



Sociedad Internacional de Derecho del Trabajo y de la Seguridad Social

XXIII Congreso Mundial

7 - 10 de Septiembre de 2021 - Lima, Perú

RETOS DE LOS SISTEMAS DE LEGISLACIÓN LABORAL Y SEGURIDAD SOCIAL

- Transformación del trabajo: desafíos para el Derecho del Trabajo
- Comercio internacional y trabajo
- Nuevos retos de la Seguridad Social
- Trabajadores migrantes
- Trabajadores atípicos e informales
- Igualdad en el trabajo
- El Estado y las nuevas formas de voz colectiva



Sociedad Internacional de Derecho del Trabajo y de la Seguridad Social

XXIII Congreso Mundial

7 - 10 de Septiembre de 2021 - Lima, Perú

RETOS DE LOS SISTEMAS DE LEGISLACIÓN LABORAL Y SEGURIDAD SOCIAL

- Transformación del trabajo:
desafíos para el Derecho del Trabajo
- Comercio internacional y trabajo
- Nuevos retos de la Seguridad Social
- Trabajadores migrantes
- Trabajadores atípicos e informales
- Igualdad en el trabajo
- El Estado y las nuevas formas de
voz colectiva

PATROCINADORES



AUSPICIADORES



Retos de los Sistemas de Legislación Laboral y Seguridad Social
PRIMERA EDICIÓN DIGITAL MARZO 2023
Prohibida su reproducción total o parcial DERECHOS RESERVADOS D. Leg. N.º 822
<p>Autores: Alberto Pizzoferrato / Sergio Torres Teixeira / Wilfredo Sanguinetti Raymond / Kurt Paerli / Masahiko Iwamura / Helga Špadina / Petra Herzfeld Olsson / Pamhidzai Bamu / Roberto Fragale Filho / María Luisa Molero Marañón / Bernd Waas / Oscar Raúl Chuquillanqui Aragón / Carlos De Fuentes García-Romero De Tejada / Marina Fernández Ramírez / Carmen Ferradans Caramés / Giovanni Gaudio / Francisca Moreno Romero / María Olaya Martín Rodríguez / Rodrigo Palomo Vélez / Adrián Pérez Pastrana / César Alfredo Puntriano Rosas / María Carmen Tatay Puchades / Mireia Llobera / Dulce María Cairós Barreto / Carlos García Gallego / María Katia García Landaburu / Luis Gordo González / Oscar Hernández Álvarez / José Eduardo López Ahumada / Priscila Martín Vales / Rosa María Morato García / Daniel Peres Díaz / Gastón López Argonz / Matthieu Chabannes / Leopoldo Gamarra Vilchez / Miguel Ángel Martínez-Gijón Machuca / Javier Paitán Martínez / Leiso Fasney Restrepo Aguirre / Gaye Burcu Yildiz / Francisca Bernal Santamaria / Karla Giamnina Cánova Talledo / Chiara Cristofolini/ Vincenzo Cangemi/ Roberto Pettinelli / Ljubinka Kovačević/ Boško Latković / Kwang-Taek Lee / Jovana Rajić-Čalić / Jovana Misailović / Carlos Eduardo Saco Chipana / Daniel Ulloa Millares / Christa Caro Palacios / Ángela Sofía Bilbao Pazmiño / Laura Sofía Pérez Pianda / Stefano Guadagno / Chiara Hassemer / Flávia Souza Máximo Pereira / Luis Mendoza Legoaas / Fiorella Peyrone Villacorta / Ivan Ramiro Campero Villalba / Lilli Carollo / Macarena Castro Conde / Emilio De Castro Marín / Viviana Mariel Dobarro / María Begoña García Gil / Luciana Guaglianone / María Laura Parisi / Balwinder Kaur / Diego Megino Fernández / Pedro Oliveira / Ccantu Stefany Osorio Velarde / Luz Pacheco Zerga / María Gema Quintero Lima / Carmen Grau Pineda / Concha Sanz Sáez / Sarai Rodríguez González / Fernando Varela Bohórquez / Juan Manuel Moreno Díaz.</p>
<p>Coordinadora: María Katia García Landaburú</p> <p>© Comisión Organizadora del Congreso: Germán Ramírez-Gastón Ballón (Presidente), Guillermo Boza Pró, María Katia García Landaburu, Emilio Morgado Valenzuela, Mónica Pizarro Díaz, Michael Vidal Salazar</p>
<p>Copyright 2021 Sociedad Peruana de Derecho del Trabajo y de la Seguridad Social</p>
<p>Sociedad Peruana de Derecho del Trabajo y de la Seguridad Social Dirección: Av. Dos de Mayo 516, dpto. 201. Miraflores - Lima, Perú Telef.: 51(1) 7055586</p>
<p>ISBN: 978-9972-9422-4-2 Hecho el Depósito Legal en la Biblioteca Nacional del Perú N.º 2023-02736 Publicado en el mes de marzo de 2023 DERECHOS RESERVADOS. Prohibida su reproducción parcial o total (D. Leg. 822)</p>

En su edición electrónica, el libro alcanza a un número de lectores peruanos y del extranjero, de los ámbitos universitario, gremial, profesional, impulsando el estudio del Derecho del Trabajo y de la Seguridad Social. Esta edición se encuentra alojada y disponible para descarga libre en la página web de la Sociedad Peruana de Derecho del Trabajo y de la Seguridad Social: www.spdts.org.pe

COMISIÓN ORGANIZADORA DEL CONGRESO

Germán Ramírez-Gastón Ballón (Presidente)

