the personal situation of the worker in the destination country. More than half of all respondents viewed language barriers as important factors contributing to the risk of labour exploitation. These barriers can impede the effectiveness of labour inspections. In addition, social isolation can result from a lack of language skills. In Finland, for instance, the majority of respondents indicated that an absence of language skills is a factor which leads to workers having difficulties when seeking help, as well as to lacking awareness of their rights.

Many experts also considered the fact that a worker is barred from entering into regular employment a significant risk factor exerting a pull effect. State interventions, instead of empowering vulnerable groups, can add to the power imbalance between employers and workers and thereby potentially increase the risk of labour exploitation.

Several questions relate to forms of discrimination as risk factors, one concerning the fact that occasional patterns emerge suggesting the employment of workers from a certain source country as ‘ideal’ employees in a specific sector of the economy. Stereotypes, like the ‘Polish plumber’ or the ‘Filipino nurse’, shape attributed identities.

It is important to realise that an individual victim does not necessarily fit into a rigid pattern. While, from a macro perspective, relative and absolute poverty are powerful risk factors pointing towards severe labour exploitation, and language barriers will often prevent victims from coming forward to report exploitation, all we know of

the individual victim is that their fundamental right to decent working conditions has been violated. If workers are well educated, fluent in the language of their place of work and do not fit into the stereotype of the victim as ‘passive’ and ‘in need of help’, this should not prevent violations of their rights from being acknowledged.

Victims of labour exploitation do not necessarily view themselves primarily as having been deprived of rights; often, they see themselves in terms of what they have succeeded in achieving. Their self-perception does not necessarily reflect the fact that their rights to decent working conditions – in terms of the standards binding an EU Member State – have been violated.

2.3. Risk factors relating to the workplace

Almost 70 % of all respondents from individual interviews indicated that working in a sector of the economy that is particularly prone to exploitation adds to the risk of being exploited. Employment in a sector prone to exploitation is for all professional groups the most important factor relating to the workplace. However, a sector being prone to exploitation is closely linked to other mentioned factors, as conditions that allow exploitation to take place are characteristic of particular sectors of the economy. One characteristic of these sectors is working in isolation or doing ‘invisible’ work. In addition, employment situations in these sectors seem to attract labour exploitation more than others.

High-risk sectors

This raises the question of which sectors of the economy the experts consider to be particularly prone to labour exploitation.

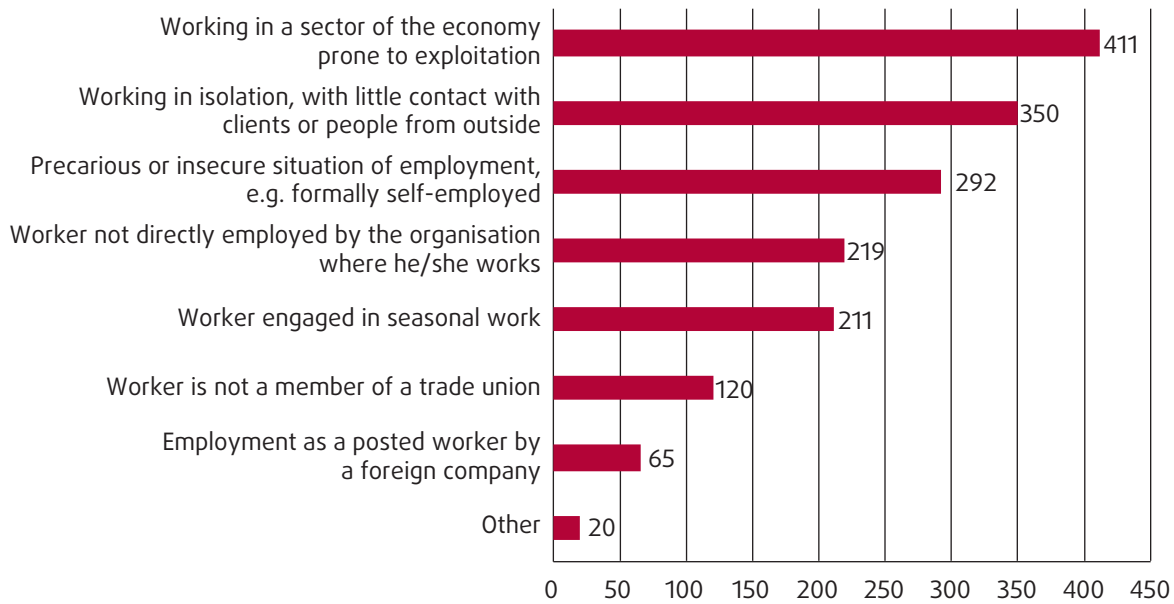
Experts from all professional groups referred to agriculture, horticulture, fishing, construction and the hospitality sector as the sectors most exposed to exploitative practices. This assessment is reflected in the case studies collected. Experts referred to manufacturing almost entirely concerning the:

- manufacture of food products, such as the meat-processing industry;
- manufacture of textiles;
- manufacture of clothing.

However, at this point two caveats must be expressed. Firstly, very significant differences exist between EU Member States. Experts from Germany rarely referred to agriculture as a problematic area, but highlighted construction more frequently than any other sector of the economy (as was the case in Belgium and Croatia). In contrast, in Italy and Poland agriculture is



Figure 6: Risk factors relating to the workplace

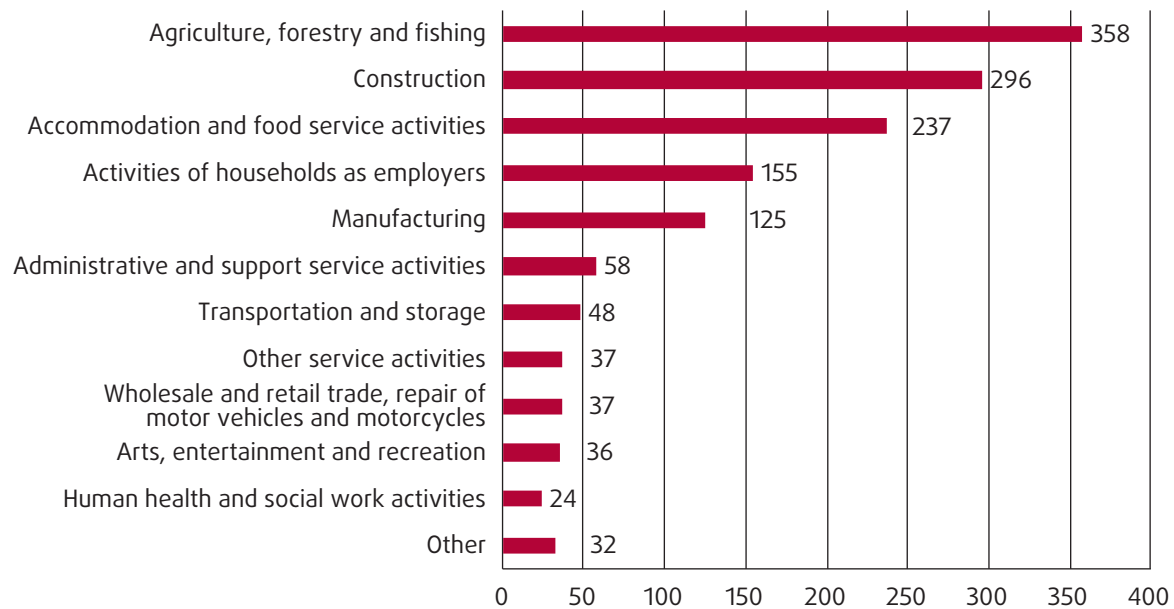


Question: Focusing on the situation of migrant workers at their workplace, which of the following are the three most important factors adding to the risk that migrant workers may be exploited?

Note: N = 603; DK = 13 (the graph summarises the answers given by 603 respondents; an additional 13 respondents selected the category 'don't know').

Source: FRA, 2015

Figure 7: Economic sectors most prone to labour exploitation



Question: Which are the (up to) three economic sectors where you, in your professional work, have witnessed most often that migrant workers are severely exploited?

Note: N = 551; DK=65 (the graph summarises the answers given by 551 respondents; an additional 65 respondents selected the category 'don't know').
The economic sectors electricity, gas, steam and air conditioning supply; education; mining and quarrying; information and communication; activities of extraterritorial organisations and bodies and others have been included in the category 'other'.

Source: FRA, 2015

overwhelmingly considered the sector most prone to exploitation. Again in marked contrast to other countries, in Ireland working in domestic households was identified as the major area for severe labour exploitation, while in Finland the cleaning sector is considered the most problematic. Similarly, in Cyprus it was commonly agreed in interviews and during the focus group discussion that labour exploitation of foreign domestic workers is significantly underreported and is an area of

particularly severe exploitation. Domestic workers do not have collective agreements and are therefore not covered by workers' unions and cannot be represented or supported in any way by them. This is because unions act in industries where there are collective agreements, such as the construction industry and the tourism industry. Hence, the question of which sectors of economy are high risk sectors needs to be dealt with on a country-by-country basis.

Table 1: Top three economic sectors in which workers are at risk of labour exploitation, by EU Member State

EU Member State	1 st sector	2 nd sector	3 rd sector
AT	Construction	Agriculture, forestry and fishing	Activities of households as employers
BE	Construction	Accommodation and food service activities	Administrative and support service activities (including cleaning services)
BG	Agriculture, forestry and fishing	Construction	Accommodation and food service activities
CY	Agriculture, forestry and fishing	Activities of households as employers	Accommodation and food service activities
CZ	Agriculture, forestry and fishing	Construction	Manufacturing
DE	Construction	Accommodation and food service activities	Activities of households as employers
EL	Agriculture, forestry and fishing	Accommodation and food service activities	Other
ES	Agriculture, forestry and fishing	Accommodation and food service activities	Activities of households as employers
FI	Accommodation and food service activities	Administrative and support service activities (including cleaning services)	Construction
FR	Construction	Agriculture, forestry and fishing	Activities of households as employers
HR	Construction	Accommodation and food service activities	Agriculture, forestry and fishing
HU	Construction	Accommodation and food service activities	Agriculture, forestry and fishing
IE	Activities of households as employers	Accommodation and food service activities	Agriculture, forestry and fishing
IT	Agriculture, forestry and fishing	Construction	Manufacturing
LT	Construction	Accommodation and food service activities	Manufacturing
MT	Construction	Accommodation and food service activities	Agriculture, forestry and fishing
NL	Agriculture, forestry and fishing	Transportation and storage	Accommodation and food service activities
PL	Agriculture, forestry and fishing	Construction	Manufacturing
PT	Agriculture, forestry and fishing	Construction	Accommodation and food service activities
SK	Construction	Agriculture, forestry and fishing	Accommodation and food service activities
UK	Agriculture, forestry and fishing	Manufacturing	Accommodation and food service activities

Question: Which are the (up to) three economic sectors where you, in your professional work, have witnessed most often that migrant workers are severely exploited?

Note: N = 551; DK = 65 (the table summarises the answers given by 551 respondents; an additional 65 respondents selected the category 'don't know').

Source: FRA, 2015

Secondly, the identification of sectors in which more labour exploitation occurs comes with the risk that labour exploitation will be overlooked in sectors where it is less frequent. It is necessary to keep an open mind about the possibility of labour exploitation occurring in a broad spectrum of sectors. Research shows that there are specific sectors prone to exploitation but that labour exploitation also occurs in other sectors, which attract less attention. For instance, it was observed by experts – for instance from the Netherlands and the United Kingdom – that the identification of ‘risk sectors’ can be based on targeted monitoring activities which, in turn, set future priorities for monitoring bodies, which results in other sectors being neglected. The need to keep an open mind about sectors prone to exploitation is stressed.

Working in isolation adds to the risk of exploitation

The ‘invisibility’ of some sectors, where workers act in isolation with little contact with clients or people from outside the company – as is the case, for example, in domestic work, fishery, agriculture and horticulture – is an important risk factor. In the absence of effective social control, the power imbalance between employers and workers is unimpeded. Some cases showed that this risk factor is reinforced by legal regulations or institutional settings that put additional restrictions on the monitoring of such sectors, as will be discussed in Chapter 5.

The seasonal nature of agricultural work also contributes to exploitation. Since workers leave after the season and are then not available as victims or witnesses in subsequent proceedings, prosecutions are difficult.

The sectors of economy that are assessed by experts as being particularly prone to exploitation strongly correlate to those involving ‘invisible’ work. Physical isolation can, for instance, be seen as a factor in fishing and in the agricultural sector. Work in remote areas restricts workers who have moved within or into the EU from contact with others, leads to limited monitoring and makes the worker dependent on the employer or gangmaster. For example, in a case of exploitation in the United Kingdom, a group of Romanian workers exploited on a farm were located far away from any populated areas, had no access to transportation and had to rely entirely on their gangmaster.

Precarious forms of work arrangements, the role of recruitment agencies and subcontracting

Certain types of work arrangements, such as seasonal work, bogus self-employment or posted work, can add to the risk of workers being exploited. Respondents in Poland reported that seasonal workers often do not receive their final salary payment when their residence permits are about to expire.

In France, respondents observed a rapid increase in posted workers, and pointed out that gaps in fiscal and social legislation across EU Member States facilitate their exploitation. In Finland, companies that post workers can often evade the law. Monitoring bodies in Austria claim that it is difficult in practice to verify the working standards of posted workers because of a lack of transnational cooperation among authorities. Posted workers often do not know who their employers actually are.

Additional difficulties arise when workers are not directly employed by the enterprise for which they work but through employment or recruitment agencies or subcontractors. These arrangements obscure the legal situation and make it more difficult for victims of severe exploitation to understand their rights and the means of their enforcement. This was emphasised by experts in Slovakia.

“They are [very skilled in] passing the buck between each other. The firm claims it is not responsible for the employee, as it merely pays the agency some pre-arranged sum; the agency, for its part, claims that the firm ordered some service and it merely provides it.” (Representative of a workers’ organisation or trade union, Slovakia)

“The person concludes a [labour] contract with a job agency; [the agency] dispatches him to a job where they treat him however they want. And if he doesn’t like the job, he does not know who he can turn to because his labour law relation is with the recruitment agency. The employer [for whom he works] is a stranger to him. And that’s the space for the curtailment of rights, because he does not have an opponent in the legal sense.” (Representative of a monitoring body, Slovakia)

FRA SELECTED CASE STUDY

Recruitment agencies

A total of 68 Chinese nationals were employed to work for a cleaning company in Finland. A Finnish recruitment agency recruited these workers, with the assistance of a Chinese recruitment agency. This led to a confused situation for the workers, who reportedly did not understand who represented the recruitment agency and who represented the cleaning company. This uncertainty was reflected in the criminal proceedings, as the charges against the Finnish recruitment agency for extortionate labour discrimination were dropped because the recruitment company was found not to have acted on behalf of the employer. The perpetrators were therefore not punished, despite their prosecution for extortionate labour discrimination and aggravated usury. The victims did not receive any compensation or back payment of recruitment fees and had to pay the ‘own risk’ portion of the legal fees.

Further risks arise for workers who have moved within or into the EU since they heavily depend on agencies for visas, transportation, accommodation and information about the nature of the work. Experts mentioned cases where the employment agency reinforced this dependency:

“in the home care sector, these private employment agencies help to start and maintain the exploitative employment relation as long as possible. [...] In the contracts that the women and the families sign with the posting company in the case of posted labour models, yes, there are regulations that prohibit a direct employment relation between the contractors, meaning the family. [...] And again, this is ensured on both sides with a contract. Hence, the family would also have to pay high penalty fees if it left this model and employed the women directly.” (Representative of a workers’ organisation or trade union, Germany)

Familiarity with and knowledge of the legal standards applying to employment and recruitment agencies differed among the professional groups. In some countries, including Finland, Hungary, Lithuania and Slovakia, many were not aware of the regulatory system in place, or they did not know which authority was in charge of monitoring recruitment agencies.

Overall, opinions on the impact of recruitment agencies were divided. Some viewed them as preventing labour exploitation and some as fostering it; the latter was the view, for instance of experts interviewed in Austria, Bulgaria and the United Kingdom. Recruitment agencies are involved in the exploitation of workers moving within or into the EU by charging fees to which they are not entitled, and they make it more difficult for workers to understand their legal situation, often adding to the lack of transparency caused by other factors, including the absence of written contracts.

At the same time, respondents in Germany, Hungary and Spain held that the role of *formal* recruitment agencies

is, overall, less relevant, since the majority of workers who have moved within or into the EU find work through *informal* recruitment mechanisms or gangmasters. Representatives of employers’ organisations and recruitment or temporary work agencies in Austria, Greece and the United Kingdom pointed out that, if only agencies would act according to the law, they would assist in preventing exploitation and protect workers. Representatives of recruitment agencies in Cyprus called for more powers and a stronger role for agencies in preventing labour exploitation.

Similar complexities arise in relation to subcontracting chains. Again, it is difficult for exploited workers to understand against which company they have a claim. As one labour inspector stated:

“The construction sector is the most predisposed [to exploitation] because it has subcontracting. When you have a contractor that assigns a subcontractor, who will also appoint a subcontractor, who will try to earn as much money as possible. And actually at the end of the chain there are workers in a difficult situation.” (Representative of a monitoring body, France)

2.4. Risk factors relating to employers’ actions

Although interpretations of labour exploitation differed between respondents, there was a remarkable consensus on certain factors contributing to it. Representatives of all professional groups and in all 21 EU Member States participating in the fieldwork mentioned particularly frequently the following factors as contributing to labour exploitation:

- workers who have moved within or into the EU do not have a written contract in a language they understand, or do not have a written contract at all. In

FRA SELECTED CASE STUDY

Severely exploitative conditions

Eight men and four women from Vietnam were reportedly exploited in a sewing factory in Bydgoszcz, Poland, from November 2011 to February 2012 by a Polish employer. The victims signed blank contracts or documents in Polish, a language that they did not understand. The employer took their passports and mobile phones. They were kept in isolation, provided with poor-quality food and had to work six days a week, 12–13 hours per day. They were paid irregularly and significantly less than had been agreed. Work was supervised by the owner and his family; they shouted, rushed the workers and did not allow them to speak to each other. The owner threatened that they would be arrested by the police and deported. After one of the workers objected to the working conditions, the owner severely beat him in the presence of the others. The victims had been recruited through an agency in Hanoi and had paid up to USD 5,000 each, which allegedly included their flight and visa costs. They travelled to the workplace with the owner and his relatives. Eventually, five victims left and contacted other Vietnamese migrants in the town. From them, they learned about the possibility of seeking assistance from the La Strada Foundation. The victims entered a programme for support and protection for victims and witnesses of trafficking in human beings and received shelter, meals and legal aid. At the time of the research for this report, an investigation by the prosecutor’s office was ongoing, but no charges had been brought.

FRA SELECTED CASE STUDY

Difficulties in proving labour exploitation

In 2008, a woman from Nepal was badly exploited in a diplomatic household in Austria. She had been recommended to the perpetrator by another diplomat. Her travel documents were withheld and she worked long hours in isolation. Finally, the victim confided in somebody, who referred her to the Federal Ministry for European and International Affairs. The victim received assistance and support from the NGO LEFÖ IBF. There was a criminal investigation by the police and a prosecution in accordance with § 116 of the Alien's Police Act 2005 (*Fremdenpolizeigesetz*), with the perpetrator charged with 'exploitation of a foreigner' (*Ausbeutung eines Fremden*). However, the perpetrator was acquitted because of a lack of evidence: the victim had received her salary in cash, and it was deemed impossible to prove that she had received too little money.

This was a landmark case in Austria. However, as from this case on, domestic workers in diplomatic households must have a bank account to which their employers transfer their salaries. Cash payments are no longer acceptable.

In another Austrian case, a man from Montenegro worked in forestry and agriculture in a rural area in Upper Styria. He worked for three months unpaid, but when he complained about the withheld wages his employer told him to prove that money was owed to him. The worker lost his job and the accommodation which had been provided to him by the employer. He hitchhiked to Graz, where he was found by a member of the public with nothing to eat or drink. The victim was supported to report his case to the Anti-Discrimination Office in Styria, which forwarded it on to the Chamber of Labour. The employer continues to emphasise the lack of proof, and alleges that he paid the worker in cash.

the United Kingdom, not having a written contract is seen as standard practice in cases of severe labour exploitation;

- workers are not properly informed about their entitlements in terms of wages, working conditions, annual leave and other essential elements of the employment situation;
- employers increase workers' dependence on them, for instance by providing accommodation or transport.

While about 60 % of the experts interviewed considered the first two risk factors important, the last factor was viewed as a significant risk factor by 40 % of interviewees.

Having a written contract, as well as receiving payments regularly and in a transparent and traceable way, would improve workers' understanding of their situation and would facilitate monitoring. Experts recalled cases of workers being paid in cash and only on completion of the project for which they were contracted. They also described cases of seasonal workers employed in agriculture receiving remuneration only at the end of the season before they returned home. It is obvious that such practices create a serious risk of wages being withheld.

Overall, respondents found that physical violence and lack of freedom of movement were infrequent in situations of labour exploitation. This reflects the relatively more frequent forms of severe exploitation of unforced labour in employment relationships than in situations that would amount to forced labour.

2.5. Conclusions

- According to the interviewed experts, the findings from the focus group discussions and the case studies, some of the most significant risk factors for labour exploitation of workers who have moved within or into the EU are:

- a lack of sufficient monitoring;
- a lack of investigations or ineffective investigations and the low risk of prosecution for offenders;
- difficulties in communication when a worker from another country does not know the language of the place of work;
- working in a sector that is particularly prone to labour exploitation;
- working in isolation with little contact with people from outside the working environment;
- workers not being given a written contract, not being informed of their rights or not being remunerated in a transparent and traceable manner;
- the worker being in a situation of irregular residence or having a legal status that is predicated on employment by one particular employer.

