



Dignity for (irregular) migrants
employed in Farm to Fork Sectors:

A Regulatory Infrastructure Approach to EU Legal and Policy Frameworks

Working Paper WP3.1

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Executive Summary

Migrant workers, including those with irregular status, are essential to the European Union's (EU) economies, particularly to food sectors and industries. Yet, irregular migrant workers face structural obstacles in accessing decent working conditions and essential services. The DignityFIRM project focuses on identifying vulnerabilities and improving working conditions and access to services by exploring and throwing light on dynamics of irregularity in upstream (agriculture and food processing) and downstream (hospitality and food delivery) aspects of Farm to Fork (F2F) supply chains. Avoiding policy siloes and disciplinary boundaries, this Working Paper maps EU-level legislative and policy frameworks across four crucial domains: migration management, the European Pillar of Social Rights – with a focus on public health policies – the EU's F2F strategy, and corporate social responsibility. It is our presumption that these policies collectively shape the conditions and vulnerabilities of irregular migrant workers. This will be empirically tested in other DignityFIRM research activities.

The Working Paper describes these four policy domains and underlying EU frameworks not in isolation but as interconnected components of a broader 'regulatory infrastructure'. This infrastructure comprises not only legal and policy dimensions, but also economic and commercial considerations and actors, social structures, and technological factors. These interconnected elements impact irregularity in various ways across the different labour sectors examined. The Paper covers multiple frameworks in these four domains, including some, as the Seasonal Workers Directive, that specifically concern F2F sectors. However, it starts off by discussing the limitations of the binary approach to irregularity embedded in EU law. This binary approach is best illustrated in the Return Directive and the Employers Sanctions Directive, which categorise migrants as either staying "legally" or "illegally" based on their residence status. By contrast, the Paper highlights the complexity of irregularity, which goes beyond this simple binary distinction, demonstrating how different frameworks and factors interact to create a multi-dimensional process of irregularity. The Paper identifies three concrete scenarios in particular that reflect this multi-dimensional process and generate discrepancies and vulnerabilities: i) status-based irregularity: this scenario involves individuals who have the right to reside in an EU Member State but either have no right to work or face restricted access to employment there, as in the case, for example, of asylum seekers or

international students; ii) temporal irregularity: individuals can transition between regular and irregular statuses. This can happen when visas expire, people lose their jobs, or asylum seekers lose their (temporary) residence status. Yet, access to work may also facilitate a return to residence status for those who have lost it; iii) territorial irregularity: in this scenario, a person has the right to stay and work in one Member State but has irregular status or restricted access to work in another Member State, as, for example, asylum seekers or refugees moving irregularly to a Member State different from that responsible for their protection. These three scenarios highlight the diverse and changing nature of irregularity and the associated risks of exploitation. This is also illustrated by the dynamics of irregularity which mobile EU citizens who engage in informal work in other Member States also face, which this Paper also covers.

The existing binary approach to irregularity, combined with lack of awareness of the broader infrastructure as well as policy incoherence and conflicting rationales of existing frameworks create legal and policy vacuums, exposing irregular migrants in F2F sectors to greater risks of abuse. This approach, this Paper shows, contributes to perpetuate the vulnerability of irregular migrant workers. By contrast, taking a regulatory infrastructure approach for better understanding dynamics of irregularity, this Working Paper reveals systemic regulatory, protective and implementation gaps across numerous policy frameworks.

At the same time, it draws attention to possible ways forward, while also problematising them. Among others, it shows the importance of exploring the notion of incentives to promote compliance with existing protective frameworks. It also raises questions around capacity in connection to compliance. For example, it highlights the potential challenges faced by smaller enterprises in adapting to changes in law and policy, including potential additional costs they may not be able to cover for in the current socio-economic environment, potentially leading to more risks for irregular migrant workers. It also points to the importance but also the lack of information as a structural obstacle for irregular migrant workers in exercising their rights.

The Paper concludes by emphasising the need for a holistic approach to improve the conditions and rights of irregular migrant workers. Other than offering a comprehensive view of the challenges and complexities associated with irregular migrant work in F2F

labour markets, this Paper highlights the need to involve both migrants and businesses as fundamental subjects in the analysis. While this should also help with the identification of ways forward, recommendations are not provided in the Paper, and will be subject to following research and targeted discussions with relevant stakeholders. Beyond this, this Working Paper sets the stage for further investigations. By helping scholars, and non-lawyers especially, to navigate existing frameworks, it should enable all researchers to better comprehend the various factors shaping irregularity and the multifaceted nature of the issue while also making a first attempt at the identification of how the mapped policies intersect and influence the experiences of irregular migrant workers.

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Abbreviations

CAP	Common Agricultural Policy
CJEU	Court of Justice of the European Union
CSR	Corporate social responsibility
EEA	European Economic Area
ELA	European Labour Authority
EPSR	European Pillar of Social Rights
ETUC	European Trade Union Confederation
EU	European Union
EFRAG	European Financial Reporting Advisory Group
ESRS	European Sustainability Reporting Standards
EU-OSHA	European Agency for Safety and Health at Work
FAO	Food and Agriculture Organization of the United Nations
FRA	European Union Agency for Fundamental Rights
F2F	Farm to Fork
HOTREC	Confederation of National Associations of Hotels, Restaurants, Cafés and Similar Establishments in the European Union and European Economic Area
HRDD	Human rights due diligence
HREDD	Human rights and environmental due diligence
ILO	International Labour Organization
MSMEs	Micro, small, and medium-sized enterprises
NCP	National Contact Point
OECD	Organisation of Economic Co-operation and Development
PICUM	Platform for International Cooperation on Undocumented Migrants
SMEs	Small and medium-sized enterprises
TFEU	Treaty of the Functioning of the EU

THB	Trafficking in Human Beings
UNGPs	UN Guiding Principles on Business and Human Rights
UTPs	Unfair trading practices

1. Introduction

1.1 Background and Goals

Migrant workers, including those with an irregular status, play a vital role in European Union (EU) economies but often face significant challenges in accessing decent working conditions and regular work.¹ The COVID-19 pandemic highlighted their positive contribution to several key economic sectors, including the Farm to Fork fields and industries.² But the pandemic also drew renewed attention to precarious work and exacerbated existing inequalities in relation to access to social and health services and, more in general, well-being. It threw light on how social and health inequalities create vulnerabilities and risks, not only for the workers but also for food supply chains, economies, and communities.

In this context, the DignityFIRM project aims to contribute to improving conditions of migrants in an irregular situation working in Farm to Fork (F2F) labour markets in four EU states (Italy, the Netherlands, Poland, Spain) and two associated countries (Morocco and Ukraine). The F2F refers to all the stages a food produce goes through, from farming and the growing of crops to processing and delivering it at the table of European consumers, as well as waste and disposal.

The focus on irregular migrants in F2F labour markets is timely. The instrumental role of these industries in securing EU livelihoods has only grown in recent years, particularly after the Russia's 2022 invasion of Ukraine put economic and food security at the centre stage in policymaking. But F2F policies are also crucial, and tightly interrelated, to the EU's longer-term commitment to sustainable social and environmental transformations.

The DignityFIRM project therefore allows for a unique critical and forward-looking reflection on the conditions of irregular migrants as an essential labour, social and economic force in such transitions.

¹ De Lange, T. & Rijken, C. (2018). Introduction: Towards a Decent Labour Market for Low-Waged Migrant Workers: An Introduction. In *Towards a Decent Labour Market for Low Waged Migrant Workers*. Amsterdam University Press. <https://doi.org/10.1515/9789048539253-001>.

² Anderson, B., Poeschel, F.G., & Ruhs, M. (2020). *COVID-19 and systemic resilience: rethinking the impacts of migrant workers and labour migration policies (Working Paper, EUI RSCAS, 2020/57) Migration Policy Centre*. <https://cadmus.eui.eu/handle/1814/68235>

More specifically, the project's focus is on both the upstream and downstream of food supply chains: farm and fork. Upstream, at the farming end, the focus is on agriculture and food processing. Downstream, closer to the fork end, it is on hospitality and food delivery. This allows DignityFIRM researchers to investigate the conditions of irregular migrant workers in labour markets with different characteristics and dynamics, with the reliance on lower-waged labour in common.

Focusing on these F2F labour markets allows DignityFIRM to adopt a transversal research design making room for a vast cross-sectoral – not just cross-national – comparison. For example, the sectors under the magnifying lens of the project differ in the extent to which they are susceptible to seasonal peaks in labour demand, the extent to which they typically offer decent working hours, the character of the employer/employee relationship (e.g. agency work, platform work), the types of health and safety risks to which workers are exposed, and the possibility to invest in labour-substituting technologies, among others.³ Yet, all of them rely to a certain extent on precarious work and irregular migrant workers as well.

Ensuring that the EU achieves economic and food security in a socially sustainable way starts by acknowledging the fundamental role played by irregular migrant workers in the F2F industries as well as addressing undignified work, the dynamics of irregularity and the risks of exploitation to which they are exposed. Should a way forward not be identified and pursued, it is not only irregular migrant workers who would be affected; F2F industries would not be able to grow sustainably or show resilience when faced with crises, with negative consequences for markets, consumers and, ultimately, food security.

³ Pekkarinen, A. G., Haapasaari, S., Jokinen, A., & Lietonen, A. (2023). *Mapping risks to migrant workers in supply chains across Europe: Case studies and best practices from the agriculture, food-processing, manufacturing and hospitality sectors*. IOM, Geneva.

1.2 The Domains and Regulatory Infrastructure under Investigation

This Working Paper seeks to map EU-level legislative and policy frameworks that shape conditions and vulnerabilities of irregular migrant workers at work in these F2F sectors. This mapping exercise is carried out using a comprehensive approach intersecting different policy domains. Four policy domains are especially relevant to the DignityFIRM project: i) migration management and mobility frameworks, as both non-EU and EU nationals can find themselves in a position of irregularity and may be subject to informal employment and/or irregular stay. ii) rules and policies relating to the European Pillar of Social Rights, iii) the EU's F2F strategy, with a focus on social aspects of sustainability, and iv) employers' obligations and corporate social responsibility (CSR).

The analysis therefore goes well beyond rules relating to migration (for non-EU nationals) and mobility (covering EU nationals). This is because the frameworks that shape dynamics of irregularity in the F2F sectors are scattered across various domains. When combined, they create the conditions and determine the (lack of) access to rights and services of migrant workers.⁴ Only the above-mentioned domains are considered in the DignityFIRM project and thus in this Working Paper.⁵ Our methodology is one of doctrinal mapping and scrutinizing laws and policy documents on the 'awareness' of their potential impact on the infrastructure shaping irregular migrant workers access to rights and services.⁶

In the DignityFIRM project, laws, and policies in these four domains are presented not just as the underlying institutional setting, but as part of a complex, interconnected and mediating infrastructure.⁷ This infrastructure is composed of different dimensions and includes actors from different sectors and at different governance levels, further shaping

⁴ Morgan, K. J. (2023). Hostile Environments: State Infrastructural Power and the Exclusion of Unauthorized Migrants in Western Europe *American Journal of Sociology* 128(4), 1077–1113.

⁵ Other domains, e.g., corporate law, tax law or laws on planning (regarding housing for instance) could have been considered, but time constraints had us make choices. Investigating 'migrant awareness', e.g. the impact on migrants or, in general low-waged workers, of other laws and policies not specifically targeting migrant communities could be a welcomed endeavor to be performed in following research projects.

⁶ The mapping involved an analysis of primary legal and policy documents in force or under negotiation. We found little relevant EU level case-law at the intersection of the investigated policy fields and although on each topic there is abundant scientific literature, few authors engage with the four identified policy domains in combination.

⁷ Gkliati, M., T. de Lange & Mantu, S. (2023). Progress in Migration and Asylum Law scholarship – International, Intersectional, and Interdisciplinary *Law and Method*, DOI: 10.5553/REM/.000077, p. 13.

patterns of irregularity and access to basic rights and services by irregular migrant workers. These are: i) the legal and policy frameworks *per se*, which are further mediated (and implemented) by national and local actors; ii) the economic/commercial infrastructure, which is modelled by employers and private entities; iii) the social infrastructure, made among others of civil society organisations and migrants-led networks; iv) the technological infrastructure goes beyond the scope of the DignityFIRM project.

This infrastructure and actors, the project aims to show, may pursue distinct and conflicting rationales and goals, and yet do not constitute discrete domains. In other words, these laws and policies are part of the same regulatory environment. From this viewpoint, laws and policies are not self-standing instruments but function as part of a wider set of enabling and constraining conditions which, altogether shape processes of irregularity in different ways. As such, they are in a dynamic relationship with the wider regulatory infrastructure.

This approach sheds light on the nature and functioning of legal and policy frameworks. These do not only change geographically and over time. If not looked at in isolation but as part of a wider infrastructure, the policy and legal frameworks mapped in this Working Paper and further examined in the context of DignityFIRM, change depending on the specific labour sector, technologies, socio-economic conditions, information available to affected persons, etc.

This Paper thus moves beyond a black-letter approach and away from the dominant narrative of legal fragmentation of irregular migrants' rights. Instead, it engages the concept of a complex interconnected and dynamic infrastructure to achieve the Project's objective of proposing a pathway towards integrated migration, social and economic policies through in-depth policy mapping and holistic approaches. Put differently, if 'solutions' to address conditions of irregularity and vulnerability are to be found, this cannot be achieved by pursuing changes in legal frameworks alone, and certainly not in discrete policy areas such as migration alone.

1.3 Goals of the Working Paper

This Working Paper constitutes the starting point for the DignityFIRM project, exposing how policy frameworks are at the same time part of the problem and, possibly, the solution towards dignified conditions for those at work from farm to fork in the EU and associated non-EU countries. To this end, it aims to provide insights, guiding questions and further areas to be explored in the following stages of the Project. More specifically, the Working Paper aims to achieve three objectives:

- i. Mapping and describing key components of relevant policy and legal frameworks to help project partners and other researchers – especially non-legal scholars – navigate the four domains under inquiry.⁸
- ii. Evaluating the extent to which these mapped frameworks address, or, by contrast, create or contribute to the creation of irregularity and precariousness. In doing this, it also identifies some policy conflicts, contradictions and gaps.
- iii. Suggesting guiding questions for other Work Packages in the DignityFIRM project. These will be included in a separate document ('Research Guidelines'). In this Working Paper, instead, the authors suggest further research questions which could inform investigations beyond the DignityFIRM project, aspiring to shape a longer-term research agenda.

This Working Paper constitutes the first deliverable of the DignityFIRM project work package on the EU level regulatory infrastructure: it should enable the consortium partners to navigate the existing regulatory infrastructure through a common frame of reference, but also facilitates the research to be conducted as part of other Work Packages in DignityFIRM. In this sense, it helps to bring the project's legal, policy and empirical analyses together. Drawing from this first step, the research conducted in other Work Packages will also pave the way for the formulation of concrete recommendations in different domains and dimensions.

⁸ Due to the reforms and legal initiatives, only changes proposed until June 2023 have been considered. Further changes will be monitored as part of the Project.

1.4 Preliminary Matters: Competences of the EU

Among the policy frameworks examined in this Working Paper are those relating to migration and employment law. Migration – alongside asylum – policy is a competence shared between the EU and its Member States.⁹ The competence for employment policy remains primarily with the Member States. Nevertheless, the EU progressively exercised its regulatory and policy-making stance in several areas of interest for this Project connected to both migration and employment.¹⁰

When it comes to employment policy, the EU has taken action to address widening inequalities, increased precariousness and less stable forms of work.¹¹ Several EU directives set minimum standards and try to improve working conditions.¹² These protections generally target all workers. Yet, some only protect EU nationals while others specifically seek to protect migrant workers. Extensive research has demonstrated that the labour and social rights of Union citizens using their free movement rights are often violated.¹³ Against this background, the European Pillar of Social Rights (EPSR) was launched in 2017, followed by targeted policy actions, including proposals for additional regulatory interventions. The EPSR sets out 20 key principles and rights to support a renewed process of convergence towards better working (and living) conditions in the EU. The European Labour Authority (ELA) also started its activities in 2019 to meet the need for greater cross-border administrative cooperation and enforcement of EU mobile workers rights¹⁴. Although the protection of labour and social rights of third-country workers (with or without legal residence) is formally not part of the ELA mandate, the organisation has started to include in its activities third-country workers social¹⁵.

⁹ Article 4(J) of the Treaty of the Functioning of the EU (TFEU).

¹⁰ Neframi, E. (2011). *Division of competences between the European Union and its Member States concerning immigration*. DG IPOL, Policy Department C: Citizens' Rights and Constitutional Affairs, European Parliament. [Division of competences between the European Union and its Member States concerning immigration - Publications Office of the EU \(europa.eu\)](#).

¹¹ Makay, M. (2023). *Employment Policy*. (Fact Sheets on the European Union). European Parliament. [Employment policy | Fact Sheets on the European Union | European Parliament \(europa.eu\)](#).

¹² European Union. (n.d.) *Types of legislation*. [Types of legislation | European Union \(europa.eu\)](#).

¹³ Blauburger, M., & Heindlmaier, A. (2023). The European Labour Authority in Practice. In Hans-Böckler-Stiftung. <https://doi.org/10.1007/3-7908-1680-9>

¹⁴ Regulation (EU) 2019/1149 of the European Parliament and of the Council of 20 June 2019 establishing a European Labour Authority.

¹⁵ European Labour Authority. (2022). Subgroup on tackling undeclared work among third- country nationals: regularisation initiatives Output paper (Issue January). Note the European Platform for tackling undeclared work is a permanent working group in ELA.

EU's shared competence to develop migration laws and policies entail that both the Union and the Member States may legislate and adopt legally binding acts in that area. However, Member States can only exercise their competence to the extent that the Union has not exercised, or has ceased to exercise its competence. There are a variety of areas relating to migration over which the EU has introduced legal and policy measures.¹⁶ These cover the rights of third-country nationals legally residing in Member States as well as policies to address irregular immigration and unauthorised residency (removal and repatriation) as well as trafficking in persons.

In addition to legal and policy interventions in the domains of employment and migration, the EU's general (i) fundamental rights and (ii) relevant decisions by the Court of Justice of the European Union (CJEU) and (iii) anti-discrimination frameworks are relevant to this topic.

First, in both employment and migration, the application of existing instruments and the adoption of new EU legislation and policies must comply with the EU Charter of Fundamental Rights¹⁷ on equality and social protection. The Charter includes rules on dignified working conditions, and specifically holds that “[e]very worker has the right to working conditions which respect his or her health, safety and dignity”, and that “[e]very worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave”.¹⁸

The EU Charter on Fundamental Rights applies to all EU institutions and Member States when legislating, and whenever a Member State applies EU law.¹⁹ Most fundamental rights and principles enshrined in the Charter are accorded to everyone irrespective of nationality or migration status.²⁰

¹⁶ Article 79 of the Treaty of the Functioning of the EU (TFEU).

¹⁷ European Union Agency for Fundamental Rights (FRA). (2020). *Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level – Guidance*. [Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level – Guidance | European Union Agency for Fundamental Rights \(europa.eu\)](https://fra.europa.eu/fr/publications/2020/06/11/applying-the-charter-of-fundamental-rights-of-the-european-union-in-law-and-policymaking-at-national-level-guidance).

¹⁸ Article 31, EU Charter.

¹⁹ Article 51, EU Charter.

²⁰ Platform for International Cooperation on Undocumented Migrants (PICUM). (2022). *Guide to Undocumented Workers' Rights at Work under International and EU Law*, p. 36.

Second, and connected to this, decisions by the Court of Justice of the EU (CJEU) expanded the protective scope of EU employment legislation over persons with an irregular status. In the *Tümer* ruling, which concerns the Employers Insolvency Directive (see below, Section 4.4), the CJEU held that Member States could not exclude third-country nationals who do not hold a regular residence permit from the definition of ‘employee’. This would have the effect of undermining protections across the EU in the case of employer insolvency. While the CJEU in this case found that protections provided by the Employers Insolvency Directive specifically apply to undocumented workers too, it can be inferred from the Court’s reasoning and the aims of other directives, that irregular residence status should not hinder the implementation of employment law and connected protection standards established by other relevant directives.²¹

Third, employment and migration policies fall under the EU’s anti-discrimination legislation.²² The Racial Equality Directive prohibits discrimination based on racial and ethnic origin in several areas,²³ including employment, social security and healthcare, and access to housing.²⁴ The Employment Equality Directive²⁵ requires that workers are treated equally, regardless of their religion or belief, disability, age or sexual orientation.²⁶

²¹ Platform for International Cooperation on Undocumented Migrants (2022), ‘[Labour Rights of Undocumented Migrant Workers: what does the EU say?](#)’, Blog Post

²² European Union Agency for Fundamental Rights (FRA). (2018). *Handbook on European non-discrimination law*. [Handbook on European non-discrimination law – 2018 edition | European Union Agency for Fundamental Rights \(europa.eu\)](#); Certain Charter provisions are restricted to citizens or lawful residents; and certain rights (e.g. on social security or on healthcare) only apply ‘in accordance with the rules laid down by Union law and national laws and practices’ which in practice could curtail irregular migrants’ chances to enjoy certain rights.

²³ Germaine, C., Snippe, E., Chopin, I. & Farkas, L. (2022). Handbook on the racial equality directive. *Euractiv*. [Handbook on the racial equality directive – EURACTIV.com](#).

²⁴ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, p. 22–26. [EUR-Lex - 32000L0043 - EN - EUR-Lex \(europa.eu\)](#).

²⁵ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16–22. [EUR-Lex - 32000L0078 - EN - EUR-Lex \(europa.eu\)](#).

²⁶ Tymowski, J. (2016). *The Employment Equality Directive: European Implementation Assessment*. Ex-Post Impact Assessment Unit of the Directorate for Impact Assessment and European Added Value, European Parliament. [EPRS_STU\(2016\)536346_EN.pdf\(europa.eu\)](#).

Instruments adopted in migration and employment matters, other than specific anti-discrimination legislation have set corresponding minimum standards. However, reflecting the need for examining the concrete impact of these frameworks – one of the aims of this Project – implementation reports²⁷ underline that breaches often happen ‘under the radar’. For example, victims without a secure residence status tend to be more reluctant to contact or report to the competent authorities when they experience discrimination.²⁸

1.5 The EU Return Directive and Existing Policy Gaps

This Working Paper maps several EU frameworks in the domains of migration and mobility, the European Pillar of Social Rights, the EU’s F2F strategy, and corporate social responsibility. Most of the frameworks covered in this mapping have direct or indirect bearings on dynamics of irregularity. Some of these frameworks, such as Seasonal Workers Directive, specifically concerns the F2F, and are permissive or protective in nature.

That said, EU policies and legislation have not been accompanied by measures addressing the treatment and rights of non-EU nationals in an irregular situation, except for the Return Directive²⁹ and the Employers Sanctions Directive³⁰ (on the latter’s limits, see Section 2.1.1).

