

# PROTECTING MIGRANTS IN AN IRREGULAR SITUATION FROM LABOUR EXPLOITATION

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## ROLE OF THE EMPLOYERS SANCTIONS DIRECTIVE

REPORT



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# Foreword

How would you feel if you worked hard but did not receive your pay? If you were forced to work in inhumane conditions and subjected to beatings and threats? Would you complain if you knew that this could reveal that you have no official status in the country you work in? And if you got the courage to report the abuse you have been experiencing, where would you turn to if you did not speak the country's language?

In 21st century Europe, thousands of exploited workers are forced to work endless hours with no or little pay and without adequate safety equipment. Many of those exploited workers are migrants in an irregular situation. Without any official status, they are an easy pray for exploitative employers.

The EU Employers Sanctions Directive was primarily enacted to dissuade employers from recruiting migrants in an irregular situation, by providing sanctions for those who do. But it also contains provisions to protect workers. It facilitates access to justice for exploited workers and sets out workers' rights to claim back payment of outstanding wages. Yet, it does not work as it should in practice.

Migrant workers often do not know what their rights are and where to complain. If they do complain, they still do not manage to get the compensation from their employers. And by complaining, they risk being detected, detained and deported.

Regardless of their status, workers have human rights. They should not be exposed to violence and abuse, they should not be forced to work in inhumane or dangerous conditions and they should get paid for their work.

This report shows what needs change to ensure workers' rights are respected. From improving the complaint systems, to providing more information and ensuring irregular workers get compensated for their work, EU countries can do a lot more to protect workers from exploitative employers. It can start with small steps, for example by requiring labour inspections to focus on labour conditions and not on reporting workers' status to immigration authorities.

We hope that our focus on this issue encourages the responsible national authorities, as well as employers, to recognise the reality of severe labour exploitation, and to take the steps necessary to drive the change across Europe.

**Michael O'Flaherty**  
Director



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# Executive summary

There are regular reports about the exploitation of migrants in an irregular work situation. Some severe cases of labour exploitation meet the definition of trafficking in human beings. A recent example is the case of 42 undocumented Bangladeshi agricultural workers, which the European Court of Human Rights decided on in *Chowdury and Others v. Greece* in March 2017.

When trafficking in human beings cannot be established, victims may rely on other instruments of European Union (EU) law. One such instrument is the Employers Sanctions Directive. Primarily enacted to dissuade employers to recruit migrants in an irregular situation, this directive also contains provisions to protect workers. It facilitates access to justice for exploited workers and sets out workers' rights to claim back payment of outstanding wages. The directive also contains provisions to enhance the effectiveness of labour inspections.

The Employers Sanctions Directive obliges EU Member States to prohibit the "employment of illegally staying third-country nationals" and to criminalise certain forms of employment – for example, when employers subject workers to particularly exploitative working conditions, as set out in Article 9 (1) (c). The directive envisages the possibility of granting such victims temporary residence permits.

In 2014, the European Commission noted – in a Communication to the European Parliament and the Council on the application of the Employers Sanctions Directive – that some Member States had yet to implement the directive's protective elements in a satisfactory manner. This report describes how the 25 Member States bound by the directive (which does not apply to Denmark or Ireland) have been implementing its protective provisions.

The existence of an effective complaint mechanism, which enables exploited workers to access justice and receive compensation, is the cornerstone for protecting migrant workers from exploitation and abuse. The evidence collected for this study shows that, in some Member States, migrants in an irregular situation are not using existing complaint systems. This may be for a number of reasons: a lack of incentives for workers to come forward; limited information on their rights and the available complaint mechanism; and, mostly, fear of being detected, detained and returned. If trade unions support only their own members, membership fees, if not waived, may represent an economic barrier.

Non-governmental organisations, trade unions and victim support organisations play a key role in supporting workers who are victims of labour exploitation or have experienced labour law violations to seek redress. Without their support, migrants risk being deported, making it much more difficult to take legal action against exploitative employers. The legislation in all but four Member States allows third parties – for example trade unions – to engage, on behalf of or in support of a worker, in any administrative or civil proceedings against the employer. This is provided for in Article 13 (2) of the Employers Sanctions Directive. In a few Member States, there is no legislation specifying that third parties can file a complaint on behalf of a worker.





Complaint mechanisms differ depending on the Member State. The case law analysed for this report shows that, in a few cases, compensation – including back pay – has been granted to victims as part of criminal proceedings. Where this was not the case, migrants had to file a separate claim to civil or labour courts to get the wages the employer owed them. This process can be costly and lengthy.

In all but one Member State, workers do not need to physically reside in the country to request back pay of wages, in accordance with Article 6 (1) of the Employers Sanctions Directive.

No Member State has centralised data on filed and successful complaints that migrant workers in an irregular situation made about back payment of due wages. This makes it difficult to assess the effectiveness of the complaint system. Even if claims are successful, it is often unknown whether or not workers actually receive back pay in the end, with employers often declaring bankruptcy or disappearing.

The Employers Sanctions Directive requires Member States to put in place enforcement mechanisms, to ensure that procedures for claiming outstanding remuneration are effective and workers receive back pay. Approximately one third of the Member States can freeze and seize employers' assets for this purpose. In addition, over one third of the Member States reported the availability of state compensation funds. However, in some Member States, state compensation funds are available only for victims of violent crimes. In other Member States, migrants in an irregular situation are excluded.

Article 14 of the Employers Sanctions Directive requires Member States to “ensure that effective and adequate inspections are carried out” to control the employment of migrants in an irregular situation. Article 6 requires Member States to inform workers “systematically and objectively” about the



employer's duty to pay outstanding remuneration, taxes and social security contributions to migrant workers in an irregular situation. It also requires them to notify workers about the available complaint mechanisms before the enforcement of any return decision. Labour inspections might help detect violations of labour law as well as labour exploitation, and inform workers about their rights.

In two thirds of Member States, labour inspectorates have an obligation to inform workers of their rights and the available complaint mechanisms. However, in some Member States labour inspectorates report that this does not happen in practice. In others, labour inspectorates mainly provide information through their websites, with no or limited translations. Sometimes, there is limited information on the specific situation of migrants in an irregular situation.

In 20 out of 25 Member States bound by the Employers Sanctions Directive, labour inspectorates report migrants in an irregular situation identified during inspections to the immigration law enforcement authorities. This discourages victims from reporting abuse and violations of labour law.

Similarly, when labour inspectorates conduct inspections with the police or immigration law enforcement authorities, this may discourage exploited workers from reporting their experiences during an inspection; it may also cause them to hide to avoid apprehension and removal. At the same time, joint inspections with specialised police units trained on labour exploitation and trafficking in human beings support the identification of victims.

According to the 2014 European Commission report on the application of the directive, all EU Member States, except for one, have criminalised the employment of migrants in an irregular situation under particularly exploitative labour conditions. Article 9 (1) (c) of the directive requires this. This FRA report finds that some EU Member States have done this using legislation combating trafficking in human beings. Other Member States have separate legal provisions criminalising particularly exploitative working conditions for migrants in an irregular situation. Compared with the situation in 2015, when FRA last reviewed national law transposing Article 9 (1) (c), three more Member States have enacted rules criminalising the act of exploitation itself or increased corresponding penalties.

The differences in approach make it difficult to compare case law across EU Member States. This also partly explains the great variety in the severity of punishments, with trafficking cases usually leading to more severe penalties. Some judicial authorities have imposed suspended criminal sentences or fines applying administrative rather than criminal law. The decision to investigate a case under criminal or administrative law has major consequences for the victim's access to support services and the granting of a residence permit.

Finally, more than half of Member States have domestic legislation providing for temporary residence permits for victims of particularly exploitative working conditions, in accordance with Article 13 (4) of the directive. The remaining Member States issue temporary permits only if the situation amounts to trafficking in human beings. These temporary permits are mostly conditional on the victims' willingness to cooperate with authorities and the progress of investigations and court proceedings. Residence permits may be renewed until the completion of the investigation or the court proceedings.

Two thirds of Member States provided disaggregated data on the number of permits issued to victims of particularly exploitative working conditions or victims of trafficking for labour exploitation from 2017 to 2019. More than

a third of Member States did not issue any residence permits to victims of particularly exploitative working conditions between 2017 and 2019.

In past reports, FRA has made a number of suggestions to prevent severe labour exploitation, and to better identify victims, ensure their referral to support organisations and protect them. Many of these suggestions also apply to migrants in an irregular situation. Annex 1 reproduces the most relevant past FRA opinions covering, in particular, the following four areas of priority action:

- enhancing the effectiveness of the complaint mechanism by enabling third parties, such as trade unions and relevant associations, to act in support of or on behalf of migrant workers in an irregular situation;
- making back pay of due wages a reality, by having criminal courts also decide on civil law claims, enabling victims to benefit from state compensation funds, and permitting the freezing and confiscating of employers' assets to compensate exploited workers;
- informing workers of their rights more systematically and effectively, paying particular attention to language barriers and giving labour inspectorates a key role in informing workers of their rights and the available complaint mechanisms, including during labour inspections;
- issuing temporary residence permits to victims of particularly exploitative working conditions.

In addition, there is also a need to carry out the following actions:

- Change national legislation and current practices requiring labour inspectorates, monitoring bodies and specialised police units trained on labour exploitation and trafficking in human beings to share the personal data of migrants in an irregular situation with immigration law enforcement authorities. This will encourage safe reporting by victims of severe labour exploitation and workers in an irregular situation whose labour rights have been violated.
- Improve national data collection to monitor the effectiveness of complaints systems. EU Member States should consider establishing a mechanism for collecting consolidated and appropriately disaggregated data on complaints about back pay, and awards and compensation that migrants in an irregular situation receive.

# Introduction

In 2009, the Employers Sanctions Directive<sup>1</sup> came into force. The directive obliges EU Member States to prohibit the employment of migrants in an irregular situation. It also lays down minimum standards on sanctions and measures that Member States must apply against those employing this category of migrants.

## Note on terminology

The Employers Sanctions Directive uses the term “illegally staying third-country nationals” when referring to migrants who are in an irregular residence situation.

Consistent with past FRA publications and in line with the United Nations terminology, this report describes them as migrants in an irregular situation.\*

\* See *Office of the High Commissioner for Human Rights (OHCHR) (2014), The economic, social and cultural rights of migrants in an irregular situation*, Geneva, OHCHR, pp. 4-5; *OHCHR (1990), International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18 December 1990, UN Treaty Series, Vol. 2220, Art. 5, p. 3.*

Although primarily an instrument for tackling irregular migration, the directive also contains important protective elements to redress injustices against migrants in an irregular situation. These include the opportunity to claim back payment of outstanding remuneration and measures to facilitate complaints. In addition, the directive invites Member States to issue temporary residence permits to third-country nationals who were victims of particularly exploitative working conditions and who participate in criminal proceedings against the exploitative employer. It also gives a key role to labour inspectors, who are required to conduct risk assessments on the employment sectors most at risk of illegal work.

In 2014, the European Commission issued its first and only communication on the implementation of the directive.<sup>2</sup> The findings show 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”.<sup>3</sup>

Reports on severe forms of labour exploitation in the European Union (EU) that FRA published between 2015 and 2019,<sup>4</sup> and a 2017 report by the European Migration Network (EMN),<sup>5</sup> have shown that, despite Member States having transposed the directive into their national legislation, gaps in implementation remain. This is especially the case with its protective provisions, including the rights to complain and to receive back pay.

In June 2019, FRA organised a meeting with representatives of monitoring bodies, police and EU organisations on the way forward concerning severe labour exploitation.<sup>6</sup> The representatives highlighted the lack of information on how Member States implement the protective provisions of the Employers Sanctions Directive and on the availability of temporary residence permits for victims of particularly exploitative working conditions. This report contributes to filling this gap.

## WHAT DOES THIS REPORT COVER?

This report looks at how the protective provisions of the Employers Sanctions Directive are implemented in the 25 EU Member States bound by the directive (i.e. all EU Member States, except Denmark and Ireland). It focuses on the impact these provisions have on migrant workers in an irregular situation who are victims of exploitation and other labour law violations.

More specifically, the report looks at the following aspects:

- the facilitation of access to justice, including claiming back pay and compensation;
- the role of labour inspectorates;
- the criminalisation of particularly exploitative working conditions;
- temporary residence permits for victims of particularly exploitative working conditions.

At national level, EU Member States apply different approaches when implementing some of the EU law requirements stemming from the Employers Sanctions Directive. Many EU Member States have separate legal provisions for victims of particularly exploitative working conditions. Others apply the definition of trafficking in human beings in a more flexible manner to also include the situations that the Employers Sanctions Directive envisages. Therefore, this report includes cases that, at domestic level, are addressed using anti-trafficking legislation.

## METHODOLOGY

This report is based on an analysis of legislation and case law, and written enquiries to three or four public authorities and organisations assisting migrant workers in an irregular situation in each of the 25 Member States covered.

Depending on the institutional setting of each Member State, the following authorities were contacted: the labour inspectorate and other monitoring bodies in charge of workplace inspections, labour courts, the ministry of justice, migration authorities, victim support services, trade unions and non-governmental organisations (NGOs). The organisations contacted in each Member State are listed in Annex 2 (available on FRA's website).

FRA conducted the research in cooperation with its multidisciplinary research network Franet<sup>7</sup> between February and June 2020. Based on the legal analysis and the replies that the contacted authorities received, Franet researchers drafted country reports. These country reports were the basis for the analysis of this report.<sup>8</sup>

## Endnotes

- 1 **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 (*Employers Sanctions Directive*).
- 2 **European Commission** (2014), p. 3.
- 3 European Commission (2014), Section IV.
- 4 FRA (2015); FRA (2018a); FRA (2018b); FRA (2019a).
- 5 **EMN** (2017a).
- 6 FRA (2019b).
- 7 See **Franet**.
- 8 We would like to thank the organisations listed in Table 6 in Annex 2 (available on FRA's website) for sharing information and data for this report, and the following organisations for their comments on the final report: the Platform for International Cooperation on Undocumented Migrants; La Strada International – a specialist network of anti-trafficking organisations in Europe; the Association for Legal Intervention (*Stowarzyszenie Interwencji Prawnej*, SIP) (Poland); Fairwork Belgium; the Association for Unionized Assistance for Undocumented Workers (*Anlaufstelle zur gewerkschaftlichen Unterstützung UNDOKumentiert Arbeitender*, UNDOK) (Austria); the German Network and Coordination Office Against Trafficking in Human Beings (*Bundesweiter Koordinierungskreis gegen Menschenhandel*, KOK) (Germany); and the International Labour Organisation (ILO) Office for the European Union. The report has been shared with the national authorities of the 25 Member States covered by the Employer Sanctions Directive for review. Thirteen among them shared comments which have been addressed in the report, as relevant.

# 1

## FACILITATING ACCESS TO JUSTICE

Under Article 13 of the Employers Sanctions Directive, there must be an effective mechanism for lodging complaints against exploitative employers.

FRA's 2015 report on severe labour exploitation points to a lack of *ex officio* investigations in cases of labour exploitation.<sup>1</sup> It is often left to exploited workers to initiate proceedings. However, certain barriers – for example constraints that employers impose, victims' lack of awareness of their rights, and the fear of being returned to their countries of origin or losing their job – render victims of labour exploitation often unable or unwilling to come forward or report to the police. Their lack of knowledge of the functioning of complaint mechanisms also prevents them from lodging a complaint.



According to the 2014 Commission communication, very few Member States (including Bulgaria, Cyprus, Greece and Slovenia) explicitly transposed the right of illegally employed migrants to make a claim against their employer for any outstanding remuneration, including once the worker has been returned to his or her country of origin (including Cyprus, Greece, Poland and Sweden). Most Member States merely refer to general provisions concerning the right to bring a case before civil or labour courts.<sup>2</sup>

Research evidence dating back to 2014 shows that, in some Member States, migrant workers who are in an irregular situation do not benefit from effective complaint mechanisms. For example, in Czechia, Hungary, Poland and Romania, workers can lodge a claim with the inspectorate, but they are not a party to the procedure. In addition, they may not interfere with the decisions the inspectorate issues to the employer or appeal against them.<sup>3</sup>

This chapter reviews the support that trade unions, civil society and victim support organisations give to migrants in an irregular situation who have been exploited at work. It then analyses complaints about outstanding remuneration.

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**“[A]ccess 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.”**

*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, 25 May 2014*



## 1.1. NON-GOVERNMENTAL ORGANISATIONS' AND TRADE UNIONS' SUPPORT

In many EU Member States, frontline organisations promoting the rights of migrant workers and victim support organisations play a key role in taking on claims for workers – including those in an irregular situation – who have suffered labour exploitation or other work-related abuse. In fact, most of the examples of workers making claims for back pay outlined in this report involve the assistance of such organisations.

Article 13 (1) of the Employers Sanctions Directive requires Member States to put in place effective mechanisms through which migrants in an irregular situation may lodge complaints against their employers, including through third parties. Article 13 (2) obliges Member States to ensure that third parties with a legitimate interest in ensuring compliance with the directive can act on behalf of or in support of the third-country national in any administrative or civil proceedings to defend their rights.