Obviously, the actual situation of workers moving within or into the EU is shaped by various combinations of these risk factors. In addition, some factors are typical of specific areas of the economy. For instance, severe exploitation of domestic workers is often fostered by a complete lack of monitoring, as a result of legal regulations preventing monitoring, the hidden workplace and multiple forms of dependency of the worker on the employer,

including emotional ties. Workers from other countries employed on construction sites are often confronted with complicated and opaque legal situations involving labour brokers and subcontracting. This makes it difficult for them to understand their rights and against whom their claims should be directed. In certain sectors of agriculture, workers who have moved within or into the EU are generally paid in cash, sometimes only at the end of the season, immediately before they return to their home country. In addition, various amounts are deducted from workers' wages, for housing, transportation, meals or other services provided by their employers. Hence the workers' practical means of understanding whether they have been paid in accordance with what was agreed, and therefore their ability to claim payments due to them, are fairly restricted, which places them at the mercy of employers.

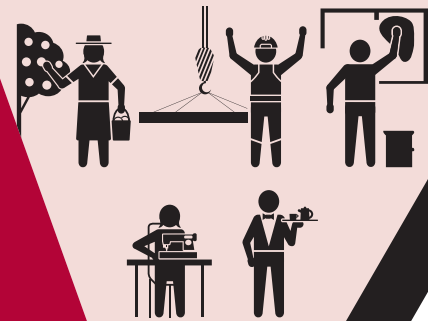
The finding that there are in general insufficient monitoring structures, and in particular insufficient workplace inspections, is in line with the European Commission assessment of the implementation of the Employer Sanctions Directive at Member State level; the Commission found that some Member States would have to substantially increase their efforts in monitoring.

- Employers involved in exploitative practices often pursue a strategy of avoiding transparency and traceability. This can include such practices as not providing a written contract in a language the employee understands, the involvement of temporary work agencies or subcontractors, payments being made in cash and at varying intervals, deductions from salaries being made on various grounds and no written information being passed on to workers. These practices all serve the dual purposes of obscuring the situation, thus making it more difficult for workers to understand their rights and whether or not they are being upheld, and concealing any evidence that would enable a public authority to discover precisely what the employment situation was in the event of an investigation. Hence, to foster the rights awareness of workers and to facilitate monitoring, standards and measures are required to enhance the transparency and the documentation of employment situations.
- The risk factors detailed above should be taken into account in all interventions that respond to these risks, be they prevention strategies, monitoring and workplace inspections, or protection measures aiming to help victims to leave situations of severe exploitation.



3

Prevention



3.1. Impact of public climate

Prejudice against workers moving within or into the EU in general may lead to tolerance of their exploitation by the public. Many respondents – for instance from Italy, the Netherlands, Spain and the United Kingdom – spoke of the need for greater awareness-raising among the public to foster public debate on labour exploitation and encourage the reporting of situations of labour exploitation by citizens. For example, respondents in Spain viewed society as complicit in failing to act against severe labour exploitation because the economy benefits from the exploitation of migrants.

“There is no social condemnation, it is not frowned upon that a businessman has a lot of irregular migrants working for him and is exploiting them [...] it is not condemned that migrants live in inhumane conditions.” (Representative of a workers’ organisation or trade union, Spain)

Respondents from the Netherlands and the United Kingdom reported that certain sectors prone to exploitation were dominated by workers from other countries because ‘nationals will not do these jobs’. These are sectors which are seen as no longer attractive to local workers. However, Member States seem to be making little effort to improve working conditions in these sectors to make jobs in them more attractive; instead, they rely on a workforce of people who have moved within or to the EU and accept the resultant undercutting of local workers. One respondent found that:

“the primary aim is not to improve working conditions and the situation of exploited workers, but rather to sanction irregular work, so that worker protection is secondary.” (Lawyer, Italy)

One area of particular concern is domestic services: cleaning ‘ladies’, au pairs, nannies and carers. The private and small-scale exploitation of migrant women in the domestic sphere is so common that it is often not conceived of as a human rights violation. The domestic sphere thus represents a grey area, where moral standards are obscured or seemingly suspended. This has the potential to undermine moral standards more generally and contribute to a climate of tolerance of labour exploitation.

FRA SELECTED CASE STUDY

Migrants in irregular situations

In Italy, a Bolivian woman in an irregular situation worked as a carer in a household, working long hours and receiving very little payment for her work. The employer used her irregular situation to intimidate her.

An Ecuadorian woman in Spain had to do the housework and take care of an older person. She had to work excessive shifts, but was not paid accordingly. She asked an NGO for help, but refrained from lodging a complaint.

In Ireland, a Nigerian girl worked for a family, taking care of the family’s child, and was prohibited from contacting her family or any other person. Her physical movements were restricted by her employer. When she complained, her employer threatened to have her returned to Nigeria.

Respondents in Hungary referred to women from Romania taking care of older people as a very frequently exploited group.

“The sector that caused the most investigations was the domestic sector, by far. There was this traditional notion of an au pair scheme as a cultural exchange, which is still intact, but moving on from that people are recruiting au pairs under similar conditions, pocket-money conditions, and not understanding or recognising that these are in fact workers. If you employ someone in your home full time to care for your elderly relative or for your children, then they are de facto workers, so that’s a whole new area that we’re seeing.” (National policy expert, Ireland)

Even where labour exploitation was widely covered in the national media – such as in Italy, following violent clashes between migrants working on fruit farms and local organised criminal gangs in Rosarno, Calabria⁴⁵ – it was still not seen as a priority for the police or public institutions:

“[I]n agriculture [...] and in manufacturing, textiles and clothing, there are situations that are particularly known, and clearly identified as labour exploitation, but [in these sectors] often [the police] do not intervene. I don’t know why, maybe for lack of a political will, or for the inability of institutions to react.” (Lawyer, Italy)

Labour inspectors, police officers and other staff of institutions dealing with workers who have moved to their country do not live in a societal vacuum; they are influenced by the attitudes prevailing in their society. Hence there is a risk that a general climate of indifference to the rights of workers who have moved within or into the EU may undermine their commitment to identifying cases of severe exploitation and acknowledging the rights of victims.

On the other hand, trade unions are trying to take action. For example, in the Netherlands a trade union is working to implement collective agreements for all to prevent employers lowering labour standards, which ultimately affects all workers:

“So there we have an interest also from the perspective of, let’s say, the white Dutch building worker, to maintain the CBA [collective bargaining agreement], because otherwise also our own working conditions go to the dogs.” (Representative of workers’ organisation or trade union, the Netherlands)

Focus groups in Portugal and Greece highlight links between severe labour exploitation and the economic crisis

According to the participants in the Portuguese focus group, labour exploitation, as well as situations involving slavery, appears to be on the rise in Portugal and in Spain. This increase is particularly connected with a growth in farming in some areas of the country and with the need for seasonal labour power. Labour exploitation is still a hidden, invisible phenomenon. Economic and political interests favour this invisibility, particularly in times of crisis. Participants pointed out that coordination among the different organisations responsible for dealing with the issue is not always efficiently handled. There is poor communication between the institutions.

“Without all the organisations pulling together, we won’t be able to make any progress. There are small things that sometimes don’t mean anything to an organisation, but which, pooled with other information that I already have, could mean a lot more.” (Monitoring body)

Participants in the Greek focus group stated that labour exploitation is not a new phenomenon in Greece, as it existed before the economic crisis. One participant from a workers’ organisation stated that labour exploitation has been always part of the Greek economy, either to boost its development or to help in its survival.

Another participant (a lawyer) claimed that any criticism of certain forms of labour exploitation would see the critic branded unpatriotic.

“We consider that the heavy jobs should be done not by the Greeks but some foreigners with less money.” (Victim support services, Greece)

⁴⁵ The research project Bitter Oranges explores the situation of African workers in Calabria. See <http://bitter-oranges.com/>.

3.2. Rights awareness and information provision in the country of work

When it comes to the crucial importance of providing information about their rights to workers moving within or into the EU, country reports are unanimous: they all indicate that rights information and legal assistance are basic preconditions for rendering justice accessible to victims of severe labour exploitation, and that they are rarely available. Outreach, rights awareness and legal assistance, which are crucial in empowering victims to claim their rights, need to be reinforced, as very significant elements of victim support. Once victims have received information and assistance in a manner and language they can understand, they are in a position to decide if and how they choose to be assisted in reporting to the police and in bringing forward their claims. Failure to reach out to victims results in a denial of rights and justice.

In addition to common forms of support services, in a few countries – including Cyprus, Greece and Italy – trade unions play an important role supporting victims and providing legal counselling and legal aid. The

development of information material in various languages for people who have moved from another country for work is common across the EU, often as a result of NGO or trade union efforts, sometimes in collaboration with monitoring institutions. In some countries, most such information material is published for EU nationals, such as for Romanians and Bulgarians in Cyprus. Some respondents expressed doubts about whether the information actually reached the target groups or not. Other, more proactive, forms of information provision also take place, as outlined below.

In the Netherlands, a support organisation, Fairwork, in cooperation with a trade union, aims to approach workers from other countries at their workplace to provide information about their rights. In Ireland, preventative work includes outreach projects by NGOs that aim to reduce distrust of state institutions; NGOs also work alongside trade unions to provide information on employment rights and organise workers who have moved from other Member States or third countries in critical sectors, such as in mushroom picking. In Italy, training courses on how to work legally in agriculture are provided by cultural mediators targeting African migrants in Calabria.

Promising practice

Providing targeted information from civil society organisations

There are many examples of civil society organisations in EU Member States that provide targeted information to workers who have moved either within or into the EU about their rights as a key part of their activities. For example, a main objective of the Migrant Rights Centre Ireland (MRCI) is to promote employment rights and protection for vulnerable workers in hidden or precarious sectors, including migrants in diplomatic households, au pairs, carers, domestic workers and restaurant workers. MRCI, together with the Irish Refugee Council, operates a drop-in centre providing free, confidential, accurate and up-to-date information on immigration issues, employment rights and access to services.



PROGE (*Die Produktionsgewerkschaft*) in Austria is a union which provides information about rights such as the minimum wage, working hours and holidays, for example to seasonal harvest workers.

Several German support services and workers' organisations reach out to workers proactively; for example, a Berlin-based support service makes contact with workers who have moved within or into the EU on internet platforms and forums. In Baden-Württemberg, one workers' organisation reaches out to truck drivers at motorway service stations, asking them about their labour conditions, educating them about their rights and offering help with joining a union or claiming their rights in court. Another interesting practice is a campaign informing potential victims of labour or sexual exploitation in various languages about organisations that can provide help by displaying information on soap packages and packets of sweets displayed in restaurants, bistros, bars and bank branches. Two support services produce films that provide information about the risk of labour exploitation in Germany and screen them at public events and in so-called integration courses for newly arrived migrants.

For more information, see: www.mrci.ie; www.proge.at; www.bamf.de/EN/Willkommen/DeutschLernen/Integrationskurse/integrationskurse-node.html?sessionid=BoD139FzE7513755BD0AA866267960EE.1_cid383

Promising practice

Offering support to domestic workers

The association ComuniDária – Integration of Migrants and Ethnic Minorities (ComuniDária – Integração de Migrantes e Minorias Étnicas) carries out projects that are specifically aimed at supporting migrant women working in domestic service ('Trabalho Decente: Tu precisas de mim, eu preciso de ti'). It provides them with information and undertakes awareness raising campaigns targeting the general public.

For more information, see: www.comunidaria.org/trabalhodig.php

In Vienna, a counselling centre for undocumented workers, *UNDOK – Anlaufstelle zur gewerkschaftlichen Unterstützung Undokumentiert Arbeitender*, which opened in March 2014, informs workers in Austria in a situation of irregular residence or work about their rights. It also offers help with labour and social law affairs and legal assistance with enforcing claims against employers. Counselling is available free of charge and in multiple languages (for example, Bosnian, Croatian, English, French, German, Serbian and Spanish). The centre is financed by the trade union and the Federal Ministry for Labour, Social Affairs and Consumer Protection.

For more information, see: www.undok.at

Respondents also described campaigns aimed at raising workers' awareness of their rights and, at the same time, fostering public debate on labour exploitation. For instance, an employers' organisation in Italy organised public meetings to discuss the main issues linked to the labour market, in particular relating to workers'

safety in the workplace. Support services also provide information material to make workers aware of the exploitative nature of their situation, and to help them find routes to the regularisation of their residence status.

Domestic workers, because of the isolation of their workplace, constitute a group that is particularly difficult to reach out to and to provide with information. Recent initiatives in Austria and Ireland aim to overcome these barriers by providing domestic workers with information about their rights in their first language when they apply for a visa, well before they are placed in a situation of isolation.

FRA SELECTED CASE STUDY

Diplomatic immunity

For about seven months in 2009 and 2010, the victim worked for a diplomatic household in Berlin. She was responsible for domestic work and had to care for five children and the diplomat's wheelchair-bound wife. She slept on a carpet in the children's room, worked extremely long days, with no days off, and was not paid. The victim was forbidden to leave the house and was abused verbally and physically. She managed to flee and found help with a Berlin-based organisation for victims of trafficking. Her case was brought before court. At first, charges were dismissed because of the perpetrator's diplomatic immunity; however, when he had returned to his home country and immunity ceased, the case was referred back to the labour court and the victim was compensated. A constitutional complaint concerning diplomatic immunity in such cases is still pending.

Promising practice

Informing domestic workers about their rights

The Austrian Task Force on Combating Human Trafficking provides domestic workers with information about their rights (for example, to a bank account, leisure time, minimum wages) and about labour exploitation in their first language when they apply for a visa. Their employers are not allowed to be present at these awareness-raising sessions. Diplomats who employ domestic workers have to provide the Foreign Ministry with the workers' documents and employment contracts. Domestic workers have to prove that they have a bank account to which their employer transfers their wages.

For more information, see: Austria, Federal Government, *National Action Plan on Combating Human Trafficking 2012–2014*

In Ireland, the MRCI runs a Domestic Workers Action Group, which provides a space for domestic workers employed in the private home to come together, analyse their experiences, and campaign for policy and legal changes to improve their position in Irish society. The group aims to provide a safe and empowering environment for domestic workers to seek equality as women and as workers.

For more information, see: www.nwci.ie/?/discover/member_detail/migrant_rights_centre_ireland_domestic_workers_action_group#sthash.Fm8UAMqC.dpuf

The United Nations Office of the High Commissioner for Human Rights (OHCHR) Regional Office for Europe published a study entitled *The human rights of migrant domestic workers in the EU: some good practices in 2015*.

For more information, see: www.europe.ohchr.org

In Portugal, participants in the focus group discussion emphasised that the situation of domestic workers is characterised by close personal relationships between the victims and the exploiters, even where there is a climate of intimidation and pressure is exerted upon the worker, which makes it even more difficult for victims to withdraw from an exploitative employment relationship.

The Austrian example is of particular interest in that it empowers domestic workers employed in the households of diplomats, who are – within certain limits – protected from prosecution by their diplomatic immunity, which constitutes another risk factor for labour exploitation.

3.3. Pre-departure programmes

Experts were asked about pre-departure programmes organised in their countries for workers moving to another Member State to better equip them to avoid exploitation. Many respondents considered it essential for workers moving within or into the EU to be informed about working conditions in a country before their arrival. However, in most Member States, respondents knew of few pre-departure programmes organised by government authorities, besides some initiatives by consulates in the countries of origin.

Promising practice

Creating guidelines to prevent abusive recruitment, exploitative employment and trafficking of workers in the Baltic Sea Region (the ADSTRINGO project)

These guidelines were designed by HEUNI in Finland to respond to challenges in effective cross-border cooperation and prevent the abuse of workers' rights. They followed from research on recruitment practices and the roles of recruitment agencies and employers in the exploitation of migrant labour in Estonia, Finland, Lithuania and Sweden. Research was carried out by HEUNI in partnership with the Permanent International Secretariat of the Council of the Baltic Sea States, the Lithuanian Ministry of the Interior and the University of Tartu in Estonia.

The guidelines are available in English, Estonian, Finnish, Lithuanian and Swedish.

For more information, see: HEUNI, ADSTRINGO – Addressing trafficking in human beings for labour exploitation through improved partnerships, enhanced diagnostics and intensified organisational approaches

In Poland and Slovakia, trade unions inform their nationals about their rights prior to their departure. German support services focus on passing information to neighbouring countries to the east. They cooperate with trade unions in Bulgaria and Romania and, through their channels, spread information to those who are interested in working in Germany. During the focus group discussion that was organised in Berlin, one support service representative mentioned a handbook for people from Bulgaria and Romania, informing them about safe access to the labour market, labour rights and the addresses of focal points (for example, trade unions) in Germany. The experts participating in the focus group discussion regarded pre-departure programmes as helpful, and their implementation as overdue; however, they generally target specific groups, such as young people, women working in diplomatic households and people living in rural areas. Because of limited funding, they cannot reach out to potential victims of exploitation in a broader way.

FRA SELECTED CASE STUDY

Trafficking and forced labour

In 2011, 10 Romanians – five men and five women, including one 17-year-old girl – were trafficked to Greece and forced to harvest strawberries. They had been recruited by a Romanian perpetrator with the promise of a regular job with a good salary. They worked under appalling slavery-like conditions, without being paid. They were accommodated in makeshift shelters made out of paper and plastic, in dangerous and unhealthy conditions. They were told that they already owed the perpetrators a significant amount of money for the trip from Romania to Greece and then for having found them a job and accommodation and providing them with water and electricity. If they did not agree to work off this 'debt', they would get hurt. During the next two weeks, they were forced to work, being shouted at and threatened. Some of the perpetrators, two Romanians and one Greek, were arrested two weeks later during a police operation after the under-age girl managed to call the Romanian Embassy. The victims were provided with food and shelter and then transported back to Romania. The local police department continued with the investigation, forwarding the evidence to prosecutors, who charged the perpetrators with establishing a criminal community and human trafficking. The case has been referred to the criminal court and is still pending. The victims have not yet been awarded any compensation.

Several union representatives in France also reported efforts to develop cross-border activities and missions, for example to reach out to unions in countries of origin such as Spain and Bulgaria. Links between unions are seen as critical for the protection of workers. As one union representative stated, 'Ideally, there would be a link with the unions from start to finish.' Initiatives in this area could involve, for example, foreign union representatives coming to France.

There is a clear trend across several Member States towards involving embassies in providing workers with information about their rights prior to departure. For example, a German interviewee working in victim support services highlighted a project at the German embassy in Sofia, carried out by the Federal Foreign Office. The project provides Bulgarians with information on how to find safe work in Germany. Several Finnish interviewees mentioned that Finnish embassies offer information in countries of departure about employment in Finland. For example, a booklet by the Ministry of Foreign Affairs includes information about the terms of employment and the rights of workers in Finland.

A representative of a recruitment agency in Malta also mentioned an EU-funded publication about living and working in Malta for third-country nationals, which includes information on health, residency, equal treatment, and obligations of the employer and the employee derived from the Employment and Industrial Relations Act. This booklet is intended to be distributed through Maltese embassies and consulates abroad.⁴⁶

In addition, it should be noted that several case studies identified as part of the research indicate that embassies have an important role in protecting the rights of their citizens in situations of labour exploitation.

Experts from France and Spain criticised the involvement of employers in pre-departure programmes for seasonal workers that fail to mention workers' rights:

"Sometimes it is the employers' unions who hire workers in the country of origin and who exploit them, and they are the ones who are given, on many occasions, the resources to inform those workers." (Representative of a workers' organisation or trade union, Spain)

⁴⁶ Employment and Training Corporation, 'Living and Working Conditions in Malta'.

Promising practice

Raising awareness of third-country nationals of their rights in practice in Poland

The project aimed to raise the awareness of third-country nationals about their rights and obligations in Poland and to prevent discrimination against and exploitation of third-country nationals in the Polish labour market. The project addressed workers of various nationalities who were staying in Poland and would-be migrants from Ukraine, Belarus and Armenia, who were allowed to work in Poland on the basis of an employer's statement. A website contained information on workers' rights and advice on how to work legally. The website was in Armenian, English, French, Polish, Russian, Ukrainian and Vietnamese, and helplines operated in Armenia, Belarus, Poland and Ukraine. Information provided in Poland was also made available in Chinese and Vietnamese. Information leaflets were disseminated at the Polish-Ukrainian border and information meetings were organised for migrants in Poland and would-be migrants abroad. Training programmes were also held for recruitment agencies, labour inspectors, trade union representatives, human rights advocates, job counsellors, law enforcement officers and NGO activists.

The project (2011-2014) was carried out in partnership with the International Organization for Migration, and financed by the European Fund for the Integration of Third-Country Nationals.

For more information, see: www.migrant.info.pl

3.4. Countering risks by accreditation and standard-setting

Expert interviews also raised questions about counteracting risk factors through preventative measures. In this respect, voluntary codes of conduct and membership of associations to set standards among, in particular, recruitment agencies were considered important. In the United Kingdom, membership of the Gangmasters Licensing Authority (GLA) and the Recruitment and Employment Confederation, a voluntary body regulating recruitment agencies, was considered to set a good standard of business for recruitment agencies. In the Netherlands, recruitment agencies can be certified through various schemes, and this certification has a direct effect on the legal liability of the hiring company. If, for instance, a company chooses a certified recruitment agency for its labour provision, it is not held liable for the wages and benefits of the workers. Conversely, if a company hires a non-certified recruitment

agency, it can be held responsible for any breaches of labour law committed by the recruitment agency. A voluntary organisation was also active in the Netherlands, monitoring the implementation of the collective bargaining agreement in the recruitment sector (*Stichting Naleving CAO voor Uitzendkrachten*, SNCU) to improve practices. In Germany, au pair agencies can voluntarily commit to the standards set by the quality control association *Gütgemeinschaft Au pair e.V.* Some respondents, however, were doubtful about the value of self-regulation and voluntary codes of conduct, demanding instead that states play a role in guaranteeing standards of performance for recruitment agencies, as well as standards of certification.

To oblige providers in supply chains, including in developing countries, to respect human rights and ensure decent working conditions, companies in Spain have set up standards, and the Ethical Trade Initiative in the United Kingdom has developed a code of practice

“the aim of which is to ensure that throughout the supply chain minimum labour standards are respected and enforced. We would say that it is not as effective as we would like it to be, but it is better to have the system than to have no system at all.” (Representative of a workers’ organisation or trade union, United Kingdom)

FRA SELECTED CASE STUDY

Exploiters mislead consumers

The ‘Happy Eggs’ brand, under which eggs were supplied to major supermarkets in the United Kingdom, was found to be used for eggs collected by exploited Lithuanian workers. The company claimed to do ‘everything in its power to make its farms truly happy places’. However the gangmaster who supplied the workers made unauthorised deductions from the workers’ wages, physically assaulted the workers and accommodated them in overcrowded conditions. Although the gangmaster lost his license to operate, no criminal charges were brought.