While it does not concern F2F, and it is for this reason not examined in-depth in the section dedicated to migration frameworks, the Return Directive is especially relevant for

²⁷ European Commission. (2021e). *Report from the Commission to the European Parliament and the Council on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (‘the Racial Equality Directive’) and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (‘the Employment Equality Directive’)*. [EUR-Lex - 52021DC0139 - EN - EUR-Lex \(europa.eu\)](#).

²⁸ European Union Agency for Fundamental Rights (FRA). (2017). *Second European Union Minorities and Discrimination Survey - Main results*. [Second European Union Minorities and Discrimination Survey - Main results | European Union Agency for Fundamental Rights \(europa.eu\)](#)

²⁹ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24.12.2008, p. 98–107 (Return Directive). [EUR-Lex - 32008L0115 - EN - EUR-Lex \(europa.eu\)](#)

³⁰ 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 L 168, 30.6.2009, p. 24–32 (Employers Sanctions Directive). [EUR-Lex - 32009L0052 - EN - EUR-Lex \(europa.eu\)](#)

the purpose of this preliminary mapping, as it sets out common standards and procedures to be applied in EU Member States for returning “illegally staying third-country nationals”. The Return Directive also provides a starting point for the legal definition of irregularity in the EU, from which however this Project departs.

The cardinal principle of the Return Directive is restrictive in nature, as it establishes that Member States are obliged to (“shall”) issue a return decision to any third-country national staying irregularly on their territory.³¹ The Directive accordingly lays down common standards and procedures for returning irregular migrants. However, it does not provide any further guidance on the treatment of migrants who cannot be returned, except for specifying that “their basic conditions of subsistence should be defined according to national legislation”.³²

If the Directive is based on the restrictive principle that irregular migrants shall not be present on EU territory, and be removed thanks to swift and effective removal procedures, the reality shows that this is a misguided assumption: return rates in the EU have remained low across the years.

This creates a legal and policy vacuum, which also explains the risks of abuse that persons in an irregular situation face, including in the F2F sectors examined in the DignityFIRM project. The Return Directive does leave the door open for Member States to regularise irregularly staying migrants, but this is done at their discretion, either by granting them a residence permit or by means of other authorisations “for compassionate, humanitarian or other reasons”³³ (on ‘solutions’, such as regularisation initiatives, see Section 1.8 and the Conclusion of this Working Paper).³⁴

³¹ Art. 6, Return Directive.

³² Recital 12, Return Directive

³³ Art. 6(4), Return Directive

³⁴ Malheiros, J., Peixoto, J. (2023). Challenges and Ambiguities of the Policies for Immigrants’ Regularisation: The Portuguese Case in Context. In: Finotelli, C., Ponzo, I. (eds) *Migration Control Logics and Strategies in Europe*. IMISCOE Research Series. Springer, Cham. https://doi.org/10.1007/978-3-031-26002-5_6; Fox-Ruhs, C., & Ruhs, M. (2022). *The Fundamental Rights of Irregular Migrant Workers in the EU. Understanding and reducing protection gaps*. Policy Department for Citizens’ Rights and Constitutional Affairs Directorate-General for Internal Policies, European Parliament, p. 1–95. [https://www.europarl.europa.eu/RegData/etudes/STUD/2022/702670/IPOL_STU\(2022\)702670_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/702670/IPOL_STU(2022)702670_EN.pdf)

Given the lack of binding standards, it does not surprise that EU states have followed divergent approaches when it comes to the definition but also the restrictions of the rights of migrants in an irregular situation, including work-related rights. Many non-returnable non-EU nationals in a situation of irregularity, including in the F2F labour sectors, thus face a legal limbo, destitution, and homelessness, also representing a significant challenge for national and especially local administrations.

Their lack of access to work and social services do not only lead to enduring social problems in several European cities and municipal contexts. It also makes them vulnerable to exploitation. And yet, the risks they faced are not addressed by EU frameworks functioning in a binary mode.

The Employers Sanctions Directive provides an illustration of this. This Directive, which provides for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, does not take a broader approach to the definition of irregularity. Its scope is limited to “illegally staying third-country nationals”.³⁵ Hence legally staying yet not legally employed migrants do not fall within its scope and are as such not protected from possible employers’ exploitative practices.

1.6 Defining Irregularity in the DignityFIRM Project

While irregular migrants in a narrow sense are defined in the Return Directive and irregularly staying migrants *as* workers are covered by the Employers Sanctions Directive, DignityFIRM goes beyond this narrowly defined focus. This is because the binary approach adopted in the Return and Employers Sanctions directives reduces regularity to “legal” or “illegal” status, which fails to account for the wider and more nuanced spectrum of existing vulnerabilities and the wide and complex regulatory infrastructure of farm to fork work which effectively shapes irregularity.

It is not only migrants in an irregular situation that face the risk of abuse, but also a range of other non-EU nationals who, strictly speaking, have residence rights, as well as EU mobile citizens. However, due to distinctions based on migration status and the approach

³⁵ Art. 2(b), Employers Sanctions Directive.

to irregularity premised on the distinction between “legal” and “illegal”, these may go unnoticed.

For this reason, drawing on the mapping of this regulatory infrastructure, we conceptualise irregularity as a multi-dimensional process generating three types of discrepancies³⁶:

- i) based on legal status (to be understood in this case as the general condition and capacity for acquiring obligations and possessing different sets of rights, and not as the antithesis of illegal or irregular);
- ii) temporal;
- iii) territorial.³⁷

Three scenarios reflect these discrepancies and capture the variety of processes of irregularity that are not reflected in a binary approach: the first one, status-based, is the scenario where a person who has the right to reside in a given Member State, has either no right to work or restricted access to work there. The second one, temporal, applies to persons who transition from regular to irregular status, and vice-versa, multiple times, showing that irregularity is a dynamic process with many grey areas in-between. In the third scenario, a person has a right to stay and work in one Member State, but has irregular status or restricted access to work in another Member State.

Concrete examples show the variety of situations falling within the scope of these scenarios, and pinpoint blind spots under binary approach of the Return and Employers Sanction directives:

Looking at concrete examples of the first scenario, several categories of persons who may have access to residence do not have access to regular work. For example, asylum seekers – while having permission to reside on the territory while their application for international protection is pending – are exposed to the risk of undeclared work because of restrictions applied in some Member States in accessing the labour market. Similarly,

³⁶ Following Belloni, M., Pastore, F. & Roman, E. (2023). Chapter 12: The irregularity maze: investigating asymmetries and discontinuities in the interaction between migrants geographic mobility and regulatory frameworks. In Liempt, I. van, Schapendonk, J., & Campos-Delgado, A. (Eds.). (2023). *Research Handbook on Irregular Migration*. Cheltenham, UK: Edward Elgar Publishing. <https://doi.org/10.4337/9781800377509>

³⁷ Ibid.

still looking at cases of displaced persons, a person holding a Temporary Protection status, as several millions of Ukrainians today, has the right to stay. Temporary Protection beneficiaries are entitled, by the Temporary Protection Directive, to work or engage in self-employed activities.³⁸ They and their employers do not need work permits etc. Yet, a registration may be required and in the absence of such a registration, the employment may be deemed irregular.³⁹ Another example falling in this first scenario is that of an international student who may be staying regularly in a Member State (see below, Section 2.2.2), and yet has a restricted access to work, e.g. limited working hours, therefore leading to higher risks of undeclared work.

Concerning the second scenario, irregularity is taken as a fixed status in time. However, due to the nature and conditions for residence, a person may drift in and out of regularity multiple times during their migratory journey. This generates uncertainties and risks. People whose visas have expired may be included in this category. Asylum seekers whose application is rejected and lose their (temporary) residence status, and with it the right to work, are also included. More broadly, a non-EU national who loses a job may also be at risk of losing the right to stay. The same person may have no option but to resort to irregular work as livelihood. For all these persons, accessing F2F labour markets may constitute a danger, due to their vulnerability. At the same time, it may also correspond to an economic necessity and may pave the way for residence rights once again, possibly on a different ground.

Moving to the third scenario, while enjoying regular status in one Member State, there may persons who find themselves in 'irregularly working situations' in another Member State. This scenario includes non-EU nationals in general, but also specific categories. This is the case of asylum-seekers or refugees with a residence permit in a Member States who move irregularly to another state for the purpose of work. If found, they may see their residence rights and social support reduced. Although they cannot be subject to a return order from the EU as a whole, they can be forced to go back to the Member State where they reside officially. If non-EU nationals, their employer can also be fully

³⁸ Article 12 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

³⁹ This is the case for example in the Netherlands.

sanctioned under the Employers Sanctions Directive if the person who is in an irregular situation does not fulfil the conditions for regular stay in that Member State.

The examples of non-EU nationals who have restricted access to the labour market, those who have lost their residence status as well as those who are subject to different frameworks in different EU countries show that patterns of irregularity have become extremely diversified.⁴⁰ Reflecting this, it is not only non-EU nationals who are affected by dynamics of ‘irregularisation’ and are at risk of exploitation in the F2F industries. It is also mobile EU nationals.

EU nationals partly fall within the scope of the third scenario outlined above, but also transcend it in some ways. The right to free movement that comes with EU citizenship and the unique possibility of remaining for a short period of time in another Member State (see below, Section 3), may incentivise mobile EU citizens (or their employers) to engage in undeclared work during their short stay – and in some cases, beyond it – for example, avoiding tax and social security contributions. Notably, reports indicate that many EU mobile citizens in this situation are engaged in informal work in labour market sectors linked to the F2F.⁴¹

While finding it easier to move to other Member States, EU nationals are exposed to risks of abuse, especially in sectors with high short-term volatility of demand, such as agriculture or tourism, and others connected to F2F.⁴² Yet, paradoxically due to their status granting them mobility rights within the EU, risks and vulnerabilities may also go unnoticed, and not be adequately addressed in existing policy and legal frameworks. For example, by definition, EU nationals do not fall within the scope of the Employers Sanction Directive, and do not benefit from a specific framework allowing them to lodge complaints against employers.

⁴⁰ Triandafyllidou, A., & Bartolini, L. (2020). ‘Understanding Irregularity’, in *Migrants with Irregular Status in Europe Evolving Conceptual and Policy Challenges* (eds. Sarah Spencer, Anna Triandafyllidou)

⁴¹ European Platform tackling undeclared work. (2019a). Cross-border actions tackling undeclared work. <https://ec.europa.eu/social/BlobServlet?docId=21877&langId=en>

⁴² See Terziev, P., & Mineva, D. (2020). ‘Boundaries of cross-border undeclared work in the European Union’. *Journal of Economic Boundaries and Transformation*, 1(1), 75–86

Beyond free movement rights, there are other examples of employers exploiting the greater flexibility of EU rules relating to EU nationals in F2F. Illustrating this, in recent years, studies have reported an increase in businesses relying on the irregular or false posting of EU nationals in agriculture.⁴³ Countries in Southern Europe like Spain and Italy tend to have the highest proportion of this type of labourers among agricultural workers.

But because EU nationals do not fall within the scope of the Employers Sanction Directive, unless specific legislation is in place in the Member State in question, the irregular recruitment of EU citizens is also less dangerous for employers. This has also made EU mobile workers more likely to be involved in some undeclared and informal employment contexts, including in F2F.⁴⁴

These three scenarios and the concrete examples here provided, which are by no means all encompassing, suggest several blind spots to the complex dynamics of irregularity that only looking at non-EU nationals falling under the scope of the Return Directive – or Employers Sanctions Directive – would fail to capture. The spectrum approach instead allows us to identify overlaps between *irregular stay*, *irregular migrant work* and *precarious work*: low waged, unprotected (e.g. dangerous, physically/mentally taxing), insecure (e.g. no permanent contract, dependency on employer for e.g. housing) and ‘demanding’ (e.g. long working hours).

Combined with a regulatory infrastructure approach, this spectrum approach therefore provides a clear entry point for analysis of issues relating to access to rights and services that constitutes the core goal of the DignityFIRM project. Looking at specific labour markets also allows the project to retain a broad vision across multiple policy domains while pursuing a clearly defined analysis. More broadly, it allows tracing relevant frameworks and blind spots against the wider ambition to determine whether it is possible, and how, to re-orient the regulatory infrastructure in F2F sectors towards the

⁴³ Archain, S. (2017). The transnational Supply of Workforce within the European Union. Issues of Equal treatment for migrant workers. *L'altro diritto*. Centro di documentazione su carcere, devianza e marginalità.

⁴⁴ Palumbo, L. & Sciubra, A. (2018). *The vulnerability to exploitation of women migrant workers in agriculture in the EU: the need for a human rights and gender based approach*. European Parliament Study, 2018/604966, Policy Department for Citizens' Rights and Constitutional Affairs, [Global Governance Programme], [Cultural Pluralism]. <https://hdl.handle.net/1814/55444>

overarching principle of human dignity and decent work, this being the overall goal of DignityFIRM to be implemented in the following stages of the inquiry.

1.7 Scope of the Working Paper and Contents

While setting the scene and paving the way for further empirical analysis at the national and local levels, in relation to employers and the experiences of irregular migrants themselves, this Working Paper does not aim at formulating recommendations for addressing irregularity (see Conclusion). For example, this Paper does not consider the way in which EU Member States have devised or implemented regularisations programmes.⁴⁵ These will instead constitute part of the following investigations aimed at testing recommendations for policymakers and other stakeholders.

Although it seeks to provide a holistic assessment of regulatory infrastructures impacting the dynamics of irregular migrant work in F2F, not all relevant frameworks are covered, due to time and analytical constraints as well as words limit.

Accordingly, this Paper does not examine legal pathways to work in the EU for non-EU nationals, although these have a significant impact on access to information, migration and labour trajectories, access to dignified work as well as prevention of exploitation. It also does not examine the specific situation of refugees from Ukraine who benefit from Temporary Protection, which will be the subject of a different inquiry. As noted in the Introduction, it also limits itself to the above mentioned four domains, although others (such as those governing social security contributions, industry subsidies and taxes) may also shape dynamics of irregularity. While the so-called ‘Brussels-effect’ of EU policies is a well-known phenomenon, the impact of this regulatory infrastructure in associate countries (Ukraine and Morocco) is also beyond the scope of this Paper, and is treated in another investigation as part of this project.

Finally, while the frameworks under examination have been subject to reforms and the current 2019-2024 EU legislative cycle has seen a variety of relevant legislative

⁴⁵ Malheiros, J., & Peixoto, J. (2023). Challenges and Ambiguities of the Policies for Immigrants’ Regularisation: The Portuguese Case in Context. In: Finotelli, C., Ponzio, I. (eds) Migration Control Logics and Strategies in Europe. IMISCOE Research Series. Springer, Cham. https://doi.org/10.1007/978-3-031-26002-5_6

initiatives, only proposals until June 2023 have been considered. Further changes will be monitored as part of the Project.

This Working Paper is structured as follows. The next two Sections map migration and mobility frameworks targeting non-EU nationals and EU nationals respectively. The Paper's following section moves on to labour standards set by EU directives, and corresponding reforms aimed at strengthening protections as defined in the European Pillar of Social Rights. While targeting all workers, the directives covered in this section have an especially important value for persons in an irregular situation. This third Section draws from work previously conducted by the Platform for International Cooperation on Undocumented Migrants (PICUM). The mapping follows with an examination of the F2F strategy and its implications for the irregular migrant workers in connected industries. After this, the Paper specifically looks at instruments addressing supply chain dynamics and those tackling food security. The final Section of this Working Paper digs deeper in EU and international frameworks aimed at increased employers' responsibility in respect of migrant workers' rights, with a focus on due diligence and corporate social responsibility. The conclusion presents some final overarching reflections on dynamics of irregularity.

2. EU Migration Frameworks

The purpose of this Section is to reflect on how legal and policy frameworks related to non-EU nationals address the management of irregular migration and how they shape employment dynamics. EU legislative instruments relating to migrant workers can be divided into those including specific provisions and protections for non-EU nationals qua workers or potential victims of abuse and those targeting non-EU nationals more generally, having however an impact on their access to the labour market. The description of these frameworks will be complemented by that on relevant frameworks under the EPSR, which focuses on occupational health and safety (see Section 4).

Not all relevant migration frameworks are covered. The Return Directive, for the reasons explained in the Introduction, is not examined, except for some general reflections on policy gaps and legal uncertainties. While EU laws and policies also impact the conditions and procedures for entry, these aspects are also not covered in this mapping, unless the same frameworks also shape access to rights and services and, consequently, dynamics of regularity and irregularity within the EU (e.g. a right to equal treatment under the Single Permit Directive).

The analysis is divided in two parts. The first part concerns frameworks that aim at (protecting or regulating the situation of) non-EU nationals and directly affect migrants in an irregular situation. The second concerns frameworks that, while covering specific sub-categories of non-EU nationals (e.g. students or asylum-seekers) and not concerning migrants in an irregular situation in particular, have direct bearing on their residence and work prospects.

Among the frameworks analysed in the first part are the Employers Sanctions Directive (which targets employers, and remains an immigration control tool, but has direct consequences and potential protective elements for migrants in an irregular situation),

and the Victims,⁴⁶ Anti-Trafficking⁴⁷ and Seasonal Workers⁴⁸ directives. Common to these frameworks are so-called ‘firewalls’. These are measures ensuring that undocumented migrants non-EU nationals can use complaint and reporting mechanisms against abuses without fearing retaliation from their employers or deportation under the Return Directive.⁴⁹

From this perspective, firewalls are relevant to many frameworks considered in this Paper in that they seek to separate between social rights and immigration authorities.⁵⁰ The broader regulatory infrastructure, however, presents unique challenges to implementing firewall protection.⁵¹ For example, under the Return Directive, Member States must issue a return decision to non-EU nationals who are not authorised on their territory, and to enforce that decision by removing the person in question. The Return Directive provides some exceptions for victims of human trafficking. However, it remains uncertain whether or not the Return Directive allows for a generic non-enforcement of a return decision in the possible situation of abuse that irregular non-EU nationals face, for example, where they are a victim of crime.⁵²

Common to these targeted Directives is also that they design protection frameworks with complaint mechanisms for workers, and obligations for Member States as well as employers. These complaint mechanisms and sanctions can be systematised into those

⁴⁶ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315, 14.11.2012, p. 57–73.

⁴⁷ 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 L 101, 15.4.2011, p. 1–11.

⁴⁸ Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, OJ L 94, 28.3.2014, p. 375–390.

⁴⁹ European Union Agency for Fundamental Rights (FRA). (2021). *Protecting migrants in an irregular situation from labour exploitation – Role of the Employers Sanctions Directive*. Luxembourg: Publication Office of the European Union. [Protecting migrants in an irregular situation from labour exploitation – Role of the Employers Sanctions Directive | European Union Agency for Fundamental Rights \(europa.eu\)](https://fra.europa.eu/en/publication-062021-01-protecting-migrants-in-an-irregular-situation-from-labour-exploitation-role-of-the-employers-sanctions-directive); See also: European Trade Union Confederation (ETUC). (2021a). *Position on the Implementation of the Employers Sanctions Directive*. [ETUC Position on the Implementation of the Employers Sanctions Directive | ETUC](https://www.etuc.org/en/positions/2021-01-01-position-on-the-implementation-of-the-employers-sanctions-directive)

⁵⁰ Crépeau, F., & Hastie, B. (2015). The Case for ‘Firewall’ Protections for Irregular Migrants, *European Journal of Migration and Law*, 17(2-3), 157-183. doi: <https://doi.org/10.1163/15718166-12342076>

⁵¹ Timmerman, R. I., Leerkes, A., Staring, R., & Delvino, N. (2020). ‘Free In, Free Out’: Exploring Dutch Firewall Protections for Irregular Migrant Victims of Crime, *European Journal of Migration and Law*, 22(3), 427-455. doi: <https://doi.org/10.1163/15718166-12340082>

⁵² Ibid.

addressing the individual migrant worker or those – albeit on the surface – addressing supply chain dynamics (e.g. Employer Sanctions Directive).

The second part of this Section concerns frameworks that target specific categories of non-EU nationals, such as seasonal workers, asylum seekers, students and long-term residents. These frameworks do not specifically target irregular stayers, nor do they have explicit F2F scope. However, they have direct consequences on the social and economic rights of non-EU nationals, as well as on access to labour markets in the EU. In this sense, those falling under their scope face dynamics of irregularity covered all three scenarios outlined in the Introduction (see above, Section 1.6), status-based (with residence rights but no access to the labour market; temporal, with the possibility that access to residence rights and to the labour market is lost; and territorial limits to their access to the labour market).

They are also relevant at a sectorial level because a large share of those falling within their scope may be working in F2F sectors (e.g. agriculture, food processing, restaurants).

For example, a large number of non-EU workers in the agriculture and horticulture sectors are seasonal. Of the non-EU nationals among the seasonal workers, the European Commission fears “a significant number [...] work as undeclared or illegal seasonal workers in the EU”. Because of their insecure residence status and lack of knowledge of the language, non-EU seasonal workers are at risk of working and living in precarious circumstances, and in danger of exploitation and abuse. Although Eurostat data on the number of permits issued based on the Seasonal Workers Directive appears incomplete, it is also worth highlighting that studies and reports indicate that, in recent years, there was an increase in the number of non-EU nationals engaged in seasonal labour in Member States relevant for this project, e.g. Moroccans going to Spain and France.

Although other frameworks, starting from the European Pillar of Social Rights examined further below, provide further avenues for extending protections, the gaps identified in this Section remain, thus generating opportunities for further targeted research as part of the DignityFIRM project as well as reflections for possible future recommendations. Abuses and risks are also faced by other irregular migrant workers whose vulnerabilities

are not addressed and accounted for in the frameworks mapped in this Section (for EU mobile citizens, see Section 3). This makes a holistic approach, also looking at other domains, as well as future research initiatives, even more relevant and urgent.

Overall, from this overview of the policy frameworks more specifically addressing non-EU nationals, what becomes clear is the complexity of the rules in place, and the distinct and sometimes conflicting rationales and objectives they pursue. Relevant actors, whether non-EU nationals in general, specific groups of migrants such as asylum seekers or employers, may struggle to navigate the complexity of the legal frameworks, fully understand their rights and obligations, and be able to handle the administrative hurdles and costs, including those involved in regular work.⁵³ In the case of both migrants and employers, the obstacles are further complemented by the reported ineffective provision of information, leading to de facto limitations in the exercise of rights.⁵⁴ This calls for specific attention to be given to the issue of access to information, which will be further touched upon in the Conclusion to this Working Paper.

