

# **Normative Framework Guide**

**Responsibility of Businesses Concerning  
Human Rights, Labour Exploitation and  
Human Trafficking**



**Anni Lietonen  
Anniina Jokinen  
Anna-Greta Pekkarinen**

**Authors:**

Anni Lietonen, Anniina Jokinen and  
Anna-Greta Pekkarinen

**Legal consultants and writers of sections:**

Posting of Workers and Enforcement  
Directive; Employers' Sanctions  
Directive; The European Union General  
Data Protection Regulations;  
and Annex 1. Examples of contractual  
clauses to mitigate labour exploitation  
and trafficking for the purpose of labour  
exploitation

Beata Faracik and  
Claire Methven O'Brien

**Layout:**

Aili Pääkkönen  
Aleksandra Anikina

FLOW publications logo and layout  
style elements developed by Simone  
Gaglione <https://www.simonegi.it/>

Published as a PDF-format by  
the European Institute for Crime  
Prevention and Control, affiliated with  
the United Nations (HEUNI) Helsinki in  
2020



This publication was  
funded by the European  
Union's Internal Security  
Fund – Police.

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**HEUNI Publication Series No. 94**

ISBN 978-952-7249-18-5 (PDF)

ISSN 1799-5590

ISSN-L 1237-4741



Ministry of the Interior  
Republic of Latvia



# Table of Contents

Introduction	4
Business and Human Rights	6
Human Rights for Workers	7
The United Nations and International Soft Law Norms	9
Legal Responses by the EU and Member States to Corporate Social Responsibility	11
Regional and National Legislation Related to Labour Exploitation and Human Trafficking	14
Posting of Workers and Enforcement Directive	15
Employers' Sanctions Directive	17
The European Union General Data Protection Regulation	19
Severe Labour Exploitation and Trafficking in Human Beings for Forced Labour	20
Corporate Liability on Human Trafficking	23
Conclusions	25
References	27
Annex 1. Examples of Contractual Clauses to Mitigate Labour Exploitation and Trafficking	32

# Introduction

This normative framework guide provides a summarised overview of existing legal frameworks outlining businesses' responsibilities with regard to human rights, with a focus on labour exploitation and trafficking in human beings. Various legal frameworks applicable in this field already exist and not all of them are outlined in-depth in this publication. The aim of the guide is to fill in knowledge gaps concerning the main legal and non-legal standards, principles and current trends on which companies ought to build their activities regarding social responsibility and human rights. This guide has been developed in the context of the EU-funded FLOW-project<sup>1</sup>, and it is meant to be read alongside the "Navigate through your supply chains – Toolkit for prevention of labour exploitation and trafficking" developed as part of the same project<sup>2</sup>. The toolkit is a resource for businesses that want to take steps to address and minimise the risk of labour exploitation and trafficking in their operations. It has also been tailored and translated for the four project countries, Finland, Bulgaria, Estonia and Latvia (available at HEUNI's website). Both the toolkit and this guide are specifically meant for:

- Businesses, NGOs and/or organisations that use low-skilled migrant workers through outsourcing, subcontracting, recruitment companies and labour intermediaries in, e.g., construction, cleaning or catering services.
- Businesses working in risk sectors where labour exploitation or human trafficking have been identified.
- Public procurement units working for States, municipalities and/or State enterprises.
- Corporate Social Responsibility/Business and human rights experts and networks.

<sup>1</sup> *Flows of illicit funds and victims of human trafficking: uncovering the complexities (grant agreement number: 814791). The FLOW project focuses on Bulgaria, Estonia, Finland and Latvia.*

<sup>2</sup> <http://www.heuni.fi/en/index/publications/heunireports/reportseries93a.html>

These matters are relevant to all businesses. Several European Union Member States have reported that trafficking for labour exploitation is on the rise (COM 2018), due to the growing demand for cheap labour which is provided by individuals or criminal groups who take advantage of discrepancies in economic opportunities, income levels and labour legislation to maximise their profits. The most common sectors where victims are exploited in the EU include construction, agriculture and forestry, manufacturing, catering, care services, cleaning services and domestic work, entertainment, fishing, hospitality, retail and transportation (FRA 2019). Also, the role and responsibilities of businesses are changing due to an increasing focus on transparency and expectations from clients, investors and states to mitigate the negative human rights impacts.

This guide will first outline the international regulations that govern State actions regarding human rights, followed by a discussion on the development of binding national regulation in different parts of the world for businesses on due diligence and the prevention of forced labour. Also, the role of the European Union (EU) in regulating requirements for working conditions is overviewed along with the responsibilities for businesses when it comes to contractor's liability and/or using posted workers. Furthermore, the legal framework related to human trafficking and severe labour exploitation are outlined. And finally, the guide includes an annex that lists examples of contractual clauses that can be useful in determining the obligations and requirements of the contractual partners in order to mitigate the risk of labour exploitation and human trafficking when using sub-contractors and suppliers.

# Business and Human Rights

The responsibility of businesses to respect human rights is based on the set of internationally recognised rights for individuals outlined in the 1948 Universal Declaration of Human Rights. The key idea of human rights is that everyone has the right to be treated with dignity whatever their nationality, place of residence, sex, national or ethnic origin, colour, religion, language or any other status. These rights are stated in international human rights law which legally obliges States to respect, promote and protect human rights and fundamental freedoms. The State's obligation to protect human rights requires them to protect individuals and groups against human rights abuses, including by business enterprises. National law defines the legal liability for businesses to prevent and mitigate human rights abuses, as outlined in international human rights standards.