Consumers can also play a role, by reducing the demand for cheap goods. In this regard, supermarket branding is useful and should also lead to more inspections and tighter control of potentially exploitative employers. For example, in the Netherlands, the foundation Fair Produce Nederland aims to prevent labour exploitation in the growing and trading of mushrooms, a sector which is notorious for bad employment practices. The certificate is visible both to retailers and consumers at the end of the chain. This has a positive, preventative effect on the entire sector:

“By making honest employment practices visible in the market you provide added value. [...] If you want to get at someone you can give them a fine, which helps. But it helps much more if they cannot sell their product any more.” (Representative of an employers’ organisation, the Netherlands)

Views on product branding were mixed. Representatives of employers’ organisations in the Netherlands pointed out that membership of an industry federation could be seen as a sufficient mark of good business standards and did not see the need for further certification, arguing that companies already have enough regulations to deal with. Other respondents highlighted difficulties for consumers who are unable to afford more expensive products. They felt that responsibility for better standards cannot lie with the consumer alone and that businesses should bear the primary responsibility for ensuring that their supply chains operate without recourse to exploitative practices.

The research showed that some labelling may not always be trustworthy. The various schemes are not always rigorous enough, and simply being part of an accredited scheme may not always mean that a business works in an ethical manner.

Hence, if ethical branding is to be trustworthy and reliable for consumers, EU Member States will need to take responsibility for monitoring systems of branding and accreditation.

Promising practice

Promoting best practices for the prevention of labour exploitation to supermarkets

The GLA in the United Kingdom created a protocol (developed in 2010 and updated in 2013) for supermarkets to use, putting forward best practices for suppliers and retailers to help prevent or reduce cases of labour exploitation. This initiative was funded by the government (Department for Environment, Food and Rural Affairs).

For more information, see: GLA, Supplier/retailer protocol

In a further initiative, the GLA, together with the Association of Labour Providers and Migrant Help, developed a joint initiative called Stronger2gether, aimed at promoting multi-agency and collaborative work between employers, labour providers and workers. This is done through education and training. Stronger2gether runs training sessions aimed at making sure that businesses follow best practices and limit potential opportunities for exploitation. Major supermarket chains in the UK – including the Co-operative Group, Marks and Spencer, Sainsburys, Tesco and Waitrose – funded this initiative.

For more information, see: <http://stronger2gether.org/>

3.5. Labour exploitation, Member States' duty to respect workers' rights, and public procurement

Under Article 31 of the Charter, Member States not only have an obligation to protect workers from exploitation by private employers; they are also bound – in all their own activities – to respect the right of workers to decent working conditions and hence to avoid becoming embroiled in or supporting labour exploitation. Member States need to have this obligation in mind in particular:

- in all public procurement procedures;
- in the administration and recovering of public benefits or subsidies, including the administration of EU funding;
- when acting as owners of public enterprises.

FRA SELECTED CASE STUDY

Public procurement

In 2005, a group of Indian men, recruited by a Saudi Arabian subcontractor, worked in Malta on a large, government-funded infrastructural project. They were very badly paid (far less than the statutory minimum wage) and were not allowed sick leave or days off. Costs for the meagre food and substandard accommodation provided for them were deducted from their wages. On site, the working conditions were not obviously poor, so inspectors were not aware of the situation until a third party informed them. A Trade Union then exerted political pressure on the Maltese government through the media instead of taking the case to court, since 'financial penalties against employers were minimal'. The union provided legal aid to the workers and mobilised their embassy: this resulted in the workers being fully compensated, including being paid overtime, in accordance with the local minimum wage.

Article 7 of the Employer Sanctions Directive obliges Member States to ensure that employers can, when appropriate, be excluded from participation in a public contract as well as from entitlement to some or all public benefits, aid or subsidies for up to five years. In addition, the laws of Member States should, in appropriate cases, allow for the temporary or permanent withdrawal of a licence to conduct the business activity in question and for the temporary or permanent closure of the establishment that has been used for the employment of third-country nationals in an irregular situation.

As concerns the responsibilities of EU Member States in public procurement procedures, the legislative

package adopted in February 2014⁴⁷ has strengthened obligations aiming to counteract social dumping and ensure that workers' rights are respected, including rules on subcontracting under Article 71 of Directive 2014/24/EU. Overall, Recital 98 of this directive emphasises the necessity of safeguarding basic working conditions, such as minimum rates of pay at the level set by national legislation or by collective agreements.

In the expert interviews, cases of labour exploitation in the context of public procurement projects were mentioned. Numerous violations of labour law have been detected among cleaning companies in the public sector in Greece. In one instance, a woman from Ghana who complained about working conditions was forced into 'voluntary retirement'. In the Netherlands, over 70 Portuguese men were recruited for a road construction project commissioned by the government. Nearly half of their gross monthly wage of €968.75 was withheld for housing, road transportation and flight tickets. The government, however, had no contractual means to intervene or inspect.

FRA PUBLICATION

Freedom to conduct a business

Article 16 of the Charter of Fundamental Rights of the European Union introduces a concept crucial to modern society. The freedom to conduct a business is about enabling individual aspirations and expression to flourish, about encouraging entrepreneurship and innovation, and about social and economic development. A FRA report on this article takes its starting point in the legal situation of the 28 Member States and proceeds to look at obstacles and promising practices, in particular in relation to specific groups, such as migrants and women.

For further information, see: FRA (forthcoming), Freedom to conduct a business: exploring the dimensions of a fundamental right, Luxembourg, Publications Office

In public procurement proceedings, EU institutions have the same fundamental rights obligations as Member States. They should be encouraged to lead by example as regards the obligations of enterprises they contract to accept responsibility for exploitative practices by subcontracted companies.

Obligations contracted between EU institutions and their partners in public procurement proceedings can be more effective when they are combined with publicly blacklisting companies that have been convicted of labour exploitation or with effective systems of accreditation or certification. Two examples of this emerge from Ireland and France. In Ireland, in 2013, the National Employment Rights Authority (NERA) started to publish

⁴⁷ Directive 2014/23/EU, OJ 2014 L 94, Directive 2014/24/EU, OJ 1994 2014 L, and Directive 2014/25/EU, OJ 2014 L 94.

the names of those employers whose cases had been brought before the District or Circuit Court and who had had a sanction imposed. NERA's report contains 15 pages of names and addresses of employers who were prosecuted, their industry or sector and the legislation to which the conviction relates. In 2013, most convictions were of employers in the catering industry. Organisation of Working Time Act and Employment Permits Act claims formed the majority of the convictions. Catering has long been the leading sector for complaints to and inspections by NERA, with over 500 inspections and €132,005 in recovered wages in 2012, and twice that in 2013: 1,048 inspections and €252,109 in recovered wages.⁴⁸

In France, several interviewees referred to the 'Savary Bill', which provides for reinforced obligations and a possible blacklist of sanctioned enterprises. This provision was adopted into law in July 2014.⁴⁹ Interviewees also reported the development of online information on legal obligations and conditions applicable with regard to posting workers to France.⁵⁰

3.6. Conclusions

In conclusion, experts reported few specific preventative activities aimed at tackling labour exploitation other than the general activities of their monitoring institutions and police.

- In interviews and focus group discussions, experts pointed to a certain 'trivialisation', a form of acceptance of non-violent forms of severe labour exploitation by society in general. There are indications that attitudes of indifference to labour exploitation of workers who have moved within or into the EU often prevail. The exploitation of foreign domestic workers was highlighted as a grey area in which moral standards are weak or blurred and, as a consequence, severe labour exploitation in private households is endemic.

Therefore, a comprehensive prevention strategy should begin by strengthening society's rejection of and refusal to tolerate severe labour exploitation. It must be noted that there is a lack of public discussion drawing attention to situations of severe exploitation of workers who have moved within or

into the EU and reaffirming society's intolerance of such exploitation.

- One way of preventing severe labour exploitation is by empowering workers to know their rights and where they can find support if needed. Workers are more vulnerable if they are not given a written contract in a language they understand and are not informed of their rights. There are several examples of promising practices relating to initiatives by trade unions, NGOs or governments to inform workers who have moved within or into the EU of their rights before their departure or on arrival in their country of destination. In addition, some broader awareness-raising activities, focusing on workers' rights, are carried out by NGOs and trade unions, with information material published and distributed in numerous languages. However, more should be done in this respect to empower workers.
- While experts were not always familiar with systems of standard setting, accreditation or branding of products, there was a tendency to positively assess such measures as means of preventing severe labour exploitation on the condition that such labels are trustworthy. Supermarket branding allows retailers and consumers to better assess the risk that what they sell or purchase was produced under severely exploitative work conditions. The adoption of codes of conduct in supply chains could also be useful in preventing abuse. Therefore, EU institutions and Member States should support the development of codes of conduct and of reliable branding.
- In addition, EU institutions and Member States should recognise their specific responsibilities to prevent labour exploitation occurring in publicly contracted or subsidised projects, as well as in publicly owned enterprises. EU institutions and Member States should be expected to define advanced standards of prevention and lead by example.

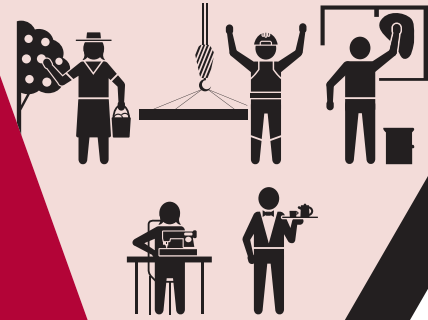
48 See: Peninsula Business Services, 'NERA Annual Review 2013'; NERA (2014).

49 France, Law no. 2014-790 of 10 July 2014 concerning the fight against illegal social dumping (Loi no. 2014-790 du 10 juillet 2014 visant à lutter contre la concurrence sociale déloyale), Article 8.

50 Ministère du travail, 'Temporary posting of workers in France'.

4

Monitoring



FRA gathered information on the mandates of monitoring institutions and the working methods they apply when attempting to identify labour exploitation and ensure compliance with laws protecting workers' rights. The term 'monitoring institution' refers to any public authority tasked with observing and assessing the employment situations of workers who have moved within or into the EU, by means of bureaucratic administration and/or carrying out workplace inspections.

Monitoring institutions with workplace inspection roles include labour inspectorates, health and safety officers, customs officers, social affairs officers and employment officers, among others. As the different names suggest, the mandates and priorities of the various bodies differ. To varying degrees, they focus on: ensuring compliance with rules on working conditions, working hours, the minimum wage, social security, and health and safety. Some of these authorities – for example in Finland, Poland and Slovakia – are also obliged to monitor the foreign workforce and ensure compliance with the country's immigration law.

Following an inspection, many of these institutions prepare a report for the employer requesting compliance and, if the employer does not comply, they can fine the employer or suspend its operations.

As this research is concerned with criminal forms of labour exploitation, the interface between monitoring institutions and law enforcement or public prosecutors' offices is of particular interest. Interviewees in Belgium, Germany, the Netherlands and the United Kingdom observed that labour authorities, where they suspect a crime, can refer the case to the police or the public prosecutor for criminal investigation.

When asked which measures would help to better counter labour exploitation, more than half of the experts interviewed across all 21 Member States highlighted the need for more effective monitoring of the working conditions of workers who have moved within or into the EU. The lack of comprehensive and effective monitoring of working conditions is arguably one of the most significant findings from the research. Interviewed experts in Bulgaria, Greece, the Netherlands, Slovakia and Spain stressed that these deficiencies are ultimately reflected in the attitudes of exploitative employers, who – as one interviewee expressed it – believe that 'nothing can happen to them' (representative of a victim support organisation, Slovakia). The views of interviewed experts are in line with the Commission's assessment of the application of the Employer Sanctions Directive, which finds that the number of inspections carried out in some Member States is unlikely to dissuade an employer from hiring third-country nationals in an irregular situation, and suggests that some Member States will need to make substantial efforts to improve inspections.⁵¹

⁵¹ European Commission (2014), pp. 9–10.

Figure 8: Measures of improvement – experts’ views



Question: In your view, which are the three measures in the following list which would mostly improve the way labour exploitation is addressed in your country?

Note: N = 604; DK = 12 (the graph summarises the answers given by 604 respondents; an additional 12 respondents selected the category 'don't know').

Source: FRA, 2015

4.1. Mandate to monitor the exploitation of workers

Lack of a legal mandate

Any system of effective monitoring is predicated on at least one public institution being clearly mandated by law to inspect the working conditions of workers who have moved within or into the EU. However, if legislation tasks labour inspectorates with monitoring only a workplace’s safety and health conditions and not also with assessing other working conditions – including the rights of workers in accordance with their contracts – this can lead to a situation where no public authority has a clear legal mandate to monitor exploitative working conditions, which is the case, for example, in Austria, Croatia and Germany. Such a legal situation necessarily leads to a systemic lack of effective monitoring.⁵²

⁵² For a comprehensive assessment of labour inspections services in 15 European countries, see European Federation of Public Service Unions (2012).

Difficult economic sectors and legal situations

Findings show that monitoring is often limited in terms of the employment sectors inspected and the numbers of employers assessed. For example, in the United Kingdom, specialised monitoring is conducted in the sectors of agriculture, horticulture and shellfish gathering, but outside these areas there is very little inspection or oversight likely to detect labour exploitation. In sectors where it is widely suspected that employment practices are poor, such as the hospitality sector, there is no monitoring and, as a result, few cases are detected:

“We haven’t had any cases referred in to us, and one would have thought with the hotel industry alone, with the sheer volume of people being employed at that low wage end and the volume of migrant workers in that sector, we haven’t seen anything there, which is interesting I think.”
(Lawyer, focus group discussion, United Kingdom)

Effective monitoring can be particularly difficult in some sectors, such as construction, where multiple

companies and chains of subcontractors operate and the legal framework underlying the employment situation is fairly complex.

Trade unions have a role in monitoring workplaces that have collective agreements. Sometimes, however, sectors particularly prone to exploitation are not covered by such agreements. In Cyprus, for example, trade unions can monitor working conditions in the tourism and construction sectors, but no collective agreements exist in agriculture or domestic work, where numerous exploitative situations arise.

Limited resources

As experts interviewed in Germany, Greece, Poland, Slovakia, Spain and the United Kingdom highlighted, the resources available for monitoring and inspection services are limited, with significant understaffing resulting in few inspections. The tourism industry in Greece was mentioned as an example, with some respondents suggesting that in this sector the improbability of being inspected was so widely known that it conveyed a clear message of impunity:

“There are about 10,000 hotels and 100,000 food service businesses of every kind. If monitoring authorities were to carry out a cycle of inspections and check every one even once, they would need about 20 years to cover all of them. So this sense of impunity makes them ever more defiant of the rules and more exploitative of people who cannot defend themselves.” (Representative of a workers’ organisation or trade union, Greece)

The percentage of employers subject to inspection or monitoring was not reported for this research; by way of indication, however, the 2014 European Commission report on the application of the Employer Sanctions Directive found that the number of inspections carried out is unlikely to dissuade an employer from employing a third-country national in an irregular situation. In Bulgaria, Poland, Romania and Slovenia, less than 1 % of all employers were inspected.⁵³

No clear focus on the rights of exploited workers, strong focus on irregular work

In addition to the more objective restrictions in relation to an authority’s mandate or powers, further limitations arise as a result of monitoring authorities taking a narrow approach to monitoring and/or prioritising certain issues. By way of example, inspections in Slovakia are focused on ‘illegal work’, which includes situations of non-registration of employees for social insurance, or ‘illegal employment’, which refers to the employment of people not entitled to reside or work in the country. In France, labour inspections and coordination between agencies focus on tackling work

by third-country nationals in an irregular situation and fraud concerning social security contributions. In Finland, the occupational health and safety authority, in addition to evaluating conditions in workplaces, reports employers who give jobs to third-country nationals in an irregular situation and employees who do not have permits. In Germany, the Financial Control of Undeclared Employment checks the working conditions of non-national employees to ensure compliance with social security laws. The Polish labour inspectorate monitors overall compliance with labour law and inspects workers’ residence status.

Interviewees from monitoring groups across all 21 Member States generally reported the lack of a specific focus on the detection and prevention of labour exploitation of workers who have moved within or into the EU, in addition to few policies or plans that prioritise this issue. Experts in Belgium, for example, found that monitoring and inspection activities are too often ‘offender-focused’ and insufficiently ‘victim-focused’. Therefore, where an institution monitors for illegal employment, it focuses on sanctioning an employer for employing a third-country national in an irregular situation. Thus, the rights of potential victims of crime are often neglected and the entitlements or support measures that the worker ought to receive are not triggered, leaving them in a more vulnerable position than before the intervention, at risk of becoming homeless, jobless and in debt.

For example, the interviews conducted in Slovakia clearly indicated that the respondents were not accustomed to the concept of labour exploitation, and certainly not with regard to migrant workers (the terms ‘illegal labour’ and ‘labour exploitation’ were used interchangeably by many interviewees). A case in Poland involving over 20 Romanian men, women and children subjected to exploitation as market workers revealed that the employer, subsequently charged with trafficking for forced labour, had been inspected many times. The main concern of the authorities was whether or not the victims had EU passports and, having satisfied themselves that they did, the authorities paid no attention to the exploitation of the workers. Similarly, in the Czech Republic respondents found that the preoccupation with residence status meant that labour conditions were not scrutinised:

“The main priority is to track the legality or illegality of their residency. That’s a big problem, that the labour inspection basically automatically sends this information to the police or they organise what’s called coordinated checks, so I see this as a problem, that there’s no priority of the protection of these labour conditions.” (Representative of a victim support organisation, Czech Republic)

In some cases, priority is given only to certain types of exploitation. In France, priority issues – including ‘illegal’ work and work of undocumented migrants – and sectoral priorities, such as hotels, restaurants and construction, often determine where monitoring bodies carry

53 European Commission (2014).

out inspections. In Italy, inspections by the Provincial Labour Directorate focus on specific economic sectors, such as the tourism sector during the summer season. Inspections are also conducted as a result of tip-offs by workers, victims, trade unions, the consulates of victims' countries or other concerned individuals.

Experts interviewed in the Netherlands and Poland explained the difficulty of prioritising victim status given the wide variety of tasks carried out by both inspectorates and police, including their respective roles in identifying third-country nationals in an irregular situation. Compounding this difficulty is the fact that victims often do not see themselves as victims and/or do not wish to cooperate with the authorities, in which case the authorities are more likely either to identify them as migrants in an irregular situation or, if they are EU nationals or have valid work permits, to take no action on their behalf. The contradictory duties of labour inspectors – dependent on receiving complaints from migrants to better target their inspections and protect migrants' rights, but at the same time able to sanction them for irregular status – were highlighted:

“Our powers are quite contradictory. On the one hand, there is this [issue of] employment legality where we can also punish foreigners and eventually make them leave the country, but on the other we are there to protect their rights, so these are conflicting things.” (Representative of a monitoring body, Poland)

Weak evidence base for risk management

In Finland, experts highlighted the lack of *effective* monitoring. Inspections need to be better targeted and rooted in a deeper understanding of risk factors. National authorities should conduct inspections based on an assessment to identify the sectors most at risk. However, from the research it appears that no country implements systematic risk assessments to guide monitoring operations with a view to detecting severe labour exploitation of workers who have moved within or to the EU. Decisions determining where to monitor and inspect are sometimes based on a particular institution's risk assessment, which tends to reflect the priorities of that individual institution.

Therefore, more should be done to strengthen the evidence base of monitoring mechanisms and priorities in particular, to support the mapping of priority sectors and enterprises/employers for targeted inspections, possibly in collaboration with other relevant organisations, such as trade unions.

Lack of coordination

Interviewees in some Member States – France, Germany, Italy, Lithuania and Slovakia – highlighted limited

coordination as one possible cause for the lack of effective monitoring, investigations and prosecutions. The experts suggested that too many different bodies are tasked with similar responsibilities, and that exchange and cooperation are not well institutionalised.

4.2. Particularly challenging situations for monitoring

Labour brokers

The monitoring of recruitment agencies involves several challenges. Complex and non-transparent labour relationships involving a chain of actors operating in several countries make monitoring difficult. In addition, labour inspectorates have limited mandates, which hinders effective monitoring.

FRA SELECTED CASE STUDY

Difficulties in monitoring labour exploitation

A Finnish entrepreneur in the cleaning sector and his Filipino wife recruited workers from the Philippines to work as assistants caring for the elderly. Each worker had paid a fee of about €8,000 to secure the job and taken out a loan to fund it. In practice, they could work only part time, despite their contract promising full-time work. After the rent, they were left with only a few hundred euros, which they sent home in order to pay their debts. Part of their loans remained unpaid and the workers were afraid that they would never be able to pay it back if they lost their jobs. The occupational health and safety authorities presented the case to the national assistance system for victims of trafficking, and the system provided information about legal aid and helped the victims to find housing. The case is currently being prosecuted as extortionate work discrimination.

Cross-border cooperation between labour administrations and relevant authorities is challenging. One interviewee described the limitations as follows:

“This is a game. Many are Community companies, they are registered in other countries and they're not registered in Portugal. Well, they know that even if I intercept their activities, I don't have any legal power in Romania, for example. Consequently, everything I do is worthless, and they're not even obliged to answer me.” (Representative of a monitoring body, Portugal)

In addition, risks of debt bondage for workers are generated by the payment of exorbitant recruitment fees to agencies.