2.1 Targeted Frameworks

2.1.1 Employers Sanctions Directive ([Directive 2009/52/EC](#))

This 2009 Directive prohibits the employment of illegally staying migrant workers (in literature also called “undocumented” workers or irregularly staying migrant workers) and lays down minimum standards on sanctions to be respected in national law. The Member States shall take the necessary measures to ensure that infringements of the prohibition to “illegally employ illegally staying migrants” are subject to effective, proportionate and dissuasive sanctions against the employer. Such sanctions shall include: (i) financial sanctions which shall increase in amount according to the number of illegally employed third-country nationals; and (ii) payments of the costs of return of illegally employed third-country nationals in those cases where return procedures are carried out. In case the employer is a natural person, the Member States in question may

⁵³ International Organization for Migration (IOM). (2022). *Labor Market Inclusion*. Includ' EU. Rome: IOM Coordination Office for the Mediterranean. Available at: https://eea.iom.int/sites/g/files/tmzbdl666/files/documents/IncludEU_Briefing_Labour_Final_REV.pdf

⁵⁴ Pekkarinen, A. G., Haapasaari, S., Jokinen, A., & Lietonen, A., (2023). *Mapping risks to migrant workers in supply chains across Europe: Case studies and best practices from the agriculture, food-processing, manufacturing and hospitality sectors*. IOM, Geneva

provide for reduced financial sanctions if it considers employment for private purposes and where no particularly exploitative working conditions are involved. Of relevance is also that Member States should provide for the possibility of further sanctions against employers. These are a) exclusions from entitlement to some or all public benefits, aids or subsidies, including agricultural subsidies,⁵⁵ b) exclusions from public procurement procedures and c) recovery of some or all public benefits, aids or subsidies, including EU funding managed by Member States, that have already been granted.⁵⁶

While the Directive remains a tool targeted at employers and for immigration control, it also has direct consequences and potential protective elements for migrants in an irregular situation. More specifically, the Directive puts in place a (limited) protective framework against abuses and exploitation. Irregularly staying migrant workers can seek to retrieve any outstanding pay from their employers and can lodge complaints against their employers. The employer must also pay any costs related to money transfers abroad, if the worker has returned (voluntary or by force).⁵⁷ The Directive also creates some value-chain pressure. Employers but also subcontractors⁵⁸ are required to pay undocumented migrant workers outstanding remuneration.⁵⁹

Member States shall ensure that effective mechanisms and legal procedures are in place for undocumented migrants to lodge complaints against employers, either directly or through an association, a union or competent authority.⁶⁰ Third parties should be able to engage in proceedings without risk of being accused of facilitating irregular

⁵⁵ Recital 18

⁵⁶ Article 7 Employer Sanctions Directive on other measures reads: 1. Member States shall take the necessary measures to ensure that employers shall also, if appropriate, be subject to the following measures: (a) exclusion from entitlement to some or all public benefits, aid or subsidies, including EU funding managed by Member States, for up to five years; (b) exclusion from participation in a public contract as defined in Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (12) for up to five years; (c) recovery of some or all public benefits, aid, or subsidies, including EU funding managed by Member States, granted to the employer for up to 12 months preceding the detection of illegal employment; (d) temporary or permanent closure of the establishments that have been used to commit the infringement, or temporary or permanent withdrawal of a licence to conduct the business activity in question, if justified by the gravity of the infringement.

⁵⁷ Article 6, Employers Sanctions Directive.

⁵⁸ Article 1 (f) Employers Sanctions Directive: 'subcontractor' means any natural person or any legal entity, to whom the execution of all or part of the obligations of a prior contract is assigned.

⁵⁹ Article 8, Employers Sanctions Directive

⁶⁰ Article 6, Employers Sanctions Directive.

migration.⁶¹ The Directive also envisages the possibility of granting temporary residence permits to workers who have been subject to particularly exploitative working conditions.

To understand the functioning of the Directive, and the concrete impact of its protective elements, it is also worth highlighting that tackling abuses depends on their detection. In this respect, in 2021, reports by the European Union Agency for Fundamental Rights (FRA)⁶² and the European Trade Union Confederation (ETUC)⁶³ found major transposition and implementation gaps. Among others, they revealed that exploited workers rarely use the existing complaint systems, as they risk retaliation from employers, loss of income, and even deportation.

The studies also underlined that one third of EU countries does not make use of the possibility to issue residence permits to victims of labour exploitation provided for by the Directive. Residence permits, when they are issued, tend to last only for the duration of the judicial proceedings. In addition, few Member States grant residence permits for the purpose of claiming outstanding wages. The Commission has acknowledged existing shortcomings and has committed to improving the Directive.⁶⁴

2.1.2 Residence Permits for Trafficking Victims Directive ([Directive 2004/81/EC](#))

The issuance of residence permits to non-EU nationals is also foreseen in cases of victims of trafficking in human beings or those non-EU nationals who have been the “subject of an action to facilitate illegal immigration”.⁶⁵ This Directive defines the conditions for granting short-term residence permits. Non-EU nationals who are victims of human

⁶¹ Article 13, Employers Sanctions Directive.

⁶² Fundamental Rights Agency. (2021). Protecting Migrants in An Irregular Situation From Labour Exploitation role of the Employers Sanctions Directive. Available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2021-employers-sanctions-directive-report_en.pdf

⁶³ European Trade Union Confederation (ETUC). (2021a). ETUC Position on the Implementation of the Employers Sanctions’ Directive Adopted at the Executive Committee meeting of 5–6 October 2021. Available at: <https://www.etuc.org/en/document/etuc-position-implementation-employers-sanctions-directive>

⁶⁴ European Commission. (2021c). *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 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.*

⁶⁵ Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities OJ L 261, 6.8.2004, p. 19–23 (Residence Permits for Trafficking Victims Directive).

trafficking must be above the age of majority and cooperate with proceedings against human trafficking. Member States can also choose to apply the Directive to victims of smuggling and to children. However, when deciding whether to grant a residence permit to a person covered by the Directive, Member States must consider: i) the opportunity presented by prolonging the migrant's stay for the investigations or judicial proceedings; ii) whether the victim has shown a clear intention to cooperate; and, iii) whether the victim has ended all relations with those suspected of human trafficking or smuggling.⁶⁶ On the other hand, when competent authorities in a Member State determine that a person falls under the Directive, they must provide information about the possibilities the Directive grants to the victims.⁶⁷ Rights provided are diverse, and include the following:

- 1) During the reflection period and when holding a residence permit, Member States shall ensure that victims have access to emergency medical treatment, including psychological treatment, and must provide free legal aid, interpretation and translation services and grant standards of living capable of ensuring subsistence.⁶⁸
- 2) Holders of residence permits should also be granted access to education, vocational training and the labour market⁶⁹ as well as programmes aimed at recovering a normal social life.⁷⁰ Such permits must be of at least six months duration and must be renewed if conditions for granting the permit continue to be satisfied and the proceedings have not been terminated by a final decision.⁷¹

2.1.4 Anti-Trafficking Directive ([Directive 2011/36/EU](#))

The 2011 Anti-Trafficking Directive provides EU common rules on: (i) criminalisation, investigation and prosecution of victims of trafficking, including the definition of offences, penalties and sanctions; (ii) assistance and support to, and protection of, victims of trafficking in human beings; and (iii) prevention of trafficking in human beings. The Directive defines human trafficking as: “[t]he recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of

⁶⁶ Article 8, Residence Permits for Trafficking Victims Directive.

⁶⁷ Article 5, Residence Permits for Trafficking Victims Directive.

⁶⁸ Articles 7 and 9, Residence Permits for Trafficking Victims Directive.

⁶⁹ Article 11, Residence Permits for Trafficking Victims Directive.

⁷⁰ Article 12, Residence Permits for Trafficking Victims Directive.

⁷¹ Article 8, Residence Permits for Trafficking Victims Directive.

abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.”⁷²

Member States must ensure that trafficking so defined is punished. Notably, this definition leaves room for states to criminalize labour exploitation as human trafficking. The Directive establishes rights for human trafficking victims and obligations for Member States. These include the following:

- 1) Member States shall ensure competent authorities do not prosecute or punish victims for any crimes the victim was compelled to commit as a consequence of the trafficking.⁷³
- 2) Member States shall take necessary measures to ensure assistance and support. Such support must not be dependent on whether or not the victim agrees to testify. It should at least cover safe accommodation, medical treatment, psychological assistance, counselling, information and interpretation.⁷⁴
- 3) Member States shall provide victims with access to legal representation in accordance with the role of victims in the national justice system.⁷⁵
- 4) Child victims shall be provided with additional assistance and support, and treated in accordance with the best interest of the child.⁷⁶
- 5) Member States shall ensure victims have access to existing compensation schemes for victims of violent crimes of intent.⁷⁷

The Directive has been complemented by soft law measures and other initiatives. For example, in 2020, the European Commission presented a EU Strategy towards the Eradication of Trafficking in Human Beings (2021-2025).⁷⁸ This invites EU governments to create safe environments for victims to report crime without fear of prosecution for acts

⁷² Article 2, Anti-Trafficking Directive.

⁷³ Article 8, Anti-Trafficking Directive.

⁷⁴ Article 11, Anti-Trafficking Directive.

⁷⁵ Article 12, Anti-Trafficking Directive.

⁷⁶ Articles 13-16, Anti-Trafficking Directive.

⁷⁷ Article 17, Anti-Trafficking Directive.

⁷⁸ European Commission. (2021d). COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS on the EU Strategy on Combatting Trafficking in Human Beings 2021- 2025. [EUR-Lex - 52021DC0171 - EN - EUR-Lex \(europa.eu\)](https://eur-lex.europa.eu/lexuris/ui/entry.do?entryId=52021DC0171)

they were forced to commit, or being exposed to secondary victimisation, intimidation or retaliation. It cross-references the Victims' Strategy on this point (see Section below).

In December 2022, the European Commission proposed to amend and update the Anti-Trafficking Directive. It proposed to broaden the scope of criminalisation to include forced marriage and illegal adoption as forms of exploitation. Furthermore, the proposal aims to improve the knowledge base on human trafficking. The data collected by EUROSTAT shows that 55 314 victims of trafficking were registered during the reporting period of 2013-2020. 20% of these were victims of labour exploitation. However, the actual number of victims of trafficking within the EU is likely much higher, as the data only includes victims identified by registering entities. The proposal contains measures to improve data collection on human trafficking, such as establishing a Knowledge and Expertise Hub on Combatting Trafficking in Human Beings and introducing an obligation in the Directive for Member States to collect and report data to the Commission every year. Furthermore, the proposal introduces obligations for Member States to ensure that legal persons, such as companies, can be sanctioned, which is currently only optional.

Moreover, the proposed reform includes measures that collectively aim to ensure that victims of trafficking in human being receive adequate assistance, support and protection across the Member States. These for example require Member States to set up formal National Referral Mechanisms. In addition, some measures are aimed at the prevention of victimhood by reducing the demand for exploited services of victims. These include the requirement for Member States to criminalise the knowing use of services exacted from victims of trafficking for all forms of exploitation.

2.1.5 Victims' Rights Directive ([Directive 2012/29/EU](#))

Increasing efforts have been made in Europe to ensure that irregular migrants are guaranteed equal access to justice and basic rights when they become a victim of crime. The Directive applies to criminal offences committed within the European Union and to criminal proceedings in the Union. The term 'victim' has a wide scope. Victims are natural persons who have suffered harm caused by a criminal offence. Family members of a

person whose death was directly caused by a criminal offence and suffered harm as a result are also considered ‘victims’ under the Directive.⁷⁹

The Victims’ Rights Directive seeks to ensure that the rights of all victims of crime are protected, without discriminating based on nationality or residence status.⁸⁰ Hence, irregular migrants who have become a victim of a crime also fall in principle under the scope of the Victims’ Rights Directive. Despite this general rule, there are some exceptions that relate to how the criminal justice system is organised in a given Member State. More specifically, the Directive leaves some room to exclude certain types of victims, depending on their national criminal justice system, which can have an impact on whether persons with an irregular status are covered or not.⁸¹ This is because the role of victim varies to a certain degree in the criminal justice system of each Member State. In some states, the victim plays an important role in criminal proceedings. In other systems, the role of the victim may be limited or equal to the role of witness or to a participant in the proceedings, not a party, thus limiting the Directive’s protective net.

If the victim of crime falls within the Directive’s scope, this establishes the obligation for Member States to implement common minimum standards on support and protection. Among others, these include cost-free access to interpretation⁸² and legal aid for victims having the status of parties to criminal proceedings,⁸³ but also emotional and psychological support.⁸⁴

The Victims’ Rights Directive not only sets support victims are entitled to. It also stipulates further minimum standards for crime reporting, enhancing protections for those who take the stand to report crimes they have been the victims of. In a nutshell, the Directive aims to ensure that victims can safely report the crime, to the police.⁸⁵ This should entail

⁷⁹ Article 2.1(a), Victims Directive; See Lauwaert, K. (2013). Restorative justice in the 2012 EU Victims Directive: a right to quality service, but no right to equal access for victims of crime. *Restorative Justice*. 1(3), 414–425, DOI: 10.5235/20504721.1.3.414

⁸⁰ Timmerman et al. (2020).

⁸¹ Buczma, S.R. (2013). An overview of the law concerning protection of victims of crime in the view of the adoption of the Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime in the European Union. *ERA Forum*, 14, 235–250. <https://doi-org.ru.idm.oclc.org/10.1007/s12027-013-0305-0>

⁸² Article 7, Victims Directive.

⁸³ Article 13, Victims Directive.

⁸⁴ Article 9, Victims Directive.

⁸⁵ Timmerman et al. (2020).

that Member States develop initiatives to promote so-called ‘safe reporting’ of crime among irregular migrants and ensure greater access to justice for victims. An example is ‘firewall protection’.⁸⁶ Firewall policies aim to prevent local police and service providers from sharing information regarding the immigration status of irregular migrants with immigration authorities when providing essential services, as this might otherwise lead to more precariousness, detention or even their deportation.

When it comes to ensuring victim protection, the purpose of the firewall is therefore to allow irregular migrants who are a victim or witness of crime to pursue their basic rights without being at risk of being detained or even subject to a return decision. In EU states, however, effective firewall protections are hard to find, and are usually limited to victims of human trafficking. Often, they do not cover most crimes. Tellingly, it seems that only the Netherlands has policies in place that offer a clear separation between victim protection and immigration enforcement, and thus an effective firewall protection in respect to the policy framework discussed in this Section.⁸⁷ Other examples of effective mechanisms of this kind, conversely, exist outside the EU.⁸⁸

Further initiatives and soft law measures provide insights into the functioning of the Directive, and its limits when it comes to undocumented persons. More specifically, the EU’s first Strategy on victims’ rights (2020-2025), launched in 2020, throws some light on the Directive’s scope over persons with an irregular status.⁸⁹ The Directive has a pillar on “empowering victims of crime”, and refers to undocumented people among the “most vulnerable victims” for whom access to support and protection should be improved. The Strategy reiterates the non-discriminatory application of the Directive to undocumented

⁸⁶ Timmerman et al. (2020).

⁸⁷ The recent study by Timmerman et al. (2020) indicates that “as suggested by parallel studies conducted in other European jurisdictions, the Dutch policy appears unique among European countries in that it reflects—at least on paper—a clear separation between victim protection and immigration enforcement. In this respect, it represents one of the only forms of ‘firewall protection’ available to victims of crime, and has been recognized as a European best practice in the area of victim protection” (Timmerman et al. 2020: 432).

⁸⁸ The most prominent examples of such ‘firewall’ protections in relation to ‘safe reporting’ are American ‘Sanctuary City’ policies.

⁸⁹ European Commission. (2020c). COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS EU Strategy on victims' rights (2020-2025) COM/2020/258 final. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0258>

victims and recognises challenges in reporting and accessing justice, including risks of facing immigration enforcement.

2.1.6 Seasonal Workers Directive ([Directive 2014/36/EU](#))

The Seasonal Workers Directive was adopted with the main aim of facilitating the entry of seasonal workers from third countries and ensuring decent working and living conditions for them.⁹⁰ It accordingly sets the conditions of entry and temporary residence of non-EU nationals for the purpose of employment as seasonal workers. Under the Directive, seasonal workers are entitled to equal treatment with respect to the terms of employment and some social benefits. Where accommodation is arranged by the employer, seasonal workers must be provided with adequate and affordable accommodation that meets health and safety standards. In addition, persons falling under the scope of the Directive have equal access to public services (excluding public housing), recognition of diplomas, education and vocational training, and tax benefits.

By granting them a residence status as a seasonal worker and prescribing equal treatment with nationals of the Member State in terms of working conditions, including pay, working hours, dismissal and branches of social security, the Directive also aims to contribute to combating exploitation, although – as in the case of the Employers Sanctions Directive – this is not its primary objective.⁹¹ Seasonal workers are among the groups of migrants who are more likely to face exploitation and sub-standard working and living conditions.⁹² The agriculture and horticulture sectors but also the hospitality industry – all sectors examined in the DignityFIRM project – are heavily dependent on migrant workers who are recruited during seasonal peaks.⁹³ A clear definition of its scope is however missing in the Directive and some Member States do not apply it to all relevant sectors, therefore limiting the effect of the Directive’s protective elements.⁹⁴

⁹⁰ The Seasonal Workers Directive has several objectives summed up in recital 7:

⁹¹ Article 23, Seasonal Workers Directive.

⁹² Augère-Granier, M. L. (2021). *Migrant seasonal workers in the European agricultural sector*. European Parliamentary Research Service (EPRS), Members' Research Service. [Migrant seasonal workers in the European agricultural sector | Think Tank | European Parliament \(europa.eu\)](#)

⁹³ International Organization for Migration (IOM). (2020). COVID-19: POLICIES AND IMPACT ON SEASONAL AGRICULTURAL WORKERS. Issue Brief. [seasonal_agricultural_workers_27052020_0.pdf \(iom.int\)](#)

⁹⁴ E.g. in the Netherlands the Directive only applies to agricultural seasonal labour, not to hospitality.

Other than by spelling out rights for seasonal workers, the Directive aims to limit the risks of exploitation by establishing that Member States must put in place appropriate mechanisms through which seasonal workers can lodge complaints and seek legal redress, either directly or through relevant third parties such as trade unions,⁹⁵ and closing some information gaps, thus complementing the Employers Sanctions Directive (see above, Section 2.1.1).⁹⁶

Reflecting an overarching problem detected in other frameworks, however, the Directive aimed to extend the protective framework for seasonal workers. In this, many seasonal workers remain vulnerable to labour exploitation as well as poor living conditions due to implementation shortcomings, the temporary nature of their work and their often precarious situation, further limiting the practical effect of the Directive's protective elements.⁹⁷

To begin with, while under the Directive Member States must establish a complaint procedure, criteria for this complaint procedure are laid down in national law, leading to uneven implementation levels across the EU and limited effectiveness overall.

To facilitate its enforcement, the Directive obliges Member States to sanction violations and establish effective monitoring mechanisms.⁹⁸ These include, where appropriate, inspections in accordance with national law or administrative practice. This does not lead to optimal implementation everywhere, however. The Directive, for example, leaves it to national law whether to allow organisations representing workers access to the

⁹⁵ Recital 50, Article 25, Seasonal Workers Directive.

⁹⁶ While the Directive explicitly refers to the Employer Sanctions Directive – e.g. in Recital 7 – it is noteworthy that the Directive makes no reference at all to the Human Trafficking Directive, or human trafficking, although combating it was a major concern when the proposal was presented (see Rijken, C. (2015). Legal Approaches to Combating the Exploitation of Third-Country National Seasonal Workers. *International Journal of Comparative Labour Law and Industrial Relations*, 31(4), 431–451. <https://doi.org/10.54648/ijcl2015024>.) Such a reference to measures to protect victims of trafficking without the right of residence, is present instead in the Employer Sanctions Directive (see Art. 13(3), Seasonal Workers Directive). The Seasonal workers Directive also only has a general reference to temporary employment agencies, despite the prominent role of in seasonal labour (Recital 12)

⁹⁷ Peers, S. (2015). Ending the exploitation of seasonal workers: EU law picks the low-hanging fruit. *EU Law Analysis: Expert insight into EU law developments*. Available at: <http://eulawanalysis.blogspot.com/2015/02/ending-exploitation-of-seasonal-workers.html>

⁹⁸ Article 24, Seasonal Workers Directive.

workplace and, with the worker's agreement, the accommodation, limiting the scope of its protective net.

Reports have also highlighted that accommodation is often used by employers to circumvent minimum wages through excessive renting prices, while tenancy is tied to the duration of employment, which increases workers' dependence.⁹⁹ Overcrowded and unsanitary facilities are also reported.¹⁰⁰ The COVID-19 pandemic put these dangers under the spotlight.¹⁰¹ In response, the Commission recently acknowledged the need to improve the Directive's implementation. To this end, it issued guidelines calling on Member States to ensure, among others, adequate working and living standards, reasonably priced accommodation, and information campaigns to improve knowledge about the rights of seasonal workers.¹⁰²

Access to information would be key for ensuring protections established on paper by the Directive. With proper information about their rights, seasonal workers vulnerabilities linked to the temporary nature of their stay could potentially be reduced. Under the Directive, non-EU nationals have a right to information.¹⁰³ The Directive regulates access to information on rights and obligations during the application procedure.¹⁰⁴ Seasonal workers should also be informed about the complaint procedure.¹⁰⁵ An explanation on a website may suffice, however, although not every seasonal worker may have access to the internet or will be able to find the right website.

⁹⁹ German Trade Union Federation. (2020). *Exploitation of seasonal and migrant workers German Trade Union Confederation's demands at the European level*. [Mobile Workers in the EU Demands by the German Trade Union Confederation.pdf](#)

¹⁰⁰ European Federation of Food Agriculture and Tourism Trade Unions (EFFAT). (2020). *Covid-19 outbreaks in slaughterhouses and meat processing plants State of affairs and proposals for policy action at EU level*. EFFAT Report. [EFFAT-Report-Covid-19-outbreaks-in-slaughterhouses-and-meat-packing-plants-State-of-affairs-and-proposals-for-policy-action-at-EU-level-30.06.2020.pdf](#)

¹⁰¹ Dahm, J. (2021). Seasonal farm workers in Germany exposed to 'massive labour rights violations.' *EURACTIV*. [Seasonal farm workers in Germany exposed to 'massive labour rights violations' - EURACTIV.com](#)

¹⁰² European Commission. (2020b). Communication from the Commission Guidelines on seasonal workers in the EU in the context of the COVID-19 outbreak 2020/C 235 I/01 C/2020/4813, OJ C 235I, 17.7.2020, p. 1–7. [EUR-Lex - 52020XC0717\(04\) - EN - EUR-Lex \(europa.eu\)](#)

¹⁰³ Article 23 read in conjunction with Article 11, Seasonal Workers Directive.

¹⁰⁴ Article 11(1), Seasonal Workers Directive.

¹⁰⁵ Recital 50, Article 25, Seasonal Workers Directive.

The Directive's impact on the lives of non-EU nationals exposed to the risks of irregular work may also be assessed based on entry conditions, however. While it seeks to disincentivise exploitation through its entry rules, risks linked to irregularity are not eliminated altogether. More specifically, the Directive includes provisions relating to circular migration and facilitated re-entry¹⁰⁶ but also penalties for employers who do not comply.¹⁰⁷ A ground for rejection also applies in case the non-EU national has not complied with the obligations arising from a previous decision on admission as a seasonal worker. Yet, these provisions may not stop employers from engaging seasonal migrant workers on an irregular or informal basis or in in-between types of arrangements (e.g. partly under the Directive yet overstaying the duration of stay entirely or working overtime).

