

EUROPEAN POLICY BRIEF

The Role of Labour Inspections in Addressing Trafficking for Labour Exploitation

As bodies tasked to monitor labour conditions and compliance with labour standards and to enforce the relevant labour, social security and other laws, labour inspection services – in principle – have an important role in addressing trafficking for labour exploitation. However, addressing trafficking for labour exploitation, or labour exploitation more widely, is not necessarily a core part of their mandate. In addition, monitoring is constrained by their limited resources and the continuous expansion of labour inspectorates' mandates and tasks.

This study shows that labour inspectorates' approaches to trafficking for labour exploitation vary considerably across countries and organisations. At the same time, outcomes in terms of prosecutions and convictions remain limited. However, the actual impact of labour inspections is difficult to assess. To date, most inspection services lack systematic evaluation mechanisms and, where they do exist, they rarely look into the effectiveness or impact of inspection activities. While the stakeholders interviewed for this study agree that labour inspections are an important element to the regulation of employer demand for labour, most respondents are reluctant to frame labour inspections as a demand-side approach against trafficking and labour exploitation more widely.

October 2017



Introduction

Labour inspectorates and other inspecting authorities with a mandate to monitor labour and employment standards (e.g. the financial police) have emerged as possible actors that can contribute to national efforts to combat trafficking. Today these authorities are expected to play a key role in tackling trafficking for labour exploitation (see, e.g., GRETA 2016) and in fact, in many countries, they have become involved in anti-trafficking efforts to implement international obligations. This policy brief summarises key findings of research conducted within the DemandAT project that examined the role of selected authorities mandated to monitor labour and employment standards in addressing trafficking in five EU Member States (Austria, Czech Republic, Germany,

The Netherlands, and the United Kingdom, see the section ‘research parameters’ at the end of this brief for more details).

Labour inspection takes place within a context of deregulation and opposition to new regulations that would constitute a burden to businesses. As a corollary, the efforts of labour inspecting services are, to a certain degree, counteracted by an overall policy environment that has increasingly become obliged to deregulate employment in order to reduce the regulatory burden on businesses and to meet employers’ demand for cheap and flexible labour.

Migrants working in temporary, low-skilled and/or low-paid work, in particular, are tending to be affected by precarious situations (Howe & Owens 2016, p. 4; Samers, 2010). Yet labour market access for migrants from third countries has become increasingly restricted, particularly for these groups. Efforts to tackle irregular employment have been intensified, whereas internal European labour-market mobility is increasing – as is the international movement of highly qualified workers (UNDP, 2009).

Critics point out that, by restricting some workers’ geographical and labour-market mobility and freedom, states are, *de facto*, creating precarious conditions for them and rendering them vulnerable to labour exploitation (Strauss, 2016). At the same time there remain (regular and irregular) back doors to the labour market, particularly in certain sectors or occupations (Samers, 2010). These sectors, in particular, are extremely prone to exploitative practices yet the greatest segment of the precariatized workforce is employed in them (e.g. seasonal work in agriculture). This brief examines how the actual role and activities of labour inspection services reflect these fundamental tensions.

Evidence and Analysis

Labour inspectorates are involved in anti-trafficking frameworks

National anti-trafficking frameworks – although these are established in different forms and scope – generally foresee a role for labour inspection services in detecting cases of trafficking for labour exploitation. Apart from labour inspectorates,¹ other bodies with a monitoring and/or enforcement mandate in the field of employment (e.g. the financial police) are often tasked with this, although it is rarely part of their core mandate.

The involvement of labour inspectorates has meant an expansion from the simple criminal-justice approach of the national anti-trafficking framework towards to a labour approach (Shamir, 2012, p. 107) aimed at strengthening workers’ rights. Such an approach can be considered more appropriate than a straightforward criminal-law approach as it can address a greater variation within a continuum of situations which extends from breaches of the labour law, on the one hand, to trafficking for the purpose of labour exploitation and other severe crimes in the context of labour on the other (Skrivankova, 2010). Combined labour, migration and criminal-justice approaches are considered the most effective (Houwerzijl & Rijken, 2011, p. 2).