“We know that because we have often encountered contracts with such offices, which changed their trade names literally all the time. They had one name one year and another one next year. [...] We saw that the salary was €500–600, approximately the basic salary for unskilled workers in Greece, but half of this amount was retained by the agency and the other half was paid to those seasonal workers, for unbelievably long days and hours of work.” (Representative of a workers’ organisation or trade union, Greece)

Subcontracting

It has been pointed out that subcontracting can obscure the legal situation from the perspective of the workers employed. However, subcontracting also complicates monitoring. A lack of transparency, difficulties in determining accountability in the case of labour law violations and – as far as workers’ rights are concerned – a ‘race to the bottom’ fuelled by tough competition typify subcontracting arrangements and can severely impede monitoring and undermine labour standards:

“Now, you know you might have a supermarket, and I’m not saying that they are culpable for this exploitation but they procure services from, let’s say, a food processing factory, which in turn procures labour from a gangmaster, which may or may not be legitimate, but the reason that there is any room for exploitation of workers is because the rates are so squeezed right from the top, all the way down. [...] [W]hen you then do discover these exploitative situations it’s never really traced back up the supply chain, there’s no holistic accountability and I think that’s a problem. So people just wash their hands, they cut that supplier out.” (Representative of an employers’ organisation, United Kingdom)

In subcontracting chains, identifying who is ultimately responsible for rights violations can raise complex questions. In one case, a worker from Poland, exploited on a construction site in Germany, was employed by a subcontractor as well as by the general contractor. Trying to determine who was finally responsible for outstanding payments proved challenging in this case, as well as in similar cases identified in Germany and Greece. This risk is exacerbated by the difficulties encountered when it comes to monitoring labour conditions in subcontracting chains. This was particularly stressed by interviewees from Poland.

“Exploitation at the level of subcontractors can be perfectly hidden [...] before the [...] inspection gets to it or – in the context of migrants – a joint inspection by the Border Guard and labour inspectorate, sometimes assisted by the police, the exploitation manages to end. [...] [I]n factories – say, [...] a shipyard where there is a lot of people – here, we are aware that nowadays work is not performed in such a way that one company employs 300 people. The company employs five subcontractors, another company employs another five or 10 subcontractors under its control and we have a pyramid.” (Representative of a police or law enforcement body, Poland)

“There are issues with civil law contracts, contracts for services or contracts for a specific task. They put the person at risk of abuse. When a regular employment contract is in place, the employer follows the Labour Code and has to put in place appropriate working conditions and an entire social security package for the employee. The abovementioned contracts are silent on this. And there are no monitoring mechanisms for work undertaken on the basis of such contracts. And these are very popular in Poland.” (Representative of the judiciary, Poland)

Subcontracting is a feature of more significance in some employment sectors – such as the construction sector or the food-processing industry – than in others. This allows for targeted measures in these sectors. In Finland, prevention work has been directed at reducing the informal economy and tackling some of the abuses which result from the use of subcontracting chains in the construction sector. The main contractor is now required, through tax regulations, to have a list of all workers on site monthly and to declare them. Every worker is obliged to have an identity card, with taxation information, to access the construction site. These changes will reportedly assist victims of labour exploitation in identifying their employer when complaints are lodged. The Finnish model should be considered an example of a promising practice.

Monitoring in conflict with respect for private and family life

Labour inspection often does not cover domestic work, with labour inspectors rarely authorised to enter private homes without court authorisation. Exploitation in domestic work, including of au pairs and those providing care for the elderly, often remains invisible because of a particular lack of monitoring of this sector in many Member States, in large part as a result of the legal and practical challenges related to inspecting private homes. This was highlighted by experts in Austria, France and Portugal, for instance. Similarly, in Cyprus, the labour inspectors of the Ministry of Labour and Social Insurance cannot enter private homes for inspections even in cases where they receive a complaint; they can only inspect work facilities.

With regard to the agricultural sector in Poland, no authority is permitted to monitor the working conditions on private farms.

Given that domestic work and agriculture are considered by experts across all 21 Member States covered by the fieldwork as two of the sectors most prone to particularly severe labour exploitation of workers who have moved within or into the EU, a total exemption from inspections is not acceptable from the point of view of the effective protection of fundamental rights.

Monitoring severe exploitation of workers in 'parallel communities'

Detecting and addressing severe exploitation in 'parallel communities' – described by several interviewed experts as communities of the same nationality or ethnic group employing workers from their country of origin, often in ethnic restaurants – also presents challenges. In such communities, workers who have moved within or into the EU can easily be moved between jobs and exploitation remains hidden.

FRA SELECTED CASE STUDY

Parallel communities

Three Romanians were exploited by a Romanian group and Italian businessmen. They were recruited to work as seasonal workers in agriculture, but were accommodated in an uninhabitable house, under the continuous control of the Romanian exploiters, who took their passports and made threats against them. The victims did not obtain an employment contract but were told that they must work to pay back the debt of transport, accommodation and food. After two months of work in these exploitative situations, six workers asked a trade union for help, since their wages had not been paid by the employer. The trade union referred the victims to the support service the La Strada Foundation, which immediately gave them accommodation in a shelter and included them in a special protection programme. They were supported in reporting the criminal organisation to the police, with the result that the perpetrators were initially charged with the offence of slavery. However, the case did not end up in court, since the anti-mafia public prosecutor decided to dismiss the case with regard to the offence of slavery. Instead, the same perpetrators were charged with the offence of illegal recruitment of workers by the ordinary public prosecutor's office of Ravenna. The victims have thus far not received any compensation and the trial is ongoing.

Some experts urged authorities (such as labour inspectors and the police) to pursue closer contact with potential victims and address possible prejudices within their own ranks:

"Prejudices are there and closer collaboration with communities would undoubtedly find more relevant details and be more effective, and may change the rationale of successfully investigated case outcomes." (Lawyer, Ireland)

4.3. Communicating with and providing information to workers

The role of workplace inspectors in raising victims' awareness of their rights

In Section 2.4. it was highlighted as a risk factor that workers are often not provided with a written contract and in general not informed about their rights. Hence it should be stressed that monitoring bodies also have an important role in providing information on workers' rights. To give an example, in Finland labour inspectors provide information to workers, for instance about the minimum wage and collective agreements. One representative explained:

"If I ask the worker, 'How much are you paid per hour?', an Estonian worker, for example, will often reply that it's confidential, they won't tell me. Then I often ask, 'Do you know how much you're entitled to get in Finland?'" If they say no, then I tell them what the minimum wage for that sector is in Finland according to the collective agreement." (Representative of a monitoring body, Finland)

Difficulties in communication

More should be done by monitoring authorities to overcome language barriers and mitigate the risk factor – highlighted above – of workers' lack of knowledge of the language of the workplace. Difficulties in communicating with workers who have moved within or to the EU because of language barriers is widespread across Member States. For example, in Poland the labour inspectorate's lack of access to translators resulted in the failure to notice the exploitation of Bangladeshi workers in a Gdansk shipyard. Two workers who subsequently fled lodged complaints against the perpetrator. Budget constraints or the unavailability of interpreters speaking the required languages often prevent communication. There are promising practices that can help to overcome this barrier. For example, in a case in France involving Polish and Moldovan workers in a circus, the Polish consulate – which had been contacted by the victims' families – ensured the availability of interpreters so that the victims could easily describe their situation to the authorities. To give another example, a Belgian police unit specialising in combating labour exploitation have brochures in many different languages that they try to distribute on first making contact with potential victims of severe labour exploitation. They also make use of a United Nations Children's Fund (UNICEF) toolkit which incorporates many simple sentences in many different languages, and call in translators and interpreters when deemed necessary.

Some interviewees in Finland claimed that labour authorities might be inclined to avoid inspecting employers



that they knew would present difficulties in terms of language. This could amount to discrimination, in that Member States should apply the same level of protection from labour exploitation for people working in enterprises where a foreign language is spoken as they do in relation to employees in enterprises where a national language of that Member State is spoken. Language barriers are sometimes overcome by seeking help from other workers in the workplace who claim they can interpret. However, findings indicate that this comes with certain risks, as sometimes the exploiter is the only migrant in the workplace with the required language skills, which means that they could then be in a position to control the group's interaction with the outside world. In Greece, in a case involving over 100 workers from Bangladesh working in strawberry fields in Nea Manolada for low wages and in difficult conditions, the interpreter used by the police during the investigation was, allegedly, an associate of the perpetrator.

4.4. Detection of labour exploitation

Experts from Finland, France, the Netherlands and Slovakia stated that the detection of situations of labour exploitation by monitoring bodies can be described as arising accidentally rather than by design. Consequently, inspection services often fail to detect exploitation and intervene to protect the rights of workers. For example, a case of trafficking for labour exploitation in Finland involving Vietnamese nationals exploited for their work in restaurants was never detected despite multiple inspections by the labour authorities. Similarly, inspections in the textile industry in Spain did not lead to action until the victims themselves lodged complaints:

“The case of Chinese textile sweatshops was vox populi and nobody said anything, then the municipality [after the inspections] was very disturbed, but the municipality was perfectly aware of this, it was evident, there were many sweatshops, many, many, it was full of illegal textile sweatshops, and everybody turned a blind eye. [...] everything started thanks to the anonymous complaint of two persons of this very nationality.” (Judge or prosecutor, Spain)

There are numerous difficulties in detecting and documenting exploitation, especially if inspections are primarily document-based:

“Then for the remuneration [...] there is that which appears on a payslip, it looks in order... but when compared with the number of hours they do [...] it's much harder to check” (Representative of a monitoring body, France)

In other cases, when an inspection does lead to the detection of exploitation, it may fail to identify the extent of exploitation, with the result that the sanctions imposed do not have a sufficiently deterring effect:

“If I don't pay what the labour agreement establishes and only two out of ten people file a complaint and then I'm forced to pay the difference to those people, I'm risking very little.” (Representative of a workers' organisation or trade union, Spain)

Effective inspections linked to effective investigations

There are examples of successful inspections which result in the identification of exploitation and remedial action. If irregularities identified during general inspections are referred to the correct investigative bodies, who are then able to initiate a criminal investigation of labour exploitation, monitoring can be effective. A situation of exploitation on a strawberry farm in the Netherlands came to light when the labour inspectorate detected irregularities during an inspection visit and passed this information on to its Social and Intelligence Investigation Service. A criminal prosecution for trafficking in human beings and forgery followed. The Court did not find the defendant guilty of an intention to exploit the workers under the trafficking law, although he had ‘exceeded the boundaries of good employment practices’. It did, however, find the defendant guilty of taking advantage of their vulnerable position and guilty of forgery.

In France, a joint inspection by the labour inspectorate and the police, under the umbrella of the local anti-fraud committee, identified a case of exploitation of Polish seasonal workers housed in ‘living conditions incompatible with human dignity’, which resulted in court proceedings, although at the time of writing it was not clear what charges would be brought.

Promising practice

Forming a network of ‘labour attachés’

The Bulgarian Ministry of Labour and Social Policy has a network of Offices for Labour and Social Affairs in five EU countries – Austria, Germany, Greece, Spain and the United Kingdom. The so-called labour attachés that head these four offices provide labour and social affairs services to Bulgarian citizens in 10 countries. The attaché in the United Kingdom also covers Ireland; the attaché in Austria covers the Czech Republic, Slovakia and Switzerland; and the attaché in Greece also covers Cyprus. The labour attachés try to provide information by reaching people proactively (e.g. through the offices' websites), but people also quite often call at the embassy to check whether a certain job offer meets the legal requirements and to find out what it is reasonable to expect and require from their employer. The list of risk factors is published on the website of the Office for Labour and Social Affairs under ‘Life and Work in Britain’.

For more information, see: <http://www.mlsp.government.bg/>

In the Netherlands, the labour inspectorate has investigative capacities:

“Regarding the inspectorate, the situation is that both monitoring and investigation fall under the responsibility of the inspectorate.” (Representative of a monitoring body, the Netherlands)

According to interviewees, the division between monitoring and investigation has crucial consequences for the activities which are carried out. This division is not only theoretical; it affects the defence rights of a suspect, as was highlighted by experts from the Netherlands. During inspections carried out for monitoring purposes, the employer – who is not a suspect – is obliged to cooperate. However, in the context of a criminal investigation, the employer – who is now a suspect – is not obliged to cooperate in his or her own prosecution and has the rights of a defendant. Therefore, the Netherlands inspectorate has different units, which are responsible for the different tasks of monitoring and investigation.

Proactive monitoring carried out by the police

The research found that, in addition to workplace inspection authorities, some specialised law enforcement units are tasked with monitoring situations prone to labour exploitation. For example, in Spain the Catalan Central Unit on Trafficking has a unit devoted to labour exploitation and, since 2002, the *Guardia Civil* General Directorate has also been mandated to periodically inspect workplaces to identify labour exploitation and ensure the safety of foreign workers. As a rule, inspections by the *Guardia Civil*'s special units – named ‘teams for aid to migrants’ – are carried out jointly with labour inspections.

Examining the fundamental rights challenges affecting migrants in an irregular situation employed in the domestic work sector

Based on research conducted with (predominantly female) migrants and with civil society organisations in 10 EU Member States, this report highlights some of the fundamental rights challenges affecting migrants in an irregular situation employed in the domestic work sector. It focuses on the experiences of migrants in an irregular situation. While many fundamental rights issues raised in this report are common to other persons employed in the domestic work sector, the risk of violations is exacerbated for workers who do not have the right to stay in the host country.

For further information, see: FRA (2011), Migrants in an irregular situation in domestic work: fundamental rights challenges in for the European Union and its Member States, Luxembourg, Publications Office of the European Union (Publications Office)

In Belgium, the Federal Judicial Police's Section on Human Trafficking has a division specialising in exploitation. In the Netherlands, the investigative unit of the labour inspectorate investigates trafficking for labour exploitation.

4.5. Conclusions

When asked about the measures that would most improve the way labour exploitation is addressed, respondents assessed two measures as equally important: more effective monitoring in the areas of the economy particularly prone to labour exploitation; and more effective coordination and cooperation between labour inspectorates, the police, victim support organisations and criminal justice systems.

- The monitoring of labour exploitation of workers who have moved within or into the EU is often not seen as a priority for public institutions, including labour inspectorates and other bodies tasked with workplace inspections. The lack of experience on the part of monitoring institutions in tackling severe labour exploitation attests to the absence of effective measures to prevent and detect labour exploitation. Interviews and case studies revealed multiple examples of failure to detect exploitation. With limited resources to go round, the priority given to checking workers' immigration status, even by labour authorities, diverts attention further from working conditions. Monitoring is limited in several Member States to a few sectors considered prone to exploitation, and staff and resource shortages further limit the number of effective workplace inspections.

At the same time, the Employer Sanctions Directive may contribute to focusing the resources of many EU Member States' monitoring bodies on sanctioning employers for the employment of third-country nationals in an irregular situation and on detecting such workers. While it also aims to protect exploited workers, defines rights to unpaid wages and stresses the possibility of granting temporary residence permits to third-country national workers, there is little evidence from this research that these provisions are benefiting migrants in practice. Instead, interventions by authorities, in general, fail to expose situations of severe labour exploitation and to identify and protect its victims.

Experts view the inadequacy of monitoring as encouraging a sense of impunity on the part of exploiters. More targeted monitoring is needed for the purposes of identifying labour exploitation, with a mapping of priority sectors and employers, but without restricting inspections exclusively to these sectors.

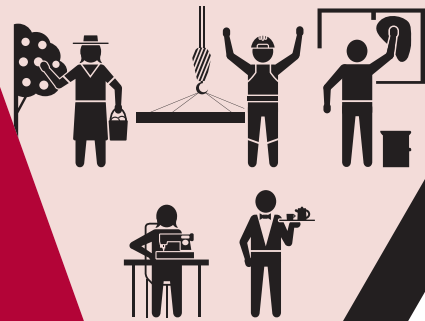


- Interviews with experts revealed that workplace and employment monitoring and inspection bodies, in addition to being under-resourced, are often not clearly mandated to identify severe labour exploitation or to support workers who have moved within or into the EU in accessing justice. Therefore, at least one public authority should be assigned the task of comprehensively monitoring working conditions:
 - on the basis of a clear legal mandate;
 - equipped with the powers needed to carry out inspections at all places where workers who have moved within or into the EU are employed;
 - with the resources required to perform these tasks effectively, including the language skills and cultural knowledge needed to communicate with workers who have moved within or into the EU, including those working in parallel communities.
- What additionally impedes the identification of victims and consequently their access to justice is the attitudes of public officials who consider third-country national workers in an irregular situation, even if they have been severely exploited, primarily in terms of managing migration, rather than acknowledging them as victims of crime entitled to access justice, support and protection. Findings from the field research point to the risk that when third-country national workers who are in an irregular situation are severely exploited, the fact of their irregular residence can obscure their status and rights as victims of crime. Therefore, EU Member States need to take actions to ensure that immigration law enforcement is conducted in full compliance with human rights standards and does not prevent access to justice for exploited workers and foster impunity for exploitative employers and recruiters. All authorities working in the context of severe labour exploitation should share a clear and unambiguous brief and orientation prioritising the fundamental rights of victims of crimes of severe labour exploitation over questions of public order or immigration management. Member States should issue clear guidance to this effect to all authorities that deal with third-country national workers, ensuring that irregular residence or work does not obstruct the obligation of public authorities to acknowledge a severely exploited worker – even when in an irregular situation of residence – as a victim of crime, and establishing clear standards and procedures to inform them of their rights and enable safe access to victim support and all justice mechanisms.
- The field research revealed that the evidence-base used to design monitoring strategies is weak. A system of monitoring should be based on all the evidence available allowing public institutions to comprehensively assess risk factors for labour exploitation. The analysis of risk factors presented in this report aims to contribute to a more profound understanding of those factors and to allow for better-targeted workplace inspections.
- According to experts, employment systems involving more actors and more countries, such as the posting of workers or the involvement of intermediaries – recruitment or temporary work agencies – make monitoring more difficult. Complexities also arise when labour exploitation occurs in subcontracting chains, as is frequently the case in certain sectors of the economy, including construction and the meat-processing industry. More efforts are needed by monitoring bodies to tackle these issues.
- It should, however, be stressed that the lack of effective monitoring is not a black-and-white issue but a question of flaws and weaknesses which stand to be contrasted with positive developments and examples, for instance:
 - using licensing or accreditation as mechanisms to regulate labour brokers;
 - the introduction of specialised investigative units in labour inspectorates that follow up on irregularities discovered during labour inspections; or
 - joint inspections carried out by the police and labour inspectorates, or other forms of close cooperation between those tasked with monitoring and investigations.

Monitoring bodies that also inspect for immigration status may discourage workers from making complaints against exploitative employers, which undermines efforts to detect exploitation and should be avoided.

5

Victims' access to justice



Article 9 (1) (c) read in conjunction with Article 2 (i) of the Employer Sanctions Directive recognises the right of a third-country national in an irregular situation not to be subjected to working conditions that offend against human dignity. This right has a basis in Article 31 of the Charter, which acknowledges the right to working conditions which respect a worker's health, safety and dignity. When this right to decent working conditions is violated, Article 47 (1) of the Charter grants the right to an effective remedy. Whether or not this right is a practical reality is not only a matter of legislation transposing the Employer Sanctions Directive but also of its correct implementation.

Charter of Fundamental Rights of the European Union

Article 47 – Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

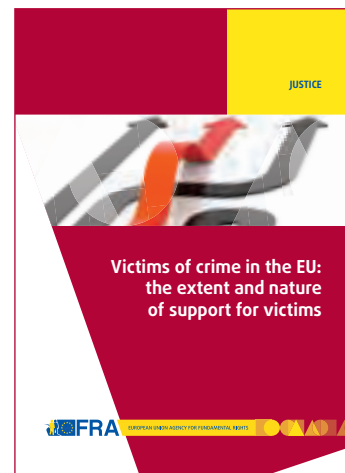
Victims' access to justice is premised, firstly, on the availability to victims of an effective remedy, and, secondly, on victims' right to actively participate in proceedings. Article 47 (2) and (3) of the Charter cover this second component.

The Victims' Directive spells out in more detail important rights of *all* crime victims, including:

- victims' rights to understand and to be understood (Article 3);
- rights to receive information (Articles 4 and 6);
- rights to interpretation and translation (Articles 5 and 7);
- a victim's right to access victim support services (Article 8);
- the right to be heard (Article 10);
- the right to a review of a decision not to prosecute (Article 11);
- the right to legal aid (Article 13);
- the right to a decision on compensation in the course of criminal proceedings (Article 16).

A 2015 FRA report, *Victims of crime in the EU: the extent and nature of support for victims*, assesses the situation of certain rights of victims in the EU.⁵⁴ The report stresses that victims' rights to have access to justice and to actively participate in proceedings, to become practically effective, are premised on measures addressing victims, including the provision of information, support services and legal counselling.

Findings show that, generally, mechanisms to enable exploited workers who have moved within or into the EU to access justice and remedies are either not in place or not effective. Respondents across professional



54 FRA (2015).

groups and across countries report that access to justice is the absolute exception for exploited workers, as criminal, civil, labour and administrative proceedings largely remain out of reach.

FRA SELECTED CASE STUDY

Reaching out for justice

Nineteen Bangladeshi nationals came to Poland in 2009 under an employee leasing scheme where temporary employment agencies hired workers only to lease them to other business entities. Initially, the Bangladeshi workers were to take up fish-filleting jobs and had permits to work in that sector. However, the perpetrator, a Bangladeshi citizen and the owner of a temporary employment agency, forced them to work in the Gdańsk shipyard without remuneration. The Gdańsk shipyard noted that they did not have relevant work permits and ordered the perpetrator to provide them. Since the perpetrator could not do that, he terminated his contract with the Gdańsk shipyard, but he continued exploiting the workers, not paying them and threatening them and their families. At first, they could quite freely go to town, but once they stopped working in the shipyard the perpetrator began to limit their freedom of movement. He told them that if they fled they could be shot dead by the police because law enforcement bodies in Poland had the power to kill illegal migrants. Two victims fled and met students who gave them money for a train. They were directed to the Association for Legal Intervention, and then to the La Strada Foundation. They entered a programme providing protection and support to trafficking victims and received help for a while, but all returned to Bangladesh in the end. The perpetrators were charged with trafficking and, at the time when the research was taking place, the case was pending, in the victims' absence.