**Even if national law provisions do not impose direct legal obligations to businesses, human rights are still important for businesses since their actions can affect their employees, their customers, workers in the supply chains or communities around their operations (OHCHR 2012).**

The following chapters will outline the key instruments for understanding what human rights are and introduce the key United Nations (UN) documents that define the global standard in reference to human rights and businesses.

## Human Rights for Workers

International labour law standards were developed and are maintained, in the framework of the International Labour Organisation (ILO).

### The eight fundamental Conventions are:

- 1) Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87);
- 2) Right to Organise and Collective Bargaining Convention, 1949 (No. 98);
- 3) Forced Labour Convention, 1930 (No. 29) (and its 2014 Protocol);
- 4) Abolition of Forced Labour Convention, 1957 (No. 105);
- 5) Minimum Age Convention, 1973 (No. 138);
- 6) Worst Forms of Child Labour Convention, 1999 (No. 182);
- 7) Equal Remuneration Convention, 1951 (No. 100);
- 8) Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

The ILO aims to promote opportunities for women and men to obtain decent and productive work in conditions of freedom, equity, security and dignity. These legally binding instruments are covered by the eight core conventions of the ILO, and they define the obligations and set basic principles and how they could be applied to States in relation to working life. The ILO Forced Labour Convention (No. 29) and the Abolition of Forced Labour Convention (No. 105) have been ratified by most states in the world. The Protocol of 2014 to the Forced Labour Convention seeks to prevent trafficking for labour exploitation and its preventative measures include supporting due diligence by both the public and private sectors to prevent and respond to risk of forced or compulsory labour.

The ILO Declaration on Fundamental Principles and Rights at Work adopted in 1998, particularly mentions groups with special needs, in-

cluding the unemployed and migrant workers, and it commits Member States to respect and promote principles and rights in four categories:

- freedom of association and the effective recognition of the right to collective bargaining;
- the elimination of forced or compulsory labour;
- the abolition of child labour; and
- the elimination of discrimination in respect of employment and occupation.

When addressing labour exploitation in the context of recruitment and employment agencies, it should be noted that out of the FLOW-project partners Bulgaria and Finland have ratified ILO Convention No. 181 concerning private employment agencies (1997), while Estonia and Latvia have not. The Convention establishes the general parameters for the regulation of recruitment, placement and employment of workers engaged by private employment agencies, prohibits charging workers a recruitment fee and guarantees the protection of fundamental rights at work, such as freedom of association, collective bargaining, equality of opportunity and treatment for migrant workers recruited or placed in host countries, as well as a system of penalties for fraudulent agencies. (FRA 2019.)



# The United Nations and International Soft Law Norms

The regulatory framework for corporate social responsibility on the international level is largely based on the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises (1976, updated version 2011), and the UN compacts and documents which define the global standard for what is expected of all States and businesses with regard to business and human rights. The OECD Guidelines have been formally adopted by its Member States and it provides non-binding principles and standards for responsible business conduct in a global context.

The UN documents discussed here, are not legally binding as such, but they set examples of and practices for States and businesses on how to incorporate a human rights framework in business and state actions. Some of these standards are also covered in international and domestic law. (OHCHR 2012.) The following chapters will outline the norms and standards put forward in the UN framework.

The UN Global Compact<sup>3</sup>, launched in 2000, was the first UN-led initiative focusing on corporate social responsibility and is currently the largest CSR initiative in the world. It supports companies to conduct business responsibly through the Ten Principles<sup>4</sup> on human rights, labour, environment and anti-corruption. It also aims to advance the role businesses play in achieving the UN Sustainable Development Goals<sup>5</sup> (SDG 8 on decent work and economic growth specifically) through collaboration and innovation.

<sup>3</sup> <https://www.unglobalcompact.org/>

<sup>4</sup> <https://www.unglobalcompact.org/what-is-gc/mission/principles>

<sup>5</sup> <https://www.unglobalcompact.org/sdgs/about>

The UN standards for States and businesses with regard to business and human rights are based on the “Protect, Respect and Remedy” Framework presented in 2008:

- a) States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms;
- b) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights;
- c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.

To advance these three pillars, the United Nations Guiding Principles (UNGPs)<sup>6</sup> were developed and adopted in 2011. The UNGPs apply to all States and to all business enterprises regardless of their size, sector, location, ownership and structure. They provided, for the first time, an authoritative global standard for preventing and addressing the risk of human rights impacts in business practices.

<sup>6</sup> [https://www.ohchr.org/Documents/Publications/GuidingPrinciples-BusinessHR\\_EN.pdf](https://www.ohchr.org/Documents/Publications/GuidingPrinciples-BusinessHR_EN.pdf)

**Guiding Principle 19 outlines the implications of the actions of businesses and elaborates how business activities and relationships are understood to include relationships with business partners, entities in its value chain, and any other entity directly linked to its operations, products or services.**

In 2014, the UN Human Rights Council adopted a resolution that established an Inter-Governmental Working Group (IGWG) to develop an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights (Heasman 2018). The discussions are ongoing in Geneva during the writing of this guide and it remains to be seen if this treaty will come into force. The latest developments in the EU on mandatory due diligence, that will be discussed in the next chapters, along with the UN treaty discussions could mean big changes in the coming years in terms of responsibilities for companies.