Legislation in several EU Member States allows third parties to lodge complaints on behalf of workers. For instance, in Portugal, third parties promoting the rights and interests of immigrants can file a complaint to the Labour Inspectorate and the court.<sup>4</sup> In Greece, the legislation is more general. Greek law establishes that those illegally employed can, on an equal basis with legally employed workers, submit in person or through third parties every complaint provided for in national legislation against their employer.<sup>5</sup>

However, some EU Member States do not allow third parties to lodge complaints on behalf of workers in an irregular situation. For example, in Estonia, where the Code of Administrative Court Procedure<sup>6</sup> provides that an association can file a complaint on behalf of someone only in the cases mentioned in the law, the possibility of filing a complaint on behalf of migrant workers in an irregular situation is not listed in domestic law. Similarly, legislation in Austria and Croatia does not refer to the possibility of third parties filing complaints in accordance with Article 13 (1) of the Employers Sanctions Directive.

As shown in Figure 1, in all but four EU Member States, the legislation specifies that third parties may engage either on behalf of or in support of a worker, with his or her approval, in any administrative or civil proceedings against the employer. They may either do so on the basis of general provisions on representation in civil or labour law disputes or through specific legislation transposing Article 13 (2) of the Employers Sanctions Directive. In Finland, Italy, Malta and Slovenia, it appears that NGOs or associations cannot engage on behalf of or in support of migrant workers in an irregular situation in civil and administrative proceedings.

In a few Member States, third parties can initiate legal proceedings against the employer even without the worker's consent. In Belgium, for example, the law details which organisations can start legal proceedings on behalf of a third-country national and establishes that proceedings can be initiated even without the worker's authorisation.<sup>7</sup> According to French law, trade unions can file complaints to support migrant workers in an irregular situation, provided there is no opposition from the worker. However, a trade union organisation can exercise its own remedies (if the worker objects).<sup>8</sup>

### PROMISING PRACTICE

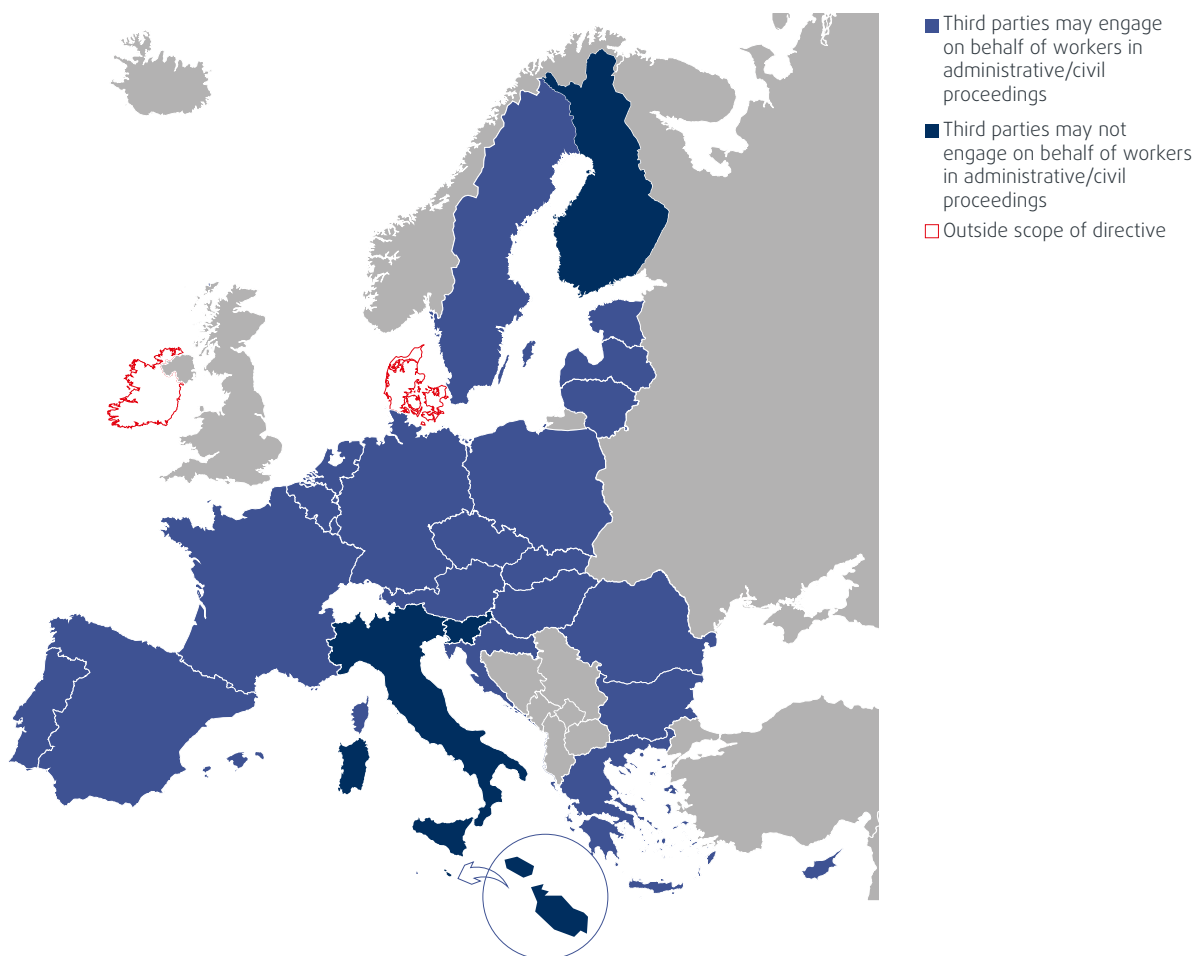
## Guidelines for developing an effective complaints mechanism

The Platform for International Cooperation on Undocumented Migrants has published guidelines to assist countries in setting up effective complaints mechanisms for undocumented migrant workers in cases of labour exploitation or abuse. Such mechanisms should be “transparent, fair, independent, accessible, responsive, speedy and socially inclusive”.

*Source: Platform for International Cooperation on Undocumented Migrants (PICUM) (2017),*

***Undocumented migrant workers: Guidelines for developing an effective complaints mechanism in cases of labour exploitation or abuse, Brussels, PICUM.***

**FIGURE 1. POSSIBILITY FOR THIRD PARTIES TO ENGAGE ON BEHALF OF OR IN SUPPORT OF WORKERS IN AN IRREGULAR SITUATION IN ADMINISTRATIVE AND/OR CIVIL PROCEEDINGS IN 25 EU MEMBER STATES**



Source: FRA, 2021 [based on national legislation as listed in Table 1 in Annex 2, available on FRA's website]

National legislation usually specifies which organisations can represent migrant workers in an irregular situation in civil and administrative proceedings; in Bulgaria and Slovakia, however, the law does not name any specific organisation.

In several Member States, the most common third party allowed to bring a complaint on behalf of workers or represent them in civil or administrative proceedings are trade unions. The law mentions trade unions or workers' associations as the only possible third parties in Croatia,<sup>9</sup> Cyprus,<sup>10</sup> France,<sup>11</sup> Germany<sup>12</sup> and Hungary.<sup>13</sup> In Belgium, only trade unions and the Federal Migration Centre Myria can act as third parties. According to Belgian law, associations defined by a royal decree could also act as third parties representing workers in civil or administrative proceedings. However, no royal decree has been published so far.<sup>14</sup> According to the practitioners interviewed in the context of a recent report by the International Labour Organization (ILO) on trafficking for labour exploitation in Belgium and the Netherlands, there is limited engagement of trade unions on the issue of trafficking in human beings. This has to do with the fact that a main focus of trade unions appears to be serving their members.<sup>15</sup> If trade unions support only their own members, membership fees, if not waived, may represent an economic barrier.

In other Member States – for example, in Poland – NGOs, other organisations or contact points set up specifically to assist migrant workers in an irregular

## PROMISING PRACTICE

# NGO support for claiming back pay

In **Austria**, the NGO Association for Unionized Assistance for Undocumented Workers (*Anlaufstelle zur gewerkschaftlichen Unterstützung UNDO*kumentiert Arbeitende, UNDOk) is the main contact point for trade union support for undocumented workers. It provides information and counselling, and takes on complaints on behalf of workers, sometimes in cooperation with NGOs specialised in helping victims of trafficking in human beings, such as the Intervention Center for Trafficked Women (*Interventionsstelle für Betroffene von Frauenhandel*, LEFÖ-IBF) and Men VIA.

According to their latest annual report, UNDOk writes to employers on behalf of migrant workers in an irregular situation, claiming back pay. If the employer does not react, UNDOk refers the person to the relevant trade union or the chamber of labour, which assists the worker in filing a complaint to the labour law court. The law provides the legal basis for representation (in particular by trade unions) at labour courts.

Source: UNDOk (2020), *Arbeit ohne Papiere, aber nicht ohne Rechte* (Work without papers, but not without rights), Vienna, UNDOk, p. 17.

**“It is thus contrary to the social objective of Directive 80/987, referred to in paragraph 42 above, to deny the protection provided for under that directive in the event of the employer’s insolvency to individuals to whom national legislation generally attributes the status of employees [...]. It follows that Directive 80/987 precludes national legislation on the protection of employees in the event of the insolvency of their employer, [...] under which a third-country national has no right to an insolvency benefit because he is not lawfully resident, even though that third-country national is recognised under the civil law of that Member State as having the status of an ‘employee’ with an entitlement to pay.”**

CJEU, C-311/13, *O. Tümer v. Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen*, 5 November 2014, paras. 45 and 46

situation, sometimes in cooperation with each other at the national level.

In addition, when not included among the third parties that can act on behalf of or in support of workers in civil and administrative proceedings against the employer, NGOs can nevertheless play a key role in assisting migrant workers in an irregular situation in raising their complaints.

## 1.2. BACK PAYMENTS AND COMPENSATION

### 1.2.1. Data on complaints about outstanding remuneration

The Employers Sanctions Directive emphasises that migrants in an irregular situation have the right to back payments of any outstanding remuneration, taxes and social security contributions (Article 6).

One of the priorities for exploited workers is that they receive outstanding remuneration. Workers can claim compensation through judicial or extrajudicial procedures. There are parallel mechanisms in place: complaints can be handled through courts, through labour inspectorates or through other bodies.

In *O. Tümer v. Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen*, the Court of Justice of the European Union (CJEU) clarified that Council Directive 80/987/EEC,<sup>16</sup> which aims to protect employees in the event of the insolvency of their employer, also applies to workers who are in an irregular situation. From this judgment it can be concluded, more generally, that the rights of workers apply to all persons considered as such under national law and are not affected by the workers’ residence status.<sup>17</sup>

According to a 2017 report by the EMN, only in 20 EU Member States can third-country nationals who are found to be illegally employed – regardless of whether they are residing regularly or irregularly – make claims against their employer for compensation of unpaid wages, as under a valid employment contract.<sup>18</sup>

As regards complaints from migrant workers in an irregular situation, civil courts and labour tribunals, 13 out of 15 EU Member States that the Platform for International Cooperation on Undocumented Migrants (PICUM) reviewed would consider them in the same manner as those submitted by other workers.<sup>19</sup>

No Member State has centralised data disaggregated by migration status on the number of complaints about outstanding remuneration that would identify migrants in an irregular situation. Each complaint system has its own data. For example, in Cyprus, data on complaints (mostly claims for unpaid wages) that the Department of Labour Relations of the Ministry of Labour collected in 2018 show that there were 2,190 complaints lodged against employers before the department: Cypriots lodged 758 complaints (36 %), EU nationals lodged 752 (36 %) and third-country nationals lodged 680 (28 %).<sup>20</sup> There is no record of how many of the 680 third-country nationals were in an irregular situation, if any.



To understand how complaint mechanisms are used in practice, FRA collected national data on complaints concerning outstanding remuneration that workers in an irregular situation filed between 2017 and 2019. These data were collected through desk research and by sending requests to various organisations, including labour inspectorates, labour courts, trade unions, victim support organisations and NGOs in 25 Member States. The different organisations FRA contacted in each Member State are listed in Annex 2 (available online).

As a general observation, few data are available. This makes it difficult to assess the effectiveness of the directive's provisions on the facilitation of access to complaint mechanisms and back pay.

In most EU Member States, the individual organisations FRA contacted could not provide data on complaints received from migrant workers in an irregular situation. A few Member States reported that they did not receive any complaints about outstanding remuneration from migrants in an irregular situation.

For example, in Croatia, FRA contacted all 28 Croatian municipal courts (the specialised court for litigation on labour-related cases), the two minor offence courts and the four responsible courts of appeal and the State Inspectorate (which has the Labour Inspectorate under its auspices). The Labour Inspectorate does not have these data. None of the courts received any complaints about outstanding remuneration from migrants in an irregular situation.

FRA received data on complaints about outstanding pay from migrants in an irregular situation from 2017 to 2019 in only the following five Member States.

— In Austria, the Association for Unionized Assistance for Undocumented Workers (*Anlaufstelle zur gewerkschaftlichen Unterstützung UNDOkumentiert Arbeitende*, UNDOk) – an organisation supporting migrants in an irregular situation – received 41 complaints in 2017 (i.e. including initial consultations, which were not followed up), 13 in 2018 and 16 in 2019 about outstanding remuneration from migrants in an irregular situation under Article 6 of the Employers Sanctions Directive.<sup>21</sup>



- Belgium illustrates the pivotal role that migrant support organisations and NGOs play in facilitating complaints from third-country nationals in an irregular situation. The Social Legislation Inspectorate in Belgium reported having received 14 complaints about outstanding wages between 2017 and 2019, including those that other inspectorates or the police referred to it.<sup>22</sup> Myria reported having received 19 complaints about outstanding wages in the same period. However, the NGO Fairwork Belgium – which promotes the labour rights of employees with precarious status or in an irregular situation – received 104 requests for assistance with non-payment of wages from migrants in an irregular situation in 2017, 120 in 2018 and 189 in 2019.<sup>23</sup> No data were available on the amounts awarded.
- In Bulgaria, the General Labour Inspectorate Executive Agency (*Изпълнителна агенция „Главна инспекция по труда“*) identified outstanding remuneration for two migrants in an irregular situation between 2017 and 2019;<sup>24</sup> during the same period, the Confederation of Independent Trade Unions of Bulgaria (*Конфедерация на независимите синдикати в България*), the largest trade union in Bulgaria, registered 24 complaints about outstanding remuneration from migrants in an irregular situation.<sup>25</sup>
- In France, the Labour Inspectorate reported receiving 20 complaints from migrant workers in an irregular situation about outstanding wages between 2017 and 2019.<sup>26</sup>
- In Portugal, among the 23 first-instance labour courts contacted, two courts looked into their individual files and found four complaints from migrant workers in an irregular situation about outstanding remuneration: one from the District Court of Faro<sup>27</sup> and three from the District Court of Lisbon.<sup>28</sup>

This information does not, however, likely reflect the total number of complaints, which, in turn, represent only the tip of the iceberg in relation to all migrant workers in an irregular situation whose wages have not been paid.

Actually receiving compensation and back pay is particularly important to victims, FRA reports show.<sup>29</sup> Successful complaints also encourage more victims to report to the police and seek redress. The following four examples indicate the difficulty in receiving outstanding pay awarded following complaints.



- In Austria, UNDOK informed FRA that awards were made for slightly more than half (38) of the 70 complaints received about outstanding remuneration from migrants in an irregular situation between 2017 and 2019. The amounts awarded typically ranged between € 200 and € 600, with a few proceedings leading to back pay of € 1,100 – 2,500. However, due wages were not paid in four or five cases because employers declared bankruptcy or disappeared.<sup>30</sup>
- In Belgium, enough evidence was found for 11 out of 14 complaints that the Social Legislation Inspectorate received between 2017 and 2019 to ask the employer for due wages. The employers paid the due wages in only five cases (totalling € 28,893). For the remaining six, the Social Legislation Inspectorate drew up a criminal report against the employers for the public prosecutor.<sup>31</sup>
- In Bulgaria, neither the General Labour Inspectorate Executive Agency nor the Confederation of Independent Trade Unions of Bulgaria had information on the award and payment of the outstanding claims for the complaints they had received. Although the Labour Inspectorate established that outstanding remuneration needed to be paid to two migrant workers in an irregular situation, it could not report whether or not the remuneration had been awarded and paid.

As the Labour Inspectorate reports, its powers are limited to the establishment of the violation. It orders the employer to duly calculate and pay the outstanding wages. However, if the remuneration is not paid, the third-country national has to file a civil law claim before the regular courts.

- In France, among the 20 complaints about outstanding remuneration that the Labour Inspectorate<sup>32</sup> received from migrants in an irregular situation between 2017 and 2019, in no case had the worker received back payment by the time of the research. Complaints were still pending with courts.

The Employers Sanctions Directive also stipulates that, to calculate the amount of back payment due, the wages must be presumed to have been at least as high as the wage provided for by the applicable laws on minimum wages, by collective agreements or in accordance with established practice in the relevant occupational branches, unless either the employer or the employee can prove otherwise.

Under Article 6 (3) of the directive, there is a presumption that the employment relationship lasted at least three months, unless other evidence is available. However, a recent PICUM study in 15 EU Member States reported that frontline NGOs in all Member States covered found that the presumption of three months of employment is rarely implemented in practice.<sup>33</sup> Furthermore, the study shows that it is challenging for workers to prove the existence of the employment relationship and the level of underpayment.<sup>34</sup>

### 1.2.2. Procedures to seek back pay and compensation

In general, compensation can be sought in criminal proceedings, in civil proceedings and, in some Member States, through administrative actions, for example labour inspectorates ordering the employer to pay.