Guillermo Boza Pró

María Katia García Landaburu

Emilio Morgado Valenzuela

Mónica Pizarro Díaz

Michael Vidal Salazar

COMISIÓN REVISORA DE PONENCIAS

Guillermo Boza Pró

Ana Cecilia Crisanto Castañeda

María Katia García Landaburu

César Gonzales Hunt

Sandro Nuñez Paz

Estela Ospina Salinas

Luz Pacheco Zerga

Mónica Pizarro Díaz

César Puntriano Rosas

Germán Ramírez-Gastón Ballón

Michael Vidal Salazar

**TRABAJADORES
MIGRANTES**

**MIGRANT
WORKERS**

MIGRANT WORKERS

HELGA ŠPADINA (CROATIA)

Associate Professor of Law at the Faculty of Law Osijek, Croatia. Her research interests and expertise lies primarily in the area of migration law, labour and social law, international refugee law and human rights law. She has working experience with the UN DPKO, UNHCR, IOM, UNODC, UNRWA, OHCHR and OSCE in South-East Europe and Middle East on legal protection of refugees, migration management and anti-human trafficking. Professor Špadina provides regular advice to the various UN agencies, the European Commission and other European and international organizations on labour migration, labour law and social policy and antidiscrimination law.

PETRA HERZFELD OLSSON (SWEDEN)

Professor of labour law at the Faculty of Law, Stockholm University. Her fields of research are labour law, European law, and human rights law. She is particularly interested in international aspects of labour law. In her dissertation, professor Herzfeld Olsson investigated the scope of workers' rights to freedom of association in UN-, Council of Europe- and EU law. Her interest in the role of human rights in working life and the interaction between different levels of law has continued to guide her research.

1. STARTING POINTS

The work described in this report has been governed by the COVID-19 crisis in a number of different ways. First and foremost, it has affected our substantive focus. Migrant workers, after all, belong among the groups hit hardest by the pandemic. It has had a significant and often detrimental impact on them. The impact has many different faces: migrants are often essential personnel, unable to work remotely or, indeed, to socially distance at the workplace or left without sufficient personal protective equipment (PPE), subject to insufficient social protection and income support measures. In some countries, what is more, they have been at increased risk of infection because of substandard and crowded accommodation.¹ In response to this unprecedented health emergency, some governments have eased the procedures and requirements for work permit extensions, regularized undocumented employment and recognized the need to improve the standard of accommodation provided by employers.² In other cases, no such measures have been taken and labor migrants have been left in very difficult situations.³

The consequences of the pandemic have also affected our own work on producing this report. It has prevented many colleagues around the world from participating, for example. We are therefore particularly grateful for the input received, beside our own national reports, from Camas Roda, F. (Spain), Doğan Yenisey, K. (Turkey) Jorens, Y (Belgium) Kovačević, Lj., Latković, B. (Serbia) Kwang-Taek, L. (South Korea), Pétremand, S. (Switzerland), and Todorova, B. (North Macedonia). It has been essential to our work.

Although the main focus of this report is on how the COVID-19 crisis has affected labor migrants in different parts of world we will not forget that

1 ADBI, OECD, ILO, Labour Migration in Asia: Impacts of the COVID-19 crisis and the Post-Pandemic Future, 2021, <https://www.oecd.org/migration/labor-migration-in-asia-a5d6e6aa-en.htm>, p vi.

2 Ibid.

3 See chapter 7.

such effects have not occurred in a vacuum. In many cases the sufferings faced by labor migrants due to the pandemic may be explained by factors that have been problematic for a long time. Labor migration was, as is well known, already identified before the pandemic as an “increasingly complex and dynamic phenomenon taking place within and between all regions of the world”.⁴ One important explanation of this is that “temporary labor migration, particularly of low-skilled workers, is exceeding permanent flows, and this presents a significant governance challenge in terms of ensuring decent work and reducing migration costs for this category of migrant workers”.⁵ At the last World Congress in Turin, Professor Dogan Yenisey presented a comprehensive report with the title “Safeguarding the rights of migrant workers: another challenge for labor law?”.⁶ She ended the report as follows: “To implement the principle of equality between migrants and nationals as regards labor and social security rights, labor law should develop a specific approach, which will prevent vulnerabilities and exploitation in the market and strengthen labor law institutions. The risk mutualization may help to capture the insights of the complex migration phenomenon”.⁷ To a certain extent the constructive measures taken by governments and others to reduce suffering during the pandemic generally reflect what Professor Dogan Yenisey suggested. We will come back to that in the conclusions.

The national rapporteurs have highlighted different aspects of relevance to the complexity of their national contexts. We will partly base this report on those accounts. This means that to a large extent the report will not give a comprehensive overview of the global situation for labor migrants, but touch mainly on specific challenges important in particular national settings. Our ambition is to draw a line between challenges discussed before the COVID-19 crisis and problems that have occurred during it, discussing whether the crisis has made it possible to draw some lessons on how to improve the governance of labor migration in the future.

4 International Labour Office, Report IV Addressing governance challenges in a changing labour migration landscape, Report IV International Labour Conference 106th Session 2017, p 5. (hereafter ILO 2017).

5 Ibid.

6 Doğan Yenisey, K., Safeguarding the Rights of Migrant Workers: Another Challenge for Labour law? In *Transformations of Work- Challenges for the Institutions and Social Actors* (eds) Giuseppe Casale, G. and Treu, T. *Bulletin of Comparative Labour Relations – 105* (Wolters Kluwer, 2019), p 227-291.