# Legal Responses by the EU and Member States to Corporate Social Responsibility

The European labour market largely relies on the use of contractors. The benefits include accessing the kind of services or know-how that a company does not have, and it can be used to fill a gap in the workforce. Contractors might also be favoured over direct employees as a cost-saving measure. The responsibility of businesses when it comes to using subcontracting and supply chains varies among sectors and companies. Sector specific exceptions may occur.

**Countries may have different legal measures to determine the contractor's liability, however, often it does not extend beyond the immediate contractual partners and it is up to companies themselves to include social responsibility and human rights clauses to their procurement contracts.**

When it comes to intra-European or local subcontracting chains with multiple links, the terms and conditions become more blurred. If the contractors want to have more detailed information about the employment process of migrant workers and want to control the use of subcontracting by business partners, special requirements need to be stipulated in the contracts (see e.g. Annex 1. and the Contract Tool of the Risk management Toolkit developed in the FLOW project).

The legal framework for protecting migrant workers is mainly defined by the applicable laws in the country they work in. Currently, most European countries do not have laws in place that would hold companies responsible for violations of human rights in supply chains in particular, e.g. concerning workers working throughout subcontracting chains and employed by other companies. International laws do not directly mandate companies to make sure that actors in their supply chains respect labour and human rights. However, during the last decade or so, several regional laws and regulations have been passed, obliging organizations to implement elements of human rights due diligence, or at the very minimum, report on human rights due diligence processes. One of these is the Directive 2014/95/EU which lays down the rules on the disclosure and reporting of non-financial and diversity information by large companies (see the box below), and another is the Conflict Minerals Regulation 2017/821.

#### **Directive 2014/95/EU of the European Parliament and the Council**

At the European Union level, non-financial reporting requirements are also mandating large public interest companies with more than 500 employees to disclose certain information concerning the way they operate and manage social and environmental challenges. Companies are obliged, in their annual reporting, to include non-financial statements about social responsibility and the treatment of employees, and respect for human rights also regarding due diligence in their supply and subcontracting chains, in order to identify, prevent and mitigate existing and potential adverse impacts.

In 2019, the European Union established the European Labour Authority (ELA). The new authority is supposed to improve cooperation between EU countries, to coordinate joint inspection, and to carry out analyses and risk assessments on cross-border labour mobility issues. It also aims to improve individuals' and employers' access to information about their rights and obligations in the areas of labour mobility and social security coordination, and access to relevant services. The authority is expected to be fully operational by 2024.

To date, only a handful of countries have enacted specific legislation on corporate responsibility. While the nature, type and scope of national legislation varies, they are mainly characterised by either mandatory

disclosure and transparency of information (e.g. California Transparency in Supply Chain Act 2010), or by mandatory due diligence (e.g. the Corporate Duty of Vigilance Law in France 2017) and obligations to report on measures that address risks in their operations and supply chains (e.g. the UK Modern Slavery Act 2015). These are often directed towards the operations of large companies that have global supply chains. However, these laws and the related demand of the market, clients and investors have increased pressure also towards small and medium sized companies to increase the transparency of their actions. A recent addition is the Dutch Child Labour Due Diligence Law (2020) that is designed to protect consumers by advancing the identification of the use of child labour in subcontracting chains. This legislation takes businesses of all sizes into account, however, the focus is only on the prevention of child labour and not forced labour in general. Dutch businesses failing to follow due diligence in this regard might face fines or even convictions. During the last years, other European countries (e.g., Switzerland, Finland, Norway and Germany) are looking into the possibility of introducing national legislation on due diligence and human rights.

**In order to mitigate the risk of labour exploitation and other human rights violations both larger and smaller companies can and do go beyond legal norms and standards. They should also initiate and implement comprehensive due diligence processes.**

Other national norms and principles related to business responsibility include government actions plans; legislation related to labour law and contractor's obligations and liability when contracting out work; collective agreements that determine labour rights; the role of employers' associations in monitoring and promoting social responsibility; as well as sector-specific practices and agreements.

# Regional and National Legislation Related to Labour Exploitation and Human Trafficking

There is no uniform national or international legal framework that regulates labour exploitation. The less severe forms of exploitation might be criminalised through provisions of the criminal code related to work discrimination or dealt with as crimes related to, e.g., employment agency offences, unauthorised use of foreign labour, fraud or usury. The more severe forms of labour exploitation might amount to human trafficking. Human trafficking is criminalised in all European countries, but national definitions often vary slightly when it comes to labour exploitation in the context of trafficking (Jokinen & Ollus 2019). Crimes related to labour exploitation or labour trafficking are not always prosecuted as crimes of trafficking for several reasons related to, e.g., lack of evidence, the victim's willingness to come forward, or lack of skills and awareness among authorities. This leads to problems with access to justice and victims' rights. Thus, it is important that businesses ensure that they have taken sufficient steps against labour exploitation within their own organisation, as well as within their own supply chains. In relation to the protection of workers' rights, all EU Member States have transposed EU directives relating to data protection, illegal employment and posting of workers which are introduced in the following chapters.