2.2 Broader Frameworks Bearing on Social and Economic Rights

2.2.1 Reception Conditions Directive ([Directive 2013/33/EU](#))

Asylum seekers are a category of interest since their status, residence and access to the labour market are subject to both temporary and territorial limitations (see Introduction, Section 1.6), thus putting them at risk. Under the Reception Conditions Directive, asylum seekers' access to the labour market remains at Member States' discretion, along with an option to prioritise citizens from the European Union and the European Economic Area (EEA), as well as legally resident third-country nationals.¹⁰⁸ Although regulated under national law, EU law sets an obligation to grant asylum seekers an effective access to the labour market within nine months from lodging an asylum application.¹⁰⁹ As a result, access to work vary between one and nine months from country to country.

The existing rules therefore provide asylum seekers with a temporary residence contract. At the same time, it curtails access to the labour market. In addition, delays in the examination of claims for international protection, which characterise many Member

¹⁰⁶ Art. 16(1), Seasonal Workers Directive: Member States can choose how to do this: by not requesting the same documents again, issuing multiple permits in one decision (for the same migrant), opening up an accelerated procedure, or giving priority to a subsequent application (Art. 16(2) Seasonal Workers Directive).

¹⁰⁷ Art. 8(3), Seasonal Workers Directive. Member States may apply a labour market test and, in the event of the presence of priority work force, they may reject an application for a seasonal work permit

¹⁰⁸ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) OJ L 180, 29.6.2013, p. 96–116.

¹⁰⁹ Reception Conditions Directive, Article 15.

States, can lead to further periods of exclusion from regular employment. This has long-term implications too, as it hinders the chances of securing decent and stable employment later and, in the short term, may push asylum seekers into informal and exploitative work relations. From a practical perspective, like several other categories of vulnerable non-EU nationals, asylum seekers may also struggle to make use of their rights due to lack of information and administrative obstacles.

Trying to address some of the existing legal shortcomings, in June 2018, the European Parliament and the Council reached a partial provisional agreement on the Directive's revision, yet to be adopted at the time of writing. Under the recast Directive, asylum seekers would be allowed to work six months after requesting asylum, instead of current 9 months. Furthermore, they should get access to language courses from day one, thus facilitating socio-economic integration from the start. That said, access to the labour market would remain limited to the country of asylum. Reducing the maximum waiting period for accessing the labour market on paper, in addition, is no guarantee of even transposition, and implementation, across Member States.

2.2.2 Researchers and Students Directive ([Directive 2016/801/EU](#))

This Directive sets the conditions of entry and residence of non-EU nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing. The Directive also confers rights on students who qualify for entry and residence. Among them is the right to work in the territory of the host Member State. Each Member State, however, remains free to determine the maximum number of hours per week or days or months per year allowed for such an activity, although this should not be less than 15 hours per week.¹¹⁰

Another relevant provision is the obligation for Member States to entitle students and researchers who have completed their studies or research to remain on the territory of the host Member State for at least nine months to seek employment or set up a business there. Although an improvement compared to the previous regime, the conditions set in the Directive may discourage students to seek regular employment during their studies.

¹¹⁰ Article 24.

This could explain the relatively high number of students who are reported to engage in undeclared work.¹¹¹

2.2.3 Single Permit Directive ([Directive 2011/98/EU](#)) and its proposed recast COM(2022/655/final)¹¹²

This Directive facilitates the procedure for non-EU nationals to work and reside in an EU Member State through a ‘single permit’ which combines work and residence permits. Accordingly, it sets out procedural rights for non-EU nationals, although the specific entry conditions are either established in other directives or in national legislation. Its second objective is to equip lawfully working non-EU nationals with a set of rights akin to that enjoyed by nationals, such as access to social security and public services which includes housing and employment advice. These equal treatment clauses are considered essential for supporting their integration in the host society.

Although this set of rights is comprehensive, the Directive’s added value remains limited.¹¹³ The Directive can be criticised for its limited scope. The Single Permit Directive does cover international students who may be employed in accordance with the Researchers and Students Directive, in so far as their equal treatment rights are concerned. However, neither seasonal workers, nor intra-corporate transferees and posted workers fall within its scope. Their rights are regulated in the respective directives. Beneficiaries of international protection are also excluded.

A 2019 report from the European Commission acknowledged implementation gaps as well as problems of transposition of the equal treatment provisions.¹¹⁴ Among others,

¹¹¹ Williams, C., & Horodnic, I. A. (2020). *Trends in the undeclared economy and policy approaches: Evidence from the 2007, 2013 and 2019 Eurobarometer surveys*. European Commission, Directorate-General for Employment, Social Affairs and Inclusion, Directorate D – Labour mobility, Unit EMPL D1.

¹¹² This Section draws on De Lange, T. (2022). Recasting the Single Permit Directive. Furthering the protection of migrants at work in the EU?. *Odysseus Network*. <https://eumigrationlawblog.eu/recasting-the-single-permit-directive-furthering-the-protection-of-migrants-at-work-in-the-eu/>

¹¹³ Groenendijk, K. (2015). Equal treatment of workers from third countries: the added value of the Single Permit Directive. *ERA Forum* 16, 547–561. <https://doi.org/10.1007/s12027-015-0403-2>

¹¹⁴ European Commission. (2019b). *Report from the Commission to the European Parliament and the Council on Directive 2011/98/EU on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State*. [1_EN_ACT_part1_v4.docx \(europa.eu\)](#)

Dutch and Italian authorities have failed to recognise equal access to social security or unemployment benefits. Litigation before the CJEU also had an important role in clarifying the application of the Directive.¹¹⁵ In cases C-449/16, C-302/19 and C-462/20, the Court held that the holders of a Single Permit cannot be excluded from the provision of social benefits under national law.

Reflecting an understanding of the legal shortcomings and implementation gaps, the Commission nevertheless proposed a reform of the Single Permit Directive. With its recast, among others, the European Commission aims to expand its scope to include beneficiaries of protection. Other than this, the reform proposal aims to reduce waiting time and improve efficiency, increase legal certainty, facilitate switching employers while remaining in the EU, and strengthen access to information.

As far as the first of these goals, to improve efficiency, the European Commission has proposed an amendment to mandate the issuing a decision on the complete application within four months of the date on which the application was lodged. Secondly, to increase legal certainty and protection, the employer is defined under the proposed text as “any natural person or any legal entity, *including temporary work agencies*, for or under the direction and/or supervision of whom the employment is undertaken”.¹¹⁶ Where national law allows admission of non-EU nationals through temporary work agencies established on its territory and where these have an employment relationship with the worker, such agencies would not be excluded from the scope of this Directive, if the reform went ahead.¹¹⁷ This new definition is similar to article 2(e) of the Employers Sanctions Directive, potentially levelling single permit holders’ rights and protection with the protection of “illegally employed and illegally staying” migrant workers under that Directive. Thirdly, the proposed recast prescribes that the Member States allow an application to be submitted from the EU country by legally staying non-EU nationals.¹¹⁸ This in-country application procedure, if adopted, should improve the effectiveness of the Directive and procedural fairness. For example, an international student would no longer be required to leave a Member State after graduation and apply for a single permit for work and

¹¹⁵ Lange, T. de & Groenendijk, K. (2021). *The EU’s legal migration acquis: Patching up the patchwork*. European Migration and Diversity Programme. European Policy Center.

¹¹⁶ Article 2(1)(c), Commission’s proposal for Single Permit Directive (recast).

¹¹⁷ Recital 6, Commission’s proposal for Single Permit Directive (recast).

¹¹⁸ Article 4, Commission’s proposal for Single Permit Directive (recast).

residence from abroad, possibly waiting for months before being able to return to the EU. Other than the legal uncertainty they face while waiting, some non-EU nationals might not travel back to their country, and instead stay irregularly and work informally while awaiting the decision on the single permit. Providing for in-country applications is considered a way to prevent irregular work and legal insecurity. Fourthly, as part of the procedural improvements, access to information is somewhat expanded in the proposed reform. Member States would have to provide, albeit upon request, adequate information to the non-EU national as well as to the future employer on the documents required to make a complete application.¹¹⁹ The proposed recast would oblige Member States to make the information easily accessible, which usually refers to a website, and add information on the entry and residence conditions, including the rights, obligations and procedural safeguards of non-EU nationals and their family members. However, it is not clear if this information includes the employers' obligations to inform the migrant worker of their worker rights under Directive on Transparent and Predictable Working Conditions (see below, Section 4.6).¹²⁰

Following the Commission's proposal, both the European Parliament and the Council have adopted negotiating positions.¹²¹ The inter-institutional negotiations are expected to lead to an agreement on the revision by the end of the current legislative period.

2.2.4 Long-Term Residents Directive ([Directive 2003/109/EC](#)) and Proposed Recast ([COM/2022/650 final](#))

Under this Directive, non-EU nationals who reside in an EU country for an uninterrupted period of five years can acquire a more secure 'long-term residence status'. This comes

¹¹⁹ Article 9, Commission's proposal for Single Permit Directive (recast).

¹²⁰ Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union OJ L 186, 11.7.2019, p. 105–121 (Directive on Transparent and Predictable Working Conditions). [EUR-Lex - 32019L1152 - EN - EUR-Lex \(europa.eu\)](#)

¹²¹ See Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (recast) - Presidency compromise text available at: <https://data.consilium.europa.eu/doc/document/ST-9474-2023-INIT/en/pdf> and DRAFT REPORT on the proposal for a directive of the European Parliament and of the Council concerning a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (recast) 2022/0131(COD), available at: https://www.europarl.europa.eu/doceo/document/LIBE-PR-738493_EN.pdf

with a set of rights similar to those enjoyed by EU citizens with respect to work, social security, access to services (including housing), and free movement rights. Generally, this Directive is seen as a ‘mixed bag’,¹²² as it is not easy for non-EU nationals to fulfil the conditions to qualify. In particular, the required residence period of five years has been subject to criticism for being over-long.¹²³ On top of the five-years waiting period, eligibility criteria include a stable and regular income, health insurance and, when required by national authorities, integration measures. In addition, Member States can set ‘labour market tests’ for moving to another EU country for work purposes.¹²⁴

The Directive is also undermined by poor records of implementation. To begin with, many Member States prefer promoting national long-term permits over EU-wide residence, which set lighter eligibility conditions but do not provide the same rights as EU-wide permits.¹²⁵ This situation is worsened by the fact that non-EU nationals have little awareness of their rights under the Directive. On this account, in other Member States different from the one where they reside, many long-term residents may only be able to seek irregular employment opportunities.¹²⁶ This situation concerns all non-EU nationals who might find it difficult to find stable employment in their country of residence. But it may also concern specific categories of non-EU nationals, such as recognised refugees, who fall within the scope of the Directive.¹²⁷

¹²² Boelaert-Suominen, S. (2005). Non-EU nationals and Council Directive 2003/109/EC on the status of third-country nationals who are long-term residents: Five paces forward and possibly three paces back. *Common Market Law Review*, 42(4), 1011-1052. <https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/42.4/COLA2005034>

¹²³ See European Commission. (2019c). *Report from the Commission to the European Parliament and the Council on the Implementation of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents*. [COM\(2019\)0161 EN.pdf \(europa.eu\)](https://ec.europa.eu/commission/presscorner/detail/en/com(2019)0161); See also European Commission. (2019a). *Fitness Check on EU legislation on legal migration*. Staff Working Document. [swd_2019-1055-staff-working-part1.pdf \(europa.eu\)](https://ec.europa.eu/commission/presscorner/detail/en/swd_2019-1055-staff-working-part1)

¹²⁴ European Migration Network. (2020). *Long-term residence status in the EU*. European Commission, DG Migration and Home Affairs. [EMN Inform Long-term resident status in the EU.pdf \(emnbelgium.be\)](https://emnbelgium.be/emn-inform-long-term-resident-status-in-the-eu)

¹²⁵ European Commission. (2019d). *Toolkit on Risk Assessments for more Efficient Inspections as a means to Tackle Undeclared Work*. DG Employment, Brussels: European Commission. Go to: <https://op.europa.eu/en/publication-detail/-/publication/4fe9edda4c56-11e9-a8ed-01aa75ed71a1/language-en>

¹²⁶ Della Torre, L., & de Lange, T. (2018). The ‘importance of staying put’: third country nationals’ limited intra-EU mobility rights. *Journal of Ethnic and Migration Studies*, 44(9), 1409-1424. <https://doi.org/10.1080/1369183X.2017.1401920>.

¹²⁷ Neidhardt, A.H. (2023). *Beyond relocations and secondary movements: Enhancing intra-EU mobility for refugees*. Policy Study. Mercator Dialogue on Asylum and Migration (MEDAM). [Beyond relocations and secondary movements: Enhancing intra-EU mobility \(epc.eu\)](https://www.mercator-dialogue.com/en/publication/beyond-relocations-and-secondary-movements-enhancing-intra-eu-mobility)

On top of the strict residence conditions and lack of awareness pertaining to all non-EU citizens who fall within the Directive's scope, specific groups of non-EU nationals, such as refugees face further challenges due to the interplay between the different legal frameworks to which they are subject. For example, in the case of refugees, the lack of cross-border recognition of the rights attached to their protection status means that, even if they manage to move to another Member State under the Directive, they will lose access to rights and social protections that they are entitled to in the first Member State.¹²⁸

In April 2022, the Commission put forward a proposal for a recast of the Long-Term Residence Directive. With its revision proposal, the Commission aims to reduce to three years the waiting period before refugees become eligible for long-term residence. Speedier access to long-term permits would strengthen socio-economic integration. Notably, by the Commission's own admission, the amendments it put forward do not constitute a "major legislative revision" doing away with all obstacles to mobility altogether.¹²⁹ To begin with, the Commission's proposal does not 'abolish' national long-term residence schemes, one of the main causes of the Directive's unsatisfactory implementation. Instead, Member States would have to extend to applicants for EU long-term residence status any more favourable rules that applicants for national schemes benefit from, for example, in relation to required resources and integration conditions.

Concerning the waiting period – with the exception of refugees who would benefit from a reduced required period of three years of residence – the proposal does not envisage a reduction to three years for all non-EU nationals. By contrast, the revised Directive would make it possible for non-EU nationals to cumulate residence periods they spent in multiple Member States, provided they lived for at least two consecutive years in the same country before applying for the status. According to the Commission's proposal, any period of residence abroad where the visa or residence permit is issued under EU or

¹²⁸ Ibid.

¹²⁹ Brussels, 27.4.2022 SWD(2022) 650 final COMMISSION STAFF WORKING DOCUMENT EXECUTIVE SUMMARY OF THE IMPACT ASSESSMENT REPORT [...] Accompanying the document Proposal for a Directive of the European Parliament and of the Council concerning the status of third-country nationals who are long-term residents (recast) {COM(2022) 650 final} - {SEC(2022) 200 final} - {SWD(2022) 651 final}

national law should be fully considered. However, this does not include period of irregular residence. Should the Commission's proposal be adopted, implementation problems may also follow in the calculation of cumulated periods of residence.

3. EU Mobile Citizens

While non-EU nationals must meet Member States entry and residence requirements, by contrast, EU citizens can move freely within the EU for the purposes of employment. The free movement of EU workers is guaranteed by Article 45 of the Treaty on the Functioning of the European Union (TFEU). As such, economically active EU citizens benefit from a stronger set of rights compared to other categories of mobile EU citizens. In addition, separately from those who are economically active, citizens of the Union also have the right to move and reside freely within the territory of the Member States under Article 21 of the TFEU, qua EU citizens.

The main frameworks to be considered against this background are Regulation 492/2011, which sets out the free movement rights for economically active citizens, and Directive 2004/38/EC (the Citizens' Rights Directive) establishing the conditions for and limitations on the right of EU citizens and their family members to move and reside freely in other EU Member States, each bringing to life Article 45 and Article 21 of the TFEU. However, for the purpose of this analysis, it is the Citizens Rights' Directive which is especially relevant, as economically active citizens by definition benefit from a wide set of enhanced protective measures.

Under the Citizens' Rights Directive, as further explained below, EU citizens can move to other Member States for periods under three months without any conditions, giving them the possibility of finding work virtually everywhere on the territory of the EU. Provided they meet some income-related conditions, under the same Directive, they can reside for longer periods. Mobile EU citizens generally manage to find work in another EU Member State under existing frameworks. In most countries, the employment rate among EU citizens living in a country other than their country of origin tends to be higher than in the citizen's country of origin, higher than the European average and higher compared to non-EU nationals living in the same host country.

This facilitative framework, however, does not constitute an absolute guarantee against the risk of irregular employment. First, opportunities, but vulnerabilities, a persistent high demand for short-term jobs in certain sectors, including F2F ones. Second, somewhat counter-intuitively at first sight, EU mobile citizens may end up in informal employment

abroad more easily, due to the permissive framework. Connected to this, the existing facilitative framework could lead to informality and uncertainty in the longer-term as well.

Looking at the first of these three issues, according to a study by the European Commission from 2021, about 650,000 to 850,000 EU citizens carry out seasonal work in another EU country every year.¹³⁰ The sectors of agriculture as well as food services account for a large share of seasonal variation and were identified as most relevant for seasonal work. Seasonal workers in these sectors are, according to the Commission, often exposed to exploitation, precarious working and living conditions. In addition, seasonal workers may have weaker ties to social security systems and protection, leading to inadequate social security coverage.

Seasonal work of EU mobile citizens in the agricultural sector and its high degree of informality and consequential risks has been well-documented. This is largely due to pressure to keep costs low and quality high, as well as because of lower entry requirements in terms of skills and qualifications. Concerns about the working conditions of seasonal EU citizens engaging in undeclared work in agriculture have especially been raised for Italy and Spain.¹³¹

Second, during their regular stay abroad, mobile citizens may lose their job, which could lead to precariousness and destitution in the longer term. This vulnerability could then lead those who have lost their job to irregular working hours, atypical contracts or even undeclared work. Reports have also shown that among mobile EU citizens engaging in undeclared work, many do not have a health insurance. Doing undeclared work and not having health insurance could amplify vulnerability, depending on the nature of the job and the potential physical hazards it brings.¹³²

¹³⁰ Fries-Tersch, E., Siöland, L., Jones, M., Mariotti, C. & Malecka, M. (2021). Intra-EU mobility of seasonal workers: Trends and challenges. European Commission, Directorate-General for Employment, Social Affairs and Inclusion Directorate D – Labour Mobility Unit D1 – Free movement of workers, EURES, p. 10.

¹³¹ *Ibid.*, p. 51-52.

¹³² Intra-EU migrants experiencing homelessness in Brussels Analysis of field data gathered by DIOGENES street outreach workers.

This Section, while shorter compared to frameworks mapped elsewhere in this Working Paper, focuses on the Citizens' Rights Directive and the Posted Workers Directive. This should provide insights into the specific risks that mobile EU citizens face. It can also lead to some initial reflections on where priorities for improving the current frameworks might lie, but also the inherently complicated task of addressing vulnerabilities in a holistic manner in the existing regulatory infrastructure.

3.1 Citizens' Rights Directive ([Directive 2004/38/EC](#))

This Directive establishes EU citizenship as the fundamental status for citizens of Member States, translating the right afforded to them to move and live freely within the EU. This is often described as a very permissive regime. During the initial three months, any EU citizen can reside in another EU country without requirements, except for holding a valid ID card or passport. The right of Union citizens to reside for more than three months remains instead subject to certain conditions: for those who are not workers or self-employed, the right of residence depends on their having sufficient resources not to become a burden on the host country.

While EU citizens benefit from this facilitative framework, this does not mean that they cannot be exposed to risks associated to irregular residence or undeclared work.

It is not uncommon that EU mobile citizens engage in informal working arrangements. Research suggests that a contributing factor to undeclared work is the initial intention of short-term mobility among EU movers.¹³³ Planning to stay briefly in the host Member State can incentivise workers to participate in undeclared work, evading tax and social security contributions. In this sense, EU mobile citizens often find themselves in less attractive and more precarious job positions compared to the domestic population. This also includes the agri-food sector.¹³⁴

¹³³ Stefanov, R., Comunale, T., Mineva, D., Yalamov, T., Georgiev, G. & Schöenberg, L. (2021). *Different forms of cross-border undeclared work, including through third-country nationals*. European Labour Authority, p. 15.
https://www.ela.europa.eu/sites/default/files/2022-01/Study-report-on-different-forms-of-cross-border-U-DW.2021_EN.pdf

¹³⁴ *Ibid.*, p. 10.

Destitution could result from loss of job, for example. This can lead mobile EU citizens to face complex situations, often involving irregular working hours or atypical contracts, making residence access uncertain. Failure to meet the basic conditions set in the Directive can also lead to restrictions, loss of residence rights, and even expulsion, even though this is in principle only warranted for a serious breach, like becoming an undue burden on the host state's social security system. But even where it does not lead to expulsion, losing residence rights deprives mobile EU citizens of health services and, more in general, social protections.

Non-EU nationals can also fall within the scope of the Directive as family members of mobile EU citizens. The right of all Union citizens to move and reside freely within the territory of the Member States is also granted to their family members, irrespective of nationality. The right to reside for over three months is subject to the same conditions: having sufficient resources to not burden the host country's social assistance system and having a health insurance.

Although the Directive seeks to simplify administrative procedures, residence formalities are particularly problematic for non-EU family members of EU citizens, for example, in relation to the documentation on marriage or birth certificates issued by non-EU countries. Illustrating this, in some EU states, certificates must be apostilled or legalised, must be first registered in the Member State of the EU citizen's nationality, and dated within 90 days of the presentation.

If they do not meet the conditions, non-EU family members are unable to receive their residence documents. If they entered on a short-term visa, they may live in fear of being expelled from the country leave the country or having to bear the consequences of overstaying. Because of this, they may also be unable to work regularly.¹³⁵

¹³⁵ Noteworthy in this respect is that references to dignity in the Directive primarily relate to family members, especially concerning relationship breakdowns. For instance, Recital 5 emphasizes granting family members the right to move and reside freely, irrespective of nationality, to preserve their dignity. Recital 15 also highlights legal safeguards for family members in cases like divorce, marriage annulment, or partnership termination to protect their right of residence on a personal basis while respecting family life and human dignity.

3.2 Posted Workers Directive ([Directive 2018/957/EU](#))

The primary aim of this Directive is to ensure the protection of the rights and working conditions of the posted employees while addressing concerns such as 'social dumping'. Under the Directive, a 'posted worker' is defined as a person who, for a limited period of time, carries out his or her work in the territory of an EU Member State other than the state in which he or she normally works. Member States have a duty to secure specific minimum employment terms and conditions for posted workers, equivalent to those received by local workers in the host country. These conditions encompass aspects like minimum wages, working hours, and paid leave.