7 Ibid 291.

The aspects that dominate discussions on labor migration differ depending on the category of workers being talked about, for example, highly skilled or low skilled labor migrants. The World Economic Forum in 2018 identified the global race for talent as one of the most important ways in which competitiveness and growth are fostered. Many policy-makers face the challenge of attracting the “best and brightest”. The most attractive prospects include start-ups⁸ and investors. According to the OECD,

mobile individuals are picking and choosing countries in which to study, work and invest based partly on how favourable the policies regarding family members and longer-term settlement are. Although employment conditions are key to attracting talents, migration policies do make a difference. The OECD Talent Attractiveness indicators show that many countries could improve their ranking by more favourable migration policies for highly qualified labor migrants.⁹

The situation concerning the largest group of labor migrants in the world, however, so-called “low skilled labour migrants” – such as seasonal and domestic workers – is rather different. Exploitation and inhuman conditions are rampant. In this case the question is seldom how we could change the nexus between labor law and migration law to make it more attractive to enter a country, but rather how to safeguard decency, fairness and basic human rights.¹⁰

We are aware that the division between highly skilled and low skilled labor migrants is not clear cut and involves a number of simplifications.¹¹ We will touch upon that, but nevertheless the report frames its content in terms of these two categories. In the pre-COVID-19 parts of the reports we chose to focus on groups that have been particularly affected by the pandemic, such as health professionals, seasonal workers and domestic workers.

Migrant workers include many categories of migrants. The channels used to enter a particular country for work differ. Some migrant workers enter with the support of work permits, but many others use different channels. Some migrant

8 OECD Migration Policy Debates N 21, January 2020, How to Make Labour Migration Management Future-Ready, p 1.

9 Ibid p 2.

10 See for example Joanna Howe and Rosemary Owens, Temporary Migration in the Global Era: The Regulatory Challenges, in Johanna Howe and Rosemary Owens (eds) Temporary Labour Migration in the Global Era – The Regulatory Challenges (Hart Publishing 2016) p 4 et seq.

11 Weinar et al, Highly Skilled Migration: Concept and definitions, Springer 2020.

workers have temporary residence permits and some permanent ones. In the report different categories are discussed in different contexts and we hope that it is relatively clear what kind of group is being discussed in a particular section.

The report is structured as follows:

After this introduction, in section 2 some technical aspects, including the numbers, geographical allocation, sectors and skills of labor migrants are introduced. However, this part will be kept to a minimum (further reading is available in, for example, the recent ILO edition of *ILO Global Estimates on International Migrant Workers*).¹² The perspective taken when discussing migrant workers depends on the focus of the entity to which the discussant belongs. This also applies to international organizations and some of the relevant perspectives are introduced in section 3. In section 4 the pre-pandemic situation for workers in highly skilled segments of the health sector and in the lower skilled domestic and seasonal work sectors is introduced from both a general and – partly – a national perspective. Already before COVID-19 there was a lack of decent work for many migrant workers. One example is the wage-gap between migrant workers and other workers. The fact that many migrant workers are performing their work in the informal sector and/or in atypical employment is one explanation. These conditions are introduced in section 5 in order to provide the background to the particular difficulties that the pandemic has brought for many migrant workers. In section 6 a constructive way forward is discussed, namely the migration partnerships agreements concluded by some of the countries represented in this report by national reports. The pandemic has affected migrant workers in different ways and in section 7 examples are given regarding entry conditions, access to the labor market, the right to remain, social security rights and labor rights. We end the report with some concluding remarks building on the conclusions of the report on migrant workers presented at the last World Congress in Turin, authored by Professor Doğan Yenisey.

12 International Labour Organization, *ILO Global Estimates on International Migrant Workers, Results and Methodology*, third edition, Geneva 2021.

2. MIGRANT WORKERS – SOME BASIC FACTS CONCERNING NUMBERS, COMPOSITION AND GEOGRAPHICAL ALLOCATION

2.1. Numbers

The 2020 IOM World Migration report states that “the number of international migrants is estimated to be almost 272 million globally, with nearly two-thirds being labour migrants”.¹³ While the migrants’ share of the world population has barely changed over the past six decades, remaining stable at 2.5–3.5 percent, migration is increasingly concentrated in a handful of destination high-income countries with ongoing labor shortages, high demand in certain sectors and occupations, and relatively liberal immigration policies.¹⁴ Two-thirds of the world’s migrants live in North America, Western and Eastern Europe, and the oil-exporting Gulf Cooperation Council countries in the Persian Gulf. The share of migrants in Western European countries has increased especially rapidly over the past four decades, rising from 18 to about 25 percent of the world migrant population.¹⁵

The ILO emphasizes that, on global average, migrant workers constitute 4.9 percent of the labor force of destination countries, with the figure being reported for the Arab States (41.4 percent).¹⁶ The country from which the largest group of migrants originate is India, followed by Mexico, China, the Russian Federation, Syria, Bangladesh, Pakistan, Ukraine and the Philippines.¹⁷ In Euro-Asian context, most sending countries are in Eastern Europe and Central Asia, while high-income (mostly) EU member countries in Western, Southern, and Northern Europe receive the largest share of migrants.¹⁸ Specific corridors have developed, the largest tending to be from developing countries to larger economies, such as the United States, France, the Russian Federation, the United Arab Emirates and Saudi Arabia.¹⁹ In the Gulf States, over 95 percent of the

13 IOM, World Migration Report 2020, p 2 (hereafter IOM 2020).

14 The World Bank, Migration and Brain Drain, 2019, p 26, <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/657051570692065211/world-bank-eca-economic-update-fall-2019>

15 Ibid.

16 International Labour Organization, ILO Global Estimates on International Migrant Workers, Results and Methodology, third edition, Geneva 2021.