#### *Criminal proceedings*

Article 16 of the Victims' Rights Directive recognises the right of victims to obtain, in the course of criminal proceedings, a decision on compensation from the offender.<sup>35</sup> As FRA has pointed out in previous reports, not all Member States process civil law claims as part of the criminal proceedings.<sup>36</sup>

## ECtHR rules in favour of victims of forced labour and trafficking in human beings

*Chowdury and Others v. Greece* concerned 42 undocumented Bangladeshi nationals, who had worked as seasonal agricultural workers in Nea Manolada in Greece. In 2013, the workers protested against their employers, who had not paid any wages for several months. More than 30 workers were injured after armed guards at the site started shooting at the protestors.

The applicants complained that they had been subjected to trafficking in human beings and that Greece had failed to fulfil its positive obligation under Article 4 of the European Convention of Human Rights. Although Greece had, in principle, put in place a legislative framework to combat trafficking in human beings, operational measures were ad hoc; this was even though the national authorities were aware of the migrant workers' situation and the abuses they had been exposed to.

The authorities acquitted the defendants of charges of trafficking in human beings interpreted very narrowly, commuted their sentences and awarded the victims a very low amount of compensation. Therefore, the European Court of Human Rights concluded that the authorities had failed to fulfil their procedural obligation to guarantee an effective investigation and judicial procedure in respect of the situations of human trafficking and forced labour.

The court ordered the Greek state to pay damages of up to € 16,000 each. With a total of € 588,000, this compensation award is one of the largest awards that the court has ever made.

Source: ECtHR, *Chowdury and Others v. Greece*, No. 21884/15, 30 March 2017



The case law analysed for this study shows that only in a few cases has back payment and/or compensation been granted to victims of severe labour exploitation during the criminal proceedings.

Such cases have concerned employers convicted of trafficking in human beings or criminal forms of labour exploitation, as the following examples illustrate.

In the Netherlands, a married couple convicted of trafficking in human beings and employment of migrants in an irregular situation were sentenced to pay non-pecuniary damages (for emotional distress and health issues) and lost income to the five victims, totalling € 26,000.<sup>37</sup>



In Sweden, a defendant who hired a Bangladeshi couple to work in his restaurant without paying them was found guilty of “human exploitation” and sentenced to pay moral damages and the wages he owed them, totalling € 12,000.<sup>38</sup> In Portugal, a defendant convicted of trafficking in human beings was ordered to pay € 2,500 compensation to each victim.<sup>39</sup>

The amount of the moral damages and compensation differs depending on the Member State, the length of the employment relationship and the number of people involved. For example, in France, the Paris Criminal Court imposed the payment of € 1,500 per person for moral damages in a case of trafficking in human beings.<sup>40</sup> In Luxembourg, a victim of trafficking in human beings was compensated € 5,000,<sup>41</sup> and in Portugal a child victim of slavery was compensated € 75,000 plus interest.<sup>42</sup>

#### *Civil law proceedings*

If claims for compensation and back pay are not adjudicated in the criminal procedure, victims need to initiate civil proceedings. Findings from past FRA reports show that, compared with being awarded damages or back payments as a result of criminal proceedings, claiming compensation in the civil justice system is (even) more burdensome for the victim.<sup>43</sup>

Compensation for moral damages decided in criminal proceedings does not replace civil law claims for unpaid work, as the following French case illustrates. A young Moroccan girl who had been adopted when she was 12 years old under *kafala* (a form of adoption under Islamic law) was forced to do housework without being paid and without being allowed to attend school. After the court of first instance dismissed the case, the Court of Appeal of Versailles sentenced the couple who adopted the young girl to pay a € 10,000 fine to the girl for moral damages for “obtaining from a vulnerable person unpaid or very low paid services”.<sup>44</sup>

The girl took the case to the civil court to obtain civil compensation for her unpaid work, but the court dismissed her case, as she had already been compensated. The case was brought to the French Supreme Court, which affirmed her right to full compensation and returned the case to the Court of Appeal to decide on the amount.<sup>45</sup> Finally, the Court of Appeal sentenced the couple to pay € 280,000 in compensation.<sup>46</sup>

Civil law claims can offer relief, as the following example illustrates. In Belgium, in 2018, a man in an irregular situation who worked for a gym under degrading working conditions and received only a small part of his salary was advised not to pursue a trafficking case but to bring his case before the Labour Court to obtain back payments from the employer, who had fired him once he asked for the payment. Finding that the Employers Sanctions Directive was applicable to this case despite its late transposition into Belgian law, the court found that, in the absence of a written contract of employment and according to available evidence, the worker was entitled to arrears of salary (€ 8,667.46), severance pay (€ 1,838.92) and a severance allowance for wrongful dismissal (€ 11,821.68).<sup>47</sup>

At the same time, civil law procedures may be costly and lengthy. For example, the Belgian victim support organisation Myria supported a case that took more than six years to finalise.<sup>48</sup> A 2019 Dutch report noted that submitting and substantiating a civil claim involves financial risks.<sup>49</sup> Civil proceedings entail legal aid and registry costs, which are the responsibility of the victim if the claim is not successful and is a complex procedure, especially for migrant workers. The Netherlands Trade Union Confederation noted that most civil law procedures fail or are not even started because of a lack of strong evidence.<sup>50</sup>

In 2015, FRA reported that, in some Member States, labour inspectorates can oblige the employer to pay remuneration due. This was the case in Czechia, France, Poland, Portugal and Slovakia.<sup>51</sup> In Belgium, if a case cannot be pursued in court, Myria tries to come to an arrangement with the employer, or requests that labour inspectors visit the workplace to verify that the individual is back to work and request immediate payment of unpaid wages.

#### *Extrajudicial procedures*

Mediation and collective action, which trade unions or workers' organisations sometimes take on on workers' behalf, also constitute ways to seek redress; these may be less time-consuming or intimidating for migrants in an irregular situation. In Belgium, for example, Myria reported that sometimes outstanding remuneration is recovered by exerting informal pressure on the employer.<sup>52</sup> Some trade unions also resort to collective action, for instance demonstrations to publicly denounce exploitative employers.<sup>53</sup>

According to a recent PICUM report,<sup>54</sup> 13 of the 15 EU Member States it reviewed have inspection bodies with the authority to receive individual complaints relating to underpayment of wages, including overtime. The report adds that these bodies are important complaint mechanisms for workers, with fewer barriers than taking the case to court. For example, the procedure would normally be quicker, not need legal representation and not include risks of liability for court costs.

However, there are also risks, as the following example illustrates. In Cyprus, the Department of Labour Relations is the public service responsible for mediation in the employment field. A specific unit was created within this department to carry out mediation in labour disputes involving migrant workers from third countries. This procedure is not provided for or regulated by law. As a result, there are no procedural safeguards.<sup>55</sup>

#### *Measures to facilitate back pay*

According to Article 6 (4) of the Employers Sanctions Directive, Member States must put in place mechanisms to ensure that third-country nationals in an irregular situation are able to receive back payment of due wages. FRA's 2015 report highlights the difficulties victims encounter in claiming compensation

## PROMISING PRACTICE

### Requesting employers to pay due wages on the spot

In **Belgium**, if the employer is present during a labour inspection and there is evidence of non-payment of wages, labour inspectors will request that employers pay due wages to workers on the spot.\* For this to happen, a number of conditions need to be fulfilled: everybody must agree to the payment, there must be a witness, there must be a formal protocol and the employer must have been issued with a formal warning.

This solution offers a swift settlement (often in cash) and takes into account the situation of the worker, who might move elsewhere and not be contactable at a later stage. With changes in Belgian legislation prohibiting payment of wages in cash in 2015 (**Law of 23 August 2015 on the protection of the salaries of workers regarding the payment of the salaries**), this practice became the subject of scrutiny, but was finally considered to be lawful and appropriate, according to the Labour Inspectorate.\*\*

*\*EMN (2017b), **Illegal employment of third country nationals in Belgium: Study of the Belgian contact point**, Brussels, EMN, p. 68.*

*\*\*Belgium, written correspondence with the Social Legislation Inspectorate (Contrôle des Lois Sociales/Arbeidsinspectie), 30 April 2020.*

from offenders, for instance when the company that employed them goes into liquidation.<sup>56</sup> This is also the case in civil and administrative proceedings for workers in an irregular situation claiming back pay.<sup>57</sup>

One measure that can be taken is the freezing and seizing of employers' assets. This is possible in some Member States in the context of criminal proceedings (for example in Austria,<sup>58</sup> Belgium,<sup>59</sup> Croatia,<sup>60</sup> France,<sup>61</sup> Hungary<sup>62</sup> and Italy<sup>63</sup>), or in the context of civil proceedings (for instance in Austria<sup>64</sup> and Italy<sup>65</sup>). However, according to a report that La Strada International published in 2019, countries face huge challenges in identifying, tracing, seizing and confiscating proceeds of crime, and many countries lack the mechanisms for ensuring that the confiscated assets are used to pay victims compensation or to contribute to a fund for victims' compensation.<sup>66</sup>

In 2018, a new EU regulation (Regulation (EU) 2018/1805)<sup>67</sup> defining the rules under which Member States recognise and execute confiscation and freezing orders that other Member States issue was passed. Trafficking in human beings and facilitation of unauthorised entry and residence are among the crimes for which mutual recognition of freezing and confiscation orders is established.

A second measure is the establishment of state compensation funds. As Figure 2 shows, according to the evidence collected for this report, in ten Member States back pay can be recovered through state compensation funds (Belgium, Czechia, Finland, France, Germany, Malta, the Netherlands, Portugal, Romania and Spain).<sup>68</sup>

However, in Belgium and the Netherlands, these funds are available only to victims of violent crime. In other cases, the state compensation fund is not available to workers who are in an irregular situation. For example, although Finland secures the payment of employees' claims in the event of the employer's insolvency,<sup>69</sup> this does not apply if the employment relationship is suspected to be reprehensible in some way, as may be the case when employing migrants in an irregular situation.<sup>70</sup> According to the national Labour Inspectorate, the only exception could be victims of trafficking in human beings who have been working without a work permit.<sup>71</sup>

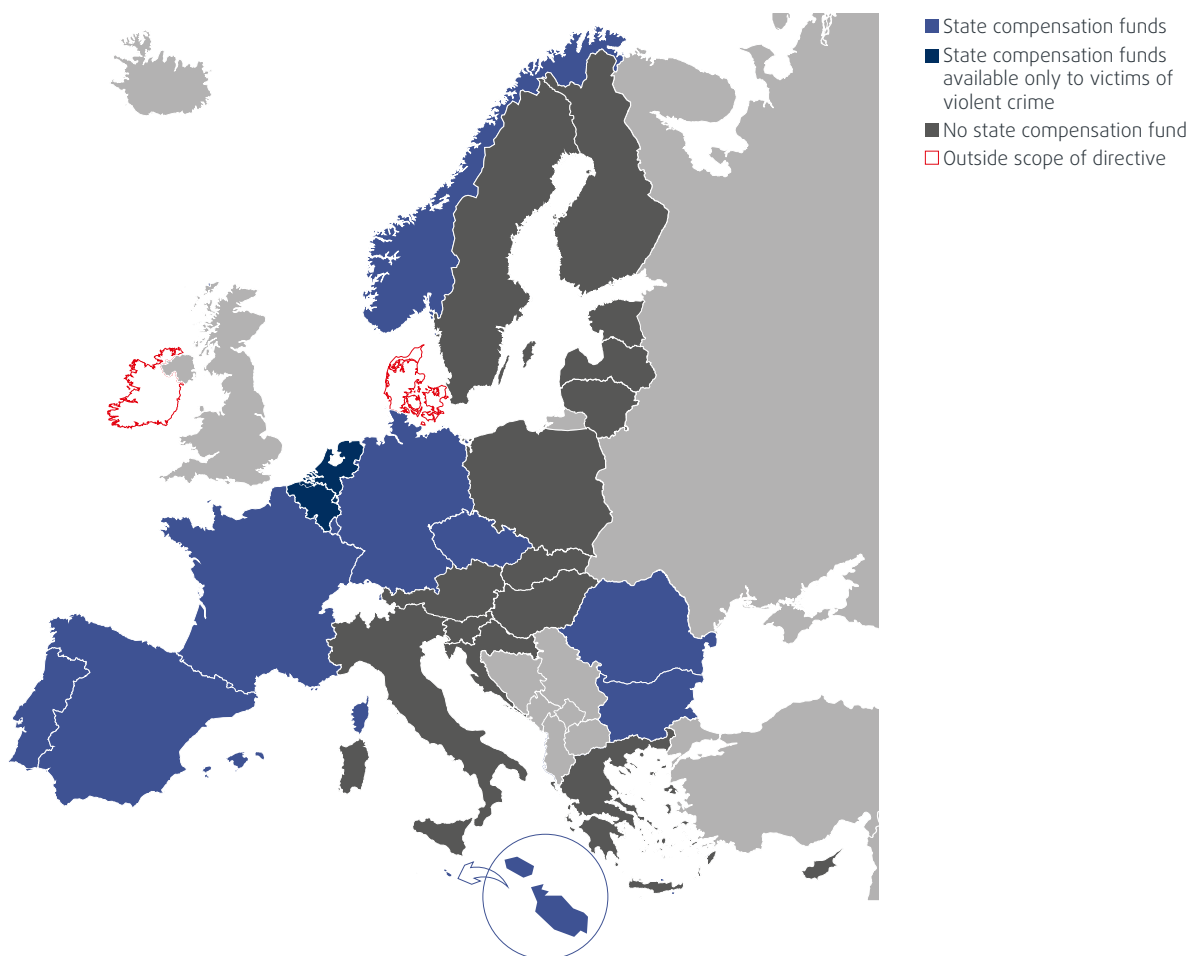
In Portugal, the Wage Guarantee Fund (*Fundo de Garantia Salarial*) is a state compensation fund established to pay outstanding remuneration to workers who cannot be paid by the employer as a result of insolvency or other serious economic situations.<sup>72</sup>

In addition, if migrants in an irregular situation are entitled to access compensation funds, these may not cover the entire sum claimed, as a 2018 judgment in Belgium exemplified. In this case, the court granted the victim of labour exploitation € 8,667.46 back payment, but the compensation in cases of an employer insolvency was limited to a maximum amount of € 6,750.

There are also other measures<sup>73</sup> to secure payment of due wages. For example, in Cyprus, the Labour Relations Committee can prevent employers from hiring new workers until they pay all the outstanding wages.<sup>74</sup> In some Member States, for example Czechia, workers can claim back payments directly from the contractor of which the employer is a direct or intermediate subcontractor, in accordance with Article 8 of the Employers Sanctions Directive.<sup>75</sup>

In France, when the employment relationship ends, the migrant worker in an irregular situation is entitled to back payments corresponding to the period of illegal work (which is supposed to have lasted at least three months) and to a fixed compensation that amounts to three months of pay.<sup>76</sup> The French

**FIGURE 2. EXISTENCE OF STATE COMPENSATION FUNDS FOR MIGRANT WORKERS IN AN IRREGULAR SITUATION CLAIMING BACK PAY IN 25 EU MEMBER STATES**



Source: FRA, 2021 [based on legislation reported in Table 2 in Annex 2, available on FRA's website]

Office for Immigration and Integration (*Office français de l'immigration et de l'intégration*) is supposed to collect these sums, but, according to the Labour Inspectorate, this does not happen in practice.<sup>77</sup> This is also confirmed in the French Office for Immigration and Integration's annual activity report for 2018.<sup>78</sup>

Article 6 (1) of the Employers Sanctions Directive stipulates that Member States must ensure that the necessary mechanisms are in place to allow third-country nationals in an irregular situation to receive any outstanding remuneration, including when they return to their country of origin. In all EU Member States but one, the worker does not need to physically reside in the country to request back pay (the sources for each Member State are reported in Table 3 in Annex 2, available on FRA's website).

In Cyprus, migrant workers must be in the country to lodge a complaint against their employers with the Department of Labour Relations. The claim must be filed at the Aliens and Immigration Department of the Ministry of the Interior, which will then send it to the Department of Labour Relations. The examination of the claim by the Labour Relations Committee involves a hearing that both parties attend.<sup>79</sup>

# Endnotes

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# 2

## ROLE OF LABOUR INSPECTORATES AND OTHER MONITORING BODIES

Article 14 of Employers Sanctions Directive requires Member States to “ensure that effective and adequate inspections are carried out” to control the employment of migrants in an irregular situation. According to the European Commission’s 2014 communication, effective and adequate inspections are indispensable not only to tackling illegal employment but also to ensuring that migrants in an irregular situation can exercise their rights.

According to experts interviewed for FRA’s 2015 report on severe labour exploitation, one important factor contributing to widespread impunity for those exploiting migrant workers is a lack of reporting by victims due to the fear of losing their job and being returned to their countries of origin.<sup>1</sup> As a consequence, Member States must be prepared to proactively carry out more workplace inspections targeting sectors at risk, and improve the effectiveness and accessibility of remedies for workers in an irregular situation.