The role of EU institutions and Member States in cases of (severe) labour exploitation or human trafficking is related to obligations of due diligence, i.e., prevention and protection from harm. In any event, all EU Member States and their national authorities have duties to protect workers – their own or migrant workers – from business-related human

rights abuses. This means they themselves are obliged to take all reasonable measures of due diligence, through e.g. regulation, inspections, judicial and other enforcement.

There are several directives and various areas of EU law which set the requirements of working conditions e.g., minimum periods of daily rest and annual leave, breaks and maximum weekly working time. The laws apply to workers regardless of nationality. Yet, labour exploitation and systematic violations of labour standards exist in the EU countries, including lack of pay, excessive working hours and occupational hazards. (FRA 2019.) The safeguards established by EU law apply to all workers, including third-country nationals in an irregular situation – undocumented migrant workers – employed on EU territory (Article 12 (1) (a) of the Single Permit Directive (2011/98/EU). Seasonal workers also have the right to equal treatment concerning terms of employment including the minimum working age, pay and working conditions including dismissal, working hours, leave, and health and safety requirements (Article 23 of the Seasonal Workers Directive (2014/36/EU).

## Posting of Workers and Enforcement Directive

Posted workers are employees sent by their employer, including temporary work agencies, to carry out a service in another EU Member State on a temporary basis. The EU Posting of Workers Directive (96/71/EC), later referred to as PWD, mainly concerns posted EU nationals and clarifies the obligations of the host state, as well as flags the costs of the service provider. The Enforcement Directive (2014/67/EU) aims to strengthen the PWD's practical application by, e.g., addressing issues related to fraud, the circumvention of rules, inspections and monitoring, and joint liability in subcontracting chains as well as the exchange of information between the Member States. The European Commission proposal on revising the rules on the posting of workers has been accepted and will enter into force in July 2020.

Posted workers, unlike EU mobile workers, remain in the host EU country only temporarily and therefore are not afforded the same protection as host state nationals or other workers exercising their free movement rights. Moreover, posted workers are not entitled to equal treatment in access to employment, working conditions, and other social and tax conditions. This is because EU rules on posted workers fall under freedom of services (Article 56 TFEU) rather than freedom of move-

ment that applies in case of the EU mobile workers.

Although the PWD was intended as a tool for posting mainly EU-nationals for short term assignments to perform services in another EU Member State, non-EU nationals currently constitute a significant percentage of this group. This is due to the employers using the PDW also for posting third-country nationals who are legally residing and working in a Member State, to another Member State under the same conditions as a Union citizen. Posted workers often receive lower wages than other workers and are forced to work in less favourable/secure and thus cheaper conditions.

**So-called letter-box companies have been created to evade labour law and social security protections for workers posted through subcontracting arrangements. Some temporary work agencies also purposefully recruit residents of more vulnerable countries and regions, and from groups with diminished access to formal labour in their home country, to have more control and be able to impose low pay and poor working conditions.**

Furthermore, posted workers' low visibility enables exploitation as they are often isolated due to language barriers, segregation and the location of housing facilities, the imposed mode of transport to/from work, and greater exposure to dangerous working conditions, as well as not having any sort of representation in the company for which they provide services.

An Amending Directive to the PWD (2018/957) which will enter into force on 30 July 2020, addresses the challenges faced by posted workers and the unclear rules of subcontracting. With this amendment, all the mandatory elements of remuneration (until now it was only pay) as well as the rules of the receiving Member State on workers' accommodation and the reimbursement of expenses will be applied to posted workers. The duration of the posting will also be limited to 12 or 18 months, after which the EU workers will become entitled to most of the terms and conditions of employment on a free movement basis. Notably, for long-term postings the length of this qualifying period may be satisfied by cu-



mulative hire of different posted workers for the same task, thus targeting the very core of the existing economic model and targeting the temporary work agencies' role in the recruitment and management of temporary migrant labour within global supply chains.

**Businesses are recommended to:**

- consider employing workers directly whenever possible,
- screen temporary work agencies and posted-workers companies before doing business with them,
- ensure that posted workers can voice their concerns and needs in e.g. workers' representation councils,
- enable trade union representatives' participation in audits of contractor premises, as well as (where relevant) workers' accommodation, and
- verify that posted workers' wages are at least on the minimum wage level of the host country.

## Employers' Sanctions Directive

The EU Employers' Sanctions Directive (2009/52/EC) provides for minimum standards on sanctions and measures against employers of illegally staying third-country nationals. The Directive addresses illegal employment linked to illegal immigration into the EU by imposing specific obligations on all employers. These include, for instance, the employer's duty to verify the legal status of workers. The Directive also provides for the imposition of sanctions against employers, e.g. exclusion from entitlement to public benefits and from participation in a public contract for up to 5 years, and even a closure of the establishments used to commit the violation. The Directive provides for the joint liability of the contractor and the subcontractor in cases where the subcontractor is in breach of the Directive. This applies unless the contractor can prove that it has fulfilled due diligence obligations as defined by national legislation, which might require e.g. informing the subcontractor about the illegality of employment of illegally staying third-country nationals and its consequences.

The Directive requires the establishment of protections for undocumented non-EU workers' rights. These include:

- the recuperation of outstanding wages,
- the availability and accessibility of complaint mechanisms,
- information about rights, and
- access to residence permits.