The low risk of prosecution and conviction for offenders was considered by experts to be one of the top three legal and institutional risk factors rendering workers who have moved within or into the EU vulnerable to exploitation. At the same time, it seems unlikely that prosecutions will function effectively without an alliance with victims. Thus, the failure to convince victims that leaving their situation of exploitative work is a realistic and viable alternative leads directly to endemic impunity. This fosters and accelerates the spreading of severe labour exploitation and, in the long run, has the potential to undermine standards of working conditions throughout large sectors of the economy.

On the same note, the European Commission Communication on the implementation of the Employer Sanctions Directive observes that 'access to justice and facilitation of complaints constitute the core of the directive's

protective measures designed to redress injustices suffered by irregular migrants. Yet it is this part of the directive that could raise concerns because Member States' transposition efforts have often resulted in weak or non-existing mechanisms to facilitate the enforcement of the irregular migrants' rights.⁵⁵ The Commission concludes: 'In general, the lack of specific mechanisms in many Member States to remedy the difficulties that irregular migrants may face in having access to justice and enforcing their rights may be counterproductive to the fight against illegal employment.'⁵⁶ Findings from this research strongly support this view.

At the same time, field research findings show that in some countries, in individual cases, exploited workers who have moved within or into the EU have successfully accessed justice and secured effective remedies. The research also highlights a number of measures that have the potential to develop into promising practices. Experiences from various other areas of crime show that, where victims have a viable alternative, they are more likely to come forward and report exploitation.

FRA SELECTED CASE STUDY

Financial compensation

In 2013, a woman from the Republic of Congo who was brought to Belgium to take care of a child and perform household chores received compensation of more than €52,000 in material damages and €5,000 in psychological damages. The woman had worked long hours, had to sleep on the floor and was not paid for her work. Her travel documents were retained by her employer. The Social Inspection Department were made aware of this situation by an anonymous informant. They then went to the perpetrator's apartment, where they found the exploited worker. A criminal investigation followed, and the perpetrator was charged with labour trafficking and offences against the Social Criminal Code. The Criminal Court of Brussels declared the defendant guilty of all charges and the woman received compensation.

Evidence from the research points to four arguably most relevant pull factors that would, according to interviewees, make a real difference to victims and have the potential to encourage them to leave their situation of exploitation and seek access to justice:

1. a real possibility of regularisation of their residence status and access to the labour market;
2. the provision of targeted and tailored support services including information about their rights;

⁵⁵ European Commission (2014), p. 7.
⁵⁶ European Commission (2014), p. 8.

3. a realistic chance of receiving compensation and back pay;
4. facilitation of victims' access to and participation in criminal proceedings.

5.1. Situation of victims and their priorities

Any strategy enhancing victims' access to justice would, first of all, have to take victims' motivation – or reluctance – to access justice into account. To make access to justice a reality for victims it is important to understand – and take seriously – the perspective of victims. What for them often comes first are the economic aims they pursue as workers moving within or into the EU. When they face exploitation, they want to be protected from further victimisation and to receive compensation and back pay from employers, which again relates to their economic objectives. In addition, the worker's family in the country of origin may be pressurising the worker to endure the situation to earn a living for the entire family, as was highlighted by experts from Ireland and the Netherlands.

Many of the interviewed experts – including from Austria, Finland, France, Hungary, the Netherlands, Portugal, Slovakia and Spain – emphasised the significance of poverty as a strong factor contributing to the risk

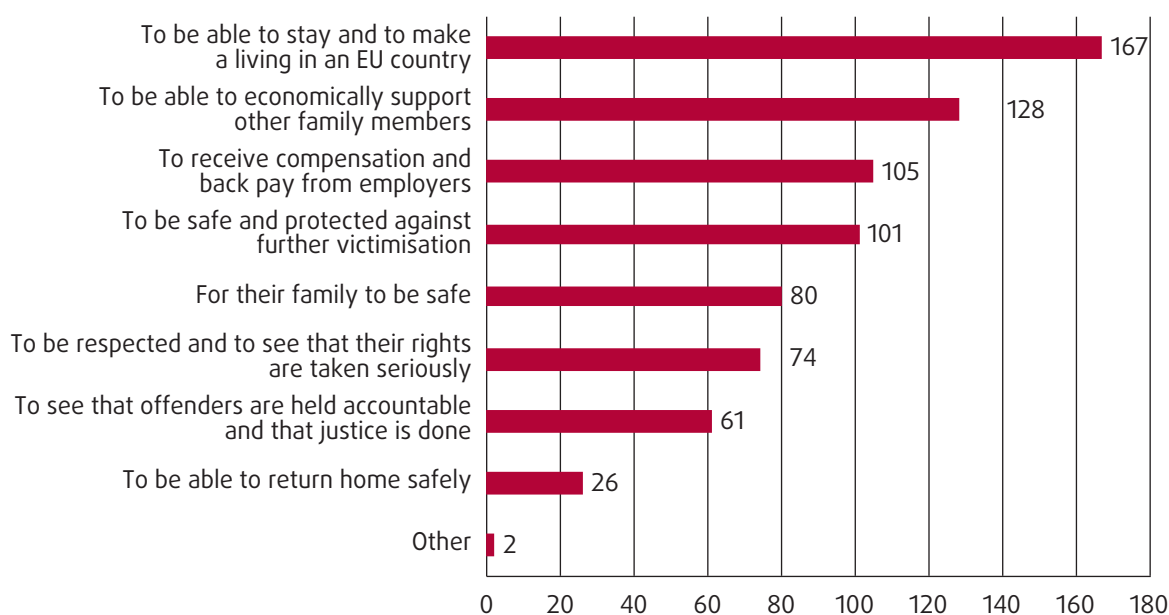
of exploitation. Poverty also influences the way workers assess their situation in the country of destination and compels them to accept exploitation because of a lack of alternatives. In addition, there may be a pressing need to send money to their families back home or to pay debts incurred to pay for transportation or recruitment.

“Let us not forget that these people have paid a lot of money before they crossed over. So they paid money or they borrowed money to leave their land of origin [...]. So these people have a lot of debts and that is why they are vulnerable, because they owe so much money they have to see from where they are going to bring it to pay up.”
(Representative of a victim support organisation, Malta)

Linked to poverty, wage differentials between countries, including within the EU, are seen as factors adding to the risk of exploitation. The wage gap and their experiences of poverty can lead workers to accept underpayment.

Reflecting the predominant economic interests of victims of labour exploitation, the reasons why they do not report their victimisation to the police are again primarily economic. The retaliation that victims fear from employers reflects their fear of losing their job. They are not aware of their rights, including the possibility of claiming back pay and compensation.

Figure 9: What is most important to victims?



Question: On the basis of your professional experience in working with victims of labour exploitation, which are the three most important factors to migrant workers who are victims?

Note: N = 253; DK = 4 (the graph summarises the five answers given by 253 respondents; an additional four respondents selected the category 'Don't know').

Answers only from professional groups: support services (S), workers' organisations (W) and lawyers (L).

Source: FRA, 2015

FRA SELECTED CASE STUDY

Fear of reporting exploitation

In 2013, a young Nigerian girl (a child at the time of her recruitment) worked as a domestic worker for a family in Ireland, who had previously employed her in Nigeria. She had been led to believe that her family would be paid, she would have more free time and she could pursue educational attainments. Once there, she had no time off and was not given her own room; moreover, she was not allowed any contact with her family in Nigeria and her movements were restricted. She contacted the MRCI and received advice and support on how to lodge a complaint. However, the victim did not report her case because she believed that this would mean she would have to leave the country.

Victims with an irregular residence status may also have the specific fear that if they report to the police they will have to leave the country – and hence lose their employment. However, even if they have the option of

regularising their residence status, they will often not know about the legal situation. Therefore, the provision of advice alongside such legal options is of fundamental importance.

In the light of victims’ perspectives as reported by the experts, it should be stressed that it is important that criminal justice systems incorporate provision for compensation for damages and back pay into their responses to severe labour exploitation. The Employer Sanctions Directive obliges Member States to put in place mechanisms that ensure third-country nationals who have been exploited can access back payments for the wages they are owed. In its communication on the application of this directive, the European Commission found that very few Member States have explicitly implemented the protective measures in favour of irregularly employed third-country nationals stipulated by the directive.⁵⁷ In addition, where such mechanisms have been put in place, they are often – for instance in Austria, France and Poland – not used by practitioners or not known to them. Some activities to reach out to

Figure 10: Five main reasons for victims not reporting exploitation to the police



Question: Which are the three most relevant factors that significantly account for the fact that not many migrant workers who have been exploited severely come forward, seek support or report to the police?

Note: N = 506; DK = 110 (the graph summarises the five most frequent answers given by 506 respondents; an additional 110 respondents selected the category 'don't know').

Source: FRA, 2015

workers in an irregular situation who find themselves in an exploitative employment relationship and to facilitate their access to justice do exist – for instance in Austria, Germany and Ireland – but this is the exception rather than the rule.

5.2. Who is a victim?

There is more than one answer to the question 'Who is a victim of severe labour exploitation?'. From the legal perspective, the victim is the person whose fundamental rights are protected by the relevant definitions of substantive criminal law and were violated by the offender. In criminal proceedings, a person who can arguably claim that their rights, protected by criminal law, have been violated, has the status and the rights of a victim.⁵⁸ Hence the status of victim in criminal proceedings is premised on objective indicators supporting an arguable claim of victimisation. On this basis, an individual is entitled to the rights of a victim flowing from the ECHR, the Charter and the Victims' Directive, including the right to have access to support services, the right to receive information and the right to legal aid.

Perceptions of victims as in need and deserving of help and protection

However, social reality is more complex, and different perspectives have to be taken into account. When it comes to workers who have moved within or into the EU as victims of labour exploitation – and in particular to migrants in an irregular situation – it even happens that the police and the public question their status as victims of crime. First of all, there is a risk of people reacting to incidents of exploitation of third-country nationals in an irregular situation by taking the view that these workers should not have come to the destination country in the first place and would then not have been victimised. Experts referred to a 'trivialisation of labour exploitation', a form of acceptance of non-violent forms of exploitation by society in general. For instance, experts interviewed in Poland reported that activities of migrants in an irregular situation are perceived by society as conducted at their own risk. A representative of a support service believed that the authorities shared these views, leading to a lack of commitment.

In addition, victims of labour exploitation do not necessarily perceive themselves as victims of crime. For them, what is often in the forefront of their minds is what they have achieved in economic terms, however little this may seem assessed by the standards of living

and income of the country in which they work. They may tend to focus on what they have gained and not on what they have been denied. Their situation of exploitation may appear to them as a first step on a long and difficult road leading to a professional life in Europe.

However, the victim's own perception in turn affects the police's response. If victims are offered help but are not willing to accept it and refuse to see themselves as victims in need of help, then the police may focus on other aspects of the case, including their irregular status, and take steps to expel them. The police response can also depend on the willingness and ability of the victim to cooperate and to provide useful information. If a victim is not cooperative, this may induce the police not to acknowledge the exploited worker as a victim of crime.

FRA SELECTED CASE STUDY

Criminalisation of victims

In 2013, a man from Pakistan worked in Ireland as a chef in a restaurant owned by a distant relative. Initially, he had a valid work permit, which, however, expired in due course. The employer did not renew the work permit and kept the victim's passport. Furthermore, the victim had to work seven days a week and received poor wages. When he noticed that his employer had failed to regularise his position with the relevant authorities, he filed a complaint. The Labour Court decided in favour of the victim. However, the perpetrator sought judicial review and the High Court subsequently overruled the Labour Court's decision, holding that 'a contract of employment involving a non-national is substantively illegal in the absence of the appropriate employment permit' irrespective of the reasons for the employee's failure to secure a work permit.

Therefore, the mere objective facts of severely exploitative working conditions may satisfy legal definitions but still not be sufficient to ensure that the rights of the victim are acknowledged in practice. Some respondents remarked that victims need to appear 'starved' for the police to see them as victims, or that there needs to be clear evidence that the worker has been threatened or that their safety is at risk. There are perceptions of victimhood which influence outcomes, as the following quote illustrates:

"It is the ability of the victim to 'move' the police that will determine their response. If it's a poor Madagascan maid in a magnificent property in Antibes, she will be listened to carefully. If it's three Senegalese workers on a construction site in Nice, I think the approach will be a bit different. And then I think it is a question of training." (Representative of a victim support organisation, France)

⁵⁸ This is settled case law of the ECtHR; see, for example, ECtHR, *El-Masri v. The Former Yugoslav Republic of Macedonia*, No. 39630/09, 13 December 2012, para. 182.

Victims qualifying for support services

Experts, for instance from Germany and Italy, criticised the fact that support services are not always inclusive of all groups of victims. Victim support often depends on the initiation of an investigation procedure and thus on the categorisation of an individual case of labour exploitation as a specific criminal act and, in particular, on the readiness of the victim to testify against the perpetrator. Closely linked to this conditionality of cooperation is the need to be recognised as a victim. In Germany, the Netherlands, Poland and the United Kingdom, support services providing accommodation or medical care are accessible only after victims are officially recognised as such by the police or public prosecutors. Without recognition, support is limited.

“If somebody is simply a victim of labour exploitation, but not a kind of exploitation which may be considered human trafficking, this person has no rights at all, no services, no access to assistance and support whatsoever. Apart from NGOs, who in fact cannot do much legally, either, because there are few legal options available. [...] There is no support, so it is difficult to assess something that doesn't exist.”
(Representative of a victim support organisation, Poland)

These restrictions and hurdles potentially depriving victims of being acknowledged may result in limitations to victims' access to support services. In practice, support services often exclude migrants in an irregular situation. For instance, options for seeking support for men working in an irregular situation in Poland's construction sector are limited: in case of a complaint to the labour court, the victim would face deportation. Similarly, filing a complaint to the National Labour Inspectorate can lead to a fine or to expulsion.

A further hurdle preventing victims of severe labour exploitation from accessing support services is a lack of awareness about the existence of services. Respondents identified this as one of the four main reasons why workers who have moved within or into the EU do not come forward or seek support. Support services and workers' organisations regarded this as the biggest obstacle preventing exploited workers from coming forward. Information about available support systems is not properly disseminated. Additionally, some organisations fear becoming too well known, because they do not have enough resources to respond to an increase in demand.

Experts in Germany and Hungary stressed that specific efforts must be made to reach out to male victims of severe labour exploitation. For some men, accepting the status of a crime victim conflicts with their gender role, which dictates that men should be 'strong' and 'in control' of their situation, rather than in need of support. This can add to the tendency of victims of labour exploitation to view themselves as economically successful despite the violations of their rights which they encounter.

5.3. Regularisation of residence status and access to the labour market

The residence status of the victim is still a major barrier to accessing victim support and justice. The research findings show that 58 % of respondents interviewed indicated that workers who have moved within or into the EU do not come forward because they fear having to leave the country, and 46 % do not do so because they fear losing their job. It is thus their irregular situation that prevents victims from having real and practical access to justice.

“Whether they will be able to continue to stay if they lodge a complaint, if they decide to turn against their employer. That is the essence of the entire issue.” (Judge or prosecutor, Hungary)

Desk research and fieldwork reveal that instruments such as the reflection period and the residence permit for victims of trafficking set out by the Residence Permit Directive (Articles 6 to 8); the principle of non-prosecution or non-application of penalties to the victim, as established in Article 8 of the Anti-Trafficking Directive; and, in particular, the granting of permits of limited duration – in accordance with Article 13 (4) of the Employer Sanctions Directive – to third-country nationals subjected to particularly exploitative working conditions are in many EU Member States implemented only to a fairly limited extent.

FRA SELECTED CASE STUDY

Irregular status as a barrier to justice

For about eight months in 2013, a Turkish student worked undocumented on a construction site in Bulgaria to fund his studies. He was required to work under harsh conditions (10–13 hours per day, with only one day off per week) and was promised payment only at the end of the project. However, upon completion of the building the manager of the site disappeared without paying the victim. Moreover, when asked, the owner of the building claimed to have paid the workers' wages to the site manager every month. The victim did not report the case for fear of running into difficulties due to his irregular situation.

As concerns trafficking victims, in 2013 a significant number of residence permits were issued in a third of all EU Member States, namely Belgium (79), the Czech Republic (23), France (38), Germany (83), Greece (38), the Netherlands (212), Spain (81) and Sweden (19). By far the most permits were issued in Italy; however, the

precise number is not clear. A total of 147 residence permits were issued in Italy for victims of trafficking as a measure of 'social protection'. In addition, 1.277 residence permits were issued for 'humanitarian reasons' (recipients included but were not limited to victims of trafficking). In all other (19) EU Member States the number of residence permits issued for victims of trafficking in 2013 is six (in Austria) or below. The European Commission communication on the implementation of the Residence Permit Directive of October 2014 offers complementary and in-depth information on the subject.

FRA SELECTED CASE STUDY

Exploiters avoid serious penalties

In the first major labour trafficking trial in Greece, 119 migrants from Bangladesh worked on a strawberry farm in the agricultural sector of Nea Manolada. They worked in inhumane conditions on the promise of €22 a day, but when the workers asked for payment the three supervisors opened fire on them. After the incident, the victims were transported to hospitals in Patras and the Supreme Court Special Prosecutor granted a residence permit for the victims of labour trafficking. However, the residence permit did not cover all the 119 workers who were shot, only the 35 workers who were hit. The authorities regularised only those 35 because they ruled that it was only those who were hit who fell under the provisions covering labour trafficking. One of the four men arrested over the attack was found guilty of the charge of causing grievous bodily injuries while another was found guilty of simple complicity, but both were released on appeal. The owner of the enterprise was acquitted unanimously of charges of serious assault and labour trafficking, so the verdict cannot be appealed by prosecutors.

Desk and field research carried out by FRA indicates that less than half of EU Member States have implemented Article 13 (4) of the Employer Sanctions Directive at the level of legislation; those that have done so include Germany, Greece, Hungary, Italy, Luxembourg, Slovakia, Slovenia, Spain and Sweden. However, even where legislation is in place, it is only rarely applied. In 2013, 28 residence permits were issued in Italy and four were issued in Germany on the basis of provisions implementing Article 13 (4) of the Employer Sanctions Directive, and in Slovakia the residence of one victim was 'tolerated'. In all these cases, the victim's residence was conditional on their willingness to cooperate with law enforcement authorities. For all other EU Member States, no residence permits issued in favour of victims of severe labour exploitation in the sense of the Employer Sanctions Directive were identified.

Field research showed that, without a minimum of legal security, including regularised residency, victims

of severe labour exploitation are often not in a position to claim their rights in the country where they have been exploited. The fear of arrest, detention and deportation or expulsion of migrant victims of crime is seen by experts – for example in Belgium, Croatia, Cyprus, Germany, Greece and Slovakia – as preventing migrants from reporting crime and accessing assistance and justice.

"[C]lients have had bad experiences. When they go there [to the authorities such as the police] with their problems, it is them who get penalised." (Representative of a victim support organisation, Hungary)

"So, they are afraid that, once the procedure is initiated, they will be deported. In other words, they won't have the time to complete this procedure. As a result, they prefer to stay here, even irregularly, instead of claiming their rights." (Judge or prosecutor, Greece)

Even where victims in an irregular situation of residence are entitled to back payments, they often do not benefit from this entitlement, as they are deported immediately after detection.

"Sometimes we don't identify [workers] during inspections at the workplace, but learn about them afterwards; for instance, the police force informs us that irregular migrants have been deported but I cannot qualify it as illegal employment with all the consequences, including settling back payments, because we don't have them [in the system]." (Representative of a monitoring body, Slovakia)

In the face of all these doubts and qualifications, it should be recalled that the right of a person to be treated as a victim and to be granted rights accordingly depends on objective circumstances that make it likely that the person has been victimised. As stated above, a victim is an individual who can or could arguably claim that their rights protected under criminal law have been violated.⁵⁹ The rights of a person as a victim are premised on such conditions, judged in objective terms, and not on any cooperation of the victim with authorities. In this vein, the UN Committee against Torture, in a report on Cyprus, recently noted information according to which victims are not provided with 'the right to an effective remedy until they are recognized as such by the Office of the Police of Combating Trafficking in Human Beings, on the basis of their own internal determination procedure'. The Committee concluded that Cyprus should provide an effective remedy 'to all the victims of a trafficking crime [...] irrespective of their ability to cooperate in the legal proceedings against traffickers'.⁶⁰ The same principle applies to victims of severe labour exploitation.

⁵⁹ See also FRA (2015).

⁶⁰ UN Committee against Torture (2014).

To premise victims' access to justice on their cooperation introduces a differentiation that relates to their residence status: as a consequence, a victim in an irregular situation of residence, when seeking access to justice, faces requirements and restrictions to which other victims are not subjected. However, such a differentiation runs counter to the non-discrimination principle of Article 1 of the Victims' Directive, which states: 'The rights set out in this Directive shall apply to victims in a non-discriminatory manner, including with respect to their residence status.' Hence, there are tensions between, on the one hand, the Residence Permit Directive and the Employer Sanctions Directive and, on the other, the Victims' Directive.

The onus should be on the authorities to enable access to justice, not on the victims to strive to earn the right to be afforded effective access to justice. States have to guarantee that mechanisms are in place that make victims' access to justice a real and practical option, while leaving it entirely up to victims whether they want to make use of this option or not. Monitoring, law enforcement and prosecution bodies are obliged to investigate and prosecute with due diligence. This includes the obligation to act *ex officio* when there is suspicion of severe labour exploitation, regardless of whether or not the victims have reported the situation or support the authorities' intervention or of their ability or willingness to cooperate or testify. In the words of the ECtHR, 'the authorities must act of their own motion once the matter has come to their attention. They cannot leave it to the initiative of the individual either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures'.⁶¹

5.4. Availability of targeted victim support services

According to Article 8 of the Victims' Directive, victims have a right to access victim support services that are confidential, free of charge and act in the interest of the victims. Under Article 47 of the Charter this right must be open to judicial review. Article 9 of the Victims' Directive specifies that victim support services, as a minimum, must provide, among other things, information about the rights of victims, including advice on accessing national compensation schemes and on financial and practical issues arising from the crime.

