

Hidden at Work - Labour and sexual exploitation and harassment of women in the (private) work sphere

Report on relevant provisions for support to the specific target group and the main bottlenecks in legal frameworks to protect women from exploitation and harassment.

Introduction

In January 2021, the two-year project Hidden at Work – Labour and sexual exploitation and harassment of women in the (private) work sphere started. Over the last two years, this project has been coordinated by FairWork in the Netherlands and implemented together with LEFÖ IBF in Austria, La Strada Czech Republic and La Strada International. The project was funded by the Rights, Equality and Citizenship (REC) Programme of the European Commission.

The project Hidden at Work focussed on (online and offline) awareness-raising and outreach to women in irregular work or with an irregular status. The women were provided with information, empowerment and (referral to) direct support services, to enable them to claim their (labour) rights. The project consortium further trained professionals who were likely to detect trafficked, exploited or harassed women at work and focused on monitoring the implementation of existing relevant legal instruments, while advocating for better compliance with existing European and national legislation.

The Hidden at Work project consortium reached out in particular to the following vulnerable women:

- Women in highly dependent situations e.g. partner-dependent residence status, living at employers' house; not speaking local/other languages.
- Women in irregular work or irregular situation, e.g. without valid work permit/contracts or work itself is irregular, or they are undocumented and without the right to stay.
- Women in isolated work situations, including domestic workers, (care) au pairs/ babysitters/ live-in care workers, persons working for 'family business'; maids and caretakers at resorts, staff at private senior houses; sex workers; persons working at massage parlors etc.
- Women who are third-country nationals (from the Philippines, Vietnam, Indonesia, Colombia, Brazil, Morocco, Thailand, Mongolia and Ukraine).

In order to define advocacy priorities for the project, desk research was conducted into the rights available for the target group based on human rights law, international treaties, ILO conventions and relevant non-binding recommendations. This paper reflects on these rights and summarises the challenges in accessing these rights. It concludes with the relevant advocacy focusses regarding the protection of women from exploitation and harassment in the (private) work sphere.

Rights of trafficked persons and victims of crime

Both at national and international level, laws, protocols and conventions have been developed and adopted to combat human trafficking. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (so called "Palermo Protocol"), is the first international instrument to explicitly define "trafficking in persons".

Next to the UN, also the European Union and Council of Europe have developed binding legislation on human trafficking, next to legislation and strategies relevant for victims of crime, including:

- UN Palermo Protocol (2000) (also UN Global Action Plan and Political declaration of 2021)
- CEDAW General Recommendation no 38 on trafficking of women and girls in the context of global migration (2020)
- Council of Europe Convention on action against THB (2005)
- Council of Europe Convention VAW (Istanbul Convention) (2011)
- CFD on standing of victims in criminal proceedings (2001)
- Residence Permit Directive (2004)
- Compensation Directive (2004)
- THB Directive (2011)
- EU anti-trafficking Strategy (2021 - 2025)
- Victims' Rights Directive (2012)
- Victims' Rights Strategy (2021 - 2025)
- Possible EU Directive on VAW/GBV

There is also EU law that provides rights to workers, including:

- Employers Sanctions Directive (2009)
- Seasonal Workers Directive (2014)
- Minimum Wages Directive

See annex 01 for the links to the above-mentioned legislation.

If we look at EU law and CoE law and the rights that are specially in place for trafficked persons, the following rights should be granted to persons identified as (potential) victims of trafficking in Europe:

- Right to be identified
- Right to a recovery and reflection period
- Right to assistance; including:
 - appropriate and secure accommodation,
 - psychological assistance,
 - material assistance,
 - access to emergency medical treatment,
 - translation and interpretation services,
 - counselling and information,
 - assistance during criminal proceedings, access to the labour market, vocational training and education, if lawfully resident in the country.
- Right to a recovery and residence permit
- Right to protection of private life and identity
- Right to protection during investigations and court proceedings

- Right for access to compensation
- Right to information
- Right to repatriation and return
- Non-prosecution or non-application of penalties to the victim.

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

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

See further annex 1 for a description of these rights according to EU law, in particular the 2011 THB Directive; 2012 Victims' Rights Directive and 2004 Residence Permit Directive and CoE conventions THB and VAW.