17 IOM 2020 (footnote 13), p 26.

18 The World Bank, Migration and Brain Drain, 2019 (footnote 14) pp 26 and 30.

19 IOM 2020 (footnote 13), p 2.

labor force in construction and domestic work comprises migrant workers.²⁰ In certain developed countries, such as Switzerland, foreign nationals make up a quarter of the resident population.²¹ This means that one out of every three hours of work in Switzerland is performed by a foreigner.²²

Other important, though narrower corridors exist throughout the world.²³ Even if the majority of migrant workers are in high-income countries, the proportion there has declined slightly. Between 2013 and 2017, a slight drop was noted, from 112.3 to 111.2 million. Upper middle-income countries experienced the opposite development, with a rise from 17.5 million to 30.5 million.²⁴ This shift may be explained by economic growth in middle-income countries and/or changes in labor immigration regulations in high-income countries.²⁵ The share of migrant workers in the total workforce across country income groups was fairly small in low income (1.9 percent), lower income (1.4 percent) and upper middle-income countries (2.2 percent), but much larger for high-income countries (18.5 percent).²⁶

Within the OECD, more than 4.9 million labor migrants entered OECD countries through temporary migration programs in 2017, an increase of 11 percent since 2016.²⁷ Permanent labor migration increased by 6 percent.²⁸ Poland was the top OECD destination for temporary labor migrants, with 1.1 million new authorizations issued to non-EU workers and 21,000 intra-EU posted workers. The United States remained the second most popular destination, with 691,000 new temporary workers in 2017.²⁹ It is also important to note that temporary migrants encompass a number of different categories at

20 Ibid, p 34; ILO 2017 (footnote 4) p 7ff.

21 Federal Statistical Office, Panorama de la société Suisse, Unine/Unifr, 2020, p. 74, cited in: Pétremand, S., National report for Switzerland for the World Congress of Labour and Social Law, 2021.

22 Ibid. Federal Statistical Office, Rapport statistique sur l'intégration de la population issue de la migration, 2017, pp. 13 and 29.

23 IOM 2020 (footnote 13) p. 58 ff.

24 Ibid, p 3. On the share see also ILO Global Estimates on International Migrant Workers, 2018, p. xi.

25 IOM, 2020 (footnote 13) p 33; see also ILO *ibid.*

26 IOM, 2020 (footnote 13) p 33.

27 OECD International Migration Outlook 2019, p 18, p 25 (hereafter OECD 2019). On temporary labour migration see also ILO 2017 (footnote 4) p 12 ff.

28 OECD 2019, (footnote 27) p 24. On permanent migration to the OECD-countries see also ILO 2017 (footnote 4) p 11f.

29 Ibid. p 18.

varying skill levels within the OECD, including highly skilled engineers, IT consultants, intra-company transferees and posted workers, and lower-skilled seasonal workers and working holidaymakers.³⁰ Other OECD and non-OECD recipients of temporary labor migrants are Australia, Brazil, Republic of Korea, Mexico, New Zealand, the Russian Federation and the Gulf states.³¹

Intra-EU/EFTA posted workers represented the main recruitment channel for temporary workers within OECD, with almost 2.7 million postings. With about 800,000 new work authorizations granted in 2017 a 16 percent increase on 2016, seasonal programs were the second largest channel for temporary labor migration,³² although in some countries their share was significantly higher (in Poland it was 47 percent and in the United States it was 23 percent).³³

Ageing populations and declining labor forces in most advanced economies and some large emerging economies suggest that migrant workers will play an important role in maintaining labor supply and filling labor shortages, as well as in contributing to social protection funds in these countries.³⁴

2.2. Gender Composition

There are about 99 million male migrant workers (58.5 percent) and 70 million female migrant workers (41.5 percent).³⁵ The higher proportion of men among migrant workers may be explained by the higher likelihood that women will migrate for reasons other than work, as well as possible discrimination, which reduces their employment opportunities.³⁶

According to the ILO, particular attention should be given to the situation of women migrant workers, who are overrepresented in the informal economy and among undocumented workers, and carry a more significant burden of unpaid work in many countries.³⁷ Migrant women workers “face a double penalty in terms of labor market segregation and discrimination” and therefore,

30 ILO 2017 (footnote 4) p 13.

31 Ibid.

32 OECD, 2019 (footnote 27) p 18, p 29.

33 Ibid.

34 ILO 2017 (footnote 4) p 10.

35 ILO Global Estimates on International Migrant Workers, 2021 (footnote 16) p 12.

36 ILO Global Estimates 2021 footnote 16) p 12 and 21-22.

37 ILO “Protecting Migrant Workers during the COVID-19 Pandemic: Recommendations for Policymakers and Constituents”. Policy Brief, April 2020, 2

all labor migration policies have to be gender sensitive.³⁸ Women are “over-represented in non-standard employment, such as temporary agency work and part-time jobs, which is also the result of discrimination, poor transferability of skills and low bargaining power”.³⁹ They are also disproportionately represented in care and domestic work. In section 4, domestic work, will be examined in a bit more detail.