However, from the perspective of the labour inspectorates and in practice, detecting cases of trafficking can conflict with their principles of prevention and advice, which they act upon according to their original mandate. The result is that the anti-trafficking framework sits uncomfortably alongside other operational priorities, creating difficulties both in internal operations and in external co-operation with other bodies. The focus on extreme cases also risks diminishing appreciation of lesser incidents of exploitation, thereby normalising precarious and even exploitative labour conditions that do not meet the same threshold.

¹ In the following, we subsume in the term ‘labour inspectorate’ all inspecting authorities with a mandate to monitor regulations in workplaces.

The strategies and approaches of labour inspectorates vary considerably

The strategies and approaches of the labour inspecting authorities vary considerably, not only because of the different institutional set-ups of the national anti-trafficking framework and labour and migration regulation regimes, but also due to the different original principles and mandates they act upon. The operations of the labour inspectorate do not focus exclusively on trafficking for labour exploitation, but are embedded into more-comprehensive approaches tackling various labour- and employment-law breaches and criminal offences. Only in the case of the UK Gangmasters Licensing Authority (GLA), transformed into the Gangmasters and Labour Abuse Authority (GLAA) in May 2017 has addressing labour exploitation been a core element of their mandate ever since the creation of the GLA in 2005 by the Gangmasters (Licensing) Act 2004. Even in the case of labour inspectorates that are explicitly mandated to investigate trafficking for labour exploitation, however, these investigations represent only a small share of the total investigations.

The fact that the detection of trafficking for labour exploitation is only a side-effect of routine activities that have other priorities in a limited field of action means that the focus is already narrowed and runs the risk of (trafficking for) labour exploitation not being addressed. At the same time, a degree of randomness regarding the priorities can be observed in all countries. This said, a strong focus on a specific sector is often due to factual reasons – e.g. a high number of posted workers in a specific sector. Yet the prioritisation of some specific sectors also bears the risk that labour exploitation elsewhere is overlooked. In regard to some sectors – domestic work being a prime example – labour inspection services additionally lack the powers and means to effectively monitor labour conditions (see Ricard-Guay 2016a, b). Moreover, the prime concern is rarely on trafficking for labour exploitation but is linked to other operations such as the detection of and law enforcement against irregular employment. As the relevant authorities argue, this approach makes use of synergies between addressing irregular employment and exploitation, although this view is challenged by other stakeholders. From the literature (e.g. Flex 2015) and also the interviews conducted for this study we know that, in cases where the identification of victims of trafficking is embedded in a criminal department or criminal approaches that involve the detection of undeclared work and/or immigration, this can inhibit the identification of victims. Potentially trafficked persons are scared to come forward because of their irregular status and potential immigration repercussions or simply because of losing their jobs. In addition, the focus of labour inspectors often is not primarily on working conditions but on the immigration status of the workers; Therefore, they are more likely to fail in identifying victims of trafficking (Flex 2015, 4).

No authority has exclusive responsibility for tackling trafficking for labour exploitation

Since no authority is specialised in investigating and monitoring trafficking for labour exploitation, a responsibility gap can be observed in some areas. As a result, law enforcement appears to be highly dependent on the institutional set-up of national anti-trafficking actors and of labour inspection systems, as well as on the commitment of certain actors, organisations, or indeed individuals within organisations.

Limited resources entail targeted approaches, but the evaluation of outcomes is mostly lacking

The reality of limited resources for inspection and enforcement means that businesses have little likelihood of being inspected. Limited resources have led labour inspection bodies to consider how better to target resources to optimise deterrent effects and maximise compliance. However, despite much discussion of and investment into risk assessments and intelligence frameworks intended to achieve greater compliance through lighter-touch regulation, there is little evaluation of the outcome. Instead any evaluation of new regulatory approaches tends to be means- rather than ends-oriented and their impact on the ground cannot therefore be assessed.