Rights of (undocumented) workers

Not all persons we target with the project Hidden at Work might be identified and or formally recognised as trafficked persons; they might also be in other vulnerable situations. There are various ILO Conventions that offer rights to (undocumented) workers:

- Forced Labour Convention no. 29 (1930) and Protocol (2014)
- Abolition of Forced Labour Convention no. 105 (1957)
- Domestic Workers Convention, C189 (2011)
- Protocol to the Forced Labour Convention (2014)
- Protection of Wages Convention no. 95 (1949)
- Private Employment Agencies Convention no. 181 (1997)
- Migration for Employment Convention no. 97 (1949) and Migrant Workers (Supplementary Provisions) Convention no. 143 (1975)
- Violence and Harassment in the field of Work Convention no. 190 (2019).

These different ILO Conventions and EU law give (migrant) workers, including undocumented workers or those in irregular work, rights, including:

- Respect for their basic human rights
- Protection against violence, harassment and abuse

- Non-discrimination
- Freedom of Association & collective bargaining
- Equality of treatment
- Wages and Benefits - minimum wage, regular and final payment
- Safe and healthy work environment, protection against abusive recruitment practices and social protection
- Access to justice and safe and effective reporting and remedies

Gaps and challenges

Regardless of the rights established for trafficked persons and (migrant) workers, accessing these rights in practice is often a challenge. Obstacles include a lack of awareness among police and the judicial system to identify vulnerable and exploited workers; a lack of access to legal aid and adequate information for migrant workers and victims, the delay of trials and long duration of criminal and civil proceedings, and, in the case of foreign victims, their return or deportation to the country of origin before a verdict is reached. Other obstacles for a person to access their rights may include the person's irregular immigration status or involvement in irregular work, like domestic work or the sex industry.

Situations which can increase domestic workers' vulnerabilities to abuses and exploitation include: their isolated environment; the lack of information about their rights; gaps in national labour and employment legislation; the absence of a labour contract; their precarious immigration status; the fact that their visa/ work permit is tied to their employer due to labour migration policies; a work/living situation where there is an imbalance of power; no (real) access to complaint mechanisms; and dependency on their employer for food and/or housing.¹

If we look at the gaps and challenges related to trafficked persons' rights, we see the following major issues that are relevant for the Hidden at Work target group:

Lack of identification

The number of identified victims of human trafficking and severely exploited workers in Europe remains low. Persons in hidden situations, in particular, in an irregular situation or in irregular employment situations, are often not identified. They might not be aware of their rights, or they might not be able to safely report the crime and or claim their rights.

¹ Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, Handbook: How to prevent human trafficking for domestic servitude in diplomatic households and protect private domestic worker, 2014.

Another challenge is the difficulty to reach out to the target group: women might work, for example, in 24-hour home care or in private homes. Another obstacle is that persons might be employed by foreigners with diplomatic immunity who are (in principle) protected against prosecution for the entire period in which they hold their diplomatic post. Professionals who aim to help persons in exploitative situations cannot control the (work) situation in these private settings, or they might not be trained/equipped to recognise signs of vulnerability and follow up on severe exploitation and or trafficking cases.

Diplomatic staff who breach the host country's law cannot be arrested, detained or prosecuted, unless there is a waiver of immunity. Their residences and private vehicles are inviolable and cannot be entered or searched. The recourse of and the assistance to a domestic worker who is being abused or exploited by a diplomat employer is significantly circumscribed. In some countries, the lack of prosecution hampers the access to assistance measures offered by the state, in particular when such support is conditional on the victim's participation in criminal proceedings.²

As a result, we see that many 'workers in exploitative situations' remain invisible, unnoticed and do not receive the information, assistance and support they are entitled to. Instead, they risk being detained and expelled from the country when reporting; or they remain in a very vulnerable situation.

Lack of access to safe reporting

The dependence, the lack of alternative work and/or housing, the lack of a social networks, the language barrier, and the lack of knowledge of laws and regulations make it difficult for migrant workers to report unacceptable (work) situations. This is especially because most European countries lack adequate safe reporting mechanisms to address exploitation and access justice, with undocumented migrants facing arrest, detention, and deportation if they approach the police to report violence or abuse. The dependency on their employer for their residence and work permit creates the risk not only to lose their work, but also housing and residence. A clear 'firewall' will allow workers to safely file a complaint to police or labour authorities, and to receive access to services and justice, without facing immigration enforcement as a result.

Lack of attention for labour exploitation

Labour exploitation mainly takes place at the bottom of the labour market. This is often seen for low-paid and flexible labour in sectors such as construction, agriculture and horticulture, distribution, the meat processing industry, cleaning, and domestic/care work.