The 2015 FRA report on *Victims of crime in the EU: the extent and nature of support for victims* – the first comprehensive assessment of victim support services throughout the EU – reveals differing approaches to victim support services across EU Member States, which

vary depending on the pace, perspectives, contexts and organisational models at work. One of the greatest challenges EU Member States face in their implementation of the Victims' Directive is the obligation to ensure that all victims have access to victim support services in accordance with their rights and needs. Evidence from that report shows that police and victim support services in most states have special measures in place to deal with at least certain categories of victims who may be irregular migrants, such as victims of trafficking. Only in 19 of 28 EU Member States, however, is support available to victims of crime irrespective of their nationality, country of origin or legal status.⁶²

In general, respondents from various countries interviewed as part of the field research differed vastly in their assessment of victim support services for victims of severe labour exploitation. Many confirmed that existing services exclude particular groups. In two thirds of the EU Member States in which fieldwork was carried out (Austria, Belgium, Croatia, Cyprus, Germany, Greece, Hungary, Ireland, Italy, Lithuania, Malta, Poland, Slovakia and Spain), experts view victim support services as lacking or ineffective in practice, with very few services dedicated to victims of labour exploitation specifically, and many services outright excluding them unless trafficking or violence is involved (as mentioned by five Austrian interviewees, for example). Another difficulty, raised by interviewees in Germany and Italy, is the lack of a comprehensive and systematic approach, meaning that, rather than coordinating their efforts, every organisation tries to cope with the local circumstances and workers usually do not know in what areas the various services specialise. A Finnish support services interviewee noted that it is not enough that people have the right to the services; they must also have the capability to use them. Thus, there should be more low-threshold services offered in a language that the victim can understand, and the information needs to be provided in a comprehensive way.

Even in those EU Member States where experts generally consider victim support to work well (such as in Portugal, the Netherlands and the United Kingdom), support services have focused on sexual exploitation and trafficking, and support for victims of severe labour exploitation is seen as an emerging area. Many interviewees in Belgium consider the three main victim support services (Pag-asa, Payoke and Surya) to be effective.

Lack of sufficient resources

Overall, resources are, according to respondents – including interviewees in France, Germany, Greece, Portugal, Slovakia and Spain – limited and services are not

61 ECtHR, *Gorgiev v. The Former Yugoslav Republic of Macedonia*, No. 26984/05, 19 April 2012, para. 64.

62 FRA (2015), p. 80.

adequately staffed. Additionally, funding of support services is sometimes project-based and therefore not sustainable, as shown in Greece and Slovakia:

"[The system of victim support] would work perfectly if organisations had sustainable funding. So, sometimes the project ends and it is 3-4 months until there is another call for project proposals, another public procurement, in which time organisations have no funding at all." (Representative of a victim support organisation, Slovakia)

Offering accommodation to victims of severe labour exploitation is often difficult, as highlighted by respondents in France, Germany and Poland. In addition, in some Member States, such as Italy and the United Kingdom, government support for these services has been severely reduced. NGOs fill this gap in public services and organise themselves to provide support to victims, in particular to migrants in an irregular situation, who are afraid to turn to public institutions:

"In fact, we favour irregular migrants, since in our opinion, they are regulars. It is the state that labelled them as irregulars, with reference to the residence permit." (Representative of a victim support organisation, Italy)

Research shows that few support providers and lawyers have specialised in providing support to workers who have moved within or into the EU as victims of labour exploitation. Organisations that focus on the application of labour standards, such as trade unions or labour inspectorates, often deal generally or exclusively with less severe cases of labour exploitation or focus on cases of exploitation of nationals and members of a trade union.

Focus on victims of trafficking

In addition to the lack of comprehensive support service systems for victims of severe forms of labour exploitation, some existing services exclude particular groups. Institutional bodies that work on trafficking in human beings often focus exclusively on cases that are investigated and prosecuted as such. Therefore the help they provide is not accessible to victims of severe labour exploitation unless the case also comes under trafficking, as can be observed for instance in Bulgaria, the Netherlands and the United Kingdom. For example, in Bulgaria the legal framework concerning social assistance or access to support services for victims of trafficking in human beings does often not allow bodies to include cases of severe labour exploitation.

In the United Kingdom, the National Referral Mechanism is accessible only to victims who are confirmed as being victims of trafficking in human beings. Similarly, in the Netherlands respondents perceived support for EU nationals as more difficult to achieve than support

for migrants in an irregular situation, since the legal framework dealing with access to support for victims of trafficking in human beings 'is not always automatically applied to victims from the EU' (representative of victim support service, the Netherlands). On the other hand, experts from Hungary reported that support services might exclude third-country nationals.

FRA SELECTED CASE STUDY

Inequalities in access to justice

A third-country national of eastern European origin came to Belgium in 2013 to work in construction. He was in an irregular situation of residence and had to endure poor working conditions such as long hours and significant underpayment. With little knowledge of the local language or Belgian institutions, he refrained from reporting his employer for fear of losing his job and his income, and getting into trouble with the authorities because of his irregular status. Social workers were aware of his situation, but for reasons of confidentiality they did not report to the police without his consent. In Belgium, however, victim support is available only to recognised victims of trafficking in human beings who assist the investigation.

5.5. Compensation and back-payments

The case studies collected show that, as a result of limited prosecutions, offenders face a rather low risk of having to compensate exploited workers who have moved within or into the EU. In one case involving Romanian workers in Cyprus, for example, proceedings took two years to start. Following the start of proceedings, it might take another four to five years to reach a judgment, as described by respondents in Greece. Furthermore, even if a judgment does order compensation, it is not guaranteed that the victim will receive it. A Bulgarian man exploited in the Czech Republic was not able to enforce the compensation order granted in his favour, as the exploiter's business closed down. Similarly, in a case in Germany, Hungarian men exploited in the construction sector did not receive compensation because the company declared bankruptcy. A court in Ireland ruled in favour of an exploited woman from Zimbabwe, but her employer simply refused to pay the compensation awarded.

Respondents stressed that effective access to compensation will depend on:

- the quality of the investigation by the authorities;
- adequate characterisation of the offences;
- for the victims, support from a lawyer.

Claiming compensation and back pay within criminal proceedings

Compensation claims attached to criminal proceedings are still rare and, where they are submitted, they are often transferred to civil courts.

“The usual practice of judges at Slovak criminal courts – even if the court proves beyond reasonable doubt the causality between the crime and the damage as well as the amount of the damage, which the Code of Criminal Procedure explicitly stipulates as hard-and-fast conditions for allowing the court to decide on indemnification along with the sentence verdict – is to refer the indemnification claim to a separate proceeding. [...] In other words, the valid law provides for this possibility, but the application practice diverges from it and [judges tend to leave these matters] up to civil courts.” (Lawyer, Slovakia)

FRA PUBLICATION

Compensation in the case of unjustified dismissal

In the case of dismissal, effective steps should be taken to remove any practical obstacles that prevent migrants in an irregular situation from claiming compensation or severance pay from their employers, when these are foreseen for migrants in a regular situation.

For further information, see: FRA (2011), Migrants in an irregular situation in domestic work: fundamental rights challenges in for the European Union and its Member States, Luxembourg, Publications Office, p. 9

However, as was pointed out by experts from France and Belgium, compared with being awarded damages or back payments as a result of criminal proceedings, claiming compensation in the civil justice system is often (even) more burdensome for the victim. Preparing a civil claim requires assistance from a specialised lawyer, and legal aid for civil proceedings is rarely available or not accessible to workers who have moved within or into the EU.

Some countries, like the Netherlands, have adopted an active policy in criminal proceedings of contacting victims of any type of crime, informing them about the possibility of filing a compensation claim and providing assistance in doing so. Importantly, if a claim is awarded, the state is responsible for collecting the compensation money via the Central Judicial Collection Agency, and where it does not succeed, it needs to advance the money to the victim within eight months of the judgment.

“It is an interesting development that some relatively high compensation claims have been paid out to victims. In that sense, we are trying to use the criminal law to achieve some kind of redress.” (Judge or prosecutor, the Netherlands)

In Austria, the Provincial Chambers of Labour supports victims of labour exploitation in filing their civil law claims, particularly for back payment of denied wages and payment for denied social security contributions. Some of the chambers, for example, the Styrian Chamber of Labour, have, however, denied legal representation in cases of irregular work – without a work permit or written agreement – citing evidential challenges as reasons.

Facilitation of claims of back pay and their enforcement

Desk research and expert interviews have shown that some countries have mechanisms in place which are intended to facilitate the payment of compensation. These include compensation orders under the law of the United Kingdom and payment orders in Greece. The payment order is a specific form of enforcement in cases of delayed payment of salaries, intended to allow easy access to court and remedies by requesting that the employer pay the wages due. However, only workers with a regular immigration status and contract are entitled to apply for this procedure, which limits its value for the most vulnerable third-country national workers, that is, those in an irregular situation. It does not solve the issue of solvency of the offender, either, as payment is dependent on the availability of assets. Furthermore, whether this procedure has benefited exploited workers is unclear.

Desk research revealed that in 12 EU Member States public authorities with powers of inspection are in some way or other tasked with supporting workers in a manner that can also benefit victims of severe labour exploitation.⁶³ In five EU Member States – the Czech Republic, France, Poland, Portugal and Slovakia – such authorities can oblige the exploiter to pay remuneration due. This is to be considered a promising practice.

The French Office for Immigration and Integration (OFII) is responsible for the recovery and transfer of wages owed to third-country nationals in an irregular situation by employers. Where the employer does not pay wages voluntarily within a 30-day period following the documentation of the offence, the recovery can be enforced. For workers who have already returned to their country of origin, the payment system will be organised through the relevant French consulates. At the time of the data collection for the research, some wages had been recovered, and four cases were pending; however, statistics indicated that in 2013 not a single request for back pay of wages had been received.

⁶³ For an overview, see Annex IV, available online at: <http://fra.europa.eu/en/publication/2015/severe-labour-exploitation>.

Promising practice

Enhancing cooperation between international and national partners to counter trafficking for labour exploitation in Europe

The Finetune project, which the European Commission subsidises, aims to enhance cooperation between international partners (specifically ITUC, CCME and Anti-Slavery International) and national partners (trade unions, faith-based organisations and NGOs) to contribute to the response to combatting trafficking for labour exploitation in eight EU Member States – Austria (Lefö), Czech Republic (La Strada), Finland (Service Union United PAM), Ireland (Migrants Rights Centre Ireland), Lithuania (Caritas), Romania (AIDrom) and Spain (Unión General de Trabajadores UGT). Overall, the project seeks to feed into practitioners' knowledge, as well as the wider debate that addresses non-specialised actors and the EU policy debate (for example the process of transposition and implementation of the Anti-Trafficking Directive and other EU instruments).

A report published in December 2014 presents a variety of cases from selected EU Member States to assess the effectiveness of anti-trafficking measures in tackling situations where large numbers of workers might have been exploited. It further explores alternative ways that may be applied to achieve redress for workers, such as group claims taken on behalf of larger groups of workers. The report provides examples of potential solutions and approaches.

For more information, see: www.ituc-csi.org/fine-tune-report-on-labour?lang=en

The enforcement of court decisions, in particular compensation claims, is dependent on securing the assets of the perpetrator:

"[I]t's important for a victim that the prosecutor or the police [...] take actions to secure the property of the perpetrator to enable the enforcement [of compensation]. Because a court's decision itself, when we can't enforce it, it isn't of much use. And the enforcement can't be done without property. Of course, he [the perpetrator] has got assets but smartly hidden." (Judge or prosecutor, Poland)

"It's not a standard in Poland that, say, we have a construction site, the employer flees, leaves somewhere [...] the machines, and the police, upon the prosecutor's motion, seizes the machines to later sell them in the market and, upon the court's order, pay [the money to] the victims. This is an abstraction. [...] We still have a lot to do here when it comes to changes in mentality among prosecutors and judges." (Representative of police or law enforcement body, Poland)

Some Member States have introduced provisions aiming to ensure that workers receive any back payments due even after they have left – or had to leave – the country. In Belgium, if the postal address and bank details of the employee are unknown, the employer must transfer the outstanding remuneration to the deposit and consignment account (*Deposito- en Consignatiekas/Caisse des Dépôts et Consignations*),⁶⁴ where it remains available for 30 years. In Greece, an amount recovered as back payment is deposited in the Deposits and Loans Fund in favour of the beneficiary. Shipping costs may be recovered from the employer in any legal way.

The research shows that the burden of proof is a key obstacle for victims who decide to pursue compensation. Respondents support a further lifting of this burden of proof for all victims of labour exploitation.

"It is an idea which has been developed in our association, namely a presumption of [a] three-month employment relationship that would apply to all foreigners, or both foreigners and Polish citizens, who work illegally. This is taken from the [Employer Sanctions] Directive, of course. Our concept is to extend it not only to persons who stay in Poland unlawfully, without any residence permit. More pressing are problems of people who admittedly stay in Poland legally, but work illegally." (Lawyer, Poland)

State compensation funds

While the prospects of an offender being effectively made to compensate an exploited worker and pay outstanding wages are often not promising, state compensation funds are in general not available to victims of non-violent crime. Many of the case studies highlight the difficulties victims encounter in claiming compensation from offenders, for instance when the company that employed them goes into liquidation. This underlines the importance of state compensation funds in cases of severe labour exploitation.

64 Belgium, Article 11 of the Law of 11 February 2013 on sanctions and measures for employers of illegally residing nationals of third countries, entered into force on 4 March 2013, Government Gazette 22 February 2013, inserted in the Law of 12 April 1965 on the protection of employee remuneration (*Wet betreffende de bescherming van het loon der werknemers/Loi concernant la protection de la rémunération des travailleurs*), entered into force on 1 August 1965, Government Gazette 30 April 1965.

FRA SELECTED CASE STUDY

Exploiters evade financial penalties

A group of 21 Hungarian individuals worked for a construction company to install ventilating and heating systems at the Berlin airport. They were promised free accommodation and food but this accommodation was substandard, as they lived in old barracks outside Berlin, had to share rooms and had to pay for showers and transport costs from the barracks to the construction site. The victims worked for several months for the company without remuneration, but when they asserted a claim to back pay, the company filed for bankruptcy. Having lost this work and the possibility of wages in the future, the victims sought support and were able to claim the cost of a return flight home for Christmas from the contractor. The victims also brought charges against the perpetrator to obtain unpaid wages and to transform the termination without notice into a proper notice of termination. Four victims who brought charges before the company filed for bankruptcy were successful and obtained their unpaid wages as insolvency payments. The remaining 17 victims did not receive payment for their work.

In addition, such funds are still often not accessible to victims with an irregular migration status. France has recently lifted the requirement of a regular migration status for eligibility to compensation under the state compensation fund administered by the Commission for the Compensation of Victims (CIVI). It remains to be seen how this will be applied and what impact it will have on exploited workers who have moved within or into the EU in terms of their access to state compensation in France.

5.6. Facilitation of complaints and the role of third parties

Respondents note the lack of and urgent need for *ex officio* investigations in relation to cases of labour exploitation. In many countries – Finland, Germany, Greece, Italy, Portugal and Slovakia – investigation and prosecution of severe forms of labour exploitation of workers who have moved within or into the EU does not seem to be in the interest of the state, and it is left to individual complainants to step forward and initiate proceedings. In addition, law enforcement and prosecutors often rely to a large extent on the victim presenting the evidence, instead of using all measures at their disposal to gather evidence. Prosecutors rarely play a role in ensuring that the victim is aware of their right to claim compensation, that injuries and damages caused to victims are documented during the investigation or that compensation is claimed. In some countries, the attitude of justice sector

officials towards ensuring victims' access to justice is seen as passive and disengaged.

"If they [prosecutors] take the statement and the prosecutor appends an ancillary claim to the indictment, then the thing is settled, so to say. Then it does not matter if the victim is in Poland or otherwise. Certain payment is awarded in the judgment." (Judge or prosecutor, Poland)

"We've never encountered a prosecutor who would include it [a civil claim] in the proceedings. It is done at the victim's request, and the victim usually doesn't have the slightest idea [...]." (National policy expert, the Netherlands)

Despite this reliance on victims' reports, workers who lodge complaints against their exploitative employers take significant risks in doing so. Their complaint often does not lead to an investigation, prosecution, conviction or punishment of the perpetrator, but rather to their own punishment and further impoverishment.

In a significant number of EU Member States – including Austria, Belgium, Bulgaria, Finland, France, Germany, Greece, Hungary and Poland – evidence supports the view that, for victims of labour exploitation, the conditions for accessing rights and justice are, at best, precarious. Workers who have moved within or into the EU face conditional or no access to victim support, legal assistance, representation or interpretation. They also encounter disbelief and distrust from the authorities regarding the truth and seriousness of their allegations. Furthermore, they risk being deported for their irregular status, being held liable for violations committed while they were being exploited and being threatened by the perpetrator. Those who find themselves in immigration detention or prison, are even more vulnerable to being left without effective access to assistance and remedies. Hence, victims rarely file complaints on their own.

Overall, research findings revealed a lack of competent partners who could be easily addressed and would be responsive to victims, their rights and their needs. Many respondents across countries and professional groups had little experience of exploited workers who had moved within or into the EU seeking to access justice. This is compounded by a lack of knowledge among stakeholders about the entitlements and rights of exploited workers, in particular those in an irregular situation or without written labour contracts, as expressed by experts in France, Italy, the Netherlands and the United Kingdom.

From expert interviews conducted and case studies identified in Bulgaria, Cyprus, Greece, Italy, Lithuania, Slovakia and the United Kingdom, it appears that, in trying to access support services and justice, workers often face a lack of sensitivity on the part of authorities. Case studies indicate instances of victims being detained for immigration control reasons, of victims not reporting out of fear and distrust, and of authorities failing to

identify a situation of exploitation and assist the victim. Experts reported that prejudice and insensitive treatment ranges from patronising victims to discriminatory attitudes, which perpetuate negative stereotypes and can result in victims being denied assistance and justice. Authorities need to establish trust and provide a sense of safety, security and protection for exploited workers who have moved within or into the EU.

The lack of proactive intervention on the part of authorities tasked with monitoring or law enforcement, on the one hand, and victims' lack of motivation to report and the difficulties they encounter in reporting, on the other, point to the important role that third parties could perform as interveners. Hence Article 13 of the Employer Sanctions Directive obliges Member States to ensure that there are effective mechanisms in place allowing third-country nationals to lodge complaints 'directly or through third parties designated by Member States such as trade unions or other associations of a competent authority of the Member State when provided for by national legislation'.

Private or public organisations acting in support of or on behalf of victims can have an important function. Some countries, such as Austria and Belgium, have introduced anti-discrimination mechanisms in cases of labour exploitation of workers who have moved within or into the EU. For example, the Federal Migration Centre (formerly the Centre for Equal Opportunities and Opposition to Racism) in Belgium is a state institution with legal standing that can proactively search for cases, file complaints and act as a civil party to proceedings if they believe that the case involves racism or other discrimination. In Austria, Greece and Ireland, trade unions are becoming more actively involved in outreach and assistance to workers who have moved within or into the EU, and are teaming up with civil society organisations to campaign for the rights of workers, including those without work authorisation.

However, evidence from the research showed that, overall, third-party interventions and collective claims are either not allowed by law or, where possible, rarely used in cases of labour exploitation.

Desk research conducted in all 28 Member States revealed that in at least half of the Member States – Austria, Belgium, Cyprus, Finland, France, Germany, Hungary, Lithuania, Luxembourg, Poland, Portugal, Slovakia, Spain and Sweden – trade unions are entitled to lodge complaints on behalf of victims. In addition, labour inspectorates or similar monitoring authorities in more than 10 Member States can support or even act on behalf of workers in proceedings (the Czech Republic, Estonia, France, Latvia, Lithuania, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia and Spain). In about a quarter of Member States, interested private

parties, including NGOs, can intervene on behalf of victims (Bulgaria, the Czech Republic, France, Poland, Portugal, Slovakia and Spain).

FRA PUBLICATION

Access to justice

Access to justice is a crucial right, since the enforcement of all other fundamental rights hinges upon it in the event of a breach. Practical obstacles to accessing justice, such as reporting duties that may reveal a victim's identity and/or whereabouts, should be removed. Building on the Employer Sanctions Directive, effective mechanisms should allow third-country nationals in an irregular situation to lodge complaints against abusive employers. Trade unions, equality bodies and NGOs play a vital role in making justice mechanisms more accessible; they should, therefore, be given support to undertake legal proceedings against employers on behalf of migrants.

For further information, see: FRA (2011), Migrants in an irregular situation in domestic work: fundamental rights challenges in for the European Union and its Member States, Luxembourg, Publications Office, p. 9

In practice, only in rare cases have trade unions or other organisations, such as anti-racism NGOs, lodged cases when they could establish a relevant social background and collective impact. In a few countries, labour authorities can investigate and prosecute or otherwise pursue compensation from exploitative employers. Cyprus recently introduced a measure that allows the Department of Labour to file court cases on its own initiative, rather than having to file them through the police. How this new authority will be used and what its impact will be in the context of labour exploitation of workers who have moved within or into the EU remains to be seen.

Promising practice

Helping undocumented migrants to exercise their rights

The Swedish Trade Union Centre for Undocumented Migrants was created in 2008 by a number of Swedish trade union organisations, together with an organisation promoting the rights of undocumented migrants. The objectives of the centre are to inform undocumented migrants about their rights in the labour market and represent them *vis-à-vis* their employers in any proceedings if they so wish.

For more information, see: Solidar (2014), Undocumented migrants: equal access to labour and social rights?

The involvement of third-party interveners could also be used as a means to allow courts to more effectively handle cases with many victims, for example by tasking the intervening NGO with informing and updating victims on the progress of proceedings or with preparing joint statements or applications of victims in the proceedings.

In some countries, there are few if any stakeholders dealing with cases of labour exploitation of workers who have moved within or into the EU. This does not mean that new institutions or organisations must be created. What needs to be ensured is that the existing structures – public authorities, trade unions, lawyers, civil society organisations – expand their mandate, scope or practice to include interventions as third parties on behalf of victims enabling them to bridge the gap between exploited workers and justice.