### 2.1. INFORMING WORKERS OF THEIR RIGHTS AND AVAILABLE COMPLAINTS MECHANISMS

Article 6 of the Employers Sanctions Directive requires Member States to inform workers “systematically and objectively” about the employer’s duty to pay outstanding remuneration, taxes and social security contributions to migrant workers in an irregular situation, and the available complaint



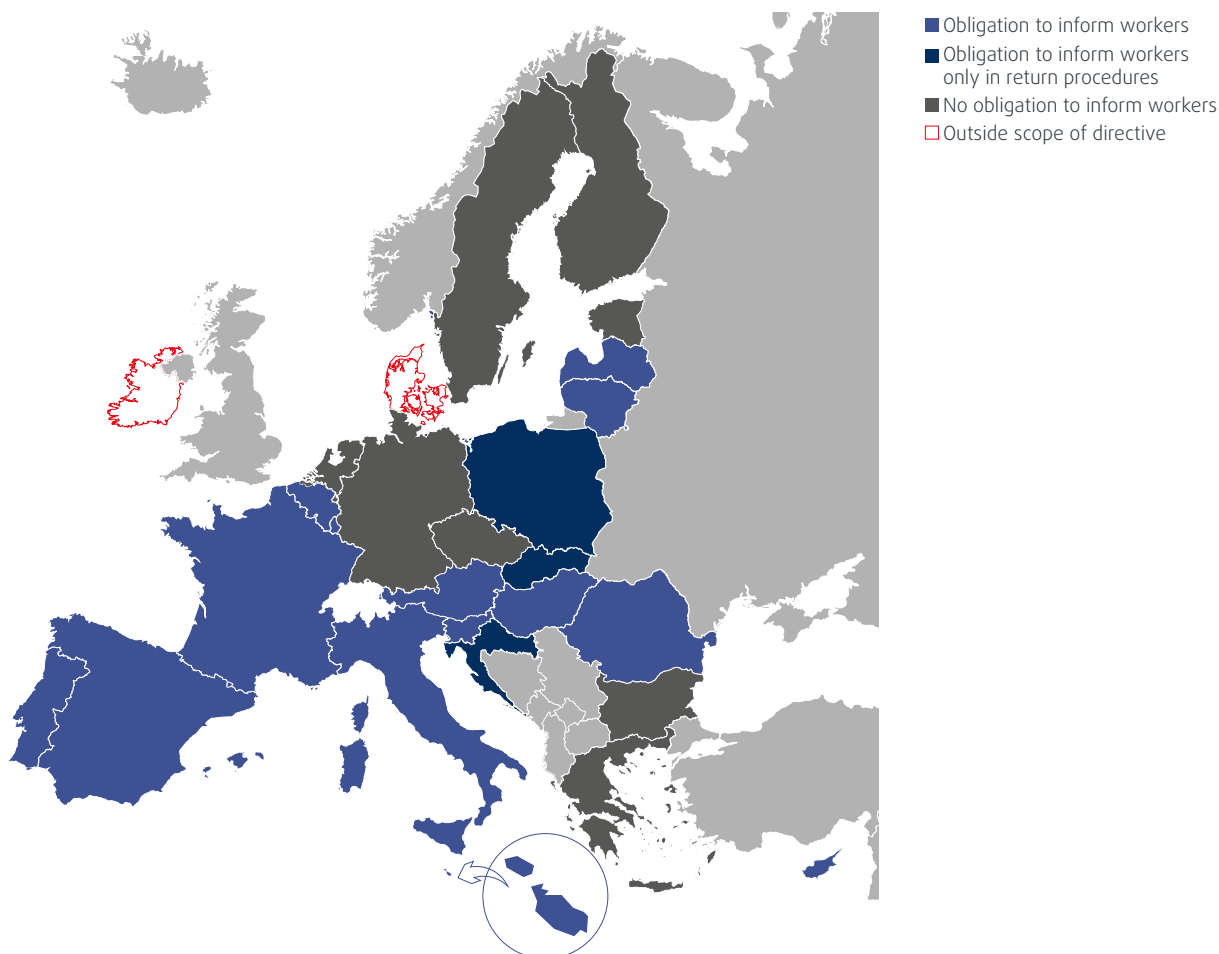
mechanisms before the enforcement of any return decision. The right to information is also included in the Victims' Rights Directive (Article 4).

FRA's past reports highlight that one of the risk factors for labour exploitation is migrants' low level of knowledge of their rights as workers in the EU Member State where they reside; this prevents them from identifying their situation as one of labour exploitation and possible avenues of redress.<sup>2</sup> Therefore, measures aimed at improving rights awareness are essential. Labour inspectorates, trade unions and embassies play a key role in this regard. Given labour inspectorates' role in implementing and monitoring standards of decent work, FRA asked them and other monitoring bodies across the EU whether or not they had an obligation to inform workers of their rights.

FRA's findings show that, in 17 EU Member States, labour inspectorates are under a general obligation to inform workers of their rights (see Figure 3). However, even in these Member States there may be gaps.

In Austria, for example, the obligation of the Labour Inspectorate to inform workers is limited to occupational health and safety and does not cover remuneration.<sup>3</sup> According to the national labour authorities in France and Slovakia, despite such an obligation being in place, information is not systematically provided to workers in practice.<sup>4</sup> According to a EMN report published in 2017, only 11 (out of 23 reviewed) Member States provided information specifically to migrant workers in an irregular situation on their rights.<sup>5</sup>

**FIGURE 3. LABOUR INSPECTORATE'S OBLIGATION TO INFORM WORKERS OF THEIR RIGHTS AND AVAILABLE COMPLAINTS MECHANISMS IN 25 EU MEMBER STATES**



Source: FRA, 2021 [based on legislation and information provided by national labour inspectorates presented in Table 1 of Annex 2, available on FRA's website]

## PROMISING PRACTICE

# Delivering information on workers' rights during labour inspections

In **Italy**, the National Labour Inspectorate reported that, if it detects third-country nationals working and staying irregularly in Italy during an inspection, it gives the workers a form with information on their rights, their employer's obligation to pay outstanding wages, pension and social insurance contributions, and how to enforce workers' rights against the employer. The workers are also informed of how to report to the police and seek redress.\*

In **Slovenia**, the authorities reported that migrants in an irregular situation found during an inspection are informed about their rights through the record of the inspection, through a document that includes information on claiming back pay. Interpreters are involved, when needed.\*\*

\* *Italy, written correspondence with the National Labour Inspectorate (Ispettorato Nazionale del Lavoro), 20 April 2020.*

\*\* *Slovenia, written correspondence with the Financial Administration of the Republic of Slovenia (Finančna uprava Republike Slovenije), 2 April 2020.*

In the Member States where an obligation to inform workers about their labour rights is in place, there are differences in relation to the type of information delivered, how information is provided and whether or not it is translated. Some indicated that they proactively inform workers about their rights during labour inspections or provide workers with translated information in writing. The evidence that FRA collected from national authorities identified the following promising practices.

In the remaining eight Member States (Bulgaria, Czechia, Estonia, Finland, Germany, Greece, the Netherlands and Sweden), labour inspectorates have no obligation to inform workers of their rights.

In Sweden,<sup>6</sup> for example, according to the labour inspectorate, such an obligation is in place only for posted workers as defined in EU law (Directive (EU) 2018/957 of the European Parliament and of the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services).

In Berlin, although there is no duty to inform workers of their rights, information seems to be provided in practice. According to the Berlin Counselling Centre for Migration and Good Work, migrants consult their service after being made aware of their rights by staff of the German Customs Office (*Finanzkontrolle Schwarzarbeit*) during inspections.<sup>7</sup>

In Croatia,<sup>8</sup> Poland<sup>9</sup> and Slovakia,<sup>10</sup> the law only requires national authorities to inform workers in an irregular situation about how to recover back pay before implementing a return procedure. In Romania, according to information provided by the Labour Inspectorate and its activity reports,<sup>11</sup> information sessions were organised with foreign students in education facilities and asylum applicants in reception centres, but not with other categories of foreign workers.

Availability of information in languages the migrants understand is key, but significant obstacles remain, as the following examples show. In Hungary and Lithuania, where the authorities reported that information was mainly provided through the labour inspectorate's website, translations of the information into English (in Hungary) and English, Russian or Ukrainian (in Lithuania) were limited.

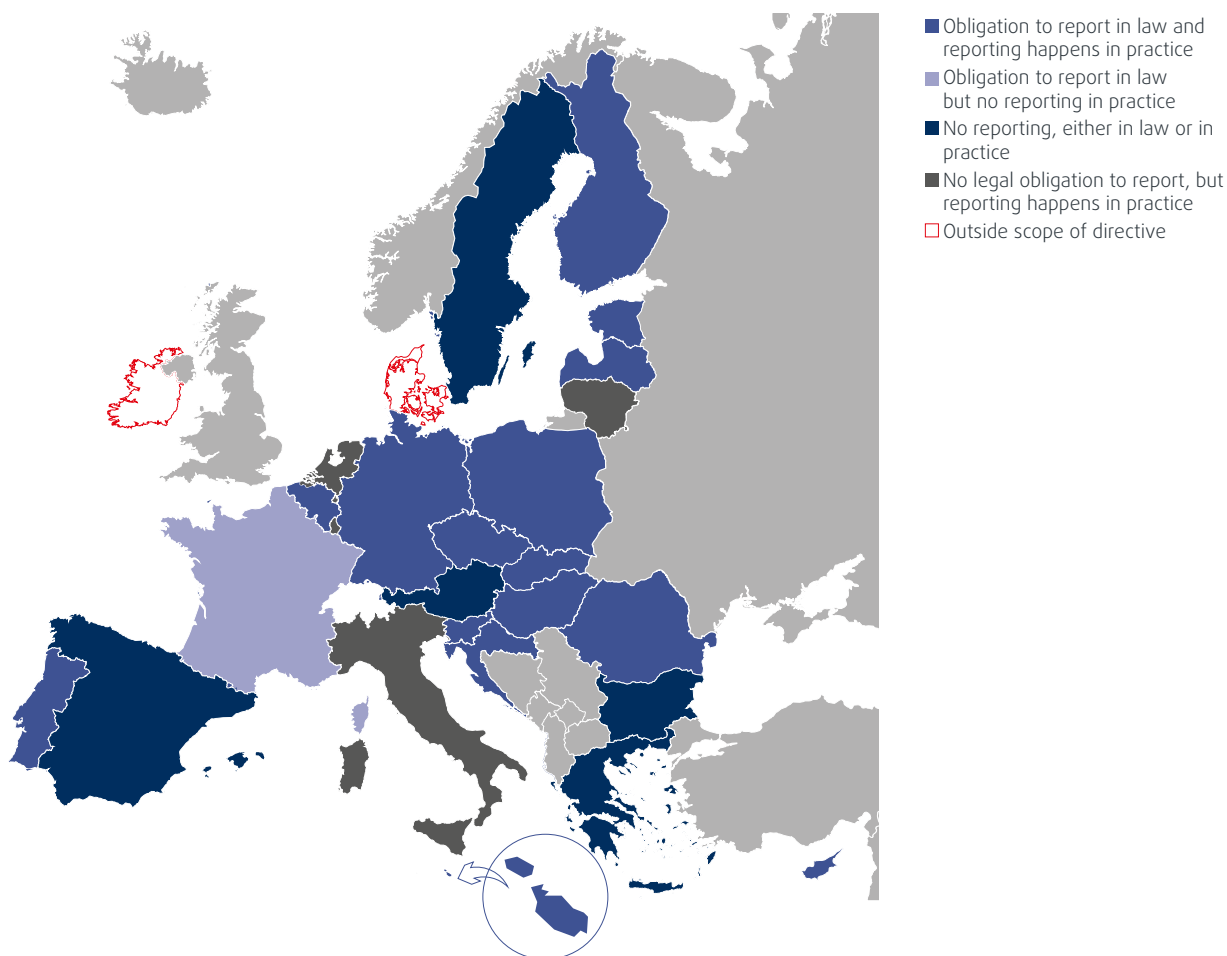
In Portugal, the labour inspectorate reported that information was provided through a dedicated phone line, through a face-to-face service, at the request of the worker, or through email, by post or through Facebook.<sup>12</sup> The labour inspectorate's website, however, provides information only in Portuguese.<sup>13</sup> In Romania, information on how to recover back pay is translated only into English.<sup>14</sup> The only information in English that the labour inspectorate's website provides, however, relates to posted workers.<sup>15</sup>

## 2.2. REPORTING MIGRANT WORKERS WHO ARE IN AN IRREGULAR SITUATION

In its report on workers' experiences of severe labour exploitation, FRA recommended that the European Commission, when evaluating the Employers Sanctions Directive, pay particular attention to the implementation of Article 14. This article requires EU Member States to carry out effective and adequate inspections. These inspections should not result in the immediate expulsion of victims of labour exploitation who are in an irregular situation.<sup>16</sup>

FRA reviewed legal provisions in place at national level and asked labour inspectorates whether or not they are under an obligation to report migrants in

**FIGURE 4. DUTY OF LABOUR INSPECTORATES TO REPORT TO POLICE OR IMMIGRATION LAW ENFORCEMENT AUTHORITIES IN 25 EU MEMBER STATES**



Source: FRA, 2021 [based on legislation and information provided by national labour inspectorates presented in Table 5 of Annex 2, available on FRA’s website]

an irregular situation to the police or immigration law enforcement authorities (see Figure 4).<sup>17</sup> The findings show that, in some Member States, there is an obligation in law or based on internal documents, or it is simply a matter of practice, for labour inspectorates to report migrants in an irregular situation to migration authorities.

As shown in Figure 4, in 20 Member States, by law or in practice, if labour inspectorates identify migrants in an irregular situation during inspections, they report them to the police or immigration law enforcement authorities.

— In 15 Member States, the reporting duty is mentioned in the law, and in one Member State (Cyprus) it is mentioned in internal guidelines.

In four Member States (Italy, Lithuania, Luxembourg and Netherlands), the national labour inspectorates informed FRA that, despite the absence of a reporting duty in the law, this happens in practice. In the Netherlands, according to a 2019 ILO report, when labour inspectors check whether employers comply with the obligation not to hire migrant workers in an irregular situation, the control is carried out with the police, which has the authority to verify the identity of the workers.<sup>18</sup>

In the remaining five Member States (Austria, Bulgaria, Greece, Spain and Sweden) the labour inspectorate indicated that there was no reporting duty in place. However, in Austria, the Financial Police – the main body in charge

## PROMISING PRACTICE

# Labour Inspectorate treating complaints with confidentiality

In **France**, the Labour Inspectorate reported that, despite a legal obligation to report, this does not happen in practice because labour inspectors treat the complaint with confidentiality, on the basis of ILO Convention No. 81.

According to Article 15 of ILO Convention No. 81, labour inspectors should treat the source of any complaint bringing a defect or breach of legal provisions to their notice as absolutely confidential.

See ILO, *Labour Inspection Convention, Convention No. 81, 19 June 1947*

## PROMISING PRACTICE

# Firewall protection to encourage crime reporting

The ‘free in, free out’ policy in the **Netherlands** makes it possible for migrants in an irregular situation to safely report crime. This policy allows these migrants to enter a police station to report a crime and be guaranteed to be able to leave freely, without being arrested or detained, regardless of the type of crime reported. It represents one of the only forms of ‘firewall protection’ available to victims of crime across Europe.

Source: Timmerman, R. I., Leerkes, A., Starling, R. and Delvino, N. (2020), “Free in, free out”: *exploring Dutch firewall protections for irregular migrant victims of crime*, *European Journal of Migration and Law*, Vol. 22, No. 3, p. 432

of controlling social fraud and illegal employment – reports migrants in an irregular situation to the migration authorities.<sup>19</sup>

A specific situation was identified in Belgium, where, according to the Labour Inspectorate, if it identifies migrant workers in an irregular situation during inspections it has an obligation to report them to the police. However, if the Labour Inspectorate receives a complaint from a migrant worker outside the context of an inspection, it will keep the information confidential and not report the worker to the police. If the Labour Inspectorate identifies violations of the Social Criminal Code, it will refer the case to the Labour Prosecutor.<sup>20</sup> According to Myria,<sup>21</sup> in practice the Immigration Office will apply specific safeguards only for migrants in an irregular situation who are potential victims of trafficking in human beings. They will be referred to a specialised centre and will not be detained.

In 14 out of the 16 Member States where a reporting duty exists, labour inspectorates report migrant workers in an irregular situation to the police or migration authorities. In the remaining two Member States, migrants in an irregular situation are reported to the public prosecutor (Portugal) or the district attorney (France).

## 2.3. JOINT INSPECTIONS WITH POLICE AND MIGRATION AUTHORITIES

Past FRA reports identify Member States where joint inspections involving the labour inspectorate and the police and/or migration authorities take place.<sup>22</sup>

FRA highlights that when joint inspections are conducted with anti-trafficking units – or other specialised units trained on labour exploitation – these inspections may help identify migrants who are victims of labour exploitation or trafficking in human beings.

However, when joint inspections are conducted with police staff or immigration law enforcement authorities, this may discourage exploited workers from reporting their experience during an inspection; it may also cause them to hide to avoid apprehension and removal. For example, the General Workers Union (GWU) – a trade union conducting inspections in Malta – reported that it does not conduct inspections with police, as third-country nationals often fear repercussions, such as deportations or unfair treatment from the police.<sup>23</sup>

FRA asked national labour inspectorates how often they conduct joint inspections with police and/or immigration law enforcement authorities and special units among them (for instance anti-trafficking units).

In all Member States, labour inspectorates reported that inspections were ‘occasionally’ or ‘often’ conducted with police or immigration law enforcement authorities, especially when they expected to find migrant workers in an irregular situation. In contrast, in the few Member States where monitoring bodies other than labour inspectorates were contacted, these bodies reported not conducting joint inspections with the police or immigration law enforcement authorities. For instance, this was the case for the social security authorities in Bulgaria<sup>24</sup> and Greece.<sup>25</sup>

The information FRA collected indicates that three reasons may motivate joint inspections.