2.3. Division of Skills, Education and Sectors in which Migrant Workers Are Found

Skills

Different categories of migrant workers are often distinguished on the basis of skills. These skills can refer to what is needed for the work carried out in the destination state or to the skills a particular labor migrant has acquired. It is clear that the skills required for a job in many cases do not correspond to the skills acquired by a particular labor migrant.⁴⁰ Migrant workers are to a larger extent than other workers over-qualified for their job. In Switzerland, for example, the migrant population has significantly higher rates of over-qualification than nationals, especially in the first generation of migrants, among non-EU/EFTA nationals and women.⁴¹ The World Bank reports the labor migration of 55 percent of the higher qualified citizens of Bosnia and Herzegovina; more than 40 percent of citizens in Armenia and Latvia; and almost 40 percent of the nationals of Albania, Kazakhstan, Moldova, North Macedonia, and Romania.⁴²

High-skilled labor migrants generally find it easier to settle in a destination country than low-skilled workers.⁴³ Nevertheless, it is important to keep in mind that the distinction between high-skilled and other labor migrants is not always clear.⁴⁴ In many cases, labor migrants selected for their skills are “nonetheless

38 ILO 2017(footnote 4) p. 19 (ILO 2016 pp 144-152).

39 Ibid.

40 EUROSTAT Labour Force Survey 2020, Press Release published on 21 July 2021, <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/ddn-20210721-1>.

41 Federal Statistical Office, Rapport statistique sur l'intégration de la population issue de la migration, p 33, cited in: Pétremand, S., National report for Switzerland, 2021, p 3.

42 The World Bank, Migration and Brain Drain, 2019, p 62.

43 ILO 2017 (footnote 4) p 11.

44 Weinar et al, Highly Skilled Migration: Concept and definitions, Springer 2020.

unable to practice in an occupation due to difficulties in professional licensing.”⁴⁵ “Skill mobility partnerships” between destination countries and origin countries have been one way forward in some countries.⁴⁶ Over one-third of all labor migrants are considered to be so-called skill-based.⁴⁷ It was estimated (ILO) in 2012 that there would be “a potential global shortage of up to 85 million highly skilled and medium skilled workers in 2020”.⁴⁸ Sectors and/or professions mentioned in this regard are health care, engineering and information technology.⁴⁹

Lower skilled labor migrants constitute the large majority of migrant workers worldwide. Furthermore, their share has been growing in recent years. This gives rise to serious concerns regarding the efficiency and equity of labor migration.⁵⁰

Sectors

Over 71.1 percent of all migrant workers in 2013 worked in the service sector. Of these 7.7 percent were domestic workers (there were 11.5 million domestic workers in total). Many labor migrants work in industry, including manufacturing, and in agriculture (11.1 percent).⁵¹ Low- and medium-skilled workers are involved mainly in agricultural activities, construction, manufacturing and freight transport.⁵²

It is interesting to note that in Switzerland, the main five economic sectors employing migrant workers are food and hospitality (69 percent), consultation and IT (19 percent), health care (4.4 percent), culture, sports and leisure, and personal services.⁵³ Switzerland currently has about 50 percent low-skilled migrants and 50 percent highly skilled migrants, which is something new compared with the 1990s, when migrants were employed mainly in low-skilled

45 Migration Policy Institute, Batalova, J., Fix, M., Fernández-Peña, J. R., *The Integration of Immigrant Health Professionals Looking beyond the COVID-19 Crisis*, Issue Brief, April 2021 (hereafter MPI April 2021),

46 Weinar et al, *Highly Skilled Migration: Concept and definitions*, Springer 2020.

47 ILO 2017 (footnote 4) p 12 et sec.

48 Ibid p 14.

49 Ibid p 16.

50 Ibid p 11.

51 Ibid p 8 f.

52 OECD 2019 (footnote 27) p 25.

53 State Secretariat for Migration, *Statistiques sur l’immigration : Les étrangers en Suisse, Année 2019*, Berne 28.1.2020, cited in: Pétremand, S., *National report for Switzerland*, 2021.

jobs. Currently, Switzerland attracts more highly skilled migrants than other European countries: the number of such migrants has more than doubled since 1991; most of them come from Germany, Austria, France, Great Britain, the United States, Canada and India.⁵⁴

3. DIFFERENT STARTING POINTS FOR DIFFERENT STAKEHOLDERS

Perspectives on labor migration differ between stakeholders. The OECD's starting point in its Migration Outlook for 2019 is ensuring that labor migration contributes to growth while avoiding negative effects – especially negative labor market impacts – on residents.⁵⁵ Granting a temporary stay is one of the main policy tools for achieving this objective.⁵⁶

The OECD reports that countries are constantly adjusting the criteria upon which their labor migration programs are based, in an effort to ensure better selection procedures to meet their skills needs. Several countries have modified their points systems to this end.⁵⁷ The systems described in the OECD report seem to focus on talent and highly skilled labor migrants.⁵⁸ Another aspect is to use these mechanisms to encourage skilled and/or seasonal labor migrants to take up jobs in remote areas. Examples include Australia, Canada, New Zealand⁵⁹ and Korea.⁶⁰

In the OECD Migration Policy Debate No. 21 January 2020, the OECD asks how to make labor migration management future-ready?⁶¹ National examples are highlighted, including sector-specific pilot measures targeting agro-food “in Ireland”, Canada and the United Kingdom.⁶² Others direct the focus to specific regions within a state.

The World Bank argues in similar ways. A World Bank report emphasized that

54 Federal Statistical Office, Panorama de la société Suisse, p 74, cited in: Pétremand, S., National report for Switzerland, 2021.