Promising practice

Researching the role of labour market intermediaries in labour exploitation

In line with the EU Strategy towards the eradication of trafficking in human beings 2012–2016 (European Commission, 2012), Eurofound coordinated an EU-wide research into the role of public authorities and social partners in helping to ensure that labour market intermediaries (LMIs) prevent, refrain from and support tackling trafficking for labour exploitation. The comparative report, which will be published in 2015, aims to map the current situation in the different EU Member States regarding the regulation of LMIs and to identify social partner initiatives and best practices aiming to prevent trafficking for labour exploitation. The report will examine the relationship between LMIs and trafficking for labour exploitation; explain relevant EU, national and international regulations and definitions; and present practical examples to illustrate what can be done to effectively prevent and combat labour exploitation.

For more information, see: European Commission (2012), The EU Strategy towards the eradication of trafficking in human beings 2012–2016, Brussels, and forthcoming Eurofound publication

5.7. Role of the police

Focus on immigration control

Across the EU, police and border authorities are under pressure to reduce irregular migration and return third-country nationals in an irregular situation. These objectives may conflict with obligations to acknowledge victims and their rights. At present, officials face contradictory tasks and expectations and are not always provided with the guidance they need. As one police expert described the situation:

“[The] agent is torn between a law saying that [the] irregular migrant has to be prosecuted as such, and another law that protects the very same migrant as [a] victim of more serious crimes.” (Representative of police or law enforcement body, Italy)

The majority of respondents across countries reported that irregular migrants found in situations of severe exploitation would be seen as ‘illegal workers’ first and not treated as victims of crime.

“Unfortunately the police would mainly see migrant workers as illegally staying in the country. In the first stage migrants would be arrested for that. Of course, police would also arrest the perpetrators and bring them to justice. As for the migrants [...] we would examine that. But only after the case would go to the prosecutor.” (Representative of police or law enforcement body, Greece)

One explanation for this is that the irregular status of a migrant is often immediately evident, whereas the status of a victim of severe labour exploitation has to be identified through investigation. For law enforcement, inspections and investigations are often based on intelligence, surveillance and informers, frequently with the specific aim of exposing trafficking, but not labour exploitation in general terms. If police are not familiar with or trained in policing severe labour exploitation, they are unlikely to detect such victims. Instead, steps will be taken to detain and expel the victim, as an irregular migrant, from the country. A Belgian expert stated:

“There’s never a word mentioned about exploitation of labour. It’s all about catching illegal migrants and deporting them.” (Judge or prosecutor, Belgium)

Acknowledging victims’ rights

Encouraging complaints against exploitative employers and outreach to victims could play an important role in strategies to improve the detection of labour exploitation. According to experts, for example from France and Poland, cases of labour exploitation are less likely to be detected as a result of proactive investigations and more likely to come to light through victim complaints. Evidence – including findings from Belgium, France and Slovakia – also indicates that victims are more likely to approach providers of victim support or social services than to contact the police for assistance in some countries, and that victims are reluctant to cooperate during inspections when the police are present, which can undermine inspection efforts.

Even when victims do report to the authorities, they might still not be treated as victims. In a case in Italy involving the exploitation of migrants from Ghana in agricultural work, the victims were encouraged to lodge complaints after political activists took an interest in their situation. As a result of their reporting the exploitation, they were detained for expulsion. Once in detention, it is unlikely that a victim will be identified, although there were some positive examples of identification in detention, for instance in the Netherlands and France. In Malta, it was reported that employers denounce their third-country national workers to the

police, having not paid them for months, to ensure their deportation and avoid payments.

One alternative view of police action was also offered. Some respondents found that the police would do nothing on the detection of victims of labour exploitation because they condone the exploitation of workers who have moved within or into the EU:

"[The police would do] none of these. Neither the one nor the other. At least from what I have in mind, especially in Manolada, [the] police didn't do any of these. [They] would tell them continue to work and don't create any trouble." (Representative of a victim support organisation, Greece)

Respondents in some countries also highlighted the lack of resources and training that prevents police from conducting effective investigations, or the simple indifference of the police:

"The police don't show any interest, they don't carry out any inspections, don't look for witnesses, don't show up in a crime place in order to investigate the violation of labour rights reported." (Lawyer, Greece)

Another weakness of investigations, highlighted by experts from Belgium, Germany and Italy in interviews, is that cases centre on the testimony of victims and witnesses. This presents risks, as victims and witnesses may withdraw their evidence or have to leave the country before the court case. Police and public prosecutors may also be discouraged from investing

time and resources in the fight against severe labour exploitation because they believe success to be unlikely. This in turn may result in impunity for and encourage perpetrators:

"These are lengthy, exhausting investigations which require strong coordination among police, carabinieri, labour inspectors. [There is] [l]ittle chance of success in trial as victims get expelled and who knows where they will be when trial finally starts. Why should a public prosecutor invest in something like that?" (Lawyer, Italy)

Need for specialist police units dealing with all forms of labour exploitation

As experts from Italy, Slovakia and the United Kingdom pointed out, because of the focus of prosecutors on trafficking, labour exploitation is unlikely to trigger a response without clear indicators of trafficking, the assessment of which may differ from country to country, requiring for instance the involvement of organised crime, seizure of passports or evidence of physical harm. In many countries trafficking expertise is still focused in practice on detecting trafficking for sexual exploitation only, so labour trafficking may remain undetected even by specialist trafficking units.

Experts believed that specialist police units, trained and experienced in countering labour trafficking and severe labour exploitation, would most likely also respond in a more sensitive manner to irregular migrants in situations of severe exploitation.

Promising practice

Creating specialised trafficking/labour exploitation police units in Belgium

In Belgium, specialised police units are tasked with conducting investigations and cooperating with other institutions in cases of labour exploitation. Becoming ever more common within the police, these specialised units also facilitate cooperation with inspection bodies.

Police officers who work as part of specialised units – in addition to persons from inspection bodies – are trained in labour protocols and are more likely to accurately identify cases of exploitation (according to a representative of a monitoring body in Belgium). Ultimately, the success of such cooperation will depend on the level of communication and coordination between the police and prosecution and inspection bodies, which varies across regions (one lawyer mentioned that cases in large cities are handled faster and more effectively).

As an example of how one such specialised unit operates, one expert described how officers accompany the inspection body to a scene of suspected severe labour exploitation or follow up directly on leads they receive from labour inspectors or through other informants. They conduct their own research and publish reports showing current trends and advising on problem areas. Crucially, they also work closely with victim support organisations and frequently also bring someone from a support organisation to the site to talk to workers they suspect are being exploited. They also cooperate with Europol in their work to combat labour exploitation.

They carry out most of their inspections proactively – conducting monthly inspections of high risk sectors, led by the auditor or public prosecutor – and in collaboration with many other organisations, including victim support organisations and labour and social inspectorates. So-called non-risk and new sectors are also regularly investigated in an attempt to identify possible new risk factors. They work with checklists and encourage officers to learn and cite labour law infractions, and they try to inform migrants about their rights where they can – using booklets in many different languages, for example.

5.8. Police referring victims to support services

As emphasised by FRA in its 2015 report *Victims of crime in the EU: the extent and nature of support for victims*, a well-functioning police referral mechanism to victim support services is a cornerstone of any effective support system. In general, despite differing models and systems of referral across Member States, FRA evidence highlights as positive the fact that information is provided to victims even in those EU Member States where no legal basis for referrals currently exists.⁶⁵ However, evidence from FRA's research into severe labour exploitation of workers who have moved within or into the EU shows that referral mechanisms are often not in place for victims of labour trafficking, and even less so when it comes to other forms of severe labour exploitation. As a result, identification and recognition of victims of severe labour exploitation is not systematic in, for example, Germany, Italy and Slovakia. Many countries do not have a specific instrument such as a national action plan, a referral mechanism or a formal victim support service geared towards victims of severe labour exploitation not involving trafficking. Furthermore, national referral mechanisms and support services established so far are often only accessible to victims of trafficking. Victims of severe labour exploitation are excluded. In Germany, for example, compared with the situation regarding trafficking for sexual exploitation, the support and referral of victims of severe labour exploitation is rare:

"I've never heard of people being exploited and then being referred to a support organisation by the police. If they seek a support organisation it's either of their own accord or not at all. In this one case that I had, the hairdresser, towards the beginning of her statement, she implied that prostitution was involved as well. [...] Yes, her statement included both matters. [...] And that's what got her onto the witness protection programme for victims of human trafficking." (Lawyer, Germany)

Respondents in Slovakia and Hungary stressed that limited efforts and a lack on the part of awareness of law enforcement leads to low numbers of identified victims and referrals to victim support services. As a result, referrals of victims of severe forms of labour exploitation to NGOs offering support are rare – for example in France – or do not take place at all, as in Bulgaria.

"Our only way to see them is through the government and they have never referred one to us." (Representative of a victim support organisation, Bulgaria)

At the same time, referral mechanisms are weak as a result of limited mandates. In Spain, for instance, labour inspectorates have no competence to refer victims to

support services. Moreover, limited resources often present challenges – for instance in Germany, Poland, Portugal and Spain – for the provision of accommodation, especially in cases involving numerous victims, but also as concerns male victims of labour exploitation. This reflects the more general aspect that male victims – in terms of how they are viewed by themselves as well as by others – do not fit easily into the preconceived stereotype of the passive victim in need of help.

If a person is identified as a potential victim, the police will try to relocate the victim to somewhere safe, often through referral to support services and will, if feasible, detain the perpetrator. Respondents in some countries – including France, Germany and Slovakia – reported problems with finding accommodation for workers suspected of being exploited. For example, in Germany, although support services distribute information leaflets and provide training on the support available, police are not well informed about support services. An important step needed to ensure the provision of assistance to victims is the issuing of temporary residence permits to workers in an irregular situation, following transposition of the Employer Sanctions Directive. These permits may currently be available to victims of trafficking and to victims of exploitation who are willing to cooperate with the authorities. However, police and other institutional professionals interviewed made few references to temporary residence permits. In Italy, the police resort to the protection offered under Article 18 of its Legislative Decree No. 286/98, which offers a permit for special humanitarian reasons, in particular to victims of trafficking for sexual exploitation. Some authorities do not realise that they have a responsibility to support victims. Also in Italy, some respondents considered that protection of a victim is only an indirect effect of activities carried out by the police, such as arrest of the employer or closure of the business, and does not constitute a separate obligation.

5.9. Prosecution and sanctions

Interviewees suggested several possible reasons for the low risk of prosecution faced by exploiters, which is emphasised in the context of risk factors. In Poland, for example, the dependence on statements of victims and witness testimony is seen as a major obstacle when victims are no longer in the country during the court proceedings. In Slovakia only natural persons – and not legal persons – can be held criminally responsible, which prevents action against companies. Diplomatic immunity can bar prosecution in cases of exploitation in diplomatic households. Difficulties in identifying a perpetrator can also cause problems in pursuing a prosecution. As reported in Ireland, Italy and Spain, in some

65 FRA (2015), p. 54.

sectors businesses close and reopen under different names or declare bankruptcy to avoid paying wages or compensation.

Focus on trafficking

The expert interviews suggest that prosecution often focuses on trafficking and that, when this strategy fails, no appropriate second line of defence of the victim's rights is pursued or available to respond to severe labour exploitation. If what remains is a case only of smuggling or illegal employment, then the person is not acknowledged as a victim, is not offered access to justice and is unable to receive compensation and back pay in criminal proceedings. As a result, many experts considered that the sanctions imposed by courts are inadequate, sometimes as a result of convictions for only minor offences. Often, suspended prison sentences are handed down, or fines are imposed. Experts consider these punishments inadequate deterrents.

FRA SELECTED CASE STUDY

Lack of effective prosecution

A Chinese agency and a Lithuanian partner agency recruited about 150 men in 2008, demanding a hefty 'mediation fee' (about €10,000 or more per worker). These men were initially recruited for work in the construction sector and the victims' work permits were issued for that sector, but after arrival in Lithuania they were required to work in completely different occupations, such as in pig and poultry farms. They were accommodated in poor conditions, with eight people per room and no proper hygiene facilities; and, contrary to what was promised, no interpreter was available to them (the victims spoke only Chinese). A pre-trial criminal investigation for trafficking in human beings was opened in Lithuania but terminated for lack of evidence. The case resulted in administrative fines for the companies, for having employed migrants in work sectors other than those their permits allowed.

While the research finds that criminal proceedings are mainly brought in relation to cases of trafficking for labour exploitation, few of these cases result in effective prosecution or conviction of the offender and compensation made to victims. The focus on labour trafficking – and the reluctance to pursue a 'fall-back position' if a case of labour trafficking cannot be achieved – should be viewed in light of the sobering number of prosecutions for labour trafficking. The latest statistics published by Eurostat reveal that in Germany in 2012, 162 persons were prosecuted for trafficking, of which only 10 % faced prosecution for labour exploitation. The equivalent figure for France, the UK and

Italy (in 2011) was 0 %.⁶⁶ While discussions about and police responses to trafficking are high on the agenda at Member State and EU level, the evidence of the field-work and case law indicates that prosecution for labour exploitation is not common.

"Look at the statistics. There are little or no prosecutions against employers who have been exploiting their migrant workers, and it's nearly always migrant workers that are the ones who are being exploited." (Representative of a victim support organisation, Ireland)

Challenges faced in dealing with criminal networks

An expert from Spain highlighted the difficulties involved in tackling international criminal networks responsible for exploiting numerous foreign workers.

"The justice system is not ready to take on these enormous cases. Justice is not ready for cases linked to organised crime." (Focus group discussion: Representative of a police or law enforcement body, Spain)

Judicial respondents in Italy reported that prosecuting the leaders of criminal organisations was worthwhile but that the statistically more frequent illegal gangmaster (*caporalato*) prosecutions were not useful in eliminating the phenomenon as a whole.

Many respondents pointed to the fact that proceedings take too long and that not only have victims and witnesses disappeared or been deported by the time cases come to court, offenders have moved their assets. There are also difficulties in prosecuting foreign offenders, or if a recruitment agency is located abroad.

Insufficient penalties

Even where proceedings succeed, interviewees consider that the penalties imposed on employers are sometimes inadequate. Fines for employers who exploit foreign workers are thought to be too low in, for example, Austria, Belgium, the Czech Republic, Lithuania and the United Kingdom.

For instance, in the United Kingdom the fines levied, compared with the profits employers gain from exploitation, represent little deterrent.

"[T]here were some cases recently of recruitment agencies withholding wages, not paying people properly and so on, and they got something like a thousand pound fine for it. It doesn't exactly send a clear message that this is important, that they're going to be properly punished for doing these things." (National policy expert, United Kingdom)

⁶⁶ Eurostat (2014), p. 120.

5.10. Conclusions

■ Many complexities revealed by the field research concern the question of how criminal investigations are initiated in cases of severe labour exploitation. The present situation can therefore be seen as shaped mainly by three issues:

1. workplace inspections fail to identify a relevant number of cases of severe labour exploitation of workers who have moved within or into the EU that could be reported to the police;
2. the police rarely proactively intervene to identify cases of severe labour exploitation of workers who have moved within or into the EU;
3. victims are reluctant to take the initiative, because of their fears about losing their job and, in irregular situations of residence, having to leave the country. At the same time, there are only very scarce measures aiming to enable and encourage victims of severe labour exploitation to come forward and report to inspectors or directly to the police.

These three factors together lead to a situation of endemic impunity for those who perpetrate severe labour exploitation. The result is a climate in which labour exploitation is condoned and likely to prosper and, over time, to undermine labour standards for all workers across the EU, in the economic sectors currently affected and beyond. As things stand, exploiters face a fairly limited risk of prosecution, and exploited workers have little reason to believe that the authorities will afford them the protection they are entitled to. This adds to their hesitance to report their situation and to their distrust of the authorities.

This situation has to be assessed and challenged in the light of the right of victims of severe labour exploitation to effective investigations that are capable of leading to the identification and punishment of offenders. A situation of endemic impunity of exploiters is a situation of systemic violation of victims' right to have access to justice. In other words, offenders' low risk of being prosecuted comes with only limited prospects for victims of seeing exploiters convicted and punished and of receiving back payments.

■ While trafficking in people has recently attracted more attention, this is not the case as concerns the severe exploitation of workers who have moved within or into the EU in employment relationships. This difference in attention is reflected in an institutional setting where specialised actors are available to deal with trafficking cases but not cases of severe labour exploitation. This situation suggests that options should be considered to extend the legal and organisational framework that has been created

to tackle trafficking to all forms of severe labour exploitation of workers who have moved within or into the EU.

Police generally tend to treat severely exploited third-country nationals in an irregular situation as 'illegal' workers first, rather than as victims of crime. Irregular status is immediately verifiable, and police and immigration authorities are under pressure to reduce immigration. Often, this results in the detention and expulsion of victims of crime, without any protection of their rights. In addition, interviewed experts stressed that investigations into criminal forms of labour exploitation are difficult and unpredictable. As a consequence, cases of severe labour exploitation are frequently presented as lesser offences, such as fraud or work discrimination. This too leads to a lack of justice for victims and inadequate sanctions against the perpetrators of crime.

What is suggested to remedy the situation is specialist police units, which are more likely to identify and assist victims. Efforts – for instance in Belgium, the Netherlands and Spain – to enhance the capacity of the police to identify and investigate cases of severe labour exploitation – beyond trafficking – are important examples of promising practices pointing the way ahead.

■ Investigations and prosecution face particular challenges when a plurality of actors are involved in the exploitation. Severe labour exploitation is often not just a matter between an employer and workers; it may occur within networks, for instance when labour brokerage, the posting of workers or subcontracting is involved. When investigating in cases involving several actors and EU Member States, the structures established to tackle organised crime groups operating transnationally should be employed also in cases of severe labour exploitation that do not qualify as trafficking. To date, such structures are available in most EU Member States in trafficking cases, but they should be extended to deal with all other forms of severe labour exploitation.

Overall, more effective interventions in cross-border situations of severe labour exploitation would require enhanced cross-border cooperation. EU agencies, and in particular Europol, Eurojust and EUOSHA, are in a position to significantly contribute in this respect.

■ Some experts voiced the opinion that the sanctions imposed on perpetrators, both natural and legal persons, are not sufficient deterrents to reflect the severity of the rights violations concerned. These views are corroborated by the findings from the desk research. In some instances, penalties are not



appropriate to the seriousness of the violation of the victim's rights. More often, legislation threatening sanctions for companies as legal persons is insufficient. In particular, it was found that the penalties imposed in practice on employers under criminal law provisions relating to Article 9 of the Employer Sanctions Directive and addressing exploitative working conditions within employment relationships are not likely to dissuade employers from offending, especially in light of the economic interests at stake. Thus, the effectiveness of the Employer Sanctions Directive in practice could be further explored.

- A crucial means of tackling the lack of investigations is encouraging victims of severe labour exploitation to report to the police. What the field research reveals is that workers who have moved within or into the EU and who have been subjected to severe forms of labour exploitation rarely, in practice, have access to victim support or effective remedies, because of a lack of awareness on the part of the victims of their rights to have access to affordable legal assistance and representation, to regular residence status and to legal security – in the case of third-country nationals – and, more generally, because of victims' lack of awareness of access to justice as a viable alternative to the situation of exploitation. Criminal justice practitioners should be seen to be trying to ensure access to justice also to workers who have moved within or into the EU, regardless of their residence status.

Getting more victims to report their exploitation to the police can be achieved only by making an attractive and sufficiently comprehensive offer to victims of labour exploitation, an offer which takes their real situation and interests into account. Above all, this would have to allow victims to stay in the country for a certain period and to look for regular employment. Given that most victims of severe labour exploitation who have moved within or into the EU were driven to do so by situations of poverty and economic interests, they will naturally meet with resistance any intervention that jeopardises their employment situation without offering a viable alternative. According to the views expressed by experts in interviews and focus group discussions, important factors that have the potential to lead to more reporting are:

- the availability of regularisation of the victim's residence status (in the case of third-country nationals in an irregular situation);
- the provision to victims of information about their rights;
- the availability of targeted support services and legal aid;
- the accessibility of damages and back payments from employers;

- facilitation of victims' access to justice by intervening associations acting in support or on behalf of victims, in particular where there are many victims in one case.
- The interviews showed that legal instruments which should protect victims of severe forms of labour exploitation from deportation are implemented to a limited extent only. Hence EU Member States should put in place effective mechanisms allowing victims of severe labour exploitation who are in an irregular situation of residence to obtain a residence permit that allows them to stay, to work and, on this basis, to pursue justice and effective remedies in the country where they have been exploited. As victims have a right to protection against further victimisation and to be provided with practicable access to justice, such a residence permit should not be premised on the victim's cooperation with the police.
- Experts highlighted as a risk factor victims' low level of knowledge of their rights in the country where they are exploited. Hence measures aimed at improving rights awareness – such as the initiatives taken in Austria, Germany and Ireland (see [Section 3.2.](#)) – are important examples of promising practices.
- EU Member States need to ensure that all workers who have moved within or into the EU, including migrants in an irregular situation, have effective access to rights protection, legal assistance and representation. To this end, EU Member States could review and strengthen their national systems for free legal aid and other state-funded or -supported legal assistance programmes providing free legal assistance and representation.
- To date, support for victims of labour exploitation has been piecemeal and not well institutionalised. This leads to numerous consequences such as limited resources for the support of victims of labour exploitation, including limited staff. NGOs have to fill the gap in public services without being adequately funded. Support services often exclude certain groups, in particular migrants in an irregular situation. Not all victim support systems that are accessible to victims of trafficking are also available to victims of severe labour exploitation. In some Member States, access to support services is particularly difficult for victims who are EU citizens exploited in an EU Member State other than their country of nationality.
- As concerns the civil law-based rights of victims of severe labour exploitation to compensation and back pay, EU Member States could build on existing

practices and explore ways to facilitate victims' access to justice, including by:

- encouraging criminal courts to deal with and decide on civil law claims of victims;
- enhancing mechanisms for class action and third-party intervention;
- enhancing the mandates and capacities of state authorities to claim or order compensation on behalf of a victim or a group of victims;
- putting in place procedures whereby authorities advance some compensation and take on the responsibility of claiming it back from the exploiters;
- ensuring that state compensation funds are accessible to victims of severe forms of labour

exploitation, regardless of their nationality or immigration status.