### 2.3.1 Joint inspections for safety reasons

Respondents in some Member States – for example Austria, Belgium, Czechia, Finland and France – reported that joint inspections were conducted with the



police as a safety measure to protect labour inspectors. However, as PICUM notes, even when police accompany inspectors for safety purposes rather than expressly for immigration law enforcement purposes, migrant workers in an irregular situation who are identified in the workplace face immigration enforcement as a result.<sup>26</sup>

### **2.3.2. Joint inspections focusing on immigration enforcement**

Respondents in other Member States – for example Croatia, Cyprus, Czechia, Hungary and Romania – noted that the focus of joint inspection was on immigration enforcement.

As an illustration, in Croatia, the Labour Inspectorate cooperates with the Ministry of the Interior to “monitor migrant workers in an irregular situation”.<sup>27</sup> In Hungary, it cooperates to “eradicate illegal migration”.<sup>28</sup> In Romania in 2019, according to the Labour Inspectorate, 51 % of labour inspections were conducted jointly with the General Inspectorate for Immigration “with the aim to identify illegally employed migrant workers and fight against illegal employment”. Inspections aiming to verify the legality of migrant workers’ employment regime are on the rise.<sup>29</sup>

In some Member States – for example France, Italy, Luxembourg, the Netherlands and Slovakia – monitoring bodies reported that some joint inspections aimed to identify labour exploitation and trafficking in human beings. In Luxembourg, for example – where the Ministry of Labour, Employment and the Social and Solidarity Economy reported that the labour inspectorate conducts inspections with the police “most of the time” – three joint inspections were conducted in 2018 with the judicial police, with the aim of detecting illegal employment of third-country nationals and the exploitation of workers.<sup>30</sup>





These joint inspections do not necessarily lead to increased identification of exploitation and trafficking. For instance, in Slovakia, throughout 2018 the Labour Inspectorate and the Police Unit to Combat Illegal Migration (which has the identification of trafficking in human beings for labour exploitation under its mandate) jointly checked 332 businesses, focusing on “prohibition of illegal employment, inspection of regularity of stay of foreigners and detection of victims of trafficking in human being[s]”. Out of 2,975 persons inspected, 1,248 were third-country nationals, 126 of whom were in an irregular situation.<sup>31</sup> No victims of trafficking were identified among the third-country nationals.

### **2.3.3. Joint inspections focusing on victims of trafficking and labour exploitation**

A number of Member States reported conducting joint inspections with anti-trafficking units or other special units focusing on trafficking in human beings and labour exploitation.

For example, in Portugal,<sup>32</sup> the Immigration and Borders Service reported having an Anti-Trafficking in Human Beings Unit, which occasionally conducted joint inspections with the Labour Inspectorate. In the Netherlands,<sup>33</sup> joint inspections of the Labour Inspectorate of the Ministry of Social Affairs and Employment (*Ministerie van Sociale Zaken en Werkgelegenheid, SZW*) and migration authorities and the police are very common. The Identification and People Trafficking Department of the Aliens Police often accompany the Labour Inspectorate.

The Labour Inspectorate in Austria<sup>34</sup> and the Financial Administration in Slovenia,<sup>35</sup> which is the monitoring body in charge of undeclared work, reported that they occasionally conducted joint inspections with the police and mentioned those conducted in the course of EU-wide Joint Action Days on trafficking organised by the European Union Agency for Law Enforcement Cooperation.

## **PROMISING PRACTICE**

### **Carrying out joint inspections to identify victims**

Joint inspections reported by labour inspectorates in some Member States are more likely to identify and protect potential victims of labour exploitation and refer them to support organisations.

In Belgium, the labour inspectorate – the National Office of Social Security (*Office National de Sécurité Sociale*) – reported usually conducting inspections alone. However, its specialised anti-trafficking teams often conduct inspections with the police anti-trafficking units, which are targeted at detecting potential situations of labour exploitation. According to the labour inspectorate, in these instances, exploited workers are more likely to be detected and referred to a specialised shelter. The risk of removal of potential victims of labour exploitation remains rather low, even when the Immigration Office takes part in the joint inspections. This is because its inspectors know how to deal with potential victims of labour exploitation, and the labour inspectors normally lead in these inspections.\*

Italy adopts a “multi-agency intervention” approach. Labour inspectorates often conduct joint inspections with other authorities – including the specialised units of *Carabinieri* (one of Italy’s main law enforcement agencies), local healthcare departments, the financial police and the police – with the support of mediators, to prevent and counter illegal recruitment (*caporalato*) and exploitation of third-country workers. These inspections are carried out in sectors or geographical areas considered at risk, which are selected through an intelligence activity and cooperation with workers’ and employers’ associations.\*\*

*\*Belgium, written correspondence with the National Office of Social Security (Office Nationale de Sécurité Sociale), 31 March 2020.*

*\*\*Italy, written correspondence with the National Labour Inspectorate (Ispettorato Nazionale del Lavoro), 20 April 2020.*

In other Member States, the practices described raise doubts about the adequate identification of cases of labour exploitation among migrant workers.

For example, in Bulgaria, the labour inspectorate conducts inspections with the anti-trafficking unit of the police when there is information about trafficking for labour exploitation. However, in practice, joint inspections have been conducted only in relation to Bulgarian citizens who might be victims of trafficking in human beings. So far, no cases have been found in which foreign nationals working in the territory of Bulgaria might be victims of trafficking for labour exploitation.<sup>36</sup>

In Estonia, if the Labour inspectorate believes that a worker may be a victim of trafficking, it will write a crime report and send it to the police. However, until now the Labour Inspectorate has not written any such report.<sup>37</sup>

#### PROMISING PRACTICE

## Training labour inspectors on identifying trafficking

In **Romania**, following a cooperation protocol between the **National Anti-trafficking Agency** (*Agenția Națională Împotriva Traficului de Persoane*, ANITP) and the Labour Inspectorate, ANITP conducted various training sessions for labour inspectors on how to detect and report cases of human trafficking in different cities.

*Source: Romania, written correspondence with the Anti-Trafficking Agency (Agenția Națională Împotriva Traficului de Persoane), May 2020*

# Endnotes

- 1 FRA (2015), pp. 75 and 76.
- 2 FRA (2019a), pp. 70–72.
- 3 However, another monitoring body, the Financial Police, whose mandate is to monitor compliance with tax measures, is under an obligation to inform workers of their rights under labour law.
- 4 France, written correspondence with the Labour Inspectorate (*Inspection du travail*) of Val d’Oise; Slovakia, written and oral communication with the National Labour Inspectorate (*Národný inšpektorát práce*).
- 5 EMN (2017a), p. 8.
- 6 Sweden, written correspondence with Swedish Work Environment Authority (*Arbetsmiljöverket*), 25 February 2020.
- 7 Germany, phone conversation with the Berlin Counselling Centre for Migration and Good Work (*Berliner Beratungszentrum für Migration und Gute Arbeit*), 7 May 2020.
- 8 Croatia, Aliens Act (*Zakon o strancima*), Official Gazette (*Narodne novine*) No. **133/2020**, 25 November 2020, Art. 197.
- 9 Poland, Act of 12 December 2013 on Foreigners (**USTAWA z dnia 12 grudnia 2013 r. o cudzoziemcach**), Art. 7 (2).
- 10 Slovakia, Law No. 82/2005 on undeclared work and undeclared employment (**Zákon č. 82/2005 Z.z. o nelegálnej práci a nelegálnom zamestnávani v znení neskorších predpisov**), 9 February 2005, Art. 7c (1).
- 11 Romania, Labour Inspectorate (*Inspectiei Muncii*) (2017, 2018, 2019).
- 12 Portugal, Working Conditions Authority (*Autoridade para as Condições do Trabalho*, ACT), 31 March 2020.
- 13 Portugal, website of the Working Conditions Authority (**Autoridade para as Condições do Trabalho, ACT**).
- 14 Romania, Government Ordinance No. 25/2014 regarding the employment and deployment of foreigners in Romania and amending other legal acts related to the regime of foreigners in Romania (**Ordonanță nr. 25 din 26 august 2014 privind încadrarea în muncă și detașarea străinilor pe teritoriul României și pentru modificarea și completarea unor acte normative privind regimul străinilor în România**), 30 August 2014, Art. 37 (3).
- 15 Romania, website of the Labour Inspectorate (**Inspectia Muncii**).
- 16 FRA (2019a), p. 19.
- 17 See Table 2 for references for each Member State.
- 18 ILO (2021), p. 36.
- 19 Austria, written correspondence with the national authorities, 12 April 2021.
- 20 Fairwork Belgium (2014), pp. 64 and 65; Belgium, written correspondence and phone conversation with Myria Federal Migration Centre (*Centre Fédéral Migration/Federaal Migratiecentrum*), 2 April 2020.
- 21 Belgium, written correspondence and phone conversation with Myria Federal Migration Centre (*Centre Fédéral Migration/Federaal Migratiecentrum*), 2 April 2020; Myria Federal Migration Centre (*Centre Fédéral Migration/Federaal Migratiecentrum*) (2016), pp. 28–31.
- 22 FRA (2015), p. 69; FRA (2018), p. 7.
- 23 Malta, conversation with the Secretary General of GWU, 3 March 2020.
- 24 Bulgaria, written correspondence with the National Social Security Institute (*Национален осигурителен институт*).
- 25 Greece, written correspondence with the National Social Security Agency (*Ενιαίος Φορέας Κοινωνικής Ασφάλισης, ΕΦΚΑ*).
- 26 PICUM (2020), p. 36.
- 27 Croatia, written correspondence with the Service for Inspection of Employment, Posting of Workers and International Cooperation of the State Inspectorate (*Državni inspektorat*), 5 May 2020.
- 28 Hungary, written correspondence with the Hungarian Labour Inspectorate (*Országos Munkavédelmi és Munkaügyi Főfelügyelőség*), 21 May 2020.
- 29 Romania, written correspondence with the Labour Inspectorate (*Inspectia Muncii*) on 13 February 2020.
- 30 Luxembourg, written correspondence with the Ministry of Labour, Employment and the Social and Solidarity Economy (*Ministère du Travail, de l’Emploi et de l’Économie sociale et solidaire*), 29 May 2020.
- 31 Slovakia, Government of the Slovak Republic (*Vláda SR*) (2019).
- 32 Portugal, written correspondence with the Immigration and Borders Service (*Serviço de Estrangeiros e Fronteiras*), 23 March 2020.
- 33 Netherlands, written correspondence with the Labour Inspectorate of the Ministry of Social Affairs and Employment (*Ministerie van Sociale Zaken en Werkgelegenheid, SZW*) (*Inspectie SZW*), 17 March 2020 and 2 June 2020.
- 34 Austria, written correspondence with the Ministry of Social Affairs, Labour Inspectorate – Labour Law Section and Central Labour Inspectorate (*Sozialministerium: Arbeitsinspektion – Sektion Arbeitsrecht und Zentral-Arbeitsinspektorat*), 16 March 2020.
- 35 Slovenia, written correspondence with the Financial Administration of the Republic of Slovenia (*Finančna uprava Republike Slovenije*), 2 April 2020.
- 36 Bulgaria, written correspondence with General Labour Inspectorate Executive Agency (GLA EA) (*Изпълнителна агенция „Главна инспекция по труда“*, ИА ГИТ), 20 February 2020.
- 37 Estonia, written correspondence with the Labour Inspectorate (*Tööinspektsioon*).

# 3

## LEGAL PROGRESS IN COMBATING PARTICULARLY EXPLOITATIVE WORKING CONDITIONS

### 3.1. CHANGES TO LEGISLATION CRIMINALISING SEVERE FORMS OF LABOUR EXPLOITATION

Article 9 of the Employers Sanctions Directive lists different situations in which Member States must impose criminal sanctions on employers recruiting migrants in an irregular situation. These include the illegal employment of children (Article 9 (1) (e)), the exploitation of victims of trafficking in human beings (Article 9 (1) (d)) and employment “accompanied by particularly exploitative working conditions” (Article 9 (1) (c)). This chapter reviews changes since 2015 in the way Member States criminalise the employment of migrants in an irregular situation under particularly exploitative working conditions.

According to the 2014 European Commission report, all EU Member States, except for Romania, have criminalised the employment of migrants in an irregular situation under particularly exploitative labour conditions.<sup>1</sup> In Romania, the law transposing Article 9 (1) (c) of the Employers Sanctions Directive does not refer to this specific situation.<sup>2</sup>

EU Member States apply different approaches in criminalising the employment of migrants in an irregular situation under particularly exploitative working conditions. The majority created a separate criminal offence when transposing the directive. Some EU Member States opted for applying the crime of trafficking in human beings in a more flexible manner to also cover victims of particularly exploitative working conditions. Among these Member States, a few enacted rules criminalising the act of exploitation itself.

The criminalisation of employment under particularly exploitative working conditions introduced by the Employers Sanctions Directive differs from that of trafficking in human beings for labour exploitation. Under Article 2 of the Anti-trafficking Directive, an offence of trafficking in human beings requires the presence of three constitutive elements: acts (recruitment, transport, transfer, harbouring or reception of persons), means (use of threat, force and other forms of coercion; abuse of a person’s position of vulnerability) and the purpose of exploiting the victim.<sup>3</sup> Only when all three elements are shown to be present can an offence of trafficking in human beings be established. This may raise evidential and prosecutorial challenges. For example, it might be difficult to prove the intention to exploit.

In contrast, for the purpose of Article 9 (1) (c) of the Employers Sanctions Directive, it is sufficient to establish that there has been an act of exploitation of a certain gravity. There is no need to prove the employer’s purpose to exploit the victim. Although particularly exploitative working conditions may be the result of trafficking in human beings, not all exploitation occurs in the context of trafficking.<sup>4</sup> Nor have victims of particularly exploitative working conditions necessarily been coerced into working. They are victims because

their experience of work encompasses working conditions that extend far below what is acceptable in law. Nevertheless, many cases of particularly exploitative working conditions are likely to qualify as trafficking in human beings. There is, therefore, a fine line between the two.

In its 2015 report on severe labour exploitation, FRA reported that 20 EU Member States had national law provisions criminalising exploitation in employment that transposed Article 9 (1) (c) of the Employers Sanctions Directive. Six EU Member States (Belgium, Estonia, Finland, the Netherlands, Romania and Sweden)<sup>5</sup> considered that their national legislation on trafficking in human beings covered Article 9 (1) (c) of the directive.<sup>6</sup> This general approach has not changed since 2015.



FRA's 2015 report notes that, among the six Member States that considered their anti-trafficking legislation to cover the issue, only Belgium and Estonia adopted a broad definition of trafficking. In Finland, the Netherlands, Romania and Sweden, the legislation is more restrictive. In the Netherlands, however, the courts broadly interpret the scope of definitions.<sup>7</sup>

At the same time, there may also be criminal offences other than that of trafficking that could protect exploited workers – for example, in Finland, the offence of “extortionate work discrimination”.<sup>8</sup> Under this offence, an “employee is placed in a considerably inferior position through the use of the job applicant’s or the employee’s economic or other distress, dependent position, lack of understanding, thoughtlessness or ignorance”. Extortionate work discrimination can apply to cases in which the ignorance or status of a foreign worker has been abused when deciding on the terms of employment. The penalty for extortionate work discrimination is a fine or imprisonment for, at most, two years.

In the past five years, the following Member States have introduced important changes into the legal framework criminalising labour exploitation or increased corresponding penalties.