55 OECD 2019 (Footnote 27), p 119.

56 Ibid.

57 Ibid p 19, p 47ff.

58 Ibid p 47ff.

59 Ibid p 51.

60 OECD Migration Policy Debates, No 21, January 2020 (footnote 8), p 1.

61 Ibid.

62 Ibid.

labour mobility can address many of the long-run challenges the Europe and Central Asia region is facing, such as the burdens created by demographic pressures arising from population aging and low fertility rates. The main difficulty is designing policies that will enable the region to take advantage of the gains generated by labour mobility and address the costs of migration. The policy debate should focus on managing external and internal migration so that the region can more effectively transition to a competitive, inclusive, efficient, and integrated market.⁶³

The ILO has taken another starting point in its report “Addressing governance challenges in a changing labour migration landscape” from 2017.⁶⁴ The starting point is fairness. In 2014 the ILO published the report “Fair migration: setting an ILO agenda”. This perspective does not prevent the ILO from discussing “the governance of labour migration in the light of the rapidly changing nature of work, widening economic and demographic disparities, and the need for skills and job matching to meet labour market needs”.⁶⁵ But the focus and concerns are very different: The challenges in governing labour migration will grow, according to the ILO, due to trends such as technological changes, evolution of the employment relationship and erosion of the social contract between the state and other actors”.⁶⁶ Less-skilled migrant workers are exposed more frequently to “decent work deficits and bear higher migration costs”.⁶⁷ The ILO has also demonstrated that the shortcomings and vulnerabilities already created before the pandemic have turned out to lead to extremely severe difficulties for migrant workers during the pandemic.⁶⁸ The COVID-19 crisis has “exacerbated pre-existing decent work deficits, increased poverty, widened inequalities, and exposed the digital gap within and among countries.”⁶⁹

In the 2030 Agenda for Sustainable Development, Goal 8 on decent work and economic growth – namely target No. 8.8 – underscores that labor rights and safe and secure working environments should be protected for all workers,

63 The World Bank, *Migration and Brain Drain*, 2019, (footnote 14) pp. 25-26,

64 ILO 2017 (footnote 4), p 1.

65 Ibid.

66 Ibid.

67 Ibid p 11.

68 ILO, *Inequalities and the world of work*, International Labour Conference 109th Session 2021, International Labour Office, Geneva, 2021, see for example paras 2, 11, 12, 21, 37, 43, 44-47, 49, 51, 79, 89.

69 International Labour Conference, 109th Session, Resolution concerning a global call to action for a human-centred recovery from the COVID-19 crisis that is inclusive, sustainable and resilient (17 June 2021) para 3.

including migrants, in particular women migrants and those in precarious employment.⁷⁰

The adoption of the Global Compact for Safe, Orderly and Regular Migration in 2018 gave a “reason to hope for a new era of international cooperation on cross-border movements”.⁷¹ The Global Compact was described as “the first internationally negotiated statement of objectives for migration governance, striking a balance between migrants’ rights and the principle of states’ sovereignty of their territory”.⁷² Through 23 objectives, the Global Compact aims to foster cooperation among states in regulating the movement of people across international borders,⁷³ but with the advent of COVID-19 legitimate concerns were raised about whether the Global Compact might still be relevant in the new circumstances of a “worldwide crisis of immobility”.⁷⁴ Detailed study of Compact commitments whose implementation might help states to respond to the acute stage of pandemic disruption demonstrated that the Global Compact did not lose its relevance in the COVID-19 era.⁷⁵ On the contrary, MPI puts forward arguments that none of its commitments became irrelevant, and indeed that they have the potential to become essential to restoring international migration in the post-pandemic era and be vital in removing pandemic-related impediments to the mobility of migrant workers.⁷⁶ These arguments include reducing vulnerabilities during migration, strengthening consular services, using detention only as a last resort, and providing migrants with access to basic services (such as health care), coordinated border management (including pre-screening of arriving persons); legal identity and adequate documentation for all migrants; and clear, predictable migration procedures for screening and assessment, in order to refer migrants to the appropriate channels for possible admission and stay.⁷⁷

70 UN transforming the world 2016, <https://www.un.org/sustainabledevelopment/sustainable-development-goals/>

71 Migration Policy Institute/German Cooperation Deutscher Zusammenarbeit, Policy brief by Newland, K. Will International Migration Governance Survive the COVID-19 Pandemic?, 2020, p 3 <https://www.migrationpolicy.org/sites/default/files/publications/globalcompact-migration-governance-pandemic-final.pdf>

72 IOM, 2020 (footnote 13) p 291.

73 See footnote 50, p 4.

74 Ibid.

75 Ibid, p 4.

76 Ibid.

77 MPI, 2020 (footnote 72).

4. DIFFERENT STARTING POINTS FOR DIFFERENT CATEGORIES OF LABOR MIGRANTS

4.1. High-skilled Labor Migration with a Focus on Health Professionals

High skilled migration in general is one of the main foci of all national, regional and international labor migration regulations because of its impact on the reduction of labor shortages, filling skill gaps, innovation, productivity, international competitiveness, economic growth and taxation for the destination country, but also on poverty reduction for the country of origin of migrant workers.⁷⁸ Therefore, it is not surprising that the richest and most successful countries benefit most from high-skilled migration. Four destination countries – the United States, the United Kingdom, Canada and Australia – receive more than two-thirds of the world’s high-skilled migrants.⁷⁹ The World Bank reports that high-skilled migrants are disproportionately attracted to higher-income countries with liberal and skill-selective immigration policies and higher returns to human capital, as they have an easier time overcoming physical distances, linguistic differences and policy barriers.⁸⁰