Although the Directive's initial purpose was to enhance the mobility conditions of EU workers, its scope also encompasses non-EU nationals. More specifically, it permits non-EU nationals who have legal residence and employment in one Member State to be posted to another Member State. While temporary employment agencies or subcontractors are also used to move EU seasonal workers – the originally intended beneficiaries of the Directive – it is mainly non-EU workers who are reportedly posted. Studies specifically show that temporary work agencies, both in the EU and in third countries, proactively recruit them in the agri-food industry.¹³⁶

EU mobile citizens as well as non-EU nationals who are posted workers may be engaged in undeclared work, with this taking the form of falsely declared posting. Posted workers, for example, can become involved in undeclared work through fraudulent temporary work agencies and letterbox companies, which actively recruit cross-border and abuse the rules for posting to avoid paying taxes and social security contributions. This can result in terms of employment conditions not in line with EU or national legislation, poor working conditions and low salaries.¹³⁷

¹³⁶ Carrascosa Bermejo, D., & Contreras Hernández, Ó. (2022). Posted Workers from and to Spain. Facts and figures Authors, HIVA - Research Institute for Work and Society. Available at: <https://ruidera.uclm.es/items/67c8a94f-9ddc-4c88-94c1-e4233ef9b5f2>

¹³⁷ See Stefanov, R., Comunale, T., Mineva, D., Yalamov, T., Georgiev, G. & Schöenberg, L. (2021). *Different forms of cross-border undeclared work, including through third-country nationals*. European Labour Authority, p. 15.
https://www.ela.europa.eu/sites/default/files/2022-01/Study-report-on-different-forms-of-cross-border-U-DW.2021_EN.pdf

4. European Pillar of Social Rights and Working conditions for Migrant Workers

While Section 2 of this Working Paper looks at relevant EU instruments having a bearing on dynamics of regularity and irregularity of non-EU nationals and Section 3 examines frameworks governing EU citizens' mobility, this Section 4 maps key instruments regulating the working conditions and employment rights for all workers. The main objective is to assess the impact on irregular migrant workers of legislation and policy measures concerning access to basic rights and services for workers, and determine to what extent such measures effectively address the needs of irregular migrant workers, thus helping to achieve dignified working conditions.

Especially relevant for this mapping exercise is the European Pillar of Social Rights (EPSR), a soft law instrument adopted in 2017 with the aim of defining a new ambitious EU social policy agenda.¹³⁸ The EPSR sets out 20 principles to support fair and well-functioning labour markets as well as social protection and inclusion, including in housing matters. To achieve these objectives, the EU commits to using all available instruments, including the revisions of legislation, financial support and country-specific recommendations. Actions under the EPSR could in principle help improve working (and living) conditions for non-EU nationals, including undocumented workers. They are also meant to tackle new forms of work.¹³⁹

As a result of economic changes and technological innovations, for example, new types of atypical and precarious work have emerged. These include, for instance, domestic, voucher-based and platform workers. The EPSR therefore set as an objective to address these atypical work relations, as in the case of the proposal for a Directive on Improving the Working Conditions in Platform Work (see Section 4.8). Platform workers are specifically relevant for the purpose of the DignityFIRM project, as they are employed in delivery, one of the sectors covered on the fork end of F2F. Having said that, as shown in this mapping, the situation of migrant workers, and those in an irregular situation in

¹³⁸ Garben, S. (2017). Towards a European Pillar of Social Rights: upgrading the EU social acquis (Policy Brief series, Edition No 1.17). CEPOB - College of Europe. [Towards a European Pillar of Social Rights: upgrading the EU social acquis | Coleurope.](#)

¹³⁹ Garben, S. (2019), 'The European Pillar of Social Rights: An Assessment of its Meaning and Significance', Cambridge Yearbook of European Legal Studies, Volume 21, December 2019, pp. 101 - 127

particular, have not been put at the heart of these legislative initiatives, although non-EU nationals, including those undocumented, may constitute the lion share of the atypical workers affected in some specific F2F labour sectors, as in the case of food delivery.

More broadly, not all commitments have been achieved, with several proposals for directives and other soft law policy initiatives still awaiting adoption. This does not decrease the importance of EPSR-linked initiatives for examining dynamic processes of irregularity, however. This remains a crucial framework for assessing current actions and establishing further initiatives on which to embark in the future. For this reason, this Section provides an overview of the most relevant frameworks, also those dating back several years, as they may be outdated and no-longer fit for the socio-legal reality, including the situation of irregular migrant workers in F2F sectors. This Section draws on previous analysis conducted by the Platform for International Cooperation on Undocumented Migrants (PICUM), partner in the DignityFIRM project, updated for the purpose of this Working Paper.¹⁴⁰

4.1 Framework Directive on Health and Safety at Work ([Directive 89/391/EEC](#))

The Framework Directive on Health and Safety at Work deals with the health and safety of workers within the EU. It applies to all sectors, except certain specific public service and civil protection services, such as the armed forces or the police. Under this Directive, a ‘worker’ is defined as “any person employed by an employer, including trainees and apprentices but excluding domestic servants.”¹⁴¹ The Directive establishes requirements for employers, including:

- 1) Ensuring the health and safety of workers, including for enlisted external services or persons.¹⁴²
- 2) Taking necessary measures to ensure the health and safety of workers, including prevention of risks and provision of training, organisation and means.¹⁴³

¹⁴⁰ Platform for International Cooperation on Undocumented Migrants (PICUM). (2020). ‘Guide to Undocumented Workers’ Rights at Work under International and EU Law’. Available at: <https://picum.org/wp-content/uploads/2022/04/Guide-to-undocumented-workers-rights-EN.pdf>

¹⁴¹ Article 3

¹⁴² Article 5

¹⁴³ Article 6

- 3) Designating one or more workers to carry out activities related to the protection and prevention of occupational risks.¹⁴⁴
- 4) Taking the necessary measures and arrange contacts for first-aid, firefighting, and evacuation of workers.¹⁴⁵
- 5) Taking appropriate measures so that workers receive all the necessary information concerning safety and health risks and measures taken to meet these risks.¹⁴⁶
- 6) Consulting workers regarding health and safety measures.¹⁴⁷
- 7) Ensuring that all workers receive proper training to safeguard their health and safety;¹⁴⁸
- 8) Sensitive risks groups must be protected against the dangers which specifically affect them.¹⁴⁹

According to the European Agency for Safety and Health at Work (EU-OSHA), evidence suggests that migrant workers are a group of workers at increased risk, and that their working conditions require special attention. Undocumented workers, for EU-OSHA, are also covered in its considerations on migrant workers.¹⁵⁰

4.2 Health and Safety in Fixed-term and Temporary Employment Directive ([Directive 91/383/EEC](#))

This Directive ensures that fixed-term and temporary employees have the same level of safety and health protection at work as other employees. The Directive does not include a definition of an 'employee'. It applies to employment relationships governed by fixed-term contracts and to temporary employment relationships. A fixed-term contract is an employment contract entered into directly between an employer and a worker where the end of the employment contract is determined by objective conditions such as

¹⁴⁴ Article 7

¹⁴⁵ Article 8

¹⁴⁶ Article 10

¹⁴⁷ Article 11

¹⁴⁸ Article 12

¹⁴⁹ Article 15

¹⁵⁰ European Agency for Safety and Health at Work. (2009). 'Workforce diversity and risk assessment: Ensuring everyone is covered', p.16. Available at: <https://osha.europa.eu/en/publications/workforce-diversity-and-risk-assessment-ensuring-everyone-covered>

reaching a specific date, completing a specific task, or the occurrence of a specific event. Temporary employment relationships are where temporary employment businesses are the employer, and where the worker is assigned to work for and under the control of an undertaking and/or establishment making use of his services. Where undocumented workers have an enforceable fixed-term contract or are employed by temporary employment agencies, this Directive should apply. The Directive sets out the following rights:

- 1) Before an employee starts working, he or she should be informed of all risks connected to the work.¹⁵¹
- 2) Each worker should receive sufficient training appropriate to the particular characteristics of his or her job.¹⁵²
- 3) Special medical surveillance should be provided when required.¹⁵³

4.3 Working Time Directive ([Directive 2003/88/EC](#))

This Directive regulates minimum standards for working hours in the EU. The Directive does not include a definition of a worker. It refers to the Framework Directive on Health and Safety at Work in relation to its sectoral application, allowing derogations to some of the rights for several types of activities and workers. As the Framework Directive on Health and Safety at Work refers to “any person employed” and considering the international labour law and CJEU case law, in particular the finding in *Tümer* that undocumented workers cannot be excluded from the definition of the employee such that it would undermine the purpose of setting minimum standards across the EU (see Introduction, Section 1.4), this Directive should apply also to undocumented workers. Rights set out in the Directive include:

- 1) Every worker is entitled to a daily rest of 11 consecutive hours per 24-hour period.¹⁵⁴
- 2) If the working day is longer than six hours, every worker is entitled to a rest break.¹⁵⁵

¹⁵¹ Article 3

¹⁵² Article 4

¹⁵³ Article 5

¹⁵⁴ Article 3

¹⁵⁵ Article 4

- 3) Every worker is entitled to a minimum uninterrupted rest period of 24 hours per week.¹⁵⁶
- 4) The average working time per week should not exceed 48 hours.¹⁵⁷
- 5) Every worker is entitled to paid annual leave of at least four weeks.¹⁵⁸
- 6) Night workers should not be required to work more than an average of eight hours per every 24-hour period.¹⁵⁹
- 7) Night workers should have access to regular health assessments.¹⁶⁰
- 8) Night and shift workers should have appropriate safety and health protection.¹⁶¹

4.4 Employer's Insolvency Directive ([Directive 2008/94/EC](#))

The Employer's Insolvency Directive provides rights to employees in the case of employer insolvency. The Directive defers to the definition of 'employee' under national law, although certain groups cannot be excluded (i.e. part-time, temporary, and fixed-term workers).¹⁶² Relevant in this respect is the *Tümer*-case where the CJEU held that migrant workers with an irregular status cannot be excluded (see Introduction, Section 1.4).¹⁶³ Likely, if brought before the CJEU, similar judgements could be ruled on other social rights.¹⁶⁴

4.5 Temporary Agency Work Directive ([Directive 2008/104/EC](#))¹⁶⁵

Temporary agency workers face many uncertainties. The duration of their employment is on average less than three months. Typically, their wages are also lower despite a higher workload. This Directive aims to guarantee a minimum level of effective protection, ensure that the principle of equal treatment is applied to temporary agency workers, and

¹⁵⁶ Article 5

¹⁵⁷ Article 6

¹⁵⁸ Article 7

¹⁵⁹ Article 8

¹⁶⁰ Article 9

¹⁶¹ Article 12

¹⁶² Article 2 Insolvency Directive.

¹⁶³ *Tümer* C-311/13, 2014

¹⁶⁴ A practical guide to this end is provided by PICUM, *Guide to Undocumented Workers' Rights to Work under International and EU Law 2022*.

¹⁶⁵ Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, OJ L 327, 5.12.2008, p. 9–14.

recognise temporary-work agencies as employers (while contributing to the development of the temporary work sector).

The Directive applies to workers with a contract of employment or employment relationship with a temporary-work agency, who are assigned to user undertakings to work temporarily under their supervision and direction. The definition of ‘worker’ is any person who, in the Member State concerned, is protected as a worker under national employment law. Considering international labour law and CJEU case law, in particular the finding in *Tümer* that undocumented workers cannot be excluded from the definition of the employee, this Directive should also apply to irregularly staying migrant workers employed by temporary work agencies.

Although the Directive covers all workers irrespective of nationality, it is particularly relevant for non-EU nationals because many are unable to find secure employment and instead have temporary jobs found through employment agencies and other intermediaries.¹⁶⁶ This is especially the case in sectors such as agriculture where there are peaks in temporary recruitment.

The relevance of the Directive for F2F sectors such as agriculture is potentially significant in this context. Research by EU Fundamental Rights Agency (FRA) has shown that migrant temporary workers in high-risk sectors such as agriculture, are more likely to work overtime without pay, perform extra-contractual tasks, and live in unsanitary and degrading conditions.¹⁶⁷ The risk of exploitation for non-EU nationals is amplified in comparison to other workers, as visa and accommodation often depend on recruitment agencies or other intermediaries.

¹⁶⁶ Maroukis, T. (2016). Temporary agency work, migration and the crisis in Greece: labour market segmentation intensified. *Transfer: European Review of Labour and Research*, 22(2), 179-192. <https://doi.org/10.1177/1024258916634620>

¹⁶⁷ Fundamental Rights Agency, Protecting migrant workers from exploitation - FRA Opinions. Available at: <https://fra.europa.eu/en/content/protecting-migrant-workers-exploitation-fra-opinions>

The Directive tries to address some of these problems by setting out the following rights:

- 1) Equal treatment/non-discrimination regarding the essential conditions of work and of employment.¹⁶⁸
- 2) To be informed of any vacant posts in the user undertaking to give them the same opportunity as other workers in that undertaking to find permanent employment.¹⁶⁹
- 3) Not be charged any recruitment fees.¹⁷⁰
- 4) Equal access to amenities and collective services at work.¹⁷¹
- 5) Member States should also seek to improve access to training and to child-care facilities in the temporary-work agencies for temporary workers.¹⁷²

The Directive gives expression to the principle of human dignity in work relations. It acknowledges the need to respect fundamental rights and the compliance with the principles recognised by the Charter of Fundamental Rights of the European Union.¹⁷³ In particular, it is designed to ensure compliance with Article 31 of the Charter, which provides that every worker has the right to working conditions which respect his or her health, safety and dignity.¹⁷⁴

Despite the relevance and potentially beneficial effect of this Directive, the latest Commission assessment report, from almost ten years ago, 2014, revealed that some Member States continued to apply derogations from the principle of equal treatment.¹⁷⁵ In addition, the equal treatment provisions suffer from poor implementation, leaving workers exposed to abuse. Furthermore, the protections offered are limited, and do not address the risk of abuse faced by migrant workers, and undocumented non-EU nationals in particular.

¹⁶⁸ Article 5

¹⁶⁹ Article 6

¹⁷⁰ Article 6.3

¹⁷¹ Article 6.4

¹⁷² Article 6.5

¹⁷³ Recital 1.

¹⁷⁴ See also Introduction, Section 1.2.

¹⁷⁵ COMMISSION STAFF WORKING DOCUMENT Technical annexes Accompanying the document REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMANT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS on the application by Member States of Directive 2008/104/EC on temporary agency work. SWD(2014) 108 final.

It is especially the presence of fraudulent private agencies in the job market which constitutes an additional challenge for the protection of migrant workers' rights.¹⁷⁶ Across the EU, most temporary work agencies are compliant with the legal framework. However, due to pressures on labour costs and the more precarious nature of temporary employment, there is a higher risk of fraudulent agency work, and undeclared work.¹⁷⁷ Exploitative employers and intermediaries such as recruitment agencies utilise a broad range of practices to exploit workers who desperately seek a job and are in a weak bargaining position. This weak position is aggravated when workers are in an irregular situation, or their residence permit is tied to one specific employer. Examples of unlawful conduct include charging illegal fees and recruiting foreign workers with misleading promises of salary, working conditions as well as their residence. Fraudulent private agencies deceive workers by promising but failing to ensure legal residence.

As the Directive has a more limited scope and ambition, these situations fall outside the legal framework, however, leading to blind spots in protection and a greater danger of abuse.

4.6 Directive on Transparent and Predictable Working Conditions ([Directive 2019/1152/EU](#))

New types of atypical and precarious work have emerged in recent years. Among those in atypical work relations, there may be cases of persons declared to be self-employed who actually fulfil the conditions characteristic of an employment relationship. This Directive was adopted in 2019 as a direct follow-up to the EPSR to provide those in this situation with greater safeguards against possible abuses. The Directive establishes an obligation for employers to inform their workers about essential aspects of their contractual relation. This has the potential to strengthen protection standards for migrant workers in atypical work relations who do not know the exact details of their employment or their future working conditions.

¹⁷⁶ European Trade Union Confederation (ETUC). (2021b). ETUC Resolution on Fair Labour Mobility and Migration Adopted at the Executive Committee Meeting of 22 March 2021. Available at: <https://www.etuc.org/en/document/etuc-resolution-fair-labour-mobility-and-migration>

¹⁷⁷ Pavlovaite, I. (2020). Tools and approaches to tackle fraudulent temporary agency work, prompting undeclared work, European Platform tackling undeclared work (2020). Available at: www.ela.europa.eu/sites/default/files/2021-09/TRW%20Fraudulent%20Agency%20Work_LRP.pdf

Other relevant provisions include:

- 1) Workers with unpredictable working hours should not be required to work unless the work takes place within predetermined reference hours and days and the worker is informed by his or her employer of a work assignment within a reasonable notice period.¹⁷⁸
- 2) Member States have to take measures to prevent abusive practices associated with on-demand and similar contracts.¹⁷⁹
- 3) A worker with at least six months' service with the same employer may request a form of employment with more predictable and secure working conditions.¹⁸⁰
- 4) A worker who has not received information on his or her employment conditions in due time should have the possibility to submit a complaint and to receive adequate redress in a timely and effective manner.¹⁸¹
- 5) Workers, including former workers, should have access to effective and impartial dispute resolution and a right to redress in the case of infringements of their rights arising from this Directive.¹⁸²
- 6) Workers who file such a complaint against their employer should be protected from adverse treatment.¹⁸³
- 7) Dismissals on the grounds of exercising the rights set out in this Directive shall be prohibited. The onus is on the employer to prove that this was not the reason for the dismissal.¹⁸⁴

The Directive applies to every worker who has an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each Member State, with consideration to the case-law of the CJEU. The Directive explicitly mentions that Member States should take into account the CJEU's jurisprudence in its transposition and implementation. Accordingly, domestic and voucher-based workers in F2F sectors could benefit from the Directive's protective framework if they meet the criteria. Although the Directive does not explicitly state that it applies to undocumented

¹⁷⁸ Article 10

¹⁷⁹ Article 11

¹⁸⁰ Article 12

¹⁸¹ Article 15

¹⁸² Article 16

¹⁸³ Article 17

¹⁸⁴ Article 18

migrants, the Tümer ruling also suggests that workers without a residence permit are implicitly covered.

4.7 Directive on Adequate Minimum Wages for Employees ([Directive 2022/2041/EU](#))

The COVID-19 pandemic has hit sectors with a large share of low-wage workers, such as the retail industry, particularly hard. According to ILO, during the first month of the pandemic the total income of informal workers worldwide possibly dropped by as much as 60 percent, leading to a rise in the number of working poor, particularly among migrant workers.¹⁸⁵ This happened against the background of a pre-existing trend of rising wage inequalities.¹⁸⁶ Adjusting the minimum wage to an 'adequate' minimum can help reduce these inequalities.¹⁸⁷

This Directive was therefore described as a “watershed in the history of European social and economic integration” as it represents a shift towards recognizing the social impact of income growth.¹⁸⁸ As such it constitutes an explicit commitment of the EPSR, defining procedural elements that Member States need to respect when implementing wage policies. Ultimately, it seeks to promote the workers’ right to fair wages that provide for a decent standard of living for both workers and their families, a principle embedded in the EPSR.¹⁸⁹ Importantly, the preamble underscores that ensuring dignity through minimum wage can contribute to an array of economic and social goals including the reduction of poverty and wage inequality.¹⁹⁰ Moreover, the Directive acknowledges that non-compliance with existing rules in some Member States concerning minimum wage

¹⁸⁵ International Labour Organization (ILO). (2020) Global Wage Report 2020–21: Wages and minimum wages in the time of COVID-19. 27. Available at: https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_762534.pdf

¹⁸⁶ Amo-Agyei, S. (2020). The migrant pay gap: Understanding wage differences between migrants and nationals. 62 International Labour Organization. https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/briefingnote/wcms_763796.pdf

¹⁸⁷ Sari, D. K. (2022). The new EU Directive on minimum wage sets a dual goal'. International Labour Organisation (2022). Available at: https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_861051/lang--en/index.htm

¹⁸⁸ Müller, T., & Schulten, T. (2020). 'Minimum-wage directive: yes, but ...' (*Social Europe*, 2020), cited in Regina Anna KONLE-SEIDL, 'At a glance: The proposed Minimum Wage Directive' (Policy Department for Economic, Scientific and Quality of Life Policies Directorate-General for Internal Policies, 2020).

¹⁸⁹ EPSR, Principle 6.

¹⁹⁰ Recital 8.

leaves certain workers unprotected.¹⁹¹ This risk is heightened in the case of temporary workers and part-time workers, and agricultural and hospitality workers, as well as migrant workers, who are usually minimum wage or low wage earners.¹⁹²

The personal scope of the Directive is wide, signifying its relevance for irregular migrant workers. The Directive explicitly stipulates that undeclared workers can fall under its scope provided that they fulfil the criteria established by the CJEU.¹⁹³ Therefore, irregular migrant workers can benefit not only from a decent minimum wage but also from accessing justice and receiving redress in accordance with its provisions, while being protected from any adverse consequences resulting from a complaint lodged with the employer (on firewalls, see Section 2).¹⁹⁴

The Directive therefore carries the potential to improve working and living conditions of migrant workers, including those undocumented who work in F2F. To ensure effective minimum wage protection, it foresees two complementary processes. First, it establishes a framework to improve the adequacy of statutory minimum wages. Second, it outlines recommendations aimed at strengthening collective bargaining.¹⁹⁵ These two elements are designed to work in tandem towards a common goal of tackling in-work poverty. It should be noted, however, that the Directive does not interfere with the competence of Member States in deciding whether to establish minimum wages through legislation or by fostering protection through collective agreements.¹⁹⁶ It also does not compel Member States without existing minimum wage laws to introduce them.

¹⁹¹ Recital 14.

¹⁹² Recital 10 and 14.

¹⁹³ Recital 21 and Article 2.

¹⁹⁴ Article 5 and 12.

¹⁹⁵ Article 1

¹⁹⁶ Recital 19 and Articles 3 and 4.

4.8 Proposal for a Directive on Improving the Working Conditions in Platform Work (COM/2021/762 final)¹⁹⁷

As far as labour law is concerned, the scope of EU rules is mostly limited to traditional forms of employment,¹⁹⁸ often excluding the self-employed or those in atypical work relations. This undermines protection standards for the growing number of platform migrant workers. This proposal from December 2021 can be understood in the context of the expansion of platform business models which the COVID-19 pandemic has accelerated, as exemplified by food delivery services switching to digital systems.¹⁹⁹ This is of particular importance for this analysis, since the low entry barriers make it possible for migrant workers working through platforms, including those who are undocumented, to have a source of income. Conversely, jobs in the gig economy tend to lack social security and platform workers, especially non-EU nationals, are more easily exploited due to their often precarious situation.²⁰⁰

In this context, the European Commission²⁰¹ highlighted that, out of the 28 million people who are currently estimated to work through digital labour platforms, there may be up to 5.5 million who are “false” self-employed and therefore not entitled to protection under existing EU labour law instruments.²⁰² The proposed Directive seeks to close this gap by raising the labour and social rights of persons working through digital platforms.