In line with the Directive, businesses must, in relation to all non-EU workers, require that the workers present a residence permit or a corresponding document that proves they are authorized to legally stay in the country before taking up employment. A copy of these documents must be kept for the duration of the employment, and the authorities must be notified when employing a non-EU national.

**Businesses are recommended to:**

- ensure that they undertake due diligence in relations with subcontractors and remain particularly vigilant when operating in sectors where undocumented work is known to occur,
- consider limiting the number of sub-contractors,
- distribute information of workers' rights among their non-EU migrant employees,
- ensure that non-EU nationals have equal access to the company's grievance mechanisms, as well as
- ensure that they are represented in the worker's/work councils/are offered support by the trade unions.

While some good practices exist on the impacts for undocumented migrants, the Directive's transposition by Member States has had its flaws. For instance, the severity of punishments for offences differs significantly between Member States. Furthermore, in many EU Member States workers must first lodge a complaint with the Labour Inspectorate before launching a claim in court, which may entail automatic referral to immigration authorities resulting in deportation or detention. Contrarily, being identified as victim of trafficking may also lead to their residence or work status being regularised. In any event, labour inspectorates are in an important position to detect and act on labour rights violations.

Indeed, research by the Platform for Undocumented Migrants (PICUM) found that the lack of separation between labour inspectors and immigration enforcement mechanisms is the key barrier to labour rights enforcement for undocumented workers and to addressing exploitation. PICUM argues that without a separation between immigration enforcement and labour rights protection, undocumented workers are not in a position to denounce their exploitative employers; instead the exploitative practices are allowed to continue. (PICUM 2015, 11; See also PICUM 2017.)

## The European Union General Data Protection Regulation

Companies that implement anti-exploitation and anti-trafficking strategies in the EU, as well as social audits, need to take into consideration the General Data Protection Regulation (EU) 2016/679 (GDPR). The GDPR itself does not address trafficking in human beings (THB) nor forced labour or any other form of labour exploitation. However, it is relevant in this context because its provisions may have an impact on how companies implement social responsibility strategies (social audits, codes of conduct or contractual obligations) to verify the compliance of business partners.

Protections established for personal data of workers under the GDPR limit the ability of companies to access and verify documents containing personal data of employees (e.g. contracts, pay slips, worktime records) provided by temporary employment agencies, workers employed by (sub)contractors or suppliers or providing work for the company on another basis (e.g. civil law contracts with temporary employment agencies or subcontractors). Within the EU, interpretations of the impact of GDPR in the context of trafficking and social auditing currently vary depending on how data protection offices interpret the regulations.

### **It is recommended that the Contracting Party/ Purchaser and its contractual partners secure written consents from data subjects.**

While written consent should be prioritised, this approach has several weaknesses from the standpoint of preventing trafficking and exploitation (for instance, because data subjects can withdraw consent at any time; victims of trafficking or/and forced labour can be forced not to

consent; and because it is difficult to ensure that consent in an employment relationship is voluntary). Given the current ambiguities, this is the only approach that reliably ensures compliance with GDPR for the contracting party, while also trying to minimize the risks of trafficking and labour exploitation.

#### **EU Directive on transparent and predictable working conditions (2019)**

Another new development in this area is the recently adopted EU Directive on transparent and predictable working conditions (2019), which will bring clarity to employment relationships for workers, by ensuring that employers inform workers of the essential aspects of the employment in writing. The Directive aims to ensure workers in the EU have better rights, i.e., written information provided to workers on, among other things, the place of work, type of work, working time, remuneration, amount of paid leave, institution receiving the social security contributions, training entitlement and procedure for terminating employment. (European Commission 2019.)

In addition to the legal framework, there are many organisation-led initiatives and tools for companies to use and go beyond the national and international regulations. Some of them offer materials for free and others in exchange for money. Few examples are the [Stronger Together](#) - a multi-stakeholder initiative to reduce modern slavery, labour trafficking and exploitation of migrant workers, as well as [Anti-Slavery International](#), [Focus on Labour Exploitation \(FLEX\)](#), [Shift](#), and [Know the Chain](#), [Verité](#), and several tools developed by the [Danish Institute for Human Rights](#).