Of all high-skilled migrants, health care workers are in the most controversial position because their migration can be regarded as a multiple loss, not only in terms of the cost of their expensive education (in many countries often fully funded by the state), but also in terms of the brain drain and shortages of medical personnel in their home country. The two leading international organizations in the field of migration of health workers – the IOM and the WHO – have strongly emphasized the dual nature of migration of health care providers: the global shortage of health professionals and the consequent global imbalances between the availability of health workers and the burden of disease (the WHO gives the example of Sub-Saharan Africa, which has the world’s lowest density of doctors and nurses, at only 3 percent, the highest disease burden, at

78 Cf. Peri, Giovanni, and Chad Sparber. 2009. ‘Task Specialization, Immigration, and Wages.’ *American Economic Journal: Applied Economics* 1 (3): 135–69, and National Academies of Sciences, Engineering, and Medicine. 2017. *The Economic and Fiscal Consequences of Immigration*. Washington, DC: National Academies Press. cited in: The World Bank, *Migration and Brain Drain*, 2019, p 40.

79 Ibid, p 57.

80 Ibid, p 34.

24 percent, and less than 1 percent of the world's financial resources to attempt to cope with this burden).⁸¹

The European Migration Network (EMN) emphasize that developments in health care linked to the delivery of services and digital transformation add to the need for new skills in the future.⁸² They also note that the health sector is heavily regulated within Member States, making migrants' access more challenging, so the EU has been attracting migrant workers, but through non-labor migration channels.⁸³ There are some initiatives aimed at increasing international recruitment, often in cooperation with third countries and encompassing a comprehensive package, including recognition of qualifications, workplace training, inclusion and mentoring. But this can be done only if we improve data gathering to map demand and supply, develop skills through strategic planning (including transversal and soft skills) and strengthen governance.⁸⁴

Consequently, the labor migration of health professionals currently has two interesting aspects from the standpoint of labor law and labor mobility regulation: first, the abovementioned pre-COVID-19 aspect, including a possible brain drain from countries of origin, and second, a novel aspect, namely the need to respond to the pandemic in the face of serious shortages of health professionals and other vulnerabilities of public health care systems around the world. This points to a need to change restrictive regulations on the employment of international health professionals.

Five years ago, the World Health Organization estimated that the global shortage of health workers is 17.4 million workers. This is because of the undersupply of medical and nursing school graduates, the high cost of labor as a national health expense for governments, and demographic change and negative birth rates in developed countries.⁸⁵ The IOM points out that the well-managed migration of health workers can play a key role in development overall, as well as in building the capacity of health systems, not only in receiving countries,

81 WHO, https://www.who.int/wht/2006/06_chap1_en.pdf

82 EMN – JRC – DG HOME Briefing Paper, Roundtable on the EU labour migration policy: time to move from a skill-based to a sector-based framework? 5 November 2020, https://emn.ie/wp-content/uploads/2021/01/00_labour_migration_roundtable_briefing_paper.pdf

83 Ibid.

84 Ibid.

85 The World Bank, *Migration and Brain Drain*, 2019 (footnote 14) p 63.

but also in countries of origin. In order to promote good practices and prevent any negative effects of health worker migration, the WHO has developed the Global Code of Practice on the International Recruitment of Health Personnel, with strategies to enable both sending and destination countries to decrease their reliance on foreign-trained health workers and mitigate the negative effects of health personnel migration on the health systems of developing countries. These include, for instance: aligning government education spending with employment opportunities; not hiring directly from countries with the lowest health care worker-to-population ratios; and adopting innovative financing mechanisms, allowing local and private entities to provide funding complementary to government subsidies to health worker training.⁸⁶

In the global race for the recruitment of specialized health workers, the Eastern European countries, particularly countries of the Western Balkans, have become one of the main suppliers of health care staff. The World Bank reports that 14 percent of the population of Serbia and 48 percent of the population of Bosnia and Herzegovina have emigrated, the majority of migrant workers being in the health sector.⁸⁷ Bulgaria, Croatia and Romania report high levels of out-migration for all health workers, despite high vacancy rates in their domestic health sectors.⁸⁸ Prior to COVID, Croatia was lacking 12,000 nurses and in the period between 2008 and 2018, 7,459 nurses left the Croatian health care system to seek employment in other EU Member States (official data on employees of health care institutions; the exact number of medical nurses who left immediately after training is unknown).⁸⁹ In the same period, more than 1,000 specialist doctors emigrated from Croatia to find work abroad, while almost another thousand are in the process of emigrating. The same applies to all other medical professionals, resulting in current estimated 10–35 percent labor shortages in health care and a projected loss of one-third of medical doctors in the next five years.⁹⁰ Bearing in mind the that majority of Eastern European

86 IOM, WMR, 2020 (footnote 13).

87 The World Bank, Migration and Brain Drain, 2019 (footnote 14), p 63.

88 Ibid.

89 Juric, T., Najskuplji liječnik i sestra su oni kojih nema/The most expensive doctor and nurse are the ones lacking from the system, Medix, October/November 2020, 26/144/145, p 30, https://www.researchgate.net/publication/347465149_Najskuplji_ljecnik_i_sestra_su_oni_kojih_nema_Medicinski_casopis_M_E_D_I_X_2_0_2_0, cited in: Špadina, H. National Report for Croatia, 2021.