¹⁹⁷ Grossi, T., & De Leo, A. (2023). Regulating platform work: How will this impact migrant workers?, European Policy Centre. Available at: <https://www.epc.eu/en/publications/Andreina-De-Leo-Tommaso-Grossi-Regulating-platform-work-How-will-this-50e6f0>

¹⁹⁸ European Trade Union Institute (ETUI). (2018). The concept of ‘worker’ in EU law: status quo and potential for change. Available at: <https://www.etui.org/publications/reports/the-concept-of-worker-in-eu-law-status-quo-and-potential-for-change>

¹⁹⁹ Pesole, A., Urzì Brancati, M.C, Fernández-Macías, E., Biagi, F., González Vázquez, I., (2018). Platform Workers in Europe Evidence from the COLLEEM Survey, JRC

²⁰⁰ Altenried, M. (2021). Mobile workers, contingent labour: Migration, the gig economy and the multiplication of labour. Environment and Planning A: Economy and Space, 0(0). <https://doi.org/10.1177/0308518X211054846>

²⁰¹ European Commission. (2021a). Brussels, 9.12.2021 COM(2021) 761 final COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS Better working conditions for a stronger social Europe: harnessing the full benefits of digitalisation for the future of work

²⁰² Brussels, 10.12.2021 SWD(2021) 396 final/2 CORRIGENDUM This document corrects SWD(2021) 396 final of 9.12.2021. Reformatting of pages 10-11. The text shall read as follows: COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT REPORT Accompanying the document Proposal for a Directive of the European Parliament and of the Council to improve the working conditions in platform work in the European Union

Accordingly, the proposal would introduce control criteria to determine the actual employment status of the platform worker and whether the platform is actually an “employer”. By seeking to bring legal clarity to the employment classification of platform workers, the Directive also tries to prevent national authorities from pursuing different policy approaches in a context where court rulings in some Member States have extended the right of platform workers to social benefits.²⁰³ Those being re-classified as workers would be entitled to the minimum wage, collective bargaining, health protection, and unemployment and sickness benefits, among others.

Furthermore, the Directive proposed by the Commission would require Member States to introduce complaint mechanisms for platform workers who are incorrectly classified. To ensure the procedure’s effectiveness, the EU states should protect workers from any retaliatory actions following the lodging of a complaint. They should also guarantee enforcement of the legal presumption of employment through strengthening controls and field inspections and allowing platform workers to be represented and supported by organisations promoting workers’ rights.

While the use of well-defined criteria to determine the employment relationship increases legal certainty, this could have some unintended effects. For example, it could incentivise some platforms to draft the terms and conditions for those seeking work through them in such a way as to avoid fulfilling more than one criteria. According to the Commission’s proposal, if such a situation arises, it would be the responsibility of the individual worker to initiate administrative or judicial proceedings to activate the presumption. This expectation fails to acknowledge the unbalanced bargaining power between workers and employers. Migrant workers often face language barriers or limited knowledge of their rights, reducing the prospect of taking direct action against platforms. Non-EU nationals who are undocumented might have even greater fears of retaliation from employers. Retaliation could lead to loss of income, or the initiation of a return procedure, potentially leading to their deportation. This would make them even more reticent to initiate proceedings against platforms under the proposed Directive.

²⁰³ See e.g. <https://digitalplatformobservatory.org/legal-case/>

The Commission's proposal will be subject to inter-institutional negotiations by the European Parliament and Council, with the hope to reach an agreement by the end of the current legislative cycle. While the Directive's negotiation is ongoing, studies suggest that the positive impact of the proposed Directive will likely be limited by differences in bargaining power between migrant workers and platforms and by the well-founded fears of retaliation that some non-EU platform workers might face due to the lack of a firewall protection (see Section 2).

5. EU Farm to Fork Strategy & Sustainability

While the precise number and exact status of non-EU nationals involved in the food supply chain is unknown (like the number of non-EU nationals in an irregular situation in the EU)²⁰⁴, it is safe to say F2F markets are characterised by a high systemic dependency on non-EU nationals and mobile EU citizens, including irregular migrant workers. Yet, the main legislative and policy frameworks regulating F2F markets pay limited attention to the status of these workers, suggesting that dynamics of irregularity transcend rules set by migration and mobility law, but also include structural limits beyond them.

Reflecting this, the EU Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system (F2F Strategy in short) launched by the European Commission in 2020 was presented as a comprehensive plan to address the challenges of producing and consuming food in a fair and sustainable way.²⁰⁵ Being a core component of the European Green Deal, it connects to the EU's ambition to define a sustainable and inclusive growth strategy that can improve people's health and quality of life, care for nature, and "leave no one behind".

The F2F strategy also aims to make food systems more resilient to crises, thus contributing to greater food security. Food security has become a policy and economic imperative for the EU, after the 2022 Russia's invasion of Ukraine. In this sense, the F2F strategy should also capture the essential role played by cross-border workers in tackling and preventing food crises.

When it comes to food security, the heavy reliance of the agricultural sector on migrant workforce is effectively acknowledged under the 'essential workers' banner in the Strategy.²⁰⁶ For this reason, the F2F strategy stresses the importance of ensuring the respect of the European Pillar of Social Rights (EPSR) in relation to precarious seasonal

²⁰⁴ Another HorizonEU project is measuring irregular migration and related policies (MIrreM). It examines estimates and statistical indicators on the irregular migrant population in Europe as well as related policies, including the regularisation of irregular immigrants, see <https://irregularmigration.eu/team/>.

²⁰⁵ European Commission. (2020a). Brussels, 20.5.2020 COM(2020) 381 final COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system

²⁰⁶ Mantu, S.A. (2022). A double crisis. Mapping EU responses to essential workers during the COVID pandemic . (extern rapport, Nijmegen Migration Law Working Papers Series, no 2022/01)

and undeclared workers. Their social protection as well as their working and housing conditions, health, and safety are recognized as important factors for the achievement of more resilient and sustainable food systems.

This matches the experience gained during the COVID-19 pandemic which exposed the fragility of food systems, including in relation to workers. Still, under the Strategy, the protection of the rights of this group is generally subordinated to production needs. Consistent with this, when examining concrete policy goals and F2F instruments addressing supply chain dynamics and those tackling food security, migrant workers are not put front and centre. Relevant instruments do not explicitly acknowledge any limitation and/or vulnerability that might affect them given their precarious legal and social status. Instruments, instead, take an employer-driven approach.²⁰⁷

This means that they safeguard workers' rights in broad terms, but only indirectly, i.e. as a positive implication of improving business conditions for farmers (including by avoiding concentration in long supply chains).

Accordingly, the instruments described in this Section do not make any specific reference to labour practices that might affect migrant workers, especially those in an irregular situation or in informal working arrangement (e.g. posting work, subcontracting, agencies or intermediaries, contractual agreements, wages, language barriers in relation to training, health and healthcare). The status of posted workers and platform workers is not explicitly addressed in any of these documents, despite their role in F2F sectors (e.g. contractual arrangements, health and safety challenges, social security). Compliance with these instruments might not only be compatible with but may therefore indirectly contribute to the exploitation of situations of irregularity.

Reflecting the same overarching shortcoming, the topic of fair earnings comes up in more than one instrument but always with reference to farmers and business owners, while fair wages remain out of the picture. Similarly, the social dimension of sustainability implicitly addresses the native-born population, be it farmers and food business owners or local

²⁰⁷ Palumbo, L. (2022). 'Exploitation in the Agri-Food Sector in Europe: A Comparative Analysis of the Impact of Migration and Labour Regimes in Producing Migrants' Vulnerabilities'. *European Journal of Migration and Law* 24 (2): 287–312.

communities, with no reference to considerations about the diversity of the workforce and its needs.

Acknowledging that the food systems do not currently allow for fair economic returns and livelihoods for all actors along the chains, with the Green Deal and the F2F strategy, the EU has however committed to redesigning food systems and putting them on a sustainable path. While the F2F strategy seeks to achieve both environmental and social objectives, it is less clear whether the strategy efficiently addresses community needs broadly understood, bearing in mind the heavy reliance of the agricultural sector on migrant workforce.

More specifically, as far as the social dimension is concerned, the F2F strategy takes a narrowly defined approach. The social dimension is focused on educating consumers and ensuring fair food pricing and, by extension, farmers' livelihoods. "Fair working conditions" are mentioned but they are not analysed.²⁰⁸ Workers are mentioned in the context of food supply resilience in the face of global crises.²⁰⁹ Representation of workers in the decision-making is also only briefly mentioned.²¹⁰

Notably, beyond the lack of attention to the social reality faced by workers with an irregular or precarious status, references to other relevant frameworks mapped in this Working Paper are not complemented by systemic, complementary policy actions. For example, while the need to ensure the health and safety of workers in food supply chains in line with commitments under the EPSR is acknowledged, this is not translated into concrete steps in the Action Plan accompanying the F2F Strategy.²¹¹ This shows the insights of taking a regulatory infrastructure approach, but also the blind spots that are created at the intersection between different policy areas.

²⁰⁸ sections 4.2.2. and 4.2.3.

²⁰⁹ section 2.3

²¹⁰ section 3.7

²¹¹ Section 4.2.2. Action Plan, https://eur-lex.europa.eu/resource.html?uri=cellar:ea0f9f73-9ab2-11ea-9d2d-01aa75ed71a1.0001.02/DOC_2&format=PDF. See also [Opinion of the European Economic and Social Committee on 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A From Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system' \(COM\(2020\) 381\) \(2020/C 429/34\)](#) Scrutinizes and critiques the Commission's Communication and offers recommendations for how the EU can advance its objectives for a more sustainable and just food system.

The Strategy does not only concern how Europeans ‘value’ food: considering trade volumes, it aims to set a global standard for food that is safe and of high quality. Looking at the implications for non-EU countries, social cost is mentioned in the F2F Strategy regarding imports from third countries.²¹² Binding Human Rights and Environmental Due Diligence requirements for EU companies are also mentioned in the context of imports from third countries²¹³ (on this, see Section 6.2.3). This will be relevant for the following stages of the DignityFIRM project, when the impact of this regulatory infrastructure will be assessed with respect to dynamics of food security and its connection with irregularity in Morocco and Ukraine, two key countries in EU’s food supply chains.

Drawing on these overarching reflections, this Section accordingly identifies further potential connections as well as systemic gaps within other relevant policy and legislation concerning irregular migrant workers and their human dignity, placing emphasis on the social dimension of sustainability in the F2F Strategy.

To facilitate the mapping exercise, the following analysis is divided between instruments addressing supply chain dynamics and those tackling food security. Some instruments connected to the F2F Strategy, such as the EU Code of Conduct on Responsible Food Businesses and Marketing Practices or the Due Diligence requirements for EU companies are examined in the following Section 6, as they concern more specifically the responsibility of business actors.

5.1 Supply Chain Dynamics

The F2F policy and legislation regarding supply chain dynamics include the Common Agricultural Policy (CAP) and its Strategic Plans objectives, the EU Code of Conduct on Responsible Food Businesses and Marketing Practices, the Directive on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, and the Sustainable Food System Framework Initiative. This mapping also includes an overview of key policies relating to the hospitality sector.

²¹² Section 1.6

²¹³ Section 4.3.2

5.1.1 Common Agricultural Policy

The 2023-2027 CAP has introduced a series of reforms to make agriculture fairer for farmers, greener, and more competitive, in line with the F2F Strategy, the Biodiversity Strategy, and the Green Deal. Worth noting is that the new CAP has introduced social conditionality rules to ensure that CAP income support and rural development funding is granted to employers that respect the workers' social and labour rights, occupational safety, and health as established by the Directive on Transparent and Predictable Working Conditions and the directives on Occupational Safety and Health and Safety at Work (see Section 4).

Under the new mechanism, farmers will have to fulfil minimum social and labour standards as well as occupational safety and health requirements to receive income support and rural development funding. This will include informing workers of employment conditions in writing and ensuring their safety and protection in relation to machinery equipment, protecting clothing and equipment, and dangerous substances. National authorities will monitor the respect of these requirements and reduce or withdraw the subsidies in case of non-compliance.

Owing to the heightened risk of abuse, migrant workers may benefit from the mechanism. While this could therefore be considered a step forward towards improving the workers' conditions along food supply chains, its monitoring and enforcement will be key. However, the mechanism and the new rules will be voluntary until 2025. At the time of the writing, only Italy, France and Austria opted to introduce them. More broadly, national authorities will be responsible for implementing the CAP through their national Strategic Plans. This could lead to limited compliance in certain sectors and, more broadly, fragmentation and uneven practices.

More broadly, the social conditionality, in providing incentives for those farmers who do not currently comply with minimum requirements, addresses only one of the systemic issues revealed by taking a regulatory infrastructure approach. More specifically, incentives cannot do without sanctions at the national level for serious cases of exploitation. In relation to this, the impact of the potential sanctions introduced by the conditionality mechanism regarding workers' treatment, as a new instrument, will have to

be monitored closely, with subsidies being cut where abuse is detected, and corrective measures adopted if needed. Concerning this, national labour inspectorates will play a key role in advancing the social dimension of CAP, being responsible for identifying violations of labour rights. Sanctions should not come at a cost for irregular migrant workers, however. For this reason, firewalls in inspections – examined above in connection to other policy areas mapped in this Working Paper – are necessary, and relevant, also for the CAP.

Beyond the introduction of social conditionality rules, for the period 2023–2027, the CAP sets out ten key objectives as a basis on which EU countries should design their Strategic Plans. While the overarching goal of the Strategic Plans should be to support farmers to improve working conditions on farms, no mention is made about the specific categories of benefitting workers in the briefs outlining the details of each of the ten objectives. In fact, the objectives place a more general emphasis on rural development and the need to increase productivity. The analysis of the relevant CAP Objectives therefore confirms the overall employer-driven approach of F2F policies and a general neglect of issues related to irregularity, low wages, or lack of support for workers. The CAP objectives also appear to refer to small scale farming, while dynamics related to large scale farming are not accounted for, which could lead to blind spots and lack of scrutiny.

Accordingly, Objective 1 acknowledges the EU’s “continuing loss of its agricultural workforce” and the general decrease in farm income. It refers to Article 39 of the Treaty on the Functioning of the European Union, stating that an objective of the CAP should be to ensure a fair standard of living for the agricultural community through policy measure to support farm income. In this context, Objective 1 mentions the debate on how to best support “the individual earnings of both farmers, agricultural employees or others engaged in agriculture,” while avoiding market distortions. No further details, however, are provided about the category of agricultural employees.

Objective 2 focuses on the vicious cycle of low productivity and profitability affecting the agricultural sector. The latter shows “low productivity growth compared to the rest of the economy” due to constraints given by its underlying processes, global competition, and “just but costly” societal demands to meet environmental and climate objectives. Therefore, Objective 2 concludes, “since those working in the farming sector receive an

income that is significantly below the overall wages in the rest of the economy, finding ways to increase the sectors productivity and break the vicious cycle of low profitability leading to low productivity is crucial.”

Objective 3 addresses the farmers’ position in the value chain, highlighting the economic, social and environmental benefits of short supply chains for rural businesses. The social benefits in question are not specified beyond a reference to the potential of short supply chains of “relinking farmers to the consumers and contributing to a revival of rural communities.” Therefore, these benefits are not to be understood as relating to social inclusion or social rights. In addition, this objective confirms the overall employer-driven approach as well as an implicit focus on small scale farming. It also makes no references to the role of migrants in reviving rural communities and becoming a source of low-cost labour.

Space however is left for further implementation at the national level. For example, Objective 7 regards structural change and generational renewal. It affirms the need to provide for a policy framework and national instruments supporting young farmers to set up their businesses, “creating good working and living conditions in rural areas.” However, non-EU nationals – and specifically those affected by dynamics of irregularity, are not considered. Workers here are referred to as farmers and business owners, and specifically young ones.

Objective 8 focuses on how CAP spending helps maintain employment rates and standards of living in rural economies, taking stock of the higher levels of poverty and share of poor people in rural areas. In this respect, objective 8 refers to the lack of social inclusion and ‘a poor performing labour market’ in isolated areas, citing evidence from the World Bank as to how CAP plays a role in tackling these issues through decoupled payments and rural development measures. However, the references to the lack of social inclusion and the poor performing labour market mostly refer to the native-born population. Therefore, they do not acknowledge issues disproportionality affecting the migrant population, particularly in large scale farming.

In line with these objectives, also considering the social conditionality mechanism, the mains stakeholders served by the CAP are farmers, with a greater focus placed on

smaller scale farms. In this sense, workers may only benefit indirectly from newly introduced rules. This raises the question of how to promote sustainable policies while also structurally including considerations about the wellbeing and dignity of workers, and undocumented persons in particular, in the design of National Strategic Plans and, more broadly, in the CAP implementation.

Regarding the monitoring of the new rules, the Commission has committed to publishing a review of achievements and remaining challenges, but only in 2027. This raises the additional question on the need and opportunities for introducing structural changes earlier.

5.1.2 Food Security

In its 2021 Communication announcing a ‘Contingency plan for ensuring food supply and food security in times of crisis’²¹⁴, the European Commission recognised the free movement of workers in the food sector as one of the key principles for a common European approach to tackling and preventing food crises, in line with the objectives included in the F2F Strategy. The Commission had already recognized cross-border and seasonal workers as well as transport workers as essential workers in the Communication concerning the exercise of the free movement of workers during the COVID-19 outbreak.

Setting the stage of the development of the contingency plan, the Communication identifies the role of workers in highly interdependent food systems as one of the areas in need of further coordination. It mentions workers in the food supply chain (and more specifically, farmers and fishers, food processors, traders, retailers, food services, including their workers), but also those in sectors essential for its functioning, namely transport, logistics, and packaging. Acknowledging that the role of food and transport workers is essential for the smooth functioning of food supply chains, it accordingly reinstated that “food supply should also be sustained by facilitating free and fair movement of cross border and seasonal workers in the food sector.”

²¹⁴ European Commission. (2021b). Brussels, 12.11.2021 COM(2021) 689 final COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS Contingency plan for ensuring food supply and food security in times of crisis [SWD(2021) 317 final] - [SWD(2021) 318 final]

The importance of cross-border workers is therefore reflected in the EU's actions against food crises. Migrant workers are specifically mentioned in relation to the risks that may threaten the function of the food supply chain. Namely, these include those related to migration and other risks affecting the availability of labour as a factor of production in the food and transport sectors. However, the specific needs, risks, and vulnerabilities of migrant workers are not reflected in any detailed and targeted way. Overall, workers' rights are framed as instrumental to preserve labour as a factor of production ensuring food security, not as a direct concern.

5.1.3 Hospitality Sector

The COVID-19 pandemic has exacerbated inequalities for particularly vulnerable groups of workers in many sectors of the economy (see Introduction), and hospitality is no exception. Disruption of the economic activities led to a profound impact on the livelihoods of its migrant workforce, many of whom were engaged in informal employment, thus facing a higher risk of job losses.²¹⁵ Specifically, in the EU, the number of migrant workers employed in the hospitality subsector decreased by almost 15 percent between 2019 and 2020, in contrast to a 12.5 percent decline among native-born workers.²¹⁶ Simultaneously, numerous businesses in the tourism sector, especially micro, small, and medium-sized enterprises (MSMEs), which are major employers of migrant workers, as well as irregular workers in the sector, faced challenges in accessing government support schemes aimed at mitigating the pandemic's social impact.²¹⁷

The hospitality sector presents itself as a key player for enhancing socio-economic participation: 30% of the workforce in this part of the F2F labour markets is estimated to be low skilled and more than half of the workforce are female workers. HOTREC (Confederation of National Associations of Hotels, Restaurants, Cafés and Similar Establishments in the European Union and European Economic Area) has voiced thoughts

²¹⁵ International Labour Organization (ILO). (2022). 'The future of work in the tourism sector: Sustainable and safe recovery and decent work in the context of the COVID-19 pandemic' (Report for the Technical Meeting on COVID-19 and Sustainable Recovery in the Tourism Sector) 14.

²¹⁶ Organization for Economic Cooperation and Development (OECD). (2021). International Migration Outlook 2021.

²¹⁷ International Labour Organization (ILO). (2022). 'The future of work in the tourism sector: Sustainable and safe recovery and decent work in the context of the COVID-19 pandemic' (Report for the Technical Meeting on COVID-19 and Sustainable Recovery in the Tourism Sector) 14.

on improving the image of the sector and legal migration pathways for its workers to address labour shortages, possibly to curb irregular migrant labour in its sector although this is not made explicit.

Finally, in the hospitality sector ‘franchising’ is a common business model in the restaurant business. The European Code of Ethics for Franchising is an example of a corporate code stipulating social norms yet without mentioning (irregular) migrant workers.

6. Business Responsibilities: Due Diligence and Corporate Social Responsibility

In recent years, business responsibilities at the intersection between public and private, as well as Corporate Social Responsibilities (CSR) have emerged as a critical area to ensure that legal and policy gaps are effectively addressed, among others, by clarifying states responsibilities vis-à-vis and strengthening commitments for private actors which go beyond minimum standards set in legislation. This also applies to food value chains that have global ramifications and dimensions. But CSR can take different forms, with a notable transformation: the more traditionally understood self-imposed private standards voluntarily adopted by private actors have gradually left space for binding standards set in cooperation with or because of the intervention by public regulatory bodies, including by the EU.

But this is not the only change reflected in relation to businesses' responsibilities in the EU context. While CRS traditionally sought to address regulatory gaps in the value chain with reference to limited protections for workers in non-EU countries, CSR – and, alongside it, human rights due diligence, where publicly set standards come into play – are having growing implications for workers within the EU and in European countries. In fact, the F2F Strategy (see Section 5) explicitly seeks to employ CSR to advance its goals. Among others, to advance the EU's green transition and achieving the UN Sustainable Development Goals, the Commission launched its Proposal for a Directive on Corporate Sustainability Due Diligence (see below, Section 6.2.3), aiming to provide businesses a clear framework to ensure that they are equipped to deal with rising regulatory and stakeholder expectations regarding responsible business conduct.

CSR is, in this light, an especially interesting tool to address regulatory and jurisdictional gaps that exist because of the cross-border dimension of economic activities and, more broadly, in supply chain dynamics, raising relevant questions concerning its implications for F2F sectors.

In this Section, the Working Paper maps policy documents and legal instruments that address or regulate private actor responsibilities, emphasising those aspects that can

impact irregular migrant workers, and extend protections against abuse and vulnerabilities.

The potential limits of CSR, however, also emerge in this mapping. When it comes to publicly set standards, but also self-imposed private standards, these are generally destined to large economic actors, as also reflected in EU legislation. For example, the proposal for a Directive on Corporate Sustainability Due Diligence aims to impose mandatory due diligence obligations on large EU companies, large non-EU companies operating in the single market, and mid-cap EU companies in high-risk sectors, including agriculture. Small and medium-sized enterprises (SMEs) which are said to represent 99% of all businesses in the EU, are therefore generally excluded.