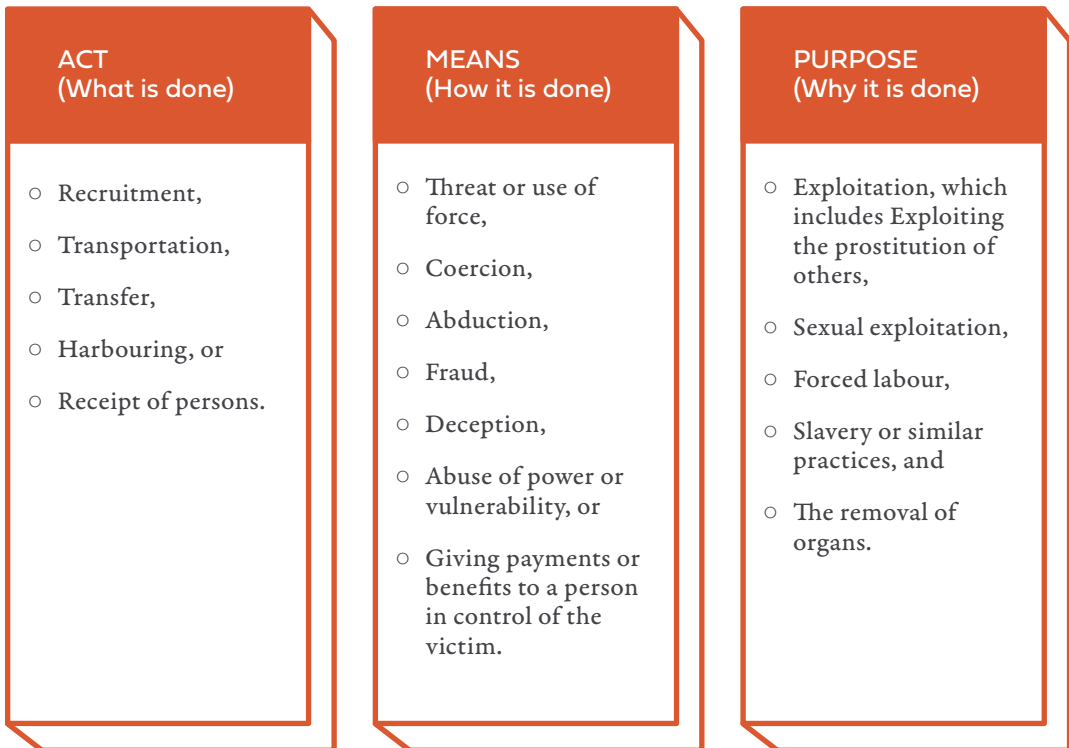
## **Severe Labour Exploitation and Trafficking in Human Beings for Forced Labour**

Anti-trafficking legislation and action has improved significantly in the last decade in Europe. The criminalisation of trafficking is in many countries drawing from the formulation of United Nations Protocol. The United Nations Convention against Transnational Organized Crime adopted in 2000 is the main international instrument in the fight against transnational organized crime. The so-called Palermo Protocol is further

supplemented by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, which entered into force in December 2003. It is the first global legally binding instrument with an agreed definition on trafficking in persons, and it is aimed to facilitate convergence in national approaches to the criminalisation of trafficking along with international cooperation in investigating and prosecuting human trafficking cases. An additional objective of the Protocol is to protect and assist the victims of trafficking.

Human trafficking is a complex crime which has three elements. These are shown in Figure 1. Each of these three elements must be proven for a case to be defined as human trafficking according to the definition of the UN Trafficking Protocol.

**Figure 1. Elements of human trafficking**



To fulfil the definitional elements of labour trafficking, it has to be proven that the purpose of the human trafficking was forced labour, unless the national legislation includes a broader meaning such as labour exploitation or circumstances contrary to human dignity or similar, which could also be used in labour related cases. According to the 1930 ILO Forced Labour Convention, forced labour is understood as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily” (Article 2). In short, a worker must always have the right to choose freely which job to take but also to choose freely to end an employment relationship.

Under the ILO definition, exacting work or service under the menace of a penalty refers to punitive practices that may serve as indicators of a forced labour situation (ILO 2005, 20–21):

- Physical or sexual violence or the threat of such violence.
- Restriction of movement of the worker e.g. through confinement or through preventing contact with the host community.
- Debt bondage or bonded labour e.g. arising from the process of recruitment and transportation.
- Withholding wages or refusing to pay the worker at all.
- Retention of passports and identity documents.
- Threat of denunciation to the authorities.

Similarly, if job offers involve misleading or deception, any consent given by the employee cannot be regarded as informed and voluntary (ILO 2009 12–13).

National anti-trafficking legislations in countries of the FLOW-project partners Finland, Estonia, Latvia and Bulgaria have all criminalised human trafficking for the purpose of forced labour even though wording and definition as well as existing case law vary between the countries. Also, awareness and understanding of labour trafficking differs between the countries.

## Corporate Liability on Human Trafficking

There are also other relevant treaties related to trafficking at the European Level, e.g. The Council of Europe's Convention on Action against Trafficking in Human Beings (2005) which requires that each party to the Convention ensures that any legal person (including a company) can be held liable for a criminal offence that is committed for its benefit by a natural person. The natural person can be acting individually or as part of an organ of the legal person, if they are able to exercise control over the company. Moreover, the Convention requires States to ensure that a company which benefits from trafficking in human beings committed by a person of authority within that company commits a criminal offence. According to a report by the Institute for Human Rights and Business (IHRB 2016, 8), the Convention includes a clear intention for corporates to be held accountable for acts committed by senior employees and directors as well as the need to ensure effective procedures to avoid the potential for such acts by other employees.

At the EU level, the EU Framework decision on combating trafficking in human beings was replaced with the EU Directive (2011/36/EU) on preventing and combating trafficking and protecting its victims. The EU Directive has a similar formulation regarding the liability of legal persons as the Council of Europe Convention. According to Article 5 of the Directive, Member States shall take the necessary measures to ensure that legal persons can be held liable for the offences committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:

- a power of representation of the legal person;
- an authority to take decisions on behalf of the legal person;
- or an authority to exercise control within the legal person.

Moreover, Member States shall also ensure that a legal person can be held liable where the lack of supervision or control has made possible the commission of the offences for the benefit of that legal person by a person under its authority. Liability of a legal persons, however, shall not exclude criminal proceedings against natural persons who are perpetrators, inciters or accessories in the offences.