Few prosecutions and convictions but much exploitation, not necessarily induced by trafficking

In general, the number of cases of trafficking for labour exploitation brought before the courts is low and so are the convictions, despite a growing body of regulatory instruments and an increasing number of institutions involved in addressing trafficking for labour exploitation. This is often attributed to the lack of enforcement of trafficking for labour exploitation (EC, 2015, p. 45f; Kyambi, forthcoming). Such views are based on the assumption that there are many undetected cases of trafficking for labour exploitation; however, there is no evidence to confirm this. Others believe that there is a large amount of exploitation but that this exploitation was induced by what is criminalised as trafficking only in few cases. Certainly, the offence of trafficking for labour exploitation is considered difficult to apply, above all – from the law enforcement actors' perspective – because it is difficult to prove. Legal provisions against trafficking for labour exploitation have therefore rarely been applied in the past. Thus some of our interview partners suggest improving the law to make it more applicable by introducing a separate offence of labour exploitation. Moreover, criminal cases are extremely lengthy and expensive. For these reasons, approaches that go beyond 'command and control' were suggested by various experts consulted for this study.

Approaches that go beyond command and control are a controversial subject among scholars

So-called 'command-and-control' approaches are based on the use of compulsion and deterrence. Compliance with certain stipulations is controlled through the threat of sanctions (Boswell & Kyambi 2016). Consequently, command-and-control strategies rely to a great extent on the effectiveness of the legal instruments and law enforcement. The effectiveness depends on various factors such as the scope of the regulation regime and the power of the labour inspectorates to administer sanctions and remedies, the likelihood of inspection and detection, and the quality of sanctions (swiftness, level of penalties, appropriateness).

The inherent limits in the capacity of law-enforcement actors to identify and sanction offences have stimulated debates on alternatives or complements to command-and-control strategies and produce compliance by using more cooperative measures. It is disputed whether stricter and harsher enforcement of labour standards would be the better option for regulating businesses or whether, on the contrary, compliance strategies that involve a cooperative and less-restrictive style of regulation, would achieve conformity with the law and the attainment of labour protection goals. Compliance approaches suggest a more selective use of the threat of prosecution as a 'last resort' in general, and prioritise compliance-centred, accommodative, self-regulatory strategies.

Some scholars consider soft-law and self-regulating approaches as appropriate remedies to compensate for insufficient law enforcement. By contrast, proponents of the deterrence approach criticise such approaches, arguing that the power imbalance between business/employers and employees means cooperative approaches can only result in uneven solutions. They propose stricter enforcement of the law, along with regulatory strategies that introduce formal sanctions at an earlier stage of an offence.

Deterrence approaches predominate: labour inspecting authorities believe in the deterrent effect of their approaches but without evidence of their effectiveness

In principle, all the inspecting authorities investigated rely on traditional command-and-control approaches in emphasising the importance of the deterrent effect of inspections and sanctioning, particularly when it comes to more-severe labour-law breaches. At the same time, law enforcement is patchy in all countries and therefore the deterrent effect of the anti-trafficking or other law and of law enforcement is diminished. Although there are several regulations, measures and actors in place that deal with labour and employment issues and that can potentially address the demand-side in the context of trafficking for labour exploitation, their effectiveness is questionable, particularly as long as the funding of the law-enforcement bodies does not correspond to the multiplication of tasks accompanied by these regulations.

Soft law can accompany law enforcement but also needs to be enforced

In addition, a steadily growing corpus of soft-law and private regulation can be observed in the domain of labour relations in many countries. Self-regulating and auditing systems like voluntary codes, certifications and corporate social responsibility (CSR) are becoming more and more widespread, particularly in countries where firms and investors are promised flexibility of labour regulations and the reduction of regulatory burdens in order to attract them (Crouch, 2009, p. 397). Such regulations and instruments aim – often alongside other aspects (e.g. environmental and human rights) – both to guarantee that a product or service is based on fair working conditions and to prevent or eradicate circumstances which put a worker at risk of exploitation. However, these instruments need to be enforced through legal regulation as well. In fact, this constitutes the main weakness of many of them (see for a similar line of argument the DemandAT policy brief on supply chain initiatives, McGrath and Mieres 2017). The employment of these instruments also entails the involvement of a number of additional state and non-state actors, including the regulated firms themselves.

Such instruments are generally promoted by private actors – NGOs and business associations and are more likely to be supported by businesses and firms which are willing to comply with the law in the first place. For firms, there are advantages in adhering to such regulations in terms of cost or reputation which firms supporting such instruments factor in. Many business supporters of private regulatory tools are also opponents of compulsory regulation (Tombs, 2015). Other businesses might not be interested in such voluntary commitment or prefer to create frameworks that suit their needs and establish only limited responsibilities and lightly monitored guarantees. As a result, voluntary regulations are often limited to sectors or products where they are visible and can be exploited commercially and their effect thus remains rather selective.

Combined approaches are rarely applied

The research shows that labour inspecting authorities are rarely directly involved in private and self-regulating initiatives and even take a sceptical stance towards such approaches. In some countries, combined approaches are applied. For instance, in Austria and the Netherlands, legal provisions are combined with white or black lists that make public whether or not employers or firms comply with certain standards. A further example of a very simple but effective measure is to invite employers of migrant workers to a briefing and to inform them about the requirements of regular employment. Such measures can potentially induce peer pressure on employers to comply with regulations and standards. This might particularly be the case in rural areas (e.g. seasonal work in agriculture) or sectors where employers know each other well. Licencing approaches have become increasingly widespread but only in the UK are they applied by an official authority. In the Netherlands, self-regulation initiatives in certain sectors are supported by the government, while CSR instruments are seen as a promising strategy in the Czech Republic.

Several measures are in place to combat the continuum of labour-law breaches ranging from legal to soft-law regulations. However, this requires the involvement of a growing number of state and non-state monitoring and enforcement actors that are tasked with the supervision of more and more businesses and regulations. Private enforcement initiatives are rarely linked to the activities of labour inspectorates. The hope that they can at least partly compensate for the lack of supervision by labour inspectorates seems misplaced, given the selectivity of such initiatives, their widely differing scope and their variable enforceability (see also McGrath and Mieres 2017b). However, there are good reasons to believe that private enforcement initiatives can contribute to enhancing overall compliance when complementing a well-designed and functioning public framework against labour exploitation. However, at this stage it is extremely difficult to assess the impact of all these measures since evaluation data are either not available or inaccessible.

Policy Implications and Recommendations

Labour inspecting authorities perceive themselves as addressing trafficking and labour exploitation more widely through their routine activities. While authorities consulted for this study consider labour inspections as an important element of the overall regulation of employer demand, most respondents are reluctant to frame labour inspections as a demand-side approach, reflecting reservations about the usefulness of demand as a guiding concept in addressing exploitative labour relations also observed by other DemandAT studies in the field of labour relations (see in particular McGrath & Mieres 2017a, p.3ff). However, as this brief argues, exploitative practices might not be detected within routine activities; in addition, the deterrent effect of these activities might be diminished, because of the patchy monitoring system and lack of formal responsibility to detect trafficking and labour exploitation more widely. These deficiencies could be addressed through the following means:

- **Specialised units** should additionally focus exclusively on trafficking for labour exploitation.
- Labour inspecting authorities should implement **targeted approaches** and focus on sectors and branches that are prone to exploitative practices without losing sight of more-hidden and new phenomena.
- Inspectorates should use **combined approaches** such as the monitoring of standards and the detection of breaches combined with additional instruments in order for the approach not to be restricted to a deterrent effect, e.g. white or black lists that make public the compliance or non-compliance of employers with standards, and their co-operation with licencing and certification organisations.

Labour markets, labour regulations and the labour-inspection systems are highly fragmented and complex in many countries. Joint actions by the different authorities are sometimes difficult to carry out because of the different and conflicting organisational and procedural logics.

- Authorities should therefore employ **integrated strategies and approaches** that involve various actors and stakeholders in the field of labour and establish corresponding instruments.

Cases of trafficking for the purpose of labour exploitation might be rare, but exploitative practices are widespread. Labour inspectorates should therefore:

- address the **whole continuum of exploitation** in order not to normalise less-severe incidents;
- address employers and signal **zero tolerance** of breaches of labour and criminal law in order to reduce a *laissez-faire* attitude towards exploitative practices in employers.

Private measures and self-regulation are quite selective in terms of sectors and businesses, and the enforcement of standards shows some weaknesses.