- In 2016, Italy passed legislation that introduced a specific criminal offence punishing employers who hire or subject employees to work under exploitative conditions. Before then, it punished only the mediator recruiting the workers on behalf of the employer with the intention of employing them under exploitative working conditions (so-called *capolarato* or illicit recruitment).<sup>9</sup> The new law abolishes the requirement that exploitation must occur by means of violence, threats and intimidation.
- In 2016, Germany criminalised the act of exploitation and profit making itself, and not only the act of forcing a person into exploitative employment, as was previously the case.<sup>10</sup>
- In 2017, Sweden passed legislation to strengthen the criminalisation of trafficking in human beings by including a new crime labelled human exploitation (*människoexploatering*) in the Criminal Code.<sup>11</sup> A person who – through unlawful compulsion or by misleading or using another person’s dependent situation, vulnerability or difficult situation – exploits someone by engaging him or her in forced labour, work under obviously unreasonable conditions or begging can be sentenced to up to four years’ imprisonment. If the crime concerns large-scale activities, has led to considerable profit or entailed particularly reckless exploitation, it amounts to serious human exploitation (*grov människoexploatering*). The penal provision in the Criminal Code is not limited to third-country nationals.<sup>12</sup>
- France passed legislation in 2016 extending the competences of the Labour Inspectorate, which must now record offences of trafficking in human beings, forced labour and servitude.<sup>13</sup>

### 3.2. CASE LAW DEVELOPMENTS

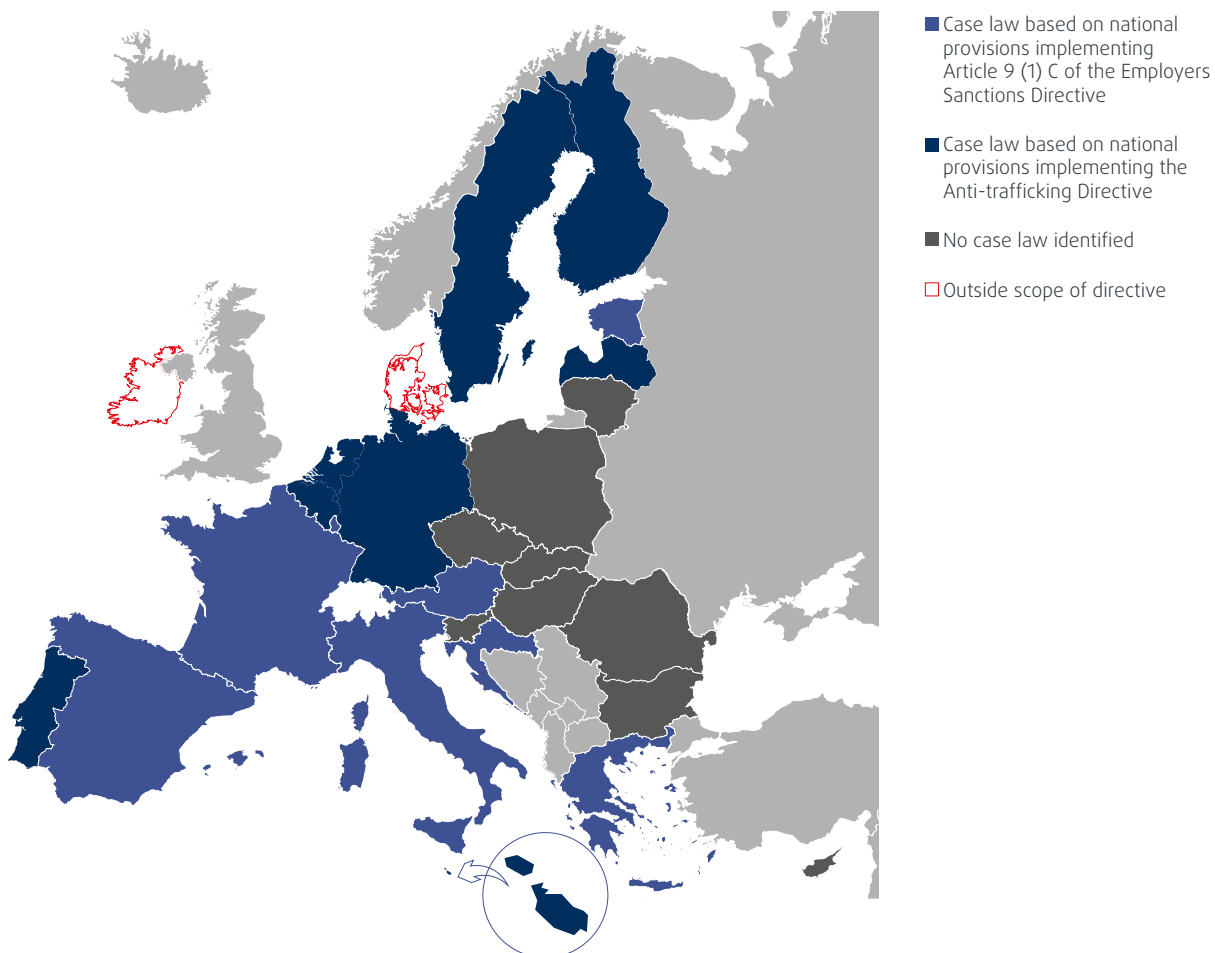
To assess how national legislation transposing Article 9 (1) (c) of the Employers Sanctions Directive is applied in practice, FRA reviewed the most relevant domestic case law between January 2015 and March 2020.

As Figure 5 illustrates, in two thirds of the 25 EU Member States to which the directive applies, one or more judgments involving severe forms of labour exploitation of migrants in an irregular situation have been issued since January 2015.

In 10 of these Member States, national courts applied domestic provisions implementing Article 9 (1) (c) of the Employers Sanctions Directive alone (Austria, Cyprus, France, Greece, Italy and Spain) and/or in conjunction with anti-trafficking legislation (Croatia, Estonia, France and Luxembourg).

In eight (Belgium, Cyprus, Finland, Germany, Latvia, the Netherlands, Portugal and Sweden), national courts applied domestic provisions implementing the Anti-trafficking Directive. In Belgium, where the law transposing the Employers Sanctions Directive extended the anti-trafficking definition,<sup>14</sup> several cases of labour exploitation of irregular third-country nationals were considered under the anti-trafficking legislation.<sup>15</sup>

**FIGURE 5. CASE LAW ON MIGRANTS IN AN IRREGULAR SITUATION WHO HAVE BEEN SEVERELY EXPLOITED AT WORK, FROM JANUARY 2015 TO APRIL 2019, IN 25 EU MEMBER STATES**



Source: FRA, 2021



Figure 5, however, also shows that, in nine EU Member States, FRA could not find any relevant court cases. In other Member States that have domestic provisions implementing Article 9 (1) (c) of the Employers Sanctions Directive, convictions concerned only trafficking in human beings.

For example, in Germany, where Section 233 of the Criminal Code was revised in 2016 to criminalise “exploitative employment” (*Ausbeutung der Arbeitskraft*), the few cases found either mentioned only the relevant legal provision in an *obiter dictum* or involved EU citizens. One conviction on labour exploitation occurred on the basis of Section 232 of the Criminal Code relating to trafficking in human beings.

In Austria, the statistics on convictions confirm that, between 2016 and 2018, there was only one conviction pursuant to Section 28c of the Employment of Aliens Act; this act implements Article 9 (1) (c) of the Employers Sanctions Directive. However, few convictions on labour exploitation have occurred on the basis of Section 104a of the Criminal Code relating to trafficking in human beings.<sup>16</sup>

The following nine examples show how national courts handled cases of severe exploitation of migrant workers in an irregular situation. Depending on national criminal law, courts used crimes of labour exploitation, anti-trafficking legislation or a combination thereof.

— Focusing on the act of exploitation, in 2017, the Assize Court of Lecce in Italy<sup>17</sup> condemned 13 people (out of a total of 15 people indicted) to imprisonment of between seven and 11 years for illicit recruitment (*caporalato*), labour exploitation and slavery.<sup>18</sup> In this case, African workers irregularly residing in Italy were hired to work in the agricultural sector for long hours and without a weekly day off. They were paid no more than € 25 per day. They were accommodated in abandoned farmhouses without a toilet and furniture.

In June 2019, the Assize Court of Appeals of Lecce (decision not public) overturned the decision and discharged 11 of the 13 defendants, arguing that the offence was committed before the law prohibiting slavery (*riduzione in schiavitù*) came into force.

— Taking a similar approach, in 2017, the Ordinary Court of Naples (Italy)<sup>19</sup> found defendants guilty of illicit recruitment and labour exploitation, criminal association, aggravated by the international nature of the conduct, and facilitation of irregular immigration. The defendants recruited workers in Bangladesh and offered them accommodation and jobs in Italian textile companies. The victims had to pay a fee of € 10,000–12,000 for this labour intermediation. Once they had arrived in Italy, the victims were forced to work for many hours under extremely degrading working conditions and with a salary of € 120–300 per month. They also repeatedly suffered abuse and violence and never got the residence permits the intermediaries had promised. Some had their identity documents confiscated by the intermediaries.

Five of the victims were awarded a residence permit for social protection<sup>20</sup> and 10 were awarded one for humanitarian reasons.<sup>21</sup> The offenders received sentences in the range of six to 15 years.

— In 2018, the Spanish Supreme Court<sup>22</sup> applied labour exploitation provisions when it reviewed the case of 38 women of different nationalities who worked as waitresses at a nightclub; four of these women were in an irregular situation. The women were involved in prostitution and were subjected to working conditions that were contrary to human dignity and clearly abusive. The women had to work for extremely long hours: from 10.00 in the morning until 4.30 or 5.30 the following morning.

The Spanish Supreme Court found that the manager of the club was guilty not only of the crime of exploitation of prostitution but also of labour exploitation of migrants in an irregular situation (Article 312.2 of the Criminal Code). The court imposed a penalty of imprisonment of two years and six months, as well as disqualification from the right to stand for election, and ordered the closure of the nightclub for two years. Furthermore, it ordered the manager to pay € 1,037.03 to the General Treasury of Social Security for having failed to register the workers with the social security system.

- The Paris Criminal Court of France<sup>23</sup> applied anti-trafficking and labour exploitation provisions in the following case. The manager of a hair salon was sentenced to two years' imprisonment for trafficking in human beings and subjecting several people – whose vulnerability or state of dependency is obvious or known – to working or accommodation conditions contrary to human dignity (Article 225-14 of the Criminal Code). The court found that the migrant workers were very poorly paid (€ 4.77 per hour on average – i.e. 40 % below the minimum wage) and subjected to degrading working conditions (such as working on unventilated premises while using toxic products, no sink for washing their hands, working days up to 14 hours, no breaks and no days off). The court found that trafficking in human beings was linked to the state of vulnerability and dependency of the workers. They were vulnerable because they were in France without regular status, unfamiliar with French laws and the judicial system, isolated (particularly because of their nationalities and therefore their languages) and responsible for young children. They were dependent on the employer because they never knew when they were going to be paid; therefore, it was as if they were forced to stay.

This is one of the few French court rulings on trafficking for labour exploitation (most rulings are on trafficking for sexual exploitation). This case also shows the importance of trade union support. The case was identified during a labour inspection, and the trade union supporting the migrant victims during the proceedings suggested the trafficking in human beings charges. The offender was also sentenced to compensate each plaintiff with up to € 1,500.

- In Luxembourg, the Court of Appeal of the Grand Duchy issued two judgments concerning the employment of migrants in an irregular situation by the owners of two restaurants. The victims were forced them to work for long hours with a very low salary.<sup>24</sup> In both cases, the employers were convicted of trafficking in human beings, persistently employing migrants in particularly abusive working conditions knowing that these people are victims of trafficking in human beings, and breaching the rules on maximum daily or weekly working hours and minimum salary.

They were both sentenced to an 18-month suspended prison sentence and criminal fines amounting to € 3,000 and € 12,000, respectively. In both cases, they were further obliged to pay € 5,000 plus accrued interest to the victims as moral damages.

- In the Netherlands, a married couple who brought over and exploited five Indonesian women as au pairs for approximately three years<sup>25</sup> was convicted of trafficking in human beings and employment of migrants in an irregular situation. The women worked extremely long days for little or no salary.

The offenders were sentenced to six months' imprisonment (including three months of probation), and were required to pay € 26,000 in damages (including lost income to all five victims) and between € 1,807.10 and € 8,119 in intangible damages (to three victims).

- In 2018, a Swedish district court convicted a restaurant owner of having exploited a young couple from Bangladesh using the new crime of “human exploitation”. This new crime includes severe labour exploitation and is part of the legal framework against trafficking in human beings.<sup>26</sup> The couple had arrived in Sweden to study and work. When they could not find accommodation, the restaurant owner offered them an apartment above his restaurant.

The couple was later promised work at his restaurant for a salary of SEK 100 (€ 10) per hour, plus food and lodging. However, the couple had to work long days in exchange for SEK 19 (€ 1.80) and SEK 28 (€ 2.60) per hour. When they demanded their wages, the restaurant owner threatened them and threw them out of the apartment.

The restaurant owner was condemned to eight months’ imprisonment and was required to pay € 12,000 of due wages and damages for harassment.

- In Portugal, the Court of Appeal of Évora<sup>27</sup> found five people guilty of trafficking in human beings under Article 160 of the Criminal Code for having exploited 23 irregularly residing Nepalese citizens. The victims were forced to live and work inside greenhouses, without access to water and sanitation services. Despite having signed labour contracts setting their remuneration at the minimum wage, the victims were paid less than agreed. The perpetrators received prison sentences of between 13 and 14 years.

In another case, the Judicial Court of Viseu<sup>28</sup> convicted two persons of trafficking in human beings under Article 160 of the Criminal Code for having exploited an irregularly residing Cape Verdean national. The victim was forced to work in construction and agriculture, without receiving remuneration, and coerced into living in the employer’s house through physical and psychological abuse. The court found that the situation of subjugation in which the victim found himself constituted trafficking for labour exploitation. The defendants received a four-year suspended prison sentence and were required to pay € 2,500 in compensation to the victim.

- In Finland, where Article 9 (1) (c) was not included in the legislation transposing the Employers Sanctions Directive, a 2017 case shows the limits of anti-trafficking legislation in dealing with cases of severe forms



of labour exploitation. The two defendants had arranged for a woman to come from the Philippines to Finland to work as a nanny and home help in their family. After her visa had expired, the woman remained in Finland in an irregular situation for almost 13 years. She lived and worked with the family, who provided accommodation, food, personal effects and pocket money for remuneration but no pay. The defendants were charged with trafficking in human beings and other offences.

The Court of Appeal for Eastern Finland found that the criteria for trafficking in human beings were not met. There was no evidence to show that the worker had been threatened or intimidated, or required to work under the menace of a penalty and against her own will. The court found insufficient evidence to prove that the defendants had placed her in a considerably inferior position, taking advantage of her situation of dependency, lack of understanding or ignorance of the labour law and practice in Finland.<sup>29</sup>

### 3.3. PENALTIES AND SANCTIONS IMPOSED ON EMPLOYERS

Article 10 of the Employers Sanctions Directive obliges Member States to ensure that penalties for employers who may be held liable for illegal employment of children (Article 9 (1) (e)), exploitation of victims of trafficking in human beings (Article 9 (1) (d)) or employment “accompanied by particularly exploitative working conditions” (Article 9 (1) (c)) are effective, proportionate and dissuasive. This also applies when the employment of migrants in an irregular situation continues or is persistently repeated. Article 11 extends liability to legal persons.

FRA’s 2015 report showed that, in practice, in most EU Member States, sanctions and penalties imposed on employers are not severe enough to dissuade people willing to exploit workers from doing so.<sup>30</sup> For example, the offence of employing a migrant in an irregular situation under particularly exploitative working conditions is punishable only with a fine in Romania,<sup>31</sup> and with a maximum sentence of two years or less in Austria,<sup>32</sup> Finland,<sup>33</sup> Greece,<sup>34</sup> Malta<sup>35</sup> and Luxembourg.<sup>36</sup>

The case law examples presented in Section 3.2 show the great variety in the severity of punishments: in Italy, the punishment is imprisonment of between 6 and 15 years for illicit recruitment, labour exploitation and criminal association;<sup>37</sup> in Spain, it is 2.5 years for “recruitment in adverse conditions” of migrants in an irregular situation;<sup>38</sup> and in Sweden, it is 8 months for “human exploitation”.<sup>39</sup> In Luxembourg and Portugal, the cases of trafficking in human beings for labour exploitation ended with suspended prison sentences.<sup>40</sup> In the Netherlands, sanctioning may take place through an administrative rather than a criminal approach (see box).

## Imposing sanctions based on administrative, rather than criminal, law

In the Netherlands, the national Labour Inspectorate of SZW (*Inspectie SZW*) makes a distinction between trafficking for labour exploitation under Article 273f of the Criminal Code and “serious disadvantage” – a concept used for situations that do not amount to trafficking but may entail other crimes or labour law violations. It refers to serious violations of labour law, for example serious underpay and employment in very poor working conditions, which are tackled under administrative law. Through this “serious disadvantage” approach, the chances of securing some form of punishment, for example a fine, increase.

According to a 2019 report by the National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children, very few labour exploitation cases in the Netherlands have been prosecuted. Administrative fines have been arguably used more often in the fight against labour exploitation than in criminal law provisions.

*Source: Netherlands, National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children (2019b), **Together against human trafficking**, The Hague, National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children, p. 22*

The decision to investigate a case under criminal or administrative law has major consequences for the victim’s residence status, as residence permits are granted mainly based on the victim’s cooperation in criminal proceedings. Prosecution for offences at a lower level than trafficking also means that victims will lose their access to shelter and assistance services.<sup>41</sup>



## Endnotes

- 1 European Commission (2014), p. 5.
- 2 For Romania, see Government Ordinance No. 25/2014 on employment and deployment of foreigners in Romania and for the amendment of several legal acts regarding the regime of foreigners in Romania (**Ordonanța Guvernului nr. 25 din 26 august 2014 privind încadrarea în muncă și detașarea străinilor pe teritoriul României și pentru modificarea și completarea unor acte normative privind regimul străinilor în România**), 26 August 2014, Art. 36, para. 1 b.
- 3 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ 2011 L 101 (*Anti-trafficking Directive*), Art. 2.
- 4 United Nations Office on Drugs and Crime (2018).
- 5 Belgium, Criminal Code (**Code Pénal/Strafwetboek**), Law of 29 April 2013 modifying Art. 433 quinques of the Criminal Code; Netherlands, Criminal Code (**Wetboek van Strafrecht**), Art. 273f; Romania, Law No. 53/2003 – the Labour Code (**Legea nr. 53/2003 – Codul Muncii**), 24 January 2003, Art. 265 (2) and Art. 265 (3); Sweden, Criminal Code (**Brottsbalk [1962:700]**), 1 July 2018, Chapter 4, Sections 1 b and 10.
- 6 See FRA (2015), **Annexes on criminal law provisions and inspection authorities, Annex III: Criminal law provisions relating to labour exploitation**. See also European Commission (2014), p. 5.
- 7 FRA (2015), p. 37.
- 8 Finland, Criminal Code 39/1889 (*Rikoslaki 39/1889*), Chapter 47, Section 3a.
- 9 Italy, Law No. 199 of 29 October 2016 (**Legge 29 ottobre 2016, n. 199**).
- 10 Germany, German Bundestag (*Deutscher Bundestag*) (2016), pp. 39 and 40.
- 11 Sweden, Criminal Code (**Brottsbalk [1962:700]**), 1 July 2018, Chapter 4, Sections 1 b and 10.
- 12 Sweden, written correspondence with the Ministry of Justice (*Justitiedepartementet*), 6 February 2020.
- 13 France, Labour Code (**Code du travail**), Art. L8112-2.
- 14 Belgium, Law of 11 February 2013 on sanctions and measures for employers of illegally residing nationals of third countries (**Wet tot vaststelling van sancties en maatregelen voor werkgevers van illegaal verblijvende onderdanen van derde landen/Loi prévoyant des sanctions et des mesures à l'encontre des employeurs de ressortissants de pays tiers en séjour illégal**), Government Gazette, 22 February 2013.
- 15 Belgium, Myria Federal Migration Centre (2020).
- 16 Austria, Statistical Office Austria (*Bundesanstalt Statistik Austria*), Statistics on convictions (**Verurteilungsstatistik**). FRA could not access the case.
- 17 Italy, Assize Court of Lecce (*Corte d'Assise di Lecce*), **Judgment of 13 July 2017**.
- 18 Italy, Criminal Code (**Codice Penale**), Art. 600.
- 19 Italy, Ordinary Court of Naples, Section of Preliminary Investigations (*Tribunale di Napoli, Sezione Giudice per le indagini preliminari*), Decision of 11 July 2017 (decision not public).
- 20 Italy, Legislative Decree 25 July 1998, No. 286 (**Decreto Legislativo 25 luglio 1998, n. 286**), Art. 18.
- 21 Italy, Legislative Decree 25 July 1998, No. 286 (**Decreto Legislativo 25 luglio 1998, n. 286**), Art. 22, co. 12-quater.
- 22 Spain, Supreme Court, Criminal Chamber, Section 1, Rec 1354/2018 (*Tribunal Supremo, Sala de lo Penal, Sección 1, Rec 1354/2018*), **Judgment No. 162/2019**, 26 March 2019.
- 23 France, Paris Criminal Court, 31st Criminal Chamber 2 (*Tribunal correctionnel de Paris 31e chambre correctionnelle 2*), **Judgment No. 14219000065**, 8 February 2018.
- 24 Luxembourg, Court of Appeal of the Grand Duchy of Luxembourg, 10th Chamber (*Cour d'appel du Grand-Duché de Luxembourg, dixième chambre*), **Judgment No. 34/19 X, 23 January 2019**; Court of Appeal of the Grand Duchy of Luxembourg, 10th Chamber (*Cour d'appel du Grand-Duché de Luxembourg, dixième chambre*), **Judgment No. 95/17 X, 1 March 2017**.
- 25 Netherlands, District Court Amsterdam (*Rechtbank Amsterdam*), **Case No. 13/730038-14**, 29 June 2017.
- 26 Sweden, Swedish Courts (*Sveriges Domstolar*) (2019). The ruling was sent by the court.
- 27 Portugal, Court of Appeal of Évora (*Acórdão do Tribunal da Relação de Évora*), Case No. 14/16.9ZCLSB.E1, 18 October 2018.
- 28 Portugal, Judicial Court of Viseu (*Tribunal Judicial de Viseu*), Case No. 84/16.oJACBR, 5 November 2019 (not published in an official database; ruling sent by the court).
- 29 Finland, Court of Appeal for Eastern Finland (*Itä-Suomen hovioikeus/Östra Finlands hovrätt*), Decision 17/145188; R 17/74, 10 November 2017 (not public).
- 30 FRA (2015), pp. 18, 19, 90 and 91.
- 31 Romania, Government Ordinance No. 25/2014 on employment and deployment of foreigners in Romania and for the amendment of several legal acts regarding the regime of foreigners in Romania (**Ordonanța Guvernului nr. 25 din 26 august 2014 privind încadrarea în muncă și detașarea străinilor pe teritoriul României și pentru modificarea și completarea unor acte normative privind regimul străinilor în România**), 26 August 2014, Art. 36 (1) (b).
- 32 Austria, Employment of Aliens Act (**Ausländerbeschäftigungsgesetz, AuslBG**), Section 28c (2) 1.
- 33 Finland, Criminal Code (**rikoslaki/strafflag**) 39/1889, Chapter 47, Sections 3a and 6a.
- 34 Greece, Law No. 4052/2012 (**Νόμος 4052/2012**), Art. 88 (1).
- 35 Malta, Subsidiary Legislation No. 217.14, **Minimum standards on sanctions and measures against employers of illegally staying third-country nationals regulations (Standards Minimi għal Sanzjonijiet u Miżuri kontra Min Ihaddemlil ħittadini minn Pajjiġi Terzi b'Residenza Illegali)**, 4 November 2011, Art. 7.
- 36 Luxembourg, Labour Code (**Code du travail**), as amended on 9 March 2020, Art. 572-5 (1).
- 37 Italy, Ordinary Court of Naples, Section of Preliminary investigations (*Tribunale di Napoli, Sezione Giudice per le indagini preliminari*), Decision of 11 July 2017 (decision not public).
- 38 Spain, Supreme Court, Criminal Chamber, Section 1, Rec 1354/2018 (*Tribunal Supremo, Sala de lo Penal, Sección 1, Rec 1354/2018*), **Judgment No. 162/2019**, 26 March 2019.
- 39 Sweden, Swedish Courts (*Sveriges Domstolar*) (2019).
- 40 Portugal, Judicial Court of Viseu (*Tribunal Judicial de Viseu*), Case No. 84/16.oJACBR, 5 November 2019 (not published in an official database; ruling sent by the court); Luxembourg, Court of Appeal of the Grand Duchy of Luxembourg, 10th Chamber (*Cour d'appel du Grand-Duché de Luxembourg, dixième chambre*), **Judgment No. 34/19 X, 23 January 2019**; Court of Appeal of the Grand Duchy of Luxembourg, 10th Chamber (*Cour d'appel du Grand-Duché de Luxembourg, dixième chambre*), **Judgment No. 95/17 X, 1st of March 2017**.
- 41 ILO (2021), p. 75.



# 4

## TEMPORARY RESIDENCE PERMITS FOR VICTIMS

Being in an irregular situation is still a major barrier to accessing victim support and justice, including for victims of criminal forms of labour exploitation. Some 58 % of experts whom FRA interviewed in 2015<sup>1</sup> indicated that the fear of having to leave the country because of their irregular situation is the main reason for exploited migrant workers not seeking justice.

Article 13 (4) of the Employers Sanctions Directive requires EU Member States to define, in national law, the conditions under which they may grant, on a case-by-case basis, permits of limited duration linked to the length of the relevant national proceedings to migrants in an irregular situation who are victims of particularly exploitative working conditions.

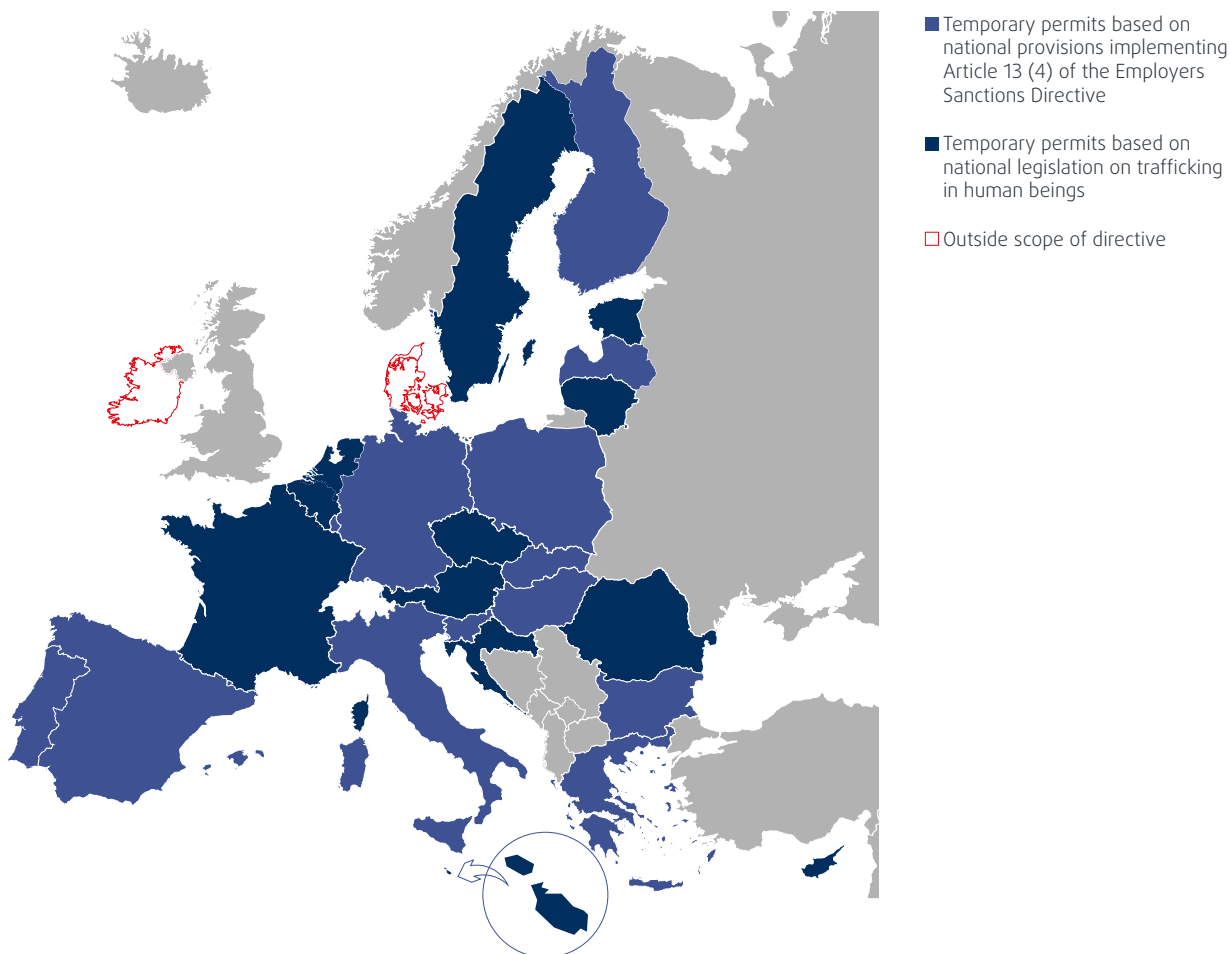
### 4.1. PROVISIONS ON RESIDENCE PERMITS

FRA findings show that more than half of the Member States have domestic legislation establishing temporary residence permits for victims of particularly exploitative working conditions, in accordance with Article 13 (4) of the Employers Sanctions Directive. The remaining Member States provide for this only if the situation amounts to trafficking in human beings, as defined under national law.

More specifically, as illustrated in Figure 6, 14 Member States have specific provisions in their national legislation that reflect the situation in Article 13 (4) of the Employers Sanctions Directive: Bulgaria, Cyprus, Finland, Germany, Greece, Hungary, Italy, Latvia, Luxembourg, Poland, Portugal, Slovakia, Slovenia and Spain. In some Member States, additional requirements apply. For example, in Latvia, residence permits can be granted to victims of particularly exploitative working conditions who have turned to the court with an application regarding the recovery of due wages.<sup>2</sup>

In the remaining 11 Member States bound by the directive, residence permits are available only for victims of trafficking in human beings, and there is no separate permit for victims of “particularly exploitative working conditions”. Specifically, this is the case in Austria, Belgium, Croatia, Czechia, Estonia, France, Lithuania, Malta, the Netherlands, Romania and Sweden. Therefore, victims have to meet the definition of “trafficking in human beings” to be granted a residence permit (unless they can apply for a residence permit on other grounds provided by national law).

**FIGURE 6. LEGAL BASIS IN NATIONAL LAW FOR GRANTING TEMPORARY RESIDENCE PERMITS FOR VICTIMS OF PARTICULARLY EXPLOITATIVE WORKING CONDITIONS IN 25 EU MEMBER STATES**



Source: FRA, 2021 [based on legislation and information provided by national labour inspectorates presented in Table 6 of Annex 2, available on FRA's website]

In the majority of Member States, exploited third-country nationals must participate in criminal proceedings against the employer to be granted a residence permit. However, this is not the case in Greece,<sup>3</sup> Latvia<sup>4</sup> and Italy.<sup>5</sup>

Granting more stable residence rights to victims is also possible in some cases. In Spain, victims, witnesses and harmed persons who are third-country nationals in an irregular situation who denounce the perpetrator or cooperate with law enforcement to fight against organised crime related to human smuggling, labour or sexual exploitation can access five-year residence and work permits.<sup>6</sup>

#### PROMISING PRACTICE

### Delinking temporary residence permits from migrants' participation in criminal proceedings

In **Greece**, a residence permit for humanitarian reasons may be granted to employed migrants in an irregular situation even when they do not cooperate with the authorities, when it is considered that their lack of cooperation is due to threats against family members, either in Greece or elsewhere.\*

In **Italy**, besides the law regulating residence permits for reasons of severe exploitation, which requires exploited migrants in an irregular situation to

participate in criminal proceedings, these migrants can be issued a residence permit to protect them from the violence and influence of the organisation exploiting them and to take part in a programme of assistance and social integration.\*\*

\*Greece, Law No. 4052/2012 (*Νόμος 4052/2012*), Article 89.

\*\*Italy, Legislative Decree of 25 July 1998 No. 286 (*Decreto Legislativo 25 luglio 1998, n. 286*, Article 18 (1)).

## PROMISING PRACTICE

# Regularising status based on employment

In France, the Labour Inspectorate reported that there are two types of complaints: individual complaints, filed without the support of a trade union; and collective complaints, filed with the support of a trade union. Usually the latter lead to 'mediation' between the Labour Inspectorate, the prefecture and the employer, which focuses not on remuneration but on regularisation by obtaining an authorisation to work.

Providing secure status through a regular renewable residence authorisation and work permit allows migrant workers to speak up against exploitation and defend their rights.

*Source: France, written correspondence with the Labour Inspectorate.*

In the Netherlands, migrants in an irregular situation who have cooperated in criminal proceedings and hold a residence permit under the Residence Scheme for Victims of Human Trafficking for three years or more or when the public prosecutor decides to prosecute can get permanent humanitarian residence status.<sup>7</sup> The decision on status is based on the crime reported that led to the granting of the temporary residence permit under the Residence Scheme for Victims of Human Trafficking.

Separately from the provisions relating to Article 13 (4) of the Employers Sanctions Directive, some Member States may grant a residence permit more generally to migrants in an irregular situation participating in criminal proceedings. This is the case, for example, in Croatia,<sup>8</sup> Cyprus,<sup>9</sup> Czechia,<sup>10</sup> Estonia,<sup>11</sup> Romania,<sup>12</sup> Spain<sup>13</sup> and Sweden.<sup>14</sup>

## 4.2. RENEWAL OF PERMITS

Residence permits are usually valid for six months or one year. Renewal of the residence permit is usually permitted until the completion of the investigation or the court proceedings.

In several Member States (Estonia,<sup>15</sup> Finland, Germany,<sup>16</sup> Poland,<sup>17</sup> Romania,<sup>18</sup> Slovenia<sup>19</sup> and Sweden<sup>20</sup>), the residence permit granted to a victim of particularly exploitative working conditions can be extended beyond the conclusion of the proceedings, until the victim has been paid due wages. For example, in Slovenia, if the victim is claiming due wages the temporary residence permit can be extended for up to one year.

In Finland, after two years of continuous residence, the third-country national can be issued with a residence permit lasting one year, which allows family reunification.<sup>21</sup>

Applying for a different residence permit once the one for particularly exploitative working conditions has expired depends on national rules and is possible in several Member States where residents permits are provided under Article 13 (4) of the Employers Sanctions Directive (for example in Germany,<sup>22</sup> Latvia,<sup>23</sup> Luxembourg,<sup>24</sup> Poland<sup>25</sup> and Slovenia<sup>26</sup>). Some Member States may require that the person leave the Member State to apply for a different resident permit.

## 4.3. NUMBER OF RESIDENCE PERMITS ISSUED

FRA asked Member States how many residence permits were issued to migrants in an irregular situation who became victims of particularly exploitative labour conditions, as Article 9 (1) (c) of the Employers Sanctions Directive describes, between 2017 and 2019. The findings show that, in most Member States, few or no such permits were issued.

More than one third of the Member States issued no residence permits. This was the case in Bulgaria,<sup>27</sup> Croatia,<sup>28</sup> Estonia,<sup>29</sup> Finland,<sup>30</sup> Hungary,<sup>31</sup> Latvia,<sup>32</sup> Lithuania (in 2017 and 2018),<sup>33</sup> Luxembourg,<sup>34</sup> Romania,<sup>35</sup> and Slovakia,<sup>36</sup> according to the respective national authorities.

According to the information FRA collected, eight EU Member States used specific provisions enacted either on the basis of the Employers Sanctions Directive or on the basis of legislation on trafficking in human beings to issue residence permits to exploited migrants in an irregular situation (no data were available for Spain).