Finally, according to Article 6 of the Trafficking Directive, Member States shall take the necessary measures to ensure that a legal person held liable is subject to effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions, such as:

- exclusion from entitlement to public benefits or aid;
- temporary or permanent disqualification from the practice of commercial activities;
- placing under judicial supervision;
- judicial winding-up;
- temporary or permanent closure of establishments which have been used for committing the offence.

According to Planitzer & Katona (2017), application of the legislation concerning corporate criminal liability for human trafficking seems to lag behind in Europe, since cases where it has been applied have been so far identified in only a few EU Member States. This might change, however as more cases are uncovered and the criminal justice authorities become more familiar in applying the legislation.



# Conclusions

Each of the frameworks and directives discussed in this guide along with national legislation and regulation vis-à-vis the obligations of States to mitigate the adverse human rights implications of their business conduct, have their strengths and weaknesses. There is need for both enhanced implementation of existing liability measures, and for increased commitment of businesses to address and end exploitation and trafficking in direct or indirect business activities.

All businesses should be aware of the risks related to labour exploitation and human trafficking in relation to their activities, as well as their relationships with business partners, entities in their value chain, and any other entity directly linked to their operations, products or services. As has been outlined in this guide, numerous legal sanctions and obligations exist in relation to human rights due diligence, human trafficking and forced and exploitative labour. The regulation and laws concerning the obligation of businesses in relation to due diligence and liability are developing rapidly both in the European, as well as global level. Their impacts on corporate practices will remain to be seen in the coming years.

**Businesses, and legal persons working for them, face potential legal liabilities if human trafficking or human rights violations take place anywhere in their business or supply chains.**

According to Institute for Human Rights and Business (2016, 54), awareness of the legal landscape and risks, and the resources available, allow businesses to take proactive measures to prevent human trafficking in their supply chains. This provides an opportunity for the companies not only to avoid legal liabilities and sanctions, but to play an active role in the elimination of forced labour and human trafficking.

Businesses who are committed in improving working conditions in local supply should go beyond the legal requirements and implement a strategic approach to corporate social responsibility that would include, and even highlight, the prevention of labour exploitation and human trafficking. The time and resources invested in doing this will positively contribute to risk management, cost savings, investor and customer relationships

and most importantly safeguard the rights of migrant workers. The contractual clauses listed in Annex 1. along with the FLOW publication “Navigate through your supply chains – Toolkit for prevention of labour exploitation and trafficking” provides companies practical measures that can be used to navigate and control complex supply chain networks especially in a local, national and intra-European context.

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# Appendix 1. Examples of Contractual Clauses to Mitigate Labour Exploitation and Trafficking

## Clauses Focused on Suppliers' Compliance with Legal Obligations in Context of Service Delivery Inside the EU<sup>7</sup>

The Contractor shall be obliged to:

- a. ensure that the law and all other applicable standards and principles, including technical standards, health and safety rules, etc. listed in [Annex] to this Agreement, are complied with in the process of performing work under this Agreement;
- b. periodically, and at least on [...] basis, verify the legality of employment of foreigners with the help of which the Contractor performs this Agreement, including verification of the validity of documents entitling such foreigners to stay and work on the territory of [name of the country], and to immediately cease providing services under this Agreement through those foreigners who are not entitled to perform the work due to the lack of a valid document entitling them to stay on the territory of [name of the country], and immediately replace them with persons who can legally provide services under this Agreement;
- c. ensure timely payment of public law liabilities and remuneration to persons with the help of whom he performs this Agreement, including in particular third country nationals.

In the event of a breach of the obligations referred to in above paragraph, the [company/purchasing authority] shall be entitled to terminate this

<sup>7</sup>Adapted from model contractual clauses developed in Polish for the toolkit on preventing forced labour in supply chains, developed by the multi-stakeholder Working Group on Workers forming part of the Committee on CSR and Sustainable Development, an advisory body to the Minister of Funds and Regional Policy of the Republic of Poland"



Agreement with immediate effect.

The Contractor shall be obliged to enable the [company/purchasing authority] and/or a third party acting on its behalf at any time to control the documentation related to the implementation of this Agreement, and in particular documentation regarding the workers who carry out work under this Agreement on the side of the Contractor, including, after obtaining their consent, documentation comprising also their personal data, i.e.:

- a. documents confirming the citizenship of the person providing work, which will allow to determine whether the person is lawfully resident in [country] (e.g. passport, visa, [other documents recognised in the country, e.g. national identity card]);
- b. documents confirming the right of the person providing work to work in [country] (e.g. work permit);
- c. copies of employment contracts and other types of contract (e.g. civil law contracts) on the basis of which workers perform their work;
- d. records of the working time of the person providing work;
- e. confirmation of payment of remuneration (e.g. a copy of a bank transfer confirmation to a bank account, confirmation of receipt of remuneration in cash) to the person providing work.

In the absence of the consent of the persons concerned, the Contractor shall provide [company/purchasing authority] and/or a third party acting on its behalf with the abovementioned documentation after prior anonymization.

## **Clauses Ensuring the Possibility of Conducting an Audit/External Verification**

[company/purchasing authority], in an effort to control its operations and supply chain, undertakes audits performed on its behalf by qualified employees of the [company/purchasing authority] or by the third parties on behalf of the [company/purchasing authority].