- To achieve **synergies** with private and self-regulation instruments like codes of conduct, labels and certificates, it would be advisable to better link the activities of labour inspectorates to these initiatives in order to enhance their standards and enforcement.
- Sectors or businesses that are not covered by such regulations should receive special attention by state monitoring bodies.

Literature review:

A literature review of relevant research articles and reports on trafficking for the purpose of labour exploitation in Europe and in the investigated countries was conducted, as was a review of the theoretical literature on regulatory approaches and specifically on the regulatory state in order to inform the analysis.

Mapping questionnaire:

A mapping questionnaire across the EU member-states (EU28) and Switzerland (response 20 countries) provided the first insights into the labour-inspecting landscape in Europe and the mandates and tasks of the labour-inspecting authorities.

In-depth case studies:

The case studies were intended to provide more-detailed information on and to improve the understanding of how labour-inspecting authorities perceive their efforts and their efficacy in addressing trafficking for the purpose of labour exploitation, and specifically, to what extent they the concept of demand is considered useful as a concept guiding their approaches. To this end, the regulatory frame, within which labour inspectors act, was analysed, including the question of whether and to what extent inspectorates are required to address the demand side (ideology), and the means that are provided to implement this task (practices).

For the purpose of this study, we defined labour inspectorates in a broader sense as an organisation or actor that supervises or enforces labour and other laws aimed at reducing exploitative and trafficking practices in employment. Specifically, we investigated authorities that are expected or tasked by national anti-trafficking actors (e.g. the national rapporteur) to contribute to national anti-trafficking efforts.

For heuristic purposes and in line with our focus on labour-inspection services, we defined 'demand' as the demand for labour as exercised by employers directly contracting workers or hiring labour through intermediaries. As a corollary, we considered as demand-side measures all those addressing employer demand, and specifically employers, in terms of preventing or sanctioning trafficking for labour exploitation.

Five in-depth case studies were conducted to investigate the role of labour-inspecting authorities, defined as an organisation or actor that supervises or enforces labour and other laws aimed at reducing exploitative and trafficking practices in employment.

- **Selection of cases:** the countries in our study were selected based on comparative considerations like political structure (federal structure/unitary state) and institutional set-up for addressing trafficking in human beings and monitoring/enforcing labour and the relevant criminal law as well as labour-market regulations. For the selection of cases, we used as a basis the results from case studies conducted in the Czech Republic, the Netherlands and the UK and data gathered by means of a mapping questionnaire within the DemandAT project. Eventually, the cases were selected purposefully according to the wealth of rich and detailed data and particularly insightful information they promised to deliver with regards to answering the research question.
- The following authorities and their fields of action, approaches, co-operation and institutional settings were investigated: the Labour Inspectorates in Austria (by ICMPD) and in the Czech Republic (by La Strada Czech Republic), the Inspectorate for Social Affairs and Employment (Inspectie Sociale Zaken en Werkgelegenheid or SZW) in the

Netherlands (by ICMPD), the Gangmaster Licensing Authority (GLA) in the UK (by the University of Edinburgh) and the Labour Inspectorate (Arbeitsschutz) and the Authority Monitoring Unreported Employment (Finanzkontrolle Schwarzarbeit, FKS) in Germany (by ICMPD).

- Interviews: between July 2015 and May 2016, around 50 expert interviews were conducted with representatives of the above-mentioned and other relevant law-enforcement actors as well as with representatives of ministries, trade unions and NGOs.

Theoretical framework:

An analytical framework was developed to categorise and analyse the different approaches of labour inspectorates in regulating demand. We differentiate between ‘command-and-control’ approaches which operate on the basis of sanctioning and deterrence, and approaches that might go beyond – or so-called smart or compliance approaches – e.g. the application of market forces (market-based approaches), peer pressure, ‘design’ and combined approaches and market-based instruments that are considered to have the potential to influence employers’ or companies’ behaviour.

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FUNDING SCHEME	FP7 Framework Programme for Research of the European Union – Collaborative project Activity 8.5 – The Citizen in the European Union
DURATION	1 January 2014 – 30 June 2017 (42 months).
BUDGET	EU contribution: 2,498,553 €.
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