EU Member States are called on to end impunity for exploitative employers by prioritising the fight against labour exploitation of all workers who have moved within or into the EU, and to review and strengthen the capacities and, if necessary, mandates of their law enforcement, prosecutorial, judicial and monitoring bodies to identify exploitative labour situations and punish those responsible for them, with the aim of defending the rights of all workers to decent working conditions, guaranteed by Article 31 of the Charter.



Conclusions

This report highlights the many challenges faced by EU Member States and also at EU level in making the right of workers who have moved within or into the EU to decent working conditions a reality. Unless efforts are considerably intensified to protect labour standards in the sectors of the economy affected by severe labour exploitation, there is a risk that labour standards will be further undermined and that this process will have an impact on ever more areas of the economy.

The huge differences in standards of living in Europe and globally, as well as workers' increasing mobility, are powerful forces that provide those employers in the EU who are prepared to exploit this situation with a supply of workers who are willing to accept substandard conditions.

Poverty fuels criminal exploitation

"Poverty and declining prosperity provide fertile ground for criminal exploitation. [...] Demand for cheap labour is bound to rise significantly as a result of a rapid expansion of the global consumer base, resulting in more labour exploitation in traditionally affected industries such as hospitality, construction or cleaning services. Industries not typically associated with this phenomenon may also be targeted."

For further information, see: Europol (2015), Exploring tomorrow's organised crime, The Hague, Europol, p. 26

Therefore, working conditions cannot be left to globalised labour markets but require rigid monitoring and control. Criminal law provisions protecting the right of workers to fair and just working conditions from particularly severe violations are a cornerstone of any effective protection.

In conclusion, the following points from the research findings should be emphasised.

Strengthening the legal framework to protect workers' rights to fair and just working conditions

An EU-level consensus is needed which states that severe labour exploitation is unacceptable and that all workers are entitled to effective protection of their rights. To date, in some EU Member States only third-country nationals in an irregular situation are protected by criminal law from severe exploitation. In other Member States, all workers are. These discrepancies reflect a lack of clear and reasonable standards.

In addition, this lack of a consensus among EU Member States impedes cross-border cooperation among monitoring authorities and criminal justice systems in cases involving several Member States, in particular when

recruitment or temporary work agencies, posting of workers or subcontracting chains are involved, as well as in cases where victims or witnesses travel home before their statements are taken. The approximation of the criminal law basis of cooperation – beyond demonstrating a normative consensus – would considerably enhance the cooperation of Member States' authorities in counteracting severe labour exploitation. Methods should be sought to follow the example of the Employer Sanctions Directive in using Article 83 (2) of the TFEU as a possible basis for establishing minimum rules to define criminal offences when implementing social policies.

Improving monitoring systems, workplace inspections and investigations

The crucial importance of monitoring bodies that exercise a supervisory function cannot be overemphasised. This report clearly conveys the message that many EU Member States must considerably enhance workplace inspections to prevent severe labour exploitation of workers who have moved within or into the EU and to reach out to victims when such exploitation occurs. In some Member States, promising practices have developed increasing the effectiveness of monitoring or policing, sometimes emphasising cooperation between labour inspectors and the police.

Encouraging victims to report

More also needs to be done to enable and encourage victims to come forward and report cases of severe labour exploitation to labour inspectors or the police. EU Member States must implement measures that make it more attractive and more viable for victims to attempt to access criminal justice. Back pay and compensation, provided in the framework of criminal proceedings, are just one important factor.

FRA research brings to light the many obstacles that victims face in accessing justice, but also reveals promising practices aimed at raising rights awareness and supporting victims in claiming their rights. It appears that trade unions and other civil society actors are increasingly aware of their important functions in this regard.

Strengthening specialisation and cross-border cooperation in all areas of severe labour exploitation

Severe labour exploitation of migrants should be recognised as an area in which criminal networks – often in the form of dubious recruiters and employment agencies, and often operating transnationally – have

a growing involvement. The police and public prosecutors need to intensify their efforts to meet these challenges and bring more offenders to justice. Some EU Member States have established specialised police units, which also facilitates cross-border cooperation, and which should be acknowledged as a promising practice.

Overall, the institutional structures that have been created to counteract trafficking should be used also to tackle all forms of severe labour exploitation. This report consistently highlights deficiencies arising from an institutional framework and institutional procedures that focus on trafficking only, thereby not paying sufficient attention to those situations of severe labour exploitation where the requirements of the trafficking definition are not met.

Enhancing prevention, including systems of binding standards and reliable branding

EU institutions and Member States are encouraged to step up prevention measures, including a focus on public procurement procedures that would prevent the

inadvertent funding of exploiters and on more effective systems for defining standards of decent work and branding products and services that meet these standards. This would allow consumers to better assess the risk that what they purchase was produced under severely exploitative conditions of work.

Creating a climate of zero tolerance of severe labour exploitation in societies

A climate of zero tolerance for the severe exploitation of any individual is the basis for defending the social rights and human dignity of all workers; these are important elements of the values on which the EU is founded. In this regard, politicians, the media and others whose voice is heard in public need to be aware of the responsibility that comes with that privilege.



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Annexes

Annex I: Methodology

FRA collected evidence on severe forms of labour exploitation by carrying out comparative socio-legal research and analysis across the EU. This section summarises the project's development and oversight, its methodological approach and its content.

Development and oversight

The research was conducted from January 2013 to September 2014 and involved a combination of desk research and primary social research (semi-structured interviews, focus groups and collection of case studies). While desk research on the legal and institutional framework covered all 28 Member States, primary social research was carried out in 21 Member States (all except Denmark, Estonia, Latvia, Luxembourg, Romania, Slovenia and Sweden).

While the limitation of the fieldwork component to 21 Member States in part reflected budgetary constraints, the selection of Member States ensured geographical coverage and the representation of Member States of various sizes and diverse legal systems and traditions, as well as different economic situations, and the involvement of EU Member States that are mainly destination or mainly source countries. In some cases, the decision not to include a Member State was based on information that it would be difficult to find a sufficient number of experts working in relation to labour exploitation of migrants. Throughout the project, it was ensured that persons participating in interviews or focus group discussions had expertise resulting from their professional work in the context of labour migration.

Working with experts

Before the fieldwork began, the questionnaires for the interviews and focus groups and the template for the cases studies were developed in house. The FRA research team received valuable input from a group of experts and practitioners in the field of labour exploitation, who variously took part in a series of expert meetings at the FRA premises. A steering committee was created and its members provided input on the research objectives and fieldwork tools. Participants included representatives of international organisations – such as the European Institute for Crime Prevention and Control (HEUNI), the International Centre for Migration Policy Development (ICMPD), the International Labour Organization (ILO), the International Trade Union Confederation (ITUC), the Organization for Security and Co-operation in Europe (OSCE) and the United Nations Office on Drugs and Crime (UNODC) – national-level experts from labour inspectorates, civil society organisations and victim support organisations, and representatives of a number of EU agencies that work in related areas. FRA has been in close contact with the European Commission (the Directorate-General for Migration and Home Affairs) from the outset of the project, especially concerning links to the implementation of the Employer Sanctions Directive. FRA would like to thank the experts who provided very valuable input at the different stages of the project, including its inception and implementation and the finalisation of the report resulting from the research.

Working with contractors

Data were collected through FRA's multidisciplinary research network, Franet. This network is composed of contractors in each EU Member State who, upon request, provide relevant data to FRA on fundamental rights issues to facilitate the agency's comparative analyses.⁶⁷ All the fieldwork material (including guidelines, questionnaires, reporting templates for interviews, focus groups and case studies) was developed by FRA. The Ludwig Boltzmann Institute was contracted to assist FRA with the analysis and drafting of the overall comparative report.

Desk research

Based on a set of detailed questions by FRA, publicly available information was gathered in each EU Member State using the available literature on the subject. In addition, a small number of data requests were made to public authorities and victim support organisations.

67 For more information, see: <http://fra.europa.eu/en/research/franet>.

Phase 1 of the desk research (January–March 2013) looked into the legal and organisational framework of measures addressing labour exploitation in Member States, and served to map the main organisations involved in monitoring and proactively reaching out and offering support to victims of labour exploitation. This phase also involved mapping the organisations addressing labour exploitation and selecting the most relevant ones for interviews in phase 2 (the fieldwork phase). In addition to information about organisations, legislation and procedures in place to tackle labour exploitation and enhance victims' access to justice, relevant case law was examined and information on public/media discourse relating to labour exploitation in Member States was gathered.

A later phase of desk research (January–September 2014) provided updates on any changes to the legal and institutional framework in Member States surrounding labour exploitation and also sought information on how Member States implement the Employer Sanctions Directive, dealing with issues such as the liability and the sanctioning of legal persons, back payments to exploited workers and facilitation of complaints.

Primary research

Primary data were gathered in 21 EU Member States in the form of interviews, focus groups and case studies. Research was conducted in two rounds: the first round included 10 Member States and the second included 11 Member States.

1. **Round 1:** Austria, Belgium, Bulgaria, the Czech Republic, Finland, Ireland, Italy, Poland, Portugal and the United Kingdom (October–May 2014)
2. **Round 2:** Croatia, Cyprus, France, Germany, Greece, Hungary, Lithuania, Malta, the Netherlands, Slovakia and Spain (February–September 2014)

Fieldwork comprised three components: expert interviews, focus group discussions and case studies. In total:

- 616 semi-structured expert interviews were conducted;
- 217 case studies were collected;
- 24 focus group discussions were implemented.

Interviews and focus group discussions aimed to collect knowledge, expertise and views from practitioners and stakeholders who work on the front line with victims of labour exploitation. Nine categories of experts working in the context of labour exploitation took part in the interviews and focus groups:

- M – Monitoring bodies (such as labour inspectorates, health and safety bodies)
- P – Police and law enforcement bodies
- S – Victim support organisations
- J – Judges and prosecutors
- L – Lawyers
- R – Recruitment and employment agencies
- W – Workers' organisations, trade unions
- E – Employers' organisations
- N – National policy experts at Member State level (for instance national anti-trafficking coordinators and their offices).

In general, the interviews showed that the views expressed by experts from different professional groups were largely homogenous, indicating consensus with regard to the main messages conveyed by interviewees. Exceptions are highlighted in the report.

Attempts to ensure gender balance among respondents met with difficulties, in particular as regards staff members of support services and police officers. While about two in three representatives of support services were female, three in four interviewees from the police group were male. Other professional groups were fairly well balanced in terms of gender representation.

The fieldwork phase targeted these nine categories in an attempt to examine labour exploitation in a comprehensive way, to allow for a good understanding of the reality of the situation for victims of severe labour exploitation, by interviewing all those involved in monitoring situations of potential exploitation in employment, supporting victims, policing or advocating the rights of workers at an institutional level.



To identify experts, Franet contractors drafted comprehensive lists of public authorities, civil society organisations and other organisations, which FRA research team approved. The contractors then directly approached these organisations requesting interviews. Several criteria were applied to the identification of potential interviewees: for example, they must have experience in dealing with labour exploitation. When selecting the interviewees, sociodemographic characteristics (such as gender, age group, ethnic origin, etc.) were also considered. Interviews and focus groups were recorded in audio format with the written, signed, informed consent of interviewees, and with appropriate data protection measures in place. Summaries of all interviews and focus groups were drafted as an intermediate step for analysing the data, and one third of the interviews were fully transcribed in English for analysis.

In two Member States, Croatia and Hungary, the fieldwork phase was terminated prematurely (following agreement between FRA and the contractor) because of a lack of identifiable experts. The difficulties encountered throughout the project in finding a sufficient number of experts who were in a position to give an account of the situation of severe labour exploitation of workers who have moved within or into their country based on their professional experience are in themselves a finding.

The number of interviews conducted in a Member State roughly reflects its size relative to other Member States, allowing, however, for a certain degree of flexibility and taking into account the fact that all professional groups were covered also in smaller Member States (with the two exceptions just mentioned).

Semi-structured interviews

Overall, 616 experts were interviewed across these nine professional groups in 21 EU Member States. In each of the Member States where the fieldwork was carried out, between 20 and 40 experts (from nine professional categories) were interviewed. The sample was based on a purposive logic where the respondents were chosen because they were 'information rich' in relation to the phenomenon of interest (i.e. labour exploitation). The main strategic choice was to interview stakeholders who had professional expertise in the field of labour exploitation. Interviewees were made aware that they were expected to base their answers on their professional expertise and not on common views and assumptions.

The interview questionnaire followed a mixed method approach and included both open and closed questions. For closed questions, interviewees chose responses from a list provided by the interviewer. Nine different questionnaires were developed, one for each of the professional groups interviewed (some sets of questions were common to all groups, while others were asked only to specific groups).

For the interviews as well as for the focus groups, experts were grouped by profession and, more precisely, by the function they primarily perform. This means that, for example, if interviewees employed by a trade union indicated that they primarily worked in the context of monitoring, they would have been interviewed in the M-group. If they indicated, however, that they performed advocacy tasks, they would have been interviewed in the W-group (concerned with workers' rights).

Interviewees were asked about their experiences with regard to: the forms and frequency of incidents of severe labour exploitation; the economic areas affected; common risk factors that contribute to labour exploitation; prevention measures aimed at reducing the risk of exploitation; and the obligations of specific organisations involved in preventing labour exploitation and supporting victims, and the cooperation that exists between them.

Interviews were semi-structured and were conducted face to face or, in rare cases (no more than 30 % of interviewees), by telephone, using a guide developed by FRA. Training and detailed instructions on the selection of interviewees and the questions for the field research – both the individual interviews and the focus groups – as well as basic training on the subject matter, were provided to Franet contractors by the FRA research team before the fieldwork phase began. Interviews lasted an average of one hour.

Focus groups

Focus group discussions were conducted in a cross-cutting manner and included between five and eight participants. Focus group discussions took place towards the end of the fieldwork phase (January–February 2014 for round 1, and May–June 2014 for round 2), to enable account to be taken of the provisional findings which emerged from the interviews.

Focus group discussions served to bring together the perspectives of various professional groups with potentially dissenting views. As a minimum, focus groups included one representative from each of the following five professional groups working in the field: monitoring bodies; victim support organisations; police/law enforcement bodies; lawyers; and workers' organisations/trade unions.

In large Member States, two focus group discussions were conducted in two regions. Medium and smaller Member States were asked to conduct one focus group discussion. Focus groups lasted approximately 1.5–2 hours. Focus groups were coordinated by Franet project managers in each Member State, following guidelines and a template designed by the FRA research team.

Similarly to the interview phase, participants were asked about: forms of labour exploitation and economic sectors affected; monitoring and inspections; prevention; protection and investigation; and attitudes. Following a provisional analysis of the interviews conducted so far at the Member State level, participants were also asked about any issues that had proven contentious in their countries and that may cause divergent views among professionals at the national level.

Focus groups were recorded, notes were taken and the discussions were then fully transcribed in the original language and summarised in English (with full English transcriptions of the majority of focus groups provided for analysis).

FRA attended focus groups (as an observer) in Austria, France, Germany, Italy, the Netherlands, Poland, Slovakia and the United Kingdom.

Case studies

FRA also collected 217 case studies – descriptive analyses of incidents of severe labour exploitation – in 21 Member States as part of the fieldwork phase.

As concerns the sources of these case studies, it became clear in the preparation of the project that information would have to be collected from various institutions, depending on the number of court cases that could be relied on and the information available from the police, and – in some countries – support services or other NGOs would have to provide documentation.. In some cases, interviewed experts provided the information needed. The wide range of sources meant that a precise and detailed case study template was needed to ensure the comparability of the case studies.

Case studies were defined as a descriptive analysis of an event of alleged labour exploitation, and information was gathered using a template designed by FRA. The case study template asked for the following information: brief description of the labour exploitation event; risk factors involved; country or countries involved; date; sector of employment; relevant factors in assessing labour exploitation; and country of origin of victim(s) and perpetrator(s). The case studies were to meet the following criteria:

- diverse economic sectors – at least three sectors represented;
- provided by at least three different target groups/sources;
- covering both victims who succeeded in accessing justice and victims who did not.

Data analysis

The data were analysed through content analysis with the aim of identifying recurrent themes and patterns and searching data to answer the research questions. Data were first analysed at the national level. National reports were drafted based on the field research, as well as on the legal and institutional mapping carried out in the relevant Member State. Subsequently, a comparative report was drafted based on the national reports.

Quality checks

One third of the interviews were fully transcribed and translated, and random controls were implemented to ensure that the English summaries of the interviews were comprehensive enough and reported all the relevant information that emerged in the interviews. As part of the quality checks, FRA organised a training session for the national researchers at the FRA premises and attended focus group discussions in Member States involved in the fieldwork. On the basis of the training provided by FRA, further training sessions were organised at the national level for researchers and interviewers.



Scope of fieldwork in the Member States

Table A1: Breakdown of fieldwork in the EU Member States (interviews, focus groups and case studies)

	Interviews	Focus groups	Case studies
Large Member States: France, Germany, Italy, Poland, Spain, and the United Kingdom	40 interviews: four to seven interviews with representatives of groups M, P and J; six to eight interviews with representatives of group S, of which two or three interviews should be conducted with representatives of child welfare organisations; two to four interviews with representatives of groups L (at least one lawyer mainly working in the field of civil or labour law), R, W and E; one interview with a national coordinator (N).	Two focus group discussions	15–18 case studies
Medium-sized Member States: Austria, Belgium, Bulgaria, the Czech Republic, Finland, Greece, Hungary, Ireland, the Netherlands, Portugal and Slovakia	30 interviews: three to six interviews with representatives of groups M, P and J; four to seven interviews with representatives of group S, of which two or three interviews should be conducted with representatives of child welfare organisations; one to three interviews with representatives of group L (at least one lawyer mainly working in the field of civil or labour law), R,W and E; one interview with a national coordinator (N).	One focus group discussion	10–12 case studies
Smaller Member States: Croatia, Cyprus, Lithuania and Malta	20 interviews: two to five interviews with representatives of groups M, P and S, of which two or three interviews should be conducted with representatives of child welfare organisations; two to three interviews with representatives of group J; one interview with representatives of groups L, R,W, E and N.	One focus group discussion	Five to six case studies

Table A2: Number of interviews conducted in the Member States, by category

Professional groups interviewed across 21 Member States	Number of experts interviewed across 21 Member States
S – Victim support organisations	139
M – Monitoring bodies (such as labour inspectorates, health and safety bodies)	102
P – Police and law enforcement bodies	82
J – Judges and prosecutors	69
L – Lawyers (who represented workers)	63
W – Workers’ organisations, trade unions	56
E – Employers’ organisations	45
R – Recruitment and employment agencies	35
N – National policy experts	25
TOTAL	616

Table A3: Number of interviews conducted in the Member States, by country

	Member State	Total number of interviews
1	Austria	30
2	Belgium	30
3	Bulgaria	30
4	Croatia*	8
5	Cyprus	21
6	Czech Republic	30
7	Finland	30
8	France	39
9	Germany	40
10	Greece	30
11	Hungary*	12
12	Ireland	30
13	Italy	43
14	Lithuania	20
15	Malta	20
16	Netherlands	30
17	Poland	40
18	Portugal	31
19	Slovakia	30
20	Spain	35
21	United Kingdom	37
	TOTAL	616

Note: * Fieldwork was terminated prematurely (following agreement between FRA and the contractor) because of an insufficient number of identifiable experts.



Annex II: Relevant EU directives and regulations

Anti-Trafficking Directive: 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, OJ 2011 L 101, p. 1

Compensation Directive: Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims, OJ 2004 L 261, p. 15

Concession Contracts Directive: Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ 2014 L 94, p. 1

Consumer Rights Directive: Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ 2011 L 304, p. 64

Disclosure Directive: Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, OJ 2014 L 330, p. 1

Employer Sanctions Directive: Directive 2009/52/EC 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, OJ 2009 L 168, p. 24

Enforcement Directive: Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'), OJ 2014 L 159, p. 11

Fixed-Term Work Directive: Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ 1999 L 175, p. 43

Free Movement of Citizens Directive: Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004 L 158, p. 77

Free Movement of Workers Regulation: Regulation (EU) No. 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, OJ 2011 L 141, p. 1.

Posted Workers Directive: Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ 1997 L 18, p. 1

Procurement by Services Directive: Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, OJ 2014 L 94, p. 243

Public Procurement Directive: Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ 2014 L 94, p. 65

Residence Permit Directive: Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, OJ 2004 L 261, p. 19

Safety and Health Directive: Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, OJ 1989 L 183, p. 1

Seasonal Workers Directive: Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, OJ 2014 L 94, p. 375

Single Permit Directive: Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, OJ 2011 L 343, p. 1

Temporary Agency Work Directive: Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, OJ 2008 L 327, p. 9

Victims' Directive: Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ 2012 L 315, p. 57

Working Time Directive: Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ 2003 L 299, p. 9



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HELPING TO MAKE FUNDAMENTAL RIGHTS A REALITY FOR EVERYONE IN THE EUROPEAN UNION

Worker exploitation is not an isolated or marginal phenomenon. But despite its pervasiveness in everyday life, severe labour exploitation and its adverse effects on third-country nationals and EU citizens – as workers, but also as consumers – have to date not received much attention from researchers. The extensive fieldwork and desk research carried out by the European Union Agency for Fundamental Rights (FRA) for the report is the first to look comprehensively into various criminal forms of severe labour exploitation of workers who move from one European Union (EU) Member State to another or from a third country. It aims to fill the knowledge gap, thus challenging the current climate of implicit acceptance of severe labour exploitation.

The report identifies risk factors contributing to such exploitation and discusses means of improving the situation. It highlights the challenges faced by EU institutions and Member States in making the right of workers who have moved within or into the EU to decent working conditions a reality. It aims to support them in preventing severe labour exploitation, monitoring situations where severe labour exploitation occurs and making victims' right to have access to justice a reality. An EU-level consensus is needed which states that severe labour exploitation is unacceptable and that all workers are entitled to the effective protection of their rights. If the EU and its Member States are serious about maintaining national and international labour standards, accepting systemic labour exploitation is not an option.

