

# COMMENTS FOR VIENNA FORUM, 20 NOVEMBER

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The empirical work by Albin Dearing and his FRA team is of obvious importance, and has clear policy implications.

On the one hand, there is a criminal offence of trafficking for the purposes of labour exploitation, broadly defined. It involves coercion. It involves a trafficker, an end use exploiter, and a victim or group of victims. It is technically a serious crime, identified as such in international law and most national laws. But as we all know, despite the global and regional estimates of many millions of victims, there have been very few successful prosecutions and convictions in Europe and elsewhere.

On the other hand, there is this very difficult concept of *exploitation*. There are obvious gradations of exploitation, and almost all of us probably feel we have been exploited by our bosses at some time in our lives. But when is it an offence? Most importantly, when is it a criminal offence? What are the other options for dealing with it? And to what extent if at all should prosecutors, judges or even human rights defenders and trade unionists be addressing these concerns under the rubric of *human trafficking*?

It is essential to distinguish between *individual* and *systemic* concerns.

Police, prosecutors, judges and also service providers basically like to deal with individuals. There is a criminal offender, and a criminally offended person. The former should go behind bars, or be otherwise sanctioned. The latter should receive a remedy and protection, and hopefully some form of compensation.

Politicians and policy advisers are more likely to deal with systemic concerns, or systems of governance and behaviour. People up for election also have to cater to public opinion and prejudices.

If we look at the issues systematically, there seem to be three main trends and challenges in Europe at present.

First, there is the now old debate about more or less “flexible” labour markets. My own country is usually seen as classically “flexible” since the days of Margaret Thatcher, with weak job protection (though now at least a legal minimum wage), and generally few costs to the employer in firing workers. France, Germany, Italy and Austria are often seen as rigid and sclerotic. In these countries – and also in Scandinavia with its historically generous welfare systems – there are concerns about a “two tier” labour market, with insiders and outsiders.

Second, there are the concerns about “atypical” forms of employment, posting systems and the rest of it. This means that, in countries with a fairly strong tradition of workers’ protection, there are exceptions for certain jobs and certain categories of worker. This can range from “zero hours” contracts to elaborate forms of subcontracting.

Third there are the linkages, rarely if ever explicitly identified, between employment policy and migration policy. The worst and most precarious jobs in Europe are increasingly done by migrants, often from outside the EU, but also from within its expanded borders, keeping wages and working conditions down at the lower end of the labour market. This is exploitation, if the benchmark is the equal application of European social laws to all people working on the national territory. It is not likely to be perceived as such by the migrants, unless the conditions are truly dreadful, perhaps even worse than they would experience in their home countries.

The recent European law enforcement experience has been very mixed. Some labour courts, as in Belgium, can use the tools of criminal justice against severe exploitation, whether or not there is evidence of coercion (physical or psychological). The Netherlands has moved in this direction, following a Supreme Court judgment a few years back, which instructed lower courts to place emphasis on the “objective factors” of exploitation rather than proof of coercion. But criminal prosecutions and convictions have tended to focus on abuses perpetrated by ethnic and other minority groups against their own members (Chinese restaurants or sweatshops, travellers as examples) rather than on abuses in what we may call the “mainstream economy”.

Yet the growing number of studies on labour exploitation in European countries – by the FRA, among others – seem to have some similar findings. There are a large range of industries and professional occupations where vulnerable workers are particularly at risk of serious exploitation: construction, hotels and restaurants, contract cleaning, health care, food services and packing, and of course agriculture, to name but a few. And the risks are compounded when recourse is had to labour brokers, who make their profits by providing a temporary workforce under conditions that undermine

traditional social guarantees. And the conditions are invariably the worst, when the workers are migrants (perhaps lawful, perhaps unlawful) with uncertain rights of residence. This is the essential backdrop of most serious labour exploitation in Europe today.

I'd like to conclude these brief comments by returning to the linkages between migration policy, employment policy, trafficking and exploitation. This time last year I was asked by the OSCE and the Government of Kazakhstan to give a training on labour migration policy, with particular reference to good practices in Europe and elsewhere. I must say that, though I tried very hard and read everything I could lay my hands on, I struggled to find those good practices. Essentially, every country wanted to attract talent to fill gaps at the higher end of the labour market, sometimes offering generous benefits. At the lower end, it was a different story. Labour was needed, and would continue to be needed. But there is a tendency to seek ways of attracting this labour for the shortest possible period, evading the equality of rights that underlies the international instruments of the ILO and UN on migrant workers.

As we all know, these are dangerous and troubling times, and European governments are not in a generous mood towards the less privileged non-nationals, whether economic migrants or refugees. But the dangers will be fuelled further, if policies add to the frustrations of an underclass that is clearly there in all European countries today. I am not saying that the solution is to encourage migration. Instead, a large part of the solution may be to do away gradually with the kind of job that nationals are increasingly unwilling to do, and thus to reduce the demand for the migrants at constant risk of exploitation.

This is why I am glad that, for the first time, this regional initiative is meeting in the offices of a distinguished trade union. Together with employers, trade unions have a vital role in negotiating the ground rules for employment policy at the lower end of the labour market, and insisting on basic protection for all categories of worker. This is the systemic challenge before us.

Thank you.