[company/purchasing authority] has the right to carry out announced and unannounced audits at sites where production is undertaken, or services performed for its benefit. During such audits, the supplier or ser-

vice provider is required to provide the [company/purchasing authority] with all documentation needed to verify compliance with the regulations and standards listed in Annex [...], in particular documentation of the persons who carry out work to fulfil this Agreement, including, after obtaining their consent, documentation comprising also their personal data, i.e.:

- a. documents confirming the citizenship of the person providing work, which will allow to determine whether the person is lawfully resident in [country] (e.g. passport, visa, [other documents recognised in the country e.g. national identity card]);
- b. documents confirming the right of the person providing work to work in [country] (e.g. work permit);
- c. copies of employment contracts and other types of contract (e.g. civil law contracts) on the basis of which workers perform their work;
- d. records of the working time of the person providing work;
- e. confirmation of payment of remuneration (e.g. a copy of a bank transfer confirmation to a bank account, confirmation of receipt of remuneration in cash) to the person providing work.

In the absence of the consent of the persons concerned, the supplier will provide the abovementioned documentation after prior anonymization.

In addition, the supplier will allow interviews with factory employees (also outside the plant) and a local visit to the plant.

After finding any irregularities in the audit result, the representative of [name of the organization] shall provide the supplier with a report containing its results, comments and recommendations for implementation.

In the event of flagrant deficiencies or failure to cooperate to address those deficiencies, [name of organization] shall/may decide to withdraw from cooperation with such a supplier.

## **Clauses on Observance of the Law and Undertakings not to Engage in Exploitative Labour Practices**

The Contractor shall comply with all laws, ordinances, rules, and regulations bearing upon the performance of its obligations under the Contract. In addition, the Contractor shall maintain compliance with all ob-

ligations relating to [ILO Core Labour Standards and other international and/or national legal instruments to be specified].

The Contractor represents and warrants that neither it, its parent entities (if any), nor any of the Contractor's subsidiary or affiliated entities (if any) is engaged in any practice inconsistent with the rights set forth in the ILO Core Labour Standards, which, inter alia, require that the contractor shall take all appropriate measures to prevent modern slavery or exploitative labour practices by its employees or any other person engaged and controlled by the Contractor to perform any services under the contract.

### **Clauses Focused on Suppliers' Implementation of a Preventive Strategy**

The [contractor/supplier] is obliged to conduct his business in a transparent manner, and in particular to inform [company/purchasing authority] of any subcontracting of the production / service process.

[company/purchasing authority] will conduct a dialogue with [contractor/supplier], aimed at identifying threats to the occurrence of forced labour and in the event of high risk for forced labour or ascertaining of forced labour, will take action with the partner to introduce appropriate risk minimization programs or corrective activities.

At the request of [company/purchasing authority], the [contractor/supplier] will provide reports on internal or external audits that will examine the phenomenon of forced labour, and will allow [company/purchasing authority] and/or a third party acting on its behalf access to documentation regarding the persons with whom the [contractor/supplier] performs this Agreement, including prior consent these people [see Annex...] including:

- a. documents confirming the citizenship of the person providing work, which will allow to determine whether the person is residing in [country] legally;
- b. documents confirming the right of the person providing work to work in [country];
- c. copies of employment contracts / other civil law contracts;

- d. records of the working time of the person providing the work;
- e. confirmation of payment of remuneration (e.g. copy of a transfer from a bank account, confirmation of receipt of remuneration in cash) to the person providing the work.

In the absence of the consent of the persons concerned, the [contractor/supplier] will provide [company/purchasing authority] and/or a third party acting on its behalf with the abovementioned documentation after prior anonymization.

In addition, the [contractor/supplier] will allow [company/purchasing authority] and/or a third party acting on its behalf to conduct interviews with employees (also outside the plant) and a local vision on their premises.

[The board of the [company/purchasing authority] obliges the [contractor/supplier] to ensure that:

- a. during the recruitment process no person will be misled as to the description of employment conditions;
- b. no person will undergo mental and physical isolation in the workplace and place of accommodation, if such is provided, except where this is essential to the nature of the work performed;
- c. it will not require persons providing work to deposit their documents (e.g. a passport, residence card, other identity document or proof of entitlement);
- d. during recruitment as well as during the performance of work it will not collect unauthorized fees, in particular recruitment fees and unjustified penalties;
- e. the work will be organized in such a way as to make the best use of the employee's skills in normal working time, and if in exceptional situations there is a need to work overtime, i.e. the need to carry out a rescue operation to protect human life or health, protect property or the environment or removal of breakdowns or the specific needs of the employer - this work will be carried out at the request of the employer, paid for and in each case the employee will be provided with adequate periods of daily and weekly rest;
- f. remuneration for employment will be paid regularly and always in full, and all deductions, except for deductions resulting from legal provisions, will require the employee's written consent;
- g. working conditions, and, if applicable, accommodation conditions,

will be safe, and if there is a direct threat to health and life, the person providing work will be able to stop work and move to a safe place;

h. will shape the organizational culture in such a way that it is free from threats, intimidation, mental and physical violence.

The management of the company [name of the organization] hereby calls for the immediate reporting of any incidents suspected of signs of forced labour at: [Place of notification] according to the procedure in the leaflet] ..... to: .....