90 Hrvatska liječnička komora. Digitalni atlas hrvatskog liječništva, 2020, <https://www.hlk.hr/digitalni-atlas-hrvatskog-lijecnistva.aspx>, cited in: Juric, 2020, p 30, cited in: Špadina, H. National

nationals benefit from publicly funded medical education, it is clear that the fiscal burden of labor migration among health professionals should not be neglected, in addition to the impact on the quality of and access to medical care. A notable feature of the Croatian and Serbian education systems is the recent establishment of undergraduate and graduate programs for medical education in German and English.⁹¹ The existence of these programs raises concerns that an even higher number of Croatian and Serbian medical professionals might be interested in emigrating after graduation.

From a labor law perspective, Eastern European health care professionals are emigrating mainly to other EU countries because at home they are often subject to labor exploitation, unpaid overtime, fixed term contracts, insufficient opportunities for specialization, low salaries, even below the national average, unrecognized MA-level nursing qualifications, and a lack of opportunities for promotion.⁹² Interestingly, the governments in the region seem aware of the reasons for this massive emigration, but nothing is being done to solve existing issues and improve the labor protection of health professionals. Simultaneously, there is no strategic approach to the brain drain in this area, nor any effort to reach out to foreign health care professionals and/or organize the labor immigration of health care personnel. For example, since Croatia became an EU member, labor migration has increased significantly, with an estimated 200,000–250,000 nationals leaving the country. Incoming and outgoing labor migration is unregulated, without migration management and in a legal environment characterized by over-normativity and complexity of laws, regulations and procedures for incoming migrant workers.⁹³ The majority of health care migrant workers employed in Croatian health institutions are from neighboring countries. This is not surprising given the language proximity and similarity of medical education systems. Nevertheless, there is no effort or initiative to conclude bilateral or multilateral migration agreements, which

Report for Croatia, 2021.

91 <http://www.mefos.unios.hr/index.php/hr/>, <http://www.mefst.unist.hr/studies/medical-studies-in-english/83>, <http://www.mefst.unist.hr/studies/medical-studies-in-english/83>, <https://medical-studies-in-english.com/>, <https://mse.mef.unizg.hr/admission/admission-requirements/> and Kovačević, Lj., Latković, B., National Report for Serbia, 2021.

92 Juric, 2020 (footnote 90) p 30.

93 Špadina, H. Croatian Migration Law: Over-normativity in Search of a Balance between Migration Control and Migrant Rights, in: Foblets, M.C., Carlier, J.Y (eds.), *Law and Migration in A Changing World*, Springer, ISBN 978-3-319-99508-3, <https://www.springer.com/gp/book/9783319995069>, in press, cited in Špadina, H, National Report for Croatia, 2021.

would regulate the inflow of medical personnel and provide a clear legal and procedural framework for the employment of health professionals, particularly taking into consideration extremely low internal labor mobility.

In Serbia, the majority of health workers have migrated to Germany through the mechanisms established under the so-called “Triple Win” project (for more see p. 14 of this Report). But a significant number of health workers have also migrated to Germany in search of employment without the involvement of the National Employment Agency, simply using the recruitment services of German employment agencies.⁹⁴

Serbia, Croatia, Bosnia and Herzegovina and all the other countries of the former Yugoslavia share the same labor law concerns related to the labor migration of health professionals, whose medical studies and the cost of medical specialization were publicly funded (covered by the public health institution). National health care laws stipulate that health workers are legally obliged to work for the public health-care institution twice as long as the period of specialization, as stipulated by all the abovementioned countries.⁹⁵ Being obliged by the civil law to respect employment contracts and work in countries of specialization, labor migration represents a breach of contractual terms. In the past few years, hospitals and other public health care institutions have demanded reimbursement of specialization costs, including costs of scholarships, exams, issuing of diplomas, besides the wages paid to these workers during specialization.⁹⁶ The Serbian National Report highlights that some public health-care institutions have also demanded, alongside the costs of specialization, compensation for damage caused by the termination of institutional employment and by the fact that institutions have been unable to engage other health-care workers during the period the migrating worker was expected to work.⁹⁷ The Medical Chamber refused to issue a certificate concerning the employment of departing health-care workers without the payment of compensation for the costs of their specialization. This subsequently led to legal proceedings.⁹⁸

94 Kovačević, Lj., Latković, B., National Report for Serbia, 2021,

95 Ibid and Špadina, H. National Report for Croatia, 2021.

96 Ibid.

97 Kovačević, Lj., Latković, B., National Report for Serbia, 2021.

98 Ibid.

During the pandemic in Sweden the labor shortages in the health sector have been more glaring than ever.⁹⁹ It has also been clear that the health sector would not survive without foreign-born personnel at all levels. Practicing immigrant medical doctors and nurses comprise 34 percent and 12 percent, respectively, of staff in those professions. In 2019, almost 50 percent of all medical doctor licenses approved were given to workers with a foreign EU/EEA education and more than 10 percent to doctors from a third country.¹⁰⁰

Nevertheless, many with a foreign education consider it difficult to get through the validation process to qualify for a license.¹⁰¹ Specific fast-track measures have been adopted during the pandemic.¹⁰² Among assistant nurses, who do not need a license, 26 percent are born abroad.¹⁰³

4.2. Low-skilled Labor Migration

As discussed in section 2 the majority of labor migrants work in low-skilled sectors.¹⁰⁴ This work may lead to increased income, increased school enrolment rates and a reduction in child mