

# Interpretation and distinction between labour exploitation in the context of trafficking in human beings and particularly exploitative working conditions under the Employers Sanctions Directive

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# Aim and scope of the Ad-hoc query

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- **Mapping legislative and procedural frameworks** regarding the distinction between:
  - “**labour exploitation**” as a form of trafficking in human beings covered by the **Anti-trafficking Directive** (Directive 2011/36/EU)
  - and “**particularly exploitative working conditions**” under the **Employers Sanctions Directive (ESD)** (Directive 2009/52/EC)
- **Giving an overview on:**
  - if and how Member States make distinctions
  - the respective authorities involved and the determination process
  - procedures in place concerning particularly exploitative working conditions
  - aid and assistance provided to victims covered by the ESD

# Key points to note



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- **14 Member States<sup>1</sup> reported to make a distinction between labour exploitation as a form of trafficking in human beings covered by the Directive 2011/36/EU of 5 April 2011 and particularly exploitative working conditions under the Employers Sanctions Directive (ESD) (Directive 2009/52/EC of 18 June 2009).**
- **In general, the conditions to qualify an offence as labour exploitation in the context of human trafficking are more stringent.**
- **close links between the two phenomena and difficulties of differentiation in practice were reported by several Member States**

<sup>1</sup> CY, EE, EL, ES, FI, FR, HU, IT, LV, LT, LU, NL, PL, SI.

## Key points to note

- **Nine Member States<sup>1</sup> reported to have a specific procedure when confronted to particularly exploitative working conditions to grant a residence permit** to an individual who is in an irregular situation. Eight Member States reported not to have a specific procedure.
- **In seven Member States<sup>2</sup>, assistance similar to the aid and assistance under Directive 2011/36/EU is also provided** to victims covered by the Employers Sanctions Directive. At the same time, seven Member States reported that no similar assistance is provided.

<sup>1</sup> CY, EE, EL, ES, FI, IT, LT, PL, SI.

<sup>2</sup> CY, EE, EL, ES, FR, IT, SI.

# Distinctions between the phenomena

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- **14 Member States<sup>1</sup> reported to make a distinction between labour exploitation** which can be considered as trafficking in human beings covered by the Directive 2011/36/EU **and particularly exploitative working conditions** under the Employers Sanctions Directive (Directive 2009/52/EC).
- **5 Member States<sup>2</sup> reported not to make such a distinction.**
- **conditions to qualify an offence as labour exploitation in the context of human trafficking generally more stringent.** But, reported **differences vary among the Member States.**

## Luxembourg:

- context of **human trafficking** puts an emphasis on forced or compulsory labour or services, servitude, slavery and on the fact that the **general conditions are contrary to human dignity.**
- with “**particularly exploitative working conditions**”, there is a labour relationship. However, **conditions are totally disproportionate** compared to legally employed workers.
- **difficult for an authority to distinguish** between both situations on the ground as **both share similar elements** and the victims in most of the cases are not willing to talk with the authorities.

<sup>1</sup> CY, EE, EL, ES, FI, FR, HU, IT, LV, LT, LU, NL, PL, SI.

<sup>2</sup> BE, BG, CZ, DE, SK.

# Authorities involved and determination process



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- most Member States reported that the **respective labour inspectorate is competent for the control regarding labour law violations and working conditions**
- in case of reasonable grounds for suspicion of particularly exploitative working conditions, **further criminal investigations by police and the public prosecutor** take place
- **definite determination** whether or not working conditions are particularly exploitative **in the framework of the criminal investigations**

## Luxembourg:

- detection or determination of “particularly exploitative working conditions” is principally done by the inspectors of the **Inspectorate of Labour and Mines**, by the officers and agents of the **Grand Ducal Police**, by the **Customs and Excise Officers** from the grade of senior brigadier upwards and by public servants of the **Directorate General of Small and Medium-Sized Businesses**
- the labour inspectors and the agents of the Directorate General must act in their legal framework



# Procedures in place concerning particularly exploitative working conditions

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- **9 Member States<sup>1</sup> reported to have a specific procedure when confronted to particularly exploitative working conditions** in order to grant a residence permit to an individual who is in an irregular situation.
  - EE: temporary residence permit; process of issuing similar to the suspension of removal in the trafficking procedure
  - EL: residence permit granted for humanitarian reasons
  - FI: two distinct categories of residence permits exist for VHTs and third-country nationals in Finland who worked illegally
- **8 Member States<sup>2</sup> reported not to have a specific procedure.**

## Luxembourg:

- **irregularly staying migrants can obtain the same residence permit as the one granted to VHTs when they are victim of illegal employment** which occurred in particularly exploitative working conditions or where a minor is involved
- **but, no specific procedure for granting them a suspension of removal** or any other similar measure

<sup>1</sup> CY, EE, EL, ES, FI, IT, LT, PL, SI.

<sup>2</sup> CZ, DE, FR, HU, LU, LV, NL, SK.

# Aid and assistance provided to victims covered by the ESD

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- **7 Member States<sup>1</sup>** reported that **assistance** similar to the aid and assistance under the Anti-trafficking Directive (Directive 2011/36/EU) **is also provided to victims covered by the ESD**.
  - ES: aid and assistance is provided, although the measures are not as extensive as in trafficking cases.
  - FR: in addition to the right to work, the temporary residence permit issued allows its holder to benefit from the protection, reception and accommodation system
  - SI: during authorised stay victims of illegal employment enjoy the rights guaranteed to third-country nationals with a temporary residence, as well as the right to free translation and interpretation.
- **7 Member States<sup>2</sup>** reported that **no assistance similar to the aid and assistance under Directive 2011/36/EU** is provided to victims covered by the ESD.

## Luxembourg:

- besides possibility of obtaining a residence permit, **only additional aid and assistance** is that illegally staying third-country nationals who are illegally employed shall, before the enforcement of any return decision, be **systematically and objectively informed by the controlling officers of the rights conferred on them by the Labour Code**, including the possibility of having recourse to free legal aid (in large majority of cases to recover unpaid salaries)

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<sup>2</sup> BE, CZ, DE, FI, LV, LT, LU.



# Discussions at the Benelux level

# BENELUX Thematic Day « Human trafficking » - 11/10/2022

BE does not distinguish between the two directives (Anti-Trafficking Directive & ESD).

- However, in order to prove trafficking, it is also necessary to resort to the notion of working conditions contrary to human dignity.
- Notion of "human dignity" -> not define in the law.
  - a cluster of elements (indicators) a subjugation, a degradation of the human person by an attack on his physical and mental capacities not limited to material conditions alone.<sup>1</sup>

LU & NL: they make the difference between the two cases, but they faced difficulties in practice.

- NL -> coercing is among the material elements of the offence of trafficking (BE & LU is an aggravating circumstance)
  - Coercion is broadly interpreted by the courts. However, the Dutch case law is more severe if the victim is an illegally resident and if there is an abuse of vulnerability.
- NL are amending the legislation but are faced with the task of trying to codify the notion of human dignity.
  - The current modernization process is considering a potential gradation of the differences between trafficking and economic exploitation offenses.
    - A "softer" form of labor exploitation currently exists in administrative law and will be incorporated into the penal code as a serious offense.

BE & LU: there is no homogeneous jurisprudence, it depends on each judge whether trafficking is retained or not -> not possible to have a clear guideline to make the distinction.

<sup>1</sup> Precisions stated in COL 1/2015, Annex 1 (confidential)

## BENELUX Thematic Day « Human trafficking » - 11/10/2022

Intention of the EU acquis was to protect the TCNs from potentiel abuses and not to create two different regimes of trafficking

**Conclusion:** despite the differences in legal systems and legislations, there is the observation that the three countries encounter difficulties in obtaining convictions in matters of trafficking in particular and that the notion of "contrary to human dignity" is interpreted differently from one judge to another!

# EMN Luxembourg Inform on this topic