More broadly, voluntary commitments are not always respected, with varying degrees of compliance across supply chains and actors. This relates to the often uncertain or limited practical benefits that private and self-imposed regulation have reportedly produced. In some fields especially, the interplay between voluntary commitments, lack of enforcement, as well as the broader regulatory infrastructure, may generate especially circumscribed results.²¹⁸

Against this background, this Section, rather than assessing the impact of the EU framework on corporate responsibility or the vulnerability of irregular migrant workers, describes relevant frameworks and paves the way for further questions to be examined in the DignityFIRM project, in line with the preceding Sections. To achieve this, the mapping will cover policy developments at EU level as well as relevant international standards. The Section is organised as follows: it begins by looking at international standards. It then moves on to consider EU-specific regulatory standards with a broader range of social objectives in mind. The third Section addresses EU-standards relating to the information provided to consumers to facilitate responsible choices.

This mapping is not all-comprehensive. Not covered are additional frameworks that employers are expected to comply with in the F2F sectors. These include the Unfair

²¹⁸ Martin, P. (2021). *Private Regulation of Labor Standards in Global Supply Chains: Problems, Progress, and Prospects* by Sarosh Kuruvilla [ILR Press, 2021, 342 pp, ISBN 9781501754524]

Trading Practices Directive.²¹⁹ This contains minimum standards against certain unfair trading practices (UTPs) imposed unilaterally along the food supply chain, which could have cascading negative spillover effects on producers. While it does not directly concern irregular migrants, unfair trading practices could lead to increased costs for economic actors along the supply chain, which could in turn incentivise them to rely on low-wage, irregular work to offset these additional costs. In other words, by protecting suppliers against the costs incurred due to unfair practices, the Directive could be said to indirectly influence the conditions which foster migrant workers exploitation along the supply chain.²²⁰ Yet, for reasons of space, it is not examined in this Section.

Having said this, the responsibility of economic actors in F2F should also be looked at from their own perspective, including that of capacity to offer dignified working conditions and comply with the rules.

When looking at businesses' responsibilities from this viewpoint, and beyond the commitments of larger companies, it is sometimes reported that employers, especially SMEs are often unaware about the regulatory framework regarding the right to work of non-EU nationals in the EU, that they struggle to navigate the administrative hurdles to hire them. Employers are often discouraged by the rules and procedures to hire non-EU citizens, as they entail additional costs. On this account, it may be unrealistic to assume that all employers will be able to familiarise, let alone adhere, to voluntary commitments beyond the binding rules that they must already comply with. While this Section does not aim at uncovering all employers' obligations, the growing relevance of policies and objectives reflected in the mapping raises a general question about the capacity of employers' – especially small ones – to adapt to this regulatory environment.

²¹⁹ Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain PE/4/2019/REV/2

²²⁰ In this sense, the Directive reflects an employer-driven approach which is common to the instruments regulating legal migration of low-skilled non-EU nationals (Seasonal Workers Directive, see Palumbo 2022, 311).

6.1 International Standards

6.1.1 United Nations' "[Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework](#)" (2011)

The UN Guiding Principles on Business and Human Rights (UNGPs) are the globally recognised standard on addressing human rights abuses related to business activities. The UNGPs consist of 31 principles along with commentary and contain three pillars: i) the State duty to protect, ii) the corporate responsibility to respect and, iii) access to remedy for the victims. While the term “dignity” is not explicitly mentioned in the UNGPs, the essence of the concept is reflected throughout the text and its goals. That said, its actual translation in concrete principles is mainly directed to state actors, while concrete obligations of business actors are more tenuous.

On the other hand, under the UNGPs, companies are considered responsible for the negative impacts that occur anywhere in the value chain, as long as they are linked to their operations, products, and services.²²¹ Relatedly, standards apply to a wide set of actors along these chains. All business enterprises, regardless of their size or sector, must prevent, mitigate and, where appropriate, remedy human rights abuses that they cause or contribute to, according to the Principles.²²² Nevertheless, the scale and comprehensiveness of the actions to be taken by a business enterprise to meet its responsibility will be proportional to its size.

The responsibility of business enterprises to respect human rights refers to internationally recognised human rights: at a minimum, the International Bill of Human Rights and the principles set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work. However, it is also specified that enterprises may need to consider further standards as derived from relevant international human rights instruments and ILO conventions when their activities could pose a risk to individuals and groups that require special attention.

²²¹ GP 17(a)

²²² GP 14

Among them are migrant workers,²²³ who are often excluded from the same level of legal protection as the wider population, according to guiding rules to interpret the UNGPs.²²⁴ This exclusion can manifest in various ways, encompassing both technical and practical impediments to accessing justice. Specifically, migrants may find themselves excluded from the protective scope of the law, and they face an increased risk of encountering procedural barriers, as well as cultural, social, physical, and financial obstacles when seeking justice. For this reason, the UNGPs foresees additional protections for migrant workers. This also opens opportunities for bringing into focus the situation faced by those with an irregular status.

Among the additional international instruments falling under the scope of the UNGPs, for example, is the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. This specifies that, when undocumented or in an irregular situation, migrant workers are “frequently employed under less favourable conditions of work”. It also acknowledges that “certain employers find this an inducement to seek such labour in order to reap the benefits of unfair competition”. However, this instrument falls short of specifying clear responsibilities for employers.

To meet their responsibility to respect human rights, the UNGPs hold that, depending on their size, business enterprises should develop protective policies, including a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human right. A requirement for human rights due diligence, it is specified, is most likely to be appropriate where the nature of business operations or operating contexts pose significant risk to human rights.

In addition, enterprises should put in place adequate processes to remedy any adverse human rights impacts they cause or to which they contribute. Similarly, corporations should establish grievance mechanisms that are legitimate, accessible, fair, transparent, and compatible with human rights standards.²²⁵ Access to an effective remedy for those

²²³ United Nations High Commissioner for Refugees (UNHCR). (2012). The Corporate Responsibility to Respect Human Rights: An Interpretive Guide. Available at: <https://www.ohchr.org/en/publications/special-issue-publications/corporate-responsibility-respect-human-rights-interpretive>. The commentary accompanying GP 3 and 12 emphasizes the heightened vulnerability of specific groups, such as migrant workers and their families, who require special attention.

²²⁴ GP 26

²²⁵ GP 28-31

affected should not be limited to internal mechanisms, but should be achieved by ensuring that State-based domestic judicial mechanisms are also able to effectively address business-related human rights abuses.²²⁶

Recognising the importance of monitoring compliance, the UNGPs also emphasise that meaningful consultation with relevant stakeholders and affected groups/individuals is deemed necessary in the assessment process.²²⁷

6.1.2 OECD-FAO [Guidance for Responsible Agricultural Supply Chains](#) (2016)

Agricultural workers are especially exposed to exploitative practices. While some companies may deliberately take advantage of the vulnerabilities posed by irregular status or limited rights enjoyed by migrant workers, enterprises may also face genuine difficulties in complying with ethical standards and legal norms. This Guidance developed by the Organisation of Economic Co-operation and Development (OECD) and the Food and Agriculture Organization of the United Nations (FAO) aims to help companies prevent risks of adverse environmental, social, and human rights impacts.

The Guidance comprises, among others, i) a model enterprise policy outlining the standards to build responsible agricultural supply chains, ii) a framework for risk-based due diligence to avoid adverse impacts of their activities, and iii) measures to mitigate existing risks.

As far as standards are concerned, according to the OECD-FAO Guidance, employers should observe internationally recognised human rights. Other than respecting international core labour standards, such as the right to collective bargaining, this involves providing decent wages, benefits and working conditions, that are at least adequate to satisfy the basic needs of workers and their families. At the same time, employers should commit to the elimination of all forms of forced or compulsory labour, which consists of any work or service not voluntarily performed that is exacted from an individual under threat of force or penalty. It also involves improving working conditions

²²⁶ GP 26-27

²²⁷ GP 18, 21 and 23

and ensuring occupational health and safety. Notably, the Guidance specifically mentions the prevention of abuses against migrant workers.

The Guidance also covers due diligence processes and describes the five steps that enterprises should follow to identify, assess, mitigate risks. These include the identification and assessment of risks in the supply chain and the development and implementation of targeted strategies to respond to identified risks. While all enterprises should conduct due diligence, not all business actors, the Guidance specifies, should follow the same steps and measures. Rather, the implementation of the recommended steps should be tailored to their position and the type of involvement in the supply chain, the context and location of their operations, as well as their size and capacities. The Guidance accordingly differentiates the responsibilities of various types of enterprises (on-farm, downstream and financial enterprises).

Specific risk mitigation measures are tailored to the above objectives, and include the establishment of preventive and control measures that are consistent with good international industry practice to ensure health and safety. The Guidance also elevates the principle of non-discrimination against workers with respect to employment or occupation on such grounds as race, colour, gender identity, religion, as well as “national extraction or social origin, or other status”.

Yet, the Guidance also acknowledges that both independent and waged employment often remains informal in the agricultural sector. As such, it highlights that many workers are excluded from the scope of labour laws.²²⁸ Marginalised groups, such as women and migrant workers, as well as workers employed on a temporary basis often face abusive or undignified working conditions, it is also underscored.²²⁹

Against this background, the Guidance emphasises the importance of preventing and addressing abusive practices against temporary and migrant workers, providing some further indications of best practices. Specific examples include situations where there is a

²²⁸ Organization for Economic Cooperation and Development (OECD), & Food and Agriculture Organization of the United Nations (FAO). (2016). OECD-FAO Guidance for Responsible Agricultural Supply Chains, OECD Publishing, Paris, <https://doi.org/10.1787/9789264251052-en> p. 55.

²²⁹ Ibid. p.56

sudden increase in demand for seasonal products.²³⁰ The food retailer in such cases should cease its contribution to this adverse situation by, for instance, easing the pressure on its supplier or increasing purchasing prices to take into account the cash flow constraints of its suppliers.

6.1.3 Implementation of OECD-FAO Standards

Signalling the shortcomings that often affect international voluntary standards, a 2022 report²³¹ on the implementation of the OECD Recommendations²³² and on the OECD-FAO Guidance for responsible agricultural supply chains revealed that, over the past five years, only around 19% of adhering countries (8 out of 42) have integrated or referenced the Guidance in their domestic laws, regulations, procedures, or government-issued guidance.

Moreover, it appears that several adhering EU Member States expect the European Union to take the lead in the area of due diligence, failing to take the initiative. That said, the 2022 report highlights two planned initiatives outlined in the F2F Strategy that have the potential to expedite the implementation of the OECD-FAO Guidance: first, the enhancement of the corporate governance framework, including the integration of sustainability into the strategies of food industry companies, and, second, the establishment of an EU code and monitoring framework to ensure responsible business practices in the food supply chain (see Section 6.2.1). In addition, the report notes that, while the EU's Common Agricultural Policy (CAP) does not explicitly mention the Guidance, its evolution since 1962 can potentially facilitate its adoption.²³³

²³⁰ Ibid. p. 37

²³¹ Organisation for Economic Co-operation and Development (OECD) Council. (2022). 99 For Official Use English - Or. English 4 May 2022 COUNCIL. Council REPORT ON THE IMPLEMENTATION OF THE OECD RECOMMENDATION ON THE OECD-FAO GUIDANCE FOR RESPONSIBLE AGRICULTURAL SUPPLY CHAINS (Note by the Secretary-General). Available: [https://one.oecd.org/document/C\(2022\)99/en/pdf](https://one.oecd.org/document/C(2022)99/en/pdf)

²³² Organisation for Economic Co-operation and Development (OECD) Council. (2016). Recommendation of the Council on the OECD-FAO Guidance for Responsible Agricultural Supply Chains. Available: <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0428>

²³³ Paragraph 84

6.1.4 [OECD Guidelines](#) for Multinational Enterprises (2023) & Due Diligence Guidance for Responsible Business Conduct

The OECD Guidelines for Multinational Enterprises on Responsible Business Conduct are recommendations addressed to multinational enterprises. OECD member countries, as well as 13 non-OECD members, are all adhering countries to the multilateral Declaration underlying the Guidelines. The Guidelines cover all key areas of business responsibility, including human rights, labour rights, consumer interests. Standards include freedom of association, collective bargaining, but also the prohibition of forced and child labour, and the elimination of workplace discrimination. Accordingly, the Guidelines encourage responsible businesses to promote progress while minimising the adverse impacts of their operations, products and services.

While being a soft law instrument, the Guidelines are of relevance for the promotion of corresponding EU frameworks. Illustrating, the Guidelines are referred to in the recitals to the European Commission's proposed Corporate Sustainability Due Diligence Directive (see below, Section 6.2.3). More broadly also relevant – including for the preceding description of standards set together with FAO – is that Italy, Netherlands, Poland and Spain – the four Member States included in the DignityFIRM project – are OECD members, and therefore bound to the Guidelines, while Morocco and Ukraine have also adhered to the corresponding Declaration.

The 2023 Guidelines include targeted updates to the recommendations for responsible business conduct, two of which are of special interest: those regarding supply chain due diligence and those concerning the establishing and procedures of the National Contact Points (NCPs).

Drawing on the UNGPs (see Section 6.1.1), the Guidelines recommend that enterprises implement a risk-based due diligence approach in their operations.²³⁴ This entails a process of assessing and monitoring adverse human rights impacts which an enterprise may be causing, contributing to, or directly linked with via a business relationship. The term “business relationship” extends beyond contractual or immediate relationships to

²³⁴ General policies No 11

downstream applications of due diligence.²³⁵ Due diligence should cover human rights linked to their business operations, products, or services through these business relationships, even if they are not directly causing those impacts.²³⁶

As far as due diligence obligations are concerned, the Guidelines also contain a strengthened recommendation to “meaningfully” engage with stakeholders who may be significantly impacted by business activities. Connected to this, as part of the due diligence process, enterprises should consider “distinct and intersecting risks, including those related to individual characteristics or to vulnerable or marginalized groups”.²³⁷ Due diligence should also specifically be carried out according to OECD due Diligence Guidance for Responsible Business Conduct.²³⁸ The latter mentions “informal work” as an example of an activity or production process that is higher and deserves being prioritised in terms of assessment.²³⁹

Furthermore, the Guidance acknowledges that certain industries carry a higher risk of adverse impacts and recognizes the vulnerability of migrant workers specifically, making an implicit reference to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.²⁴⁰ It also refers to the OECD-FAO Guidance for Responsible Agricultural Supply Chains as an additional source of practical guidance.

Other than targeted improvements to due diligence, governments adhering to the Guidelines have been required to establish NCPs to facilitate the Guidelines’ implementation. NCPs can receive complaints from affected individuals or communities regarding compliance with the Guidelines. As foreseen in the OECD Guidelines, NCPs should provide an additional avenue for victims, trade unions, and NGOs to seek corporate accountability, complementing existing grievance mechanisms. The Guidelines

²³⁵ Chapter II: General Policies, para 17

²³⁶ Paragraph 3

²³⁷ Paragraphs 45 and 50

²³⁸ Organization for Economic Cooperation and Development (OECD). (2018). OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE BUSINESS CONDUCT. Available: <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>

²³⁹ Paragraph 65

²⁴⁰ Paragraph 45

also set as objective the establishment of an alternative dispute resolution mechanism that will improve how NCPs address complaints ensure stronger redress opportunities.²⁴¹

Reflecting the need for greater accountability and transparency, the UNGPs also identify NCPs as a concrete example of an established grievance mechanism that could provide an effective remedy.²⁴² According to a database maintained by OECD Watch, however, only 22 complaints were filed during 2022 and 2023 to date. Of these, few related to social rights or agriculture and food specifically, and none to migrant worker rights.

6.2 EU Initiatives on Due Diligence

6.2.1 [EU Code of Conduct](#) on Responsible Food Businesses and Marketing Practices

The EU Code of Conduct on Responsible Food Businesses and Marketing Practices, which entered into force on 5 July 2021, is one of the first deliverables of the F2F Strategy. It mainly addresses associations, food business operators, companies. It sets out actions that actors “between the farm and the fork” can voluntarily undertake to tangibly improve and communicate their sustainability performance, either within their own business or in collaboration with other partners and other food system stakeholders, including farmers and consumers. Commitments concern all activities relating to the production, trade, processing, promotion, distribution and serving of food.

The Code of Conduct is broken down into 7 aspirational objectives that F2F actors can commit to as well as a monitoring and evaluation framework for their attainment. Especially relevant here are Objective 5 and 7. Objective 5 underlines the need for providing a safe and inclusive workplace for all. It also refers to the need to strengthen diversity, equity and inclusion in the workplace and act to improve working conditions by investing in health and safety to ensure workplaces are safer for all. The objective is inspired by the European Pillar of Social Rights (see Section 4).

Objective 7 stresses the general need to improve social performance in (global) food supply chains. This includes the protection of vulnerable groups, the promotion of decent

²⁴¹ Organization for Economic Cooperation and Development (OECD). (2023). See the 2023 Decision of the Council on the Guidelines for Multinational Enterprises on Responsible Business Conduct, OECD/LEGAL/0307 [Decision of the OECD Council](#), revised version

²⁴² GP 25, commentary

working conditions, occupational health and safety with suppliers and relative sustainability certification/audit schemes. This objective specifically recognizes the importance of the OECD-FAO Guidance for Responsible Agricultural Supply Chains.²⁴³ The social dimension of sustainability is mentioned multiple times, albeit in a rather vague manner.

In 2023, two years after it entered into force, Ipsos published a Study on commitments pledged under the EU Code of Conduct on responsible food business and marketing practices.²⁴⁴ Its primary objective was to analyse and evaluate the commitments made under each objective of the EU Code of Conduct by national, EU-level and international food industry associations and companies in a variety of sectors, focussing on the food value chain. The study primarily evaluated large companies that fall within the downstream and mostly the middle segment of the food value chain, a category that aligns with most Code of Conduct signatories.²⁴⁵ Tellingly, the Ipsos study reveals that few (only two) companies pledged to fight forced labour and ‘deploy Human Rights Due Diligence (HRDD)’ across the entirety of their operations and the whole supply chain by 2025.

Companies also took up well-being as a commitment. This includes a pledge on “mental and physical health initiatives” for the workers’ benefit. This allows some consideration about relevant implications for F2F Sectors, given the potential impact on the well-being of irregular migrant workers. In its conclusion, however, Ipsos is critical of the lack of pledges made to protect workers who are especially vulnerable, taking posted workers and platform economy workers as an example. As to the latter, the Study highlights that “[w]ork in the platform economy is linked to a series of challenges – from the lack of transparency of contractual arrangements, to health and safety challenges, to social security coverage. The status of platform workers is not explicitly addressed in any of the commitments.”²⁴⁶

²⁴³ Section 3.1, paragraph 3

²⁴⁴ Ipsos. (2022). Study on commitments pledged under the EU Code of Conduct on responsible food business and marketing practices Report 2022. Available at: https://food.ec.europa.eu/system/files/2023-03/f2f_sfpd_coc_report_mapping_2022.pdf

²⁴⁵ Only few SMEs signed up to the Code directly but might nonetheless be represented indirectly via sector associations.

²⁴⁶ Ibid., p. 43.

As far as Objective 7 is concerned, over half (54%) of Code signatories made a total of 82 commitments regarding sustainable sourcing in food supply chains, of which 13 focused on improving social performance in global supply chains. Commitments accordingly address human rights as well as fair labour standards.²⁴⁷ More specifically, the 13 commitments show that social performance is understood to include narrowly defined human rights standards (i.e. eliminating child labour), but also fair labour standards, such as ensuring that everyone who directly provides goods and services to the company earns a living wage, or, more generally, fair labour across the company's entire supply chain. However, no explicit reference is made to migrant workers with an irregular status.

Overall, the Ipsos study indicates that commitments go beyond the minimum standards set by EU legislation and endorse elements of the EPSR.²⁴⁸ For example, they strengthen obligations in relation to gender balance and active support for employment otherwise covered by the Directive on Transparent and Predictable Working Conditions.²⁴⁹ However, limits in commitment show that even the biggest companies may struggle with implementation of stricter standards.

6.2.2 Corporate Sustainability Reporting Directive ([Directive 2022/2464/EU](#))

The Corporate Sustainability Reporting Directive replaced the Non-Financial Reporting Directive²⁵⁰ which established rules regarding the disclosure of non-financial information by specific large companies based in the EU. The objective of the 2022 Directive is to enhance the quality of corporate non-financial information disclosure, with the aim of accelerating the transition to a sustainable economy by 2050 as well as combating greenwashing.²⁵¹

Companies falling under the scope of the Directive are required to report on the sustainability impacts of their own operations as well as their whole value chain, including

²⁴⁷ Ibid., pp. 48-51

²⁴⁸ Ibid., p. 43

²⁴⁹ See Section 4.6.

²⁵⁰ Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups Text with EEA relevance OJ L 330, 15.11.2014, p. 1-9

²⁵¹ Member States shall bring into force the Directive in the laws, regulations and administrative by 6 July 2024, while the obligation to report laid down in article 4 shall apply from 1 January 2024 for financial years starting on or after 1 January 2024.

products, services, business relationships, and supply chain. The reporting must adhere to the principle of double materiality, which means that companies must report on both the impact of sustainability matters on their operations and the impact of their operations on people and the planet. More specifically, companies are required to report based on the European Sustainability Reporting Standards (ESRS).

The European Financial Reporting Advisory Group (EFRAG) prepared draft standards which cover cross-cutting as well as thematic reporting. As to the former, under the Directive, ESRS must include the disclosure of information regarding social aspects such as (i) equal treatment and opportunities at work, including equal pay (ii) working conditions, including secure employment, working time, adequate wages, social dialogue, freedom of association, existence of works councils, collective bargaining, workers covered by collective agreements, information and consultation rights of workers, work-life balance, and health and safety, and (iii) respect for human rights, democratic principles, and international standards.²⁵²

As far as the latter is concerned, non-EU workers are specifically mentioned in the draft ESRS. Accordingly, a company must disclose the measures taken to consult its own workers who may be vulnerable or marginalized, including migrant workers.²⁵³ Regarding the conduct along the supply chain, it should also specify whether suppliers have set in place measures to address the safety of workers, including specific measures for those engaged in precarious work, but also include provisions on human trafficking and forced labour. Under the heading of ‘Workers in the value chain’, companies should provide a description of the types of vulnerable workers impacted by their operations or through their upstream and downstream value chain. These also include migrant workers.²⁵⁴

The Directive therefore reflects the need for mandatory reporting standards, including those specifically dedicated to migrant workers, which are particularly crucial for sectors that pose significant sustainability risks or have notable impact on human rights.²⁵⁵ These sectors, the Directive explicitly mentions, encompass agriculture.²⁵⁶ Despite this explicit

²⁵² Art 29b(2)(b)

²⁵³ Under ESRS S1, p. 10, paragraph 29

²⁵⁴ Paragraph 11 (a)(v))

²⁵⁵ Paragraph 53.