Generally, we see that labour exploitation does not receive the same focus as sexual exploitation from policy makers who draft laws and policy around human trafficking or from law enforcement and other authorities who implement them. The apparent lack of political will to prevent labour exploitation on the same scale as sexual exploitation also affects the proper detection of victims of labour exploitation, especially in the private sphere. There are additional challenges in cases of exploitation of domestic workers or care personnel, which include:

² Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, Handbook: How to prevent human trafficking for domestic servitude in diplomatic households and protect private domestic workers, 2014.

- The absence of state regulation of the private sphere of work forces domestic workers to self-regulate their employment relationships.
- The domestic work, care work and au pair sectors, though regulated by the state, offer poor working conditions, which means that workers have little bargaining power when negotiating the terms of the employment contract with their employer.
- Subtle forms of exploitation, especially in the private sphere of work, are often overlooked or belittled by authorities in practice.
- It is difficult to prove the elements of labour exploitation in the private sphere because workers are isolated, exploitation occurs behind closed doors often without any witnesses, and workers may lack the necessary documentation, such as work contracts and timesheets. This is especially the case when the work relationship is concluded verbally.

No access to a reflection and recovery period or unconditional support

NGOs frequently report that the reflection and recovery period is not offered to persons identified as (potential) trafficking victims, especially when authorities suspect that they may not find sufficient evidence to start a successful prosecution case. Access to support for victims of human trafficking is currently closely tied with the criminal justice system and the successful prosecution of perpetrators. Most EU Member States provide hardly any unconditional access to assistance and those victims not able or willing to cooperate with the authorities - often out of fear for the risk this entails - are left without any (even basic) support. Practice shows that even victims who do cooperate have limited access to protection, support and assistance, if the criminal procedure has not started or is discontinued.

Especially (potential) trafficked persons who fall under the Dublin Regulation can often be hindered in their access to a reflection and recovery period as they are returned to the first country of EU entry, even though there might be clear indications of human trafficking. This seriously hampers the human rights-based approach and the correct implementation of the EU Trafficking Directive.

Lack of adequate investigation and non-prosecution

The number of court decisions regarding cases of labour exploitation is limited. In general, it is quite difficult to prove human trafficking in court. Cases might not meet all elements of the legal definition of human trafficking, as it is difficult for courts to prove people have been forced to work under duress or have been exploited. Further, there are the difficulties of gathering sufficient proof for exploitation in the hidden sectors. In practice, the burden of proof rests with the victims. Workers in diplomatic households often have no access to adequate investigations and prosecution of their exploitative employers due to diplomatic immunity.

Insufficient binding measures to hold employers accountable

For (trafficking for) labour exploitation often an administrative approach instead of a criminal approach is used resulting in employers (including temporary employment agencies) that seriously and repeatedly broke labour laws receiving only a fine. The fines are fairly low and have little deterrent effect. Furthermore, this approach offers the victims of exploitation little help

or protection. Victims are therefore often reluctant to cooperate in an investigation because they risk losing their work, temporary accommodation and/or their health insurance while they are not guaranteed any payback or other benefit.

Lack of access to assistance (and protection)

There are clear gaps in the provision of assistance and support offered to trafficked persons in Europe. Firstly, this includes the provision of appropriate and safe accommodation (including adequate shelters for specific groups), as NGOs generally report that shelter capacity is limited and that housing facilities are full or have restricted access. Likewise, there is limited provision of material assistance, as well as necessary medical treatment, including psychological assistance, counselling and information, and translation and interpretation services. Trafficked persons are further limited in accessing legal aid, due to existing financial barriers in place and lack of specialised legal aid. When human trafficking cannot be proven, or if they are not identified as potential victims of crime they often lack access to any support.

Lack of access to residence permits

There is no guarantee of a (temporary or long-term) residence permit following positive identification as a trafficked person. Directive 2004/81/EC regulates the granting of a residence permit to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate irregular migration and who cooperate with the authorities for the investigation or prosecution of suspected traffickers. However, the laws or policies determining which trafficked persons are granted residence permits vary substantially between different EU countries. Huge differences are noted between the numbers of identified victims and issued residence permits.

Victims may be issued a renewable residence permit if their personal situation requires it, or if they need to stay in the country in order to co-operate with the authorities in the investigation of the trafficking offence. In general, there are only few possibilities to obtain (permanent) residence on personal grounds in the different European countries.

Lack of access to justice/compensation

Although trafficked persons have an established right to compensation and various compensation mechanisms are in place in EU Member States, in practice, the actual receipt of a compensation payment by a trafficked person is extremely rare. Research on the issue unveiled several interconnecting barriers that prevent trafficked persons from accessing compensation. These include a lack of awareness among police and the judicial system, a lack of access to legal aid and adequate information for victims, the delay of trials and long duration of criminal and civil proceedings, and - in the case of foreign victims - their return or deportation to their country of origin before a verdict is reached. Other reasons for denying compensation to trafficked persons may be their irregular immigration status or their involvement in the sex industry.

But even when compensation is granted, trafficked persons rarely have the means to ensure a compensation order is actually enforced. Another barrier to trafficked persons obtaining compensation is that the traffickers are not found, or are not prosecuted, or have moved their assets abroad and/or have declared themselves bankrupt to avoid confiscation of their assets and having to pay compensation.

No (sufficient) access to information

EU Member States should take appropriate measures to assist victims to understand and to be understood from the first contact and during any further interaction they have with a competent authority in the context of criminal proceedings, including where information is provided by that authority. In practice, many victims do not receive information relating to their rights or the status of their case. Moreover, workers are often not aware of their rights due to language barriers or lack of accessible information.

Repatriation and return

It is often noted that persons are returned without proper risk assessment. It is very worrying that returned victims (including those with a Dublin claim) often have no access to adequate protection and support.

Non-application of penalties to the victim

Despite international and European legally binding standards on non-punishment and the adoption of specific legislation in several countries, trafficked persons in Europe are often still wrongfully detained, prosecuted and punished for offences they have been compelled to commit in the course, or as a result, of having been trafficked. This is a serious human rights violation and a denial of justice. It serves to reinforce distrust towards the criminal justice system by victims and others. Overall, we observe a variety of interpretations, a lack of awareness among legal professionals, and serious shortcomings in the implementation of the non-punishment provision. Successful applications of the non-punishment provision do exist, but these positive experiences are more often an exception than the norm. Overall, LSI members report failures to apply the non-punishment provision for all forms of human trafficking, but particularly in cases of trafficking for forced criminality, where victims seem more likely to be automatically regarded as perpetrators.

The non-punishment provision should be applied in accordance with a human rights-based approach, fully complying with the existing legal instruments to all civil, administrative or criminal offences, including serious offences.

Lack of (undocumented) workers' rights/fair labour rights

In general, there are limited possibilities for people from outside Europe to migrate to Europe and find legal employment. Many migrant workers in Europe work without adequate protection or minimum wage and face poor working conditions, delays or non-payment of wages and limited or no occupational health and safety measures. Those in irregular work or in an irregular situation are especially at risk of severe labour exploitation and abuse, including human trafficking and forced labour.

Loopholes in the enforcement or control of legislation on work permits, visas, labour rights and working conditions are misused and legitimate business structures and regulations are abused to conceal illicit activities. Via subcontracting, the misuse of the EU Posted Workers Directive and the establishment of letter box companies, national legislation and control is avoided, as well as liability for exploitation and abuse. There is still not much effort taken by the Commission or

EU Member States to ensure adequate working conditions for migrant workers or a structural regularisation of undocumented migrant workers.

A large gap has been observed between government immigration policies and actual outcomes in the labour market.³ Regrettably, laws and policies failed to reflect the new realities of employers' demand for workers. The gap between immigration law, policies of governments and outcomes in practice is the most obvious regarding domestic workers, most of whom are women.⁴ Women migrants have limited access to formal sector jobs which indirectly forces them to take on informal sector jobs (e.g. those derived from traditionally delineated gender roles).⁵ These jobs often include cooking, cleaning and caring. In light of globalisation and disparities in income between rich and poor nations, women will likely continue to migrate from developing and/or underdeveloped countries to developed countries to find work.

Domestic work not recognised

Domestic work is often specifically excluded from a country's labour code.⁶ The employment relationship is therefore strictly a private matter between the migrant workers and their employers and/or the agents - and the women migrant workers are normally not able to negotiate the terms and conditions of their employment. In nearly all European countries, domestic workers are not recognised as workers, and face discrimination and lack of access to labour rights. International legislation that promotes domestic workers rights and addresses harassment and violence at work (ILO Conventions 189 and 190) are still not ratified by most European countries.

Advocacy focusses

In order to improve the rights of women that have been trafficked, exploited or are in very vulnerable situations and at risks of severe exploitation and abuse, the consortium identified the following advocacy needs and recommendations:

Promote access to Justice

- Enhanced access to unconditional support and a reflection period
- Establishment of a firewall, safe reporting and effective complaint mechanisms
- Ratification of ILO Convention C189⁷ and C190
- Recognition and regularisation of domestic work
- Improvement of regulations- or establishment of fair regulations for au pairs and domestic workers⁸ and end of the misuse of current (au pair) regulations.⁹
- Enhanced information provision to au pairs, care and domestic workers in general

³ ILO, Booklet 3. Recruitment and the journey for employment abroad.

⁴ ILO, Booklet 1. Introduction: why the focus on women international migrant workers.

⁵ *ibid*

⁶ ILO, Booklet 1. Introduction : why the focus on women international migrant workers.

⁷ The Austrian National Action Plan (NAP) reflects the need to look into the ratification of ILO domestic work convention. At this stage, it is unclear if Austria will ratify. In Belgium, the ILO C189 is ratified, but still a lot is not covered, so the ratification did not make a huge difference. FAIRWORK Belgium is planning to make use of the Vienna Convention on Consular Relations to lobby for change.

⁸ 'Live-in care workers' in Austria are mainly women from Romania and Slovakia. Often these women have to work as 'self-employed', which leads to situations where they are excluded from all basic workers' rights. Due to this 'self-employment', LEFÖ cannot file a complaint or build a case and lobbies now for an employment model for care workers.

⁹ Revision of regulations should not lead to exclusion of groups/harm undocumented workers.

Address the issue of diplomatic immunity

- Residence rights for workers which faced exploitation in diplomatic households¹⁰
- Establishment or improvement of referral and screening mechanisms¹¹
- Blocking of diplomats' visas when there is exploitation in their households.

More legal (labour) migration pathways and independent access to employment for low-skilled migrant workers including care workers

- Improvement of (visa) regulations for care workers
- Lift tied visa systems/work permits¹² and ensure that workers can change their employer^{13 14}
- More data on recruitment practices and work permits granted including to low-skilled workers
- No recruitment fees – all recruitment and travel costs to be paid by the employer and minimum standards for recruitment

Harmonised European approach/solution for issues around care work

- Improvement and adoption of the EU Care strategy.

Binding measures to hold employers accountable in cases of exploitation

- Binding EU and national due diligence legislation – binding for more companies and engagement of workers.
- Fines paid by employers should be used to compensate workers.

¹⁰ In Austria, women who have been exploited in diplomatic households can receive a special residence permit on these grounds.

¹¹ In Austria, such referral and screening mechanisms are in place still it remains difficult to detect and identify exploited persons in the sector. LSCZ attends interviews conducted by the Ministry with domestic workers.

¹² At this moment the main problem faced in the Czech Republic is the issue of dependency of the workers on the employer, on the basis of a new alien law. Non-EU migrants are obliged to stay for 6 months with the first employer - the one mentioned on their employer card. This creates large risks for exploitation of migrant employees.

¹³ In Finland and Canada this is possible now Finnish example: <https://migri.fi/en/residence-permit-or-certificate-due-to-exploitation-by-employer>

¹⁴ In Germany, Ban Ying lobbies to make it possible for domestic workers to change employers; that domestic workers should not have to live with their employer (in BE they don't have to, in DE they do); Foreign office is the one who gives the allowance for diplomats to hire domestic workers. After exploitation, this diplomat will not be allowed to hire domestic workers again. Domestic workers exploited by their diplomat employers have access to support and residence without the need for prosecution (as this is not possible due to diplomatic immunity); possibility to apply for long term-residence after working for a while as a domestic worker.

ANNEX 01

- » [UN Palermo Protocol 2000/2003 \(also UN Global Action Plan and Political declaration of 2021\)](#)
- » [CEDAW General Recommendation no 38 on trafficking of women and girls in the context of global migration](#)
- » [Council of Europe Convention on action against THB 2005/2008](#)
- » [Council of Europe Convention VAW \(Istanbul Convention\) 2011/2014](#)
- » [CFD on standing of victims in criminal proceedings \(2001\)](#)
- » [Residence Permit Directive \(2004\)](#)
- » [Compensation Directive \(2004\)](#)
- » [Employers Sanctions Directive \(2009\)](#)
- » [THB Directive \(2011\)](#)
- » [EU anti-trafficking Strategy 2021 - 2025](#)
- » [Victim Rights Directive \(2012\)](#)
- » [Victim Rights Strategy 2021 - 2025](#)
- » [Seasonal workers Directive \(2014\)](#)
- » [Possible EU Directive on VAW/GBV \(EU 'Istanbul' Directive\)](#)
- » [Minimum wages Directive](#)



HIDDEN AT WORK

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This project is funded by the European Union's Rights, Equality and Citizenship Programme (REC 2014-2020), co-funding for FairWork is provided by Stichting Dioraphte. The content of the materials produced represent only the views of FairWork and is her sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.