- In Germany, 10 people held a residence permit for victims of employment under unfavourable conditions in 2020 – all of these permits were issued in 2018 or earlier.<sup>37</sup>
- In 2019 alone, Greece granted 297 residence permits for humanitarian reasons to third-country nationals who were victims of abusive labour conditions.<sup>38</sup>
- Between 2017 and 2019, Italy granted 608 residence permits (including renewals) under Article 18 (labour exploitation) and Article 22 of the Immigration Law (severe labour exploitation).<sup>39</sup>
- Malta issued 45 residence permits to victims of trafficking for labour exploitation between 2017 and 2019.<sup>40</sup>
- Poland issued 12 residence permits to victims of particularly exploitative labour conditions and 11 renewals between 2017 and 2019.<sup>41</sup>
- Portugal issued one residence permit between 2017 and 2019.<sup>42</sup>
- Slovenia issued four residence permits to irregular third-country nationals who had been illegally employed between 2017 and 2019.<sup>43</sup>
- In Sweden, among the 41 temporary residence permits granted to suspected victims of trafficking in human beings and/or “human exploitation” in 2018 (the only year for which disaggregated data are available), two temporary residence permits (plus two renewals) were for victims of forced labour.

Austria,<sup>44</sup> Belgium,<sup>45</sup> Cyprus<sup>46</sup> and France<sup>47</sup> have aggregated data only on residence permits issued to victims of trafficking in human beings, not per type of exploitation. These data are not available in Czechia, according to national authorities.<sup>48</sup>

In Belgium, the Immigration Office reported that, among the 428 new requests for residence permits for victims of trafficking in human beings between 2017 and 2019, more than half (228) were for victims of trafficking for labour exploitation.<sup>49</sup> However, it is not known how many of these residence permits were actually issued.

Similarly, in Cyprus, the Police Anti-trafficking Unit identified 11 victims of trafficking for labour exploitation and 24 victims of trafficking for both labour exploitation and sexual exploitation between 2017 and 2019. It recommended that the Aliens and Immigration Department issue residence permits to all of them. It is not known how many of these residence permits were actually issued. However, according to the Police Anti-trafficking Unit, the Aliens and Immigration Department usually follows their recommendations.<sup>50</sup>

There is evidence that, in some Member States, there is a significant discrepancy between the number of suspected cases of trafficking for labour exploitation and the number of residence permits issued to victims.

According to a recent PICUM report,<sup>51</sup> between 2017 and 2019 Bulgaria issued no residence permits for victims of trafficking for labour exploitation, although NGOs and the National Commission for Combating Trafficking in Human Beings identified and supported several third-country nationals as presumed victims of trafficking for labour exploitation.

The Swedish Migration Agency<sup>52</sup> reported having drafted 481 internal reports of suspected cases of human trafficking and human exploitation in 2019. Among them, 179 concerned labour exploitation. Information on approximately three quarters of the overall trafficking cases was transferred to the police. Those in charge of the investigations at the police or the prosecutor’s office assess whether or not to apply for residence permits for these individuals. That same year, only 44 temporary residence permits were issued for suspected victims of human trafficking and/or human exploitation who were cooperating in judicial proceedings.

# Endnotes

- 1 FRA (2015).
- 2 Latvia, Immigration Law (**Imigrācijas likums**), 20 November 2002, Art. 23 (6) and (7).
- 3 Greece, Law No. 3386/2005, Entry, residence and social inclusion of third-country nationals in the Greek Territory (**Είσοδος, διαμονή και κοινωνική ένταξη υπηκόων τρίτων χωρών στην Ελληνική Επικράτεια**), Art. 44 as amended by Law No. 3907/2011, Establishment of Asylum Service and First Reception Service, adaptation of Greek legislation to the provisions of Directive 2008/115/EC on common rules and procedures in Member States for the return of illegally residing third-country nationals, and other provisions (**Ίδρυση Υπηρεσίας Ασύλου και Υπηρεσίας Πρώτης Υποδοχής, προσαρμογή της ελληνικής νομοθεσίας προς τις διατάξεις της Οδηγίας 2008/115/ΕΚ «σχετικά με τους κοινούς κανόνες και διαδικασίες στα κράτη – μέλη για την επιστροφή των παρανόμως διαμενόντων υπηκόων τρίτων χωρών» και λοιπές διατάξεις**), Art. 42, para. 1 (e).
- 4 Latvia, Immigration Law (**Imigrācijas likums**), Art. 23 (6) and Art. 23 (7).
- 5 Italy, Legislative Decree No. 286 of 25 July 1998 (**Decreto Legislativo 25 luglio 1998, n. 286**), Art. 18 (1).
- 6 Spain, Law 4/2000 of 11 January (**Ley 4/2000, de 11 de enero**), Art. 59; Royal Decree 557/2011 of 20 April (**Real Decreto 557/2011, de 20 de abril**), Art. 135-137.
- 7 Netherlands, Aliens Decree (**Vreemdelingenbesluit**), 2020, Art. 3.51.
- 8 Croatia, Aliens Act (**Zakon o strancima**), Official Gazette (*Narodne novine*) Nos **69/2017** and **46/2018**.
- 9 Cyprus, Aliens and Immigration Law Cap. 105 (**Ο περί Αλλοδαπών και Μεταναστεύσεως Νόμος ΚΕΦ.105**), Art. 18RTH(4).
- 10 Czechia, Act No. 326/1999 Coll. on the Residence of Foreign Nationals in the Czech Republic (**Zákon o pobytu cizinců na území České republiky a o změně některých zákonů**), 23 December 1999, Section 42e.
- 11 Estonia, Aliens Act (**välismaalaste seadus**), Art. 203; written correspondence with the Ministry of the Interior (*Siseministeerium*) and the Social Insurance Board (*Töötukassa*).
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# Conclusions

This report highlights that, 10 years after the deadline to transpose the Employers Sanctions Directive, there have been some improvements in the law to protect migrant workers in an irregular situation from labour exploitation and abuse – but more needs to be done.

Access to justice and facilitation of complaints are key elements of the Employers Sanctions Directive. However, the evidence collected for this study shows that, in many Member States, migrants in an irregular situation are not using the complaint system. This may be because of a lack of incentives for workers to come forward and limited information on how to complain. The lack of centralised data at the national level makes it difficult to assess the effectiveness of the complaint systems. However, based on the number of cases decided in courts and that reach different complaint bodies, it is estimated that the vast majority of exploited migrants in an irregular situation do not have effective access to a complaint mechanism.

NGOs, trade unions and victim support organisations play key roles in supporting workers who are victims of labour exploitation to seek redress. Without their support, migrants risk being deported and losing their opportunity to take legal action against exploitative employers. The legislation in all but four Member States allows third parties – for example trade unions – to engage on behalf of or in support of a worker in any administrative or civil proceedings against the employer. Article 13 (2) of the Employers Sanctions Directive provides for this. In a few Member States, there is no legislation specifying that third parties can file a complaint on behalf of a worker.

Victims were awarded back pay through criminal proceedings in only a few cases. When this was not the case, to get the wages they were owed, workers had to file a separate claim to civil or labour courts. This process can be costly and lengthy.

Even if claims are successful, it is often unknown whether or not workers actually receive back pay. Employers often declare bankruptcy or disappear. Several Member States can freeze and seize employers' assets in the context of criminal or civil proceedings. In addition, over one third of the Member States reported the availability of state compensation funds. However, in some Member States these funds are available only for victims of violent crimes. In other Member States, migrants in an irregular situation are excluded.

In four fifths of Member States, labour inspectorates report migrants in an irregular situation to immigration law enforcement authorities. This discourages victims from reporting abuse and violations of labour law. It also hinders the mission of labour inspectorates, as exploited migrants in an irregular situation will not contact them to denounce abusive labour conditions, for fear of being detained or reported as a consequence.

Some EU Member States criminalise the employment of migrants in an irregular situation under particularly exploitative labour conditions, as Article 9 (1) (c) of the Employers Sanctions Directive requires, using legislation combating trafficking in human beings. Other Member States have separate legal provisions criminalising particularly exploitative working conditions

for migrants in an irregular situation. Since 2015, national courts have been adjudicating cases of particularly exploitative working conditions in two thirds of Member States. They have imposed a great variety of penalties.

More than half of Member States have domestic legislation providing for temporary residence permits for victims of particularly exploitative working conditions, in accordance with Article 13 (4) of the directive. The remaining Member States can issue temporary permits only if the situation amounts to trafficking in human beings. However, more than one third of Member States issued no residence permits for victims of particularly exploitative working conditions between 2017 and 2019.

In past reports, FRA has made a number of suggestions to prevent severe labour exploitation, and to better identify, refer and protect victims. Many of these suggestions also apply to migrants in an irregular situation.

Annex 1 reproduces the most relevant past FRA opinions covering, in particular, the following five areas of priority action:

- enhancing the effectiveness of the complaint mechanism by enabling third parties, such as trade unions and relevant associations, to act in support of or on behalf of migrant workers in an irregular situation;
- making back pay of due wages a reality, by having criminal courts also decide on civil law claims, enabling victims to benefit from state compensation funds, and permitting the freezing and confiscating of employers' assets to compensate exploited workers;
- informing workers of their rights more systematically and effectively, paying particular attention to language barriers and giving labour inspectorates a key role in informing workers of their rights and the available complaint mechanisms, including during labour inspections;
- issuing temporary residence permits to victims of particularly exploitative working conditions.

In addition, the findings of this report suggest prioritising the following actions:

- Change national legislation and current practices requiring labour inspectorates, monitoring bodies and specialised police units trained on labour exploitation and trafficking in human beings to share the personal data of migrants in an irregular situation with immigration law enforcement authorities. This will encourage safe reporting by victims of severe labour exploitation and workers in an irregular situation whose labour rights have been violated.
- Improve data collection to monitor the effectiveness of complaints systems. EU Member States should consider establishing a mechanism for collecting consolidated and appropriately disaggregated data on complaints about back pay, and awards and compensation that migrants in an irregular situation receive.



## Annex 1 – FRA opinions on severe labour exploitation

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This Annex includes selected FRA opinions published in past FRA reports on severe labour exploitation, relevant for this report.

### I. OPINIONS FROM FRA REPORT ‘SEVERE LABOUR EXPLOITATION: WORKERS MOVING WITHIN OR INTO THE EUROPEAN UNION’ (2015)

#### FRA opinion 7:

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.

### **FRA opinion 9:**

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.

### **FRA opinion 10:**

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 adaptation of the wording of Article 11 (6) of the Anti-Trafficking Directive and of Article 13 (4) of the Employer Sanctions Directive.

### **FRA opinion 11:**

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.

**FRA opinion 12:**

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.

**FRA opinion 13:**

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.

## **II. OPINIONS FROM FRA REPORT 'OUT OF SIGHT: MIGRANT WOMEN EXPLOITED IN DOMESTIC WORK' (JUNE 2018)**

**FRA opinion 3:**

Labour inspections in the domestic work sector should focus on monitoring the working conditions of workers, and on enabling and empowering workers to report their actual situations by establishing clear standards and procedures to inform them of their rights and enable safe access to victim support and justice mechanisms. With regard to third country nationals in an irregular situation, Member States should ensure that irregular residence or work does not obstruct the obligation of public authorities to acknowledge a severely exploited worker as a victim of crime, in line with 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 (the Victims' Rights Directive), which applies to all victims in a non-discriminatory manner, including with respect to their residence status.

### **III. OPINIONS FROM FRA REPORT 'PROTECTING MIGRANT WORKERS FROM EXPLOITATION IN THE EU: BOOSTING WORKPLACE INSPECTIONS' (SEPTEMBER 2018)**

#### **FRA opinion 1:**

It is essential that EU Member States create safe conditions during workplace inspections that enable and empower workers to report their experiences of labour exploitation. For this to happen, labour inspectors need to give workers the opportunity to speak to them and be heard without their employers being present. Inspectors should also provide workers with clear information about their rights. This will serve to underpin existing legislation, including legislation addressing trafficking in human beings and particularly exploitative working conditions under the Employers' Sanctions Directive (2009/52/EC), and ensure that it is enforced in practice. Suggestions put forward by workers in this research could be combined with suggestions by professionals to create a 'checklist' on how to improve inspections and empower workers to leave exploitative situations.

#### **FRA opinion 2:**

To end the impunity of exploitative employers, workers need to be able to report situations of severe labour exploitation and be offered sufficient protection and have the right to an effective remedy in line with Article 47 of the Charter, without having to fear consequences such as losing their only source of money, a place to live, or being deported. When it comes to potential punishments and sanctions of exploitative employers, Member States could consider as aggravating factors strategies that have been utilised by employers to deceive monitoring bodies during inspections, and make it known that such behaviour will carry consequences.

#### **FRA opinion 3:**

EU Member States should 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, as stressed in the agency's 2015 report on severe labour exploitation. Authorities working in the area of severe labour exploitation should prioritise the fundamental rights of victims of crimes of such exploitation over questions of immigration management. Member States should issue clear guidance to this effect to all authorities that deal with thirdcountry national workers, ensuring that irregular residence or work does not obstruct the obligation of public authorities to acknowledge a severely exploited worker as a victim of crime – even when in an irregular situation of residence. Clear standards and procedures should be established to inform victims of their rights and to enable safe access to victim support and all justice mechanisms.



**FRA opinion 4:**

EU Member States should clearly define in law what constitutes exploitative labour conditions and make detecting criminal forms of labour exploitation a key aim of workplace inspections, in line with their obligations under EU and international law. To apply the law, Member States should train staff engaged in monitoring workplaces to understand and assess risk factors for criminal forms of labour exploitation in practice – including how to question workers and inform them about their rights where they suspect such exploitation. Monitoring bodies should organise their work in line with these factors, allocating resources according to the level of risk identified in their risk assessment/analysis. Member States which do not currently conduct such risk analysis could consider looking at the practices of other Member States, such as Belgium and the Netherlands.

**FRA opinion 5:**

Inspections at the workplace should always aim to protect workers' rights. They should also recognise that current evidence points to violations of fundamental rights to fair and just working conditions being quite widespread in certain economic sectors. Member States could consider establishing a joined-up response to tackling labour exploitation, allocating sufficient resources to involve competent bodies – such as labour inspectorates, health and safety or tax authorities and various branches of the police. These could incorporate a unified set of evidence-based risk factors to help them identify severe labour exploitation while carrying out workplace inspections.

**FRA opinion 7:**

Monitoring bodies in Member States should consider increasing their oversight of the construction and food services sectors with a view to detecting severe labour exploitation and protecting workers, in light of the fact that the majority of research participants exploited in these sectors had not witnessed or heard of any inspections.

**FRA opinion 8:**

EU Member States should complement effective monitoring with raising awareness among relevant bodies – such as businesses, trade unions, hospitals and the general public – about the existence, nature and features of severe labour exploitation. They should also encourage them to report instances of such exploitation.

**FRA opinion 9:**

Given the severity of exploitation that evidence shows can occur in the workplace, EU Member States should ensure that, where possible, employers – particularly in sectors where evidence demonstrates that workers are at higher risk of labour exploitation – are not informed about inspections in advance.

#### **FRA opinion 10:**

EU Member States should consider practical measures to overcome language barriers during workplace inspections, allowing monitoring bodies to reach and inform workers. This could include issuing materials concerning labour rights in multiple languages. At the same time, monitoring bodies should not assume that workers cannot understand or communicate in the national language, and should attempt to communicate with them. Member States should cooperate where possible with specialised bodies and civil society organisations, such as services providing support to asylum seekers, as they may be able to provide inspectors with language and translation services.

### **IV. OPINIONS FROM FRA REPORT 'PROTECTING MIGRANT WORKERS FROM EXPLOITATION IN THE EU: WORKERS' PERSPECTIVES' (2019)**

#### **FRA opinion 9:**

To reduce situations of irregularity, EU Member States should be aware of the gap between labour demand and supply and fill labour market shortages through targeted labour migration programmes, especially for those sectors particularly at risk of labour exploitation, including domestic work, agriculture and construction.

In addition, as FRA already suggested in 2011 in relation to domestic workers, to reduce the exposure of migrant workers in an irregular situation to exploitation and abuse, EU Member States should find ways to address protracted situations of irregularity. This could, for example, be achieved through individualised regularisation procedures set out in national law.

When evaluating the Employers Sanctions Directive, the Commission should pay particular attention that the implementation of Article 14 of the Employers Sanctions Directive, requiring EU Member States to carry out effective and adequate inspections to check the employment of third country nationals in an irregular situation, should not result in the immediate expulsion of victims of labour exploitation who are in an irregular residence situation. The Commission should also pay particular attention to how Article 13 (4) is implemented.

#### **FRA Opinion 13:**

In accordance with Article 8 of the Victims' Rights Directive, EU Member States must ensure that appropriate, sufficiently specialised support services are available to all victims of crime, including victims of severe labour exploitation. To this end, extending the mandate of organisations established to support victims of trafficking to cover victims of labour exploitation is one measure that should be considered.

Specialised support services, including support organisations that were set up or tasked to assist victims of trafficking, should provide to victims of severe labour exploitation targeted information on workers' rights and on the role and rights of victims in criminal proceedings with a view to enhancing victims' participation in the proceedings, assistance in all encounters with the police and court hearings, and support in finding an appropriate employment.

EU Member States should pay due attention to ensuring that victims of severe labour exploitation receive comprehensive back pay and restitution as a result of criminal proceedings without having to also engage in civil proceedings or in the enforcement of judgments.

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## PROMOTING AND PROTECTING YOUR FUNDAMENTAL RIGHTS ACROSS THE EU —

The Employers Sanctions Directive was primarily enacted to dissuade employers from recruiting migrants in an irregular situation, but it also contains provisions to protect workers. It facilitates access to justice for exploited workers and sets out workers' rights to claim back payment of outstanding wages. The directive also contains provisions to enhance the effectiveness of labour inspections.

This report describes how the 25 Member States bound by the directive have been implementing its protective provisions, focusing on the impact these provisions have on migrant workers in an irregular situation who are victims of exploitation and other labour law violations.



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