²⁵⁶ Those listed in Sections A to H and Section L of Annex I to [Regulation \(EC\) No 1893/2006](#)

recognition, however, the Directive only covers large undertakings, while SMEs in the agri-food sector are left out of scope.²⁵⁷

6.2.3 Proposal for a Directive on Corporate Sustainability Due Diligence ([COM/2022/71 final](#))

Various studies, including one by the European Commission, exposed the shortcomings of voluntary due diligence initiatives, underscoring the necessity for a mandatory framework.²⁵⁸ This proposed Directive imposes horizontal Human rights and environmental due diligence (HREDD) obligations, in line with the European Green Deal and UN Sustainable Development Goals. It also builds upon existing international standards such as the UNGPs and the OECD Guidelines for Multinational Enterprises and related guidance (see above, Section 6.1).

Adverse impacts to be subject to due diligence process include human rights issues such as forced labour, inadequate workplace health and safety, exploitation of workers. These impacts are further defined with reference to a list of international conventions contained in an Annex.

The explanatory memorandum acknowledges that the emerging legal frameworks in Member States aim to assist companies in conducting due diligence in their value chains and promoting responsible business practices that uphold human rights, alongside environmental protection. However, these frameworks have not prevented a fragmented approach. Accordingly, they pose a risk of jeopardizing legal certainty and fair competition among companies in the single market. Moreover, the explanatory memorandum identifies specific policy frameworks that the Directive should complement, including the Corporate Sustainability Reporting Directive, the Employers Sanctions Directive, the Directive 2011/36/EU on preventing and combating trafficking in

²⁵⁷ Article 19(a).

²⁵⁸ Study on due diligence requirements through the supply chain FINAL REPORT. Available at: <https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-e-en>

human beings and protecting its victims,²⁵⁹ as well as, more broadly, the EU health and safety, and fundamental rights legislation and the European Pillar of Social Rights.

The Directive lays down due diligence obligations with respect to actual or potential adverse human rights (and environmental impacts) in the companies' own operations, the operations of subsidiaries, and "value chain" operations that are carried out by 'entities within whom the company has an "established relationship".²⁶⁰ The term 'value chain' encompasses established business relationships both upstream and downstream.²⁶¹ This essentially covers the whole spectrum of the agri-food sector and the sectors examined in the DignityFIRM project. Accordingly, the Directive aims to close regulatory gaps and blind spots concerning abuses happening within the EU as well. Importantly in this regard, the explanatory memorandum explicitly states that the Directive not only addresses violations of international labour standards that occur outside the Union, but also reinforces worker protection within the EU.

There are numerous references throughout the text of the Directive about the social dimension of sustainability, connecting it with workers' rights. However, the proposal does not explicitly address the vulnerability of irregular migrant workers. In addition, the discretionary nature of stakeholder consultations – another relevant provision of the Directive – poses a significant obstacle in the case of irregular migrant workers which could lead to a lack of understanding of their actual situation, other than revealing a disregard for the concerns of current or potential victims.

Aiming to bind more than just corporate actors, the Directive covers very large EU companies,²⁶² large non-EU companies that operate in the single market selling goods or providing services,²⁶³ but also mid-cap EU companies that operate in high-risk sectors. These include the agricultural sector.²⁶⁴ SMEs and micro companies, which account for the vast majority of all companies in the EU, are however excluded from the Directive's

²⁵⁹ 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 L 101, 15.4.2011, p. 1–11

²⁶⁰ Recital 20, Art 1 and Art 3(f and e)

²⁶¹ Article 3(1)(g)

²⁶² Article 2(1)(a)

²⁶³ Article 2(2)

²⁶⁴ Article 2(1)(b)(ii)

scope²⁶⁵, in contrast with the UNGP and the OECD Guidelines that took a proportional approach (see above, Section 6.1).²⁶⁶

It could be argued, from a supply chain perspective, that the Directive does cover SMEs that operate within relevant chains, either as contractors or subcontractors.²⁶⁷ In this regard, a study by PwC-Orse-Bpifrance on the impact of the French Duty of Vigilance Law revealed that approximately 80% of French SMEs, which are not directly affected by the proposal, would be compelled by their larger purchasing companies to undertake certain actions related to HREDD.²⁶⁸ When linked to larger companies falling under the Directive's scope, smaller companies, whose presence is particularly dominant in the agri-food sector, will likely be affected, although it remains to be seen to what extent and under what conditions. Also relevant is that, for qualifying under the above-mentioned value chain definition, having an 'established' relationship is a requirement. This could further limit the scope of due diligence for businesses in F2F sectors.

The proportionality approach is instead explicitly adopted for mid-cap companies operating in high-risk sectors. However, these only have obligations relating to "severe adverse impacts".²⁶⁹ For the adverse impact to be classified as severe, it must be especially significant by its nature or affects a large number of persons or a large area of the environment, or which is irreversible, or is particularly difficult to remedy as a result of the measures necessary to restore the situation prevailing prior to the impact. Such a limited responsibility is also relevant for addressing social vulnerabilities, including the situation of irregular migrant workers in the agricultural sector.

²⁶⁵ Art 3(i).

²⁶⁶ See also European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL))

²⁶⁷ Recital 47

²⁶⁸ Bpifrance, ORSE, PwC. (2019). Résultats de l'enquête "RSE : La parole aux fournisseurs !". Available at: https://www.novethic.fr/fileadmin/user_upload/tx_ausynovethicarticles/BH/AD_Enqu%C3%AAt_e_BPI_France_ORSE_2019_Web.pdf

²⁶⁹ Recital 21 and 3

6.2.4 Proposal for a Regulation on Prohibiting Products Made with Forced Labour on the Union Market ([COM/2022/453 final](#))

This Commission's proposal embodies the EU's commitment to promote and safeguard decent working conditions in the EU and beyond. The proposal aligns with international standards such as the UNGPs and the OECD Guidelines.²⁷⁰ It also builds on the protective framework established by the Proposal for a Directive on Corporate Sustainability Due Diligence.²⁷¹ It complements the latter Directive since it is not specifically targeted at companies of a particular size. As a company law instrument, it constitutes a product-focused framework that applies to all companies engaged in the manufacturing, sale, and import of goods associated with forced labour, both within the EU internal market and for imports into the EU.²⁷²

Forced labour is defined under the proposed Regulation as forced or compulsory labour following the definition in Article 2 of the Convention on Forced Labour, 1930 (No. 29) of the International Labour Organization, including forced child labour.²⁷³ In a nutshell, under the proposed Directive, Economic operators shall not place or make available on the Union market products that are made with forced labour, nor shall they export such products. The competent authorities in the Member States should follow a risk-based approach in assessing the likelihood that economic operators violated this prohibition, based on all relevant information available to them.

The Proposal's goal to tackle forced labour is especially relevant for the F2F and migrant workers. When launching the proposal, the Commission accordingly highlighted that labour-intensive sectors, such as the agricultural one, pose a greater risk for workers.²⁷⁴

The Proposal also acknowledges that workers in an informal situation and migrant workers are particularly disadvantaged when it comes to occupational health and safety as well as fundamental and labour rights. In elaborating on the consistency with existing

²⁷⁰ Explanatory memorandum, p. 3.

²⁷¹ *Ibid.*, p. 1.

²⁷² *Ibid.*, p.2.

²⁷³ Article 2.

²⁷⁴ European Commission. (2022). Commission sets out strategy to promote decent work worldwide and prepares instrument for ban on forced labour products. Available at: [Commission's communication on decent work worldwide](#)

policy provisions, the explanatory memorandum accompanying the proposal specifically mentions the Anti-trafficking Directive²⁷⁵ and the Employers Sanctions Directive.²⁷⁶

While the Proposal is therefore relevant for monitored F2F sectors, and it falls in line with other business responsibility instruments, trying to complement them, seen from a different perspective, the Proposal arguably does not adequately address the underlying causes of forced labour, nor does it facilitate access to justice and remedies for the victims or improving the position of trade unions and workers' representatives.²⁷⁷ Significantly, from this vantage point, the proposed regulation has been criticised by civil society organisations for not providing remedies for the victims of forced labour, including irregular migrant workers.²⁷⁸

6.2.5 Responsible consumer choices: Food Information to Consumers Regulation (Regulation 1169/2011/EU)

In order to better inform EU consumers, the Food Information to Consumers Regulation (in short FIC Regulation) focuses primarily on providing food information to consumers and ensuring they have the necessary information to make informed choices. While the Regulation emphasises social and ethical considerations²⁷⁹, it does not explicitly mention the inclusion of information about decent working conditions.

As part of its F2F Strategy, the European Commission announced to revise the FIC Regulation, other than its commitment to put forth a proposal for a sustainability labelling framework to empower consumers to make more sustainable food choices (see the Section 6.2.6 below). In the context of revising the FIC Regulation, an inception impact

²⁷⁵ Recital 7

²⁷⁶ Explanatory memorandum, p. 2.

²⁷⁷ Danish Institute for Human Rights. (2022). Consultation response for the initiative “Effectively Banning Products Produced, Extracted or Harvested with Forced Labour”. Available at: <https://www.humanrights.dk/publications/consultation-response-initiative-effectively-banning-products-produced-extracted>

²⁷⁸ Amnesty International, and others. (2022). Society Statement on the Proposed Regulation on Prohibiting Products Made With Forced Labour on the Union Market Brussels. Available at: <https://www.antislavery.org/wp-content/uploads/2022/10/Joint-Statement-on-EU-FLI-10.22-v3-1.pdf>

²⁷⁹ Article 3(1)

assessment on food labelling was published in 2020.²⁸⁰ The assessment does not mention migrant workers, social rights or decent working conditions, however.

6.2.6 Proposal for a [Sustainable Labelling Framework](#)

The Sustainability Labelling Framework is part of the Sustainable Food System Framework initiative. This initiative could lead to a proposal for a Regulation of the European Parliament and the Council. The inception impact assessment²⁸¹ stipulates that the overall objective of the initiative is the promotion of a more sustainable EU food market, which “implies building a socially responsible food value chain.”²⁸² In order to meet this objective, certain policy options are set forth in the Framework.²⁸³ These objectives include promoting fair and equitable working conditions and fostering sustainable development.²⁸⁴ They should be considered along with general social minimum standards, drawing upon existing efforts within the ILO and the OECD.

These aspects align with the sustainable corporate governance initiative addressing human rights and mandatory due diligence across economic value chains, as outlined in the F2F Strategy. The initiative has the potential to make direct or indirect contributions towards achieving several objectives outlined in the Charter of Fundamental Rights of the EU, although it remains to be seen how it will complement other recent initiatives and older frameworks.

²⁸⁰ European Commission. (n.d.). About this initiative. Available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12749-Food-labelling-revision-of-rules-on-information-provided-to-consumers_en

²⁸¹ This was published for public consultation from 28 September 2021 until 26 October 2021. Available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13174-Sustainable-EU-food-system-new-initiative_en

²⁸² Ibid., p. 4.

²⁸³ Ibid., p. 5

²⁸⁴ Ibid., p. 8

7. Conclusion

Aiming to be the first deliverable of the DignityFIRM project work package on the EU level regulatory infrastructure, this Working Paper maps the legal and policy frameworks shaping processes of irregularity that migrant workers face in Farm to Fork (F2F) labour markets. In doing so, it paves the way for the comprehensive analysis of the regulatory infrastructure surrounding irregular migrant workers in these sectors in the continuation of the Project. The Working Paper highlights the growing significance of these labour markets, driven by factors such as economic security and food supply concerns, while identifying blind spots and conflicting rationales between the frameworks, as well as the conditions and constraints that should be examined in the rest of the DignityFIRM project.

Five overarching considerations can be drawn from the mapping exercise: i) the added value of transcending the binary approach for better understanding dynamics of irregularity; ii) the need for a regulatory infrastructure approach which avoids policy siloes to identify regulatory, protective and implementation gaps; iii) the relevance of incentives to complement sanctions; iv) questions around capacity in connection to compliance, or lack thereof; v) the importance but also the lack of information as a structural obstacle in accessing and benefitting from rights.

To begin with, the Working Paper demonstrates the need for understanding irregularity in a non-binary way. In this sense, the starting point of the analysis are three iterations of irregularity – based on legal status, temporal factors, and territorial variations – which reveal blind spots between the frameworks mapped. By understanding irregularity as a multidimensional process, the traditional binary approach embedded in the Return and Employers Sanctions directives (see Section 1.5 and 2.1.1) is dropped, leading to a more accurate and comprehensive mapping which accounts for the dynamic and complex experience of irregularity in F2F labour markets. The Working Paper accordingly emphasises the need to consider irregularity in a nuanced and multifaceted manner, which could also pave the way for more profound change.

A variety of possible scenarios mapped in this Paper illustrate the many iterations of irregularity that fail to be reflected in a binary approach. These include asylum seekers who but also students who may have residence rights but face limits, respectively, to the

number of months they must wait before being able to access the labour market or the number of hours they can formally work for under their permit (see Section 2.2.2); or non-EU nationals who do not manage to find employment after losing their job (see Section 2.2.3); or those who have access to residence and a corresponding right to work in one European country, but find themselves in a situation of irregularity after moving abroad (see Section 2.2.4).

Adopting a non-binary approach, more broadly, reveals that status is, in itself, an insufficient notion to capture the complexity of the issues that will be examined in the DignityFIRM project. To illustrate this, suffice it here to take the example of EU mobile citizens (see Section 3). Fundamental rights of EU citizens allow them to move and reside in other EU Member States with limited strings attached. They establish equal treatment provisions and impose strong safeguards to prevent abuse, although they also aim to ensure the sustainability of social systems in host countries. While non-EU nationals are broadly speaking at greater risk of abuse, EU nationals are nevertheless also affected by dynamics of irregularity and risk resorting to informal, poorly paid and unsafe work, if they depend on it for their livelihoods. The conclusion that one can draw from this is that abuse can happen regardless of one's status, even in case of EU citizenship. In other words, easier access to residence or the labour market, or intra-EU mobility rights – does not guarantee in all cases against abuse or situations of undignified work and irregularity.

Embracing a non-binary approach is vital to better comprehend the dynamics of irregularity, but so is also taking a regulatory infrastructure approach, the second overarching conclusion that can be drawn from this Working Paper.

The DignityFIRM project sets as its explicit objective to examine the interplay between frameworks dedicated to migrants and mobile EU nationals with other domains which are relevant in the labour markets under scrutiny, identifying systemic weaknesses impacting dynamics of irregularity, but also possible ways forward. Thanks to this approach, the mapping throws light on a) regulatory; b) protection as well as c) implementation gaps.

Concerning the first, the F2F Strategy illustrates well legislative opportunities but also shortcomings emerged in this mapping. The Strategy stands as a comprehensive plan

aimed at addressing the challenges of producing and consuming food in a sustainable and fair manner. It emphasizes the need for greater sustainability. At the same time, it aims to set global standards for food safety and quality, which could impact non-EU countries reached by food supply chain such as Morocco and Ukraine. From this viewpoint, it would appear as the ideal guiding principle for the structural improvements needed in the F2F labour markets, in the EU and beyond it.

However, the Strategy lacks a comprehensive and explicit focus on the social dimension – save for the noteworthy initiative on conditionality in the Common Agricultural Policy (CAP), whose functioning and impact must nevertheless be verified in practice (see Section 5.2) – particularly the rights of migrant and undocumented workers. It is also not them who are at the heart of CAP measures – as also shown by the direct beneficiaries of the social conditionality mechanism – but farmers.

More broadly, regarding the Strategy, while recognising the essential role of cross-border and seasonal workers in ensuring food security, particularly during crises, there is a lack of detailed and targeted measures addressing the specific needs and vulnerabilities of migrant workers in the relevant F2F sectors, which could leave persons in an irregular situation exposed to abuse.

But the F2F is only one example. Looking at corporate social responsibility (CSR) and due diligence (see Section 6), these could potentially offer an effective way of overcoming regulatory gaps created by (cross-border) supply chain dynamics. However, only larger economic actors are generally the focus of voluntary and publicly-set standards (see Section 6.2.3), whereas a large number of irregular migrant workers may be employed by small and medium enterprises (SMEs), leading to potential blind spots and regulatory gaps.

The European Pillar of Social Rights (EPSR) is also instructive in this sense. The EPSR has the potential to improve working and living conditions for non-EU nationals, including undocumented workers. However, many of its most relevant commitments are yet to be achieved and should receive sustained attention as part of this project, including legislative proposals whose negotiation is foreseen to be finalised in the upcoming months, by the end of the current EU political cycle of 2019-2024 (e.g. see Section 4.6

on the proposal regarding working conditions of platform workers, who work on the distribution end of the food chain).

As to the second gap identified in this Paper, on the one hand, EU frameworks put in place general protections for non-EU national migrant workers, including those in irregular situations and the F2F sectors. While these may not explicitly mention irregular migrant workers, the development of EU case law has also paved the way for an extension of these protective framework over those in a situation of irregularity.

That said, in many cases, migrants – and even mobile citizens – are excluded by the protective frameworks altogether (see e.g. Section 3.2), leading to diminished safeguards for all, including those in a situation of irregularity. In other cases, the measures in the relevant policy frameworks fail to consider the specific situation of irregular migrant workers, exposing them to the risk of abuse, or even amplifying their vulnerabilities (e.g. on ‘firewalls’ see Section 2). Where these scenarios occur, it also has to do with the conflicting rationales that the frameworks which are part of the broader regulatory infrastructure pursue. Having 27 different national systems also multiplies the risk of protection gaps (although it also offers opportunities to identify best practices, which will be discussed in the next phases of the project).

As to the third gap, many of the frameworks are poorly implemented. Among recurrent problems are administrative obstacles to social rights and protections, but also limited awareness about their rights among non-EU nationals. In some cases, fraudulent agencies or unscrupulous employers exploit the vulnerabilities of irregular migrants to increase their profits. Reform proposals have been advanced recently to improve compliance, with their negotiation also expected to be concluded by the end of the current legislative period. This opens opportunities for stronger protections, but also the need for continued monitoring in the future.

However, the issues of compliance leads to two further overarching considerations connected to implementation: incentives and capacity. On the former, sanctions are important in order to improve compliance and ensure accountability. However, these do not suffice to ensure a high degree of compliance. The concept of incentives is crucial for understanding the reality of F2F labour sectors against the broader background of

the regulatory infrastructure examined in the DignityFIRM project and socio-economic context. Incentives, including that of the above-mentioned CAP social conditionality mechanism can potentially promote dignified working conditions, if adequately monitored and implemented in full consideration of the risks faced by undocumented persons.

But the capacity of employers to fulfil their responsibilities and adhere to their obligations should not be taken for granted either. Doing so could lead to weakening prospects for (irregular) migrant workers further. To illustrate this, the example of CSR and due diligence can be used. Private actors' responsibilities, including in relation to workers' rights, have gained greater prominence in recent times. While the larger economic actors will be the main target of obligations newly set at the EU level, SMEs – where a large number of irregular migrant workers may be employed, it can be safely assumed, also in F2F sectors – may nevertheless fall under their scope either directly through negotiations or indirectly, through supply chain dynamics and the responsibilities of larger companies (see Section 6.2.3).

This leads to questions around the capacity of smaller enterprises to adhere to their obligations, carrying out due diligence processes and examining potential risk of abuse across supply chains, for example, despite their smaller size and lower resources, or adapting their business models to various forms of requirements while remaining competitive in a business environment characterised by lower profitability, decreasing demand and socio-economic insecurity.²⁸⁵ Seen from this perspective, more rules and further obligations, in the domains examined and beyond may only make things worse, leading employers to look for cheap labour, also in the form of workers without regular status or unconditional access to the labour market.

But smaller companies and business entities involved in the F2F sectors under examination do not necessarily choose to resort to irregular work or work by irregular migrants. They may in fact struggle to navigate the administrative hurdles and the various existing impediments to hire migrant workers in a regular way. Or employers

²⁸⁵ See European Platform tackling undeclared work (2018). Tackling undeclared work in the agricultural sector, making the argument that undeclared work in agriculture is typically associated with complex regulations and intense cost pressures exerted on farmers by the food industry. Available at: <https://ec.europa.eu/social/BlobServlet?docId=20424&langId=en>

may even be discouraged by the rules and procedures to hire non-EU citizens, as they entail additional costs or create uncertainty. This latter example shows that, closely connected to questions of capacity are therefore also information asymmetries. Against the background of a complex regulatory system, in other words, some companies in the food supply chain, and SMEs in particular, may be unaware about the frameworks governing the right to work of non-EU nationals in the EU.

Connected to this, but going beyond the role of employers and also encompassing irregular migrant workers themselves is the final overarching element transparent from the mapping in this Working Paper: lack of information. Regulatory and protection gaps combined with limited awareness pose significant obstacles to the effective realisation of any right on paper. From this viewpoint, addressing both the gaps in the frameworks but also increasing awareness and improving access to information is crucial to ensure that these workers can access their rights and protections without fear of negative repercussions. However, further efforts would then have to be devoted to assessing, and then closing information gaps in the future.

Beyond these overarching and concluding considerations, this Working Paper demonstrates that further research is needed. It shows that, to fully understand the effects of the regulatory infrastructure, the project needs to not only examine its functioning at the national and local levels, but also fully grasp the experiences of all stakeholders and actors within the infrastructure, starting from migrant workers and employers. More broadly, the Working Paper, taking a regulatory infrastructure approach, draws attention to the need to address the drivers and root causes of precariousness, vulnerability and irregularity in the EU context.

This also leads to some final considerations regarding the way forward and future recommendations. The benefit of looking at the whole regulatory infrastructure should enable the project to uncover dynamics that could profoundly alter, and improve, the experience of irregularity. Taking a holistic approach to the problem definition could enable the DignityFIRM project to pursue a variety of possible solutions and recommendations.

The concepts of ‘dignity’ and ‘decent work’, both enshrined in EU law and international commitments, will be useful both as analytical and normative concepts in DignityFIRM. This Working Paper does not in itself contain, or aim at formulating any recommendation. Having said that, the insights provided by the regulatory infrastructure approach strongly suggest that no individual measure in any individual domain will suffice, in itself, to achieve dignified working conditions. Put differently, in identifying the way forward, a reflection is needed on which would be the most effective way of addressing vulnerability across the different dimensions, domains and sectors examined, while also ensuring systemic policy coherence.

Although DignityFIRM may not be able to offer targeted solutions for all the specific migrant groups mapped in this Paper, such as asylum seekers, or students and EU mobile citizens, the success of the proposals it will formulate to address dynamics of irregularity should also be measured on their potential to benefit all workers and, in this way, build stronger, more inclusive, societies. In this sense, the Working Paper lays the groundwork not only for a comprehensive investigation into the regulatory landscape surrounding irregular migrant workers, but also for proposing concrete recommendations to safeguard the dignity and improve the working conditions of all.

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Dignity for (irregular) migrants
employed in Farm to Fork Sectors:

A Regulatory Infrastructure Approach to EU Legal and Policy Frameworks

ABOUT DignityFIRM

Towards becoming sustainable and resilient societies we must address the structural contradictions between our societies' exclusion of migrant workers and their substantive role in producing our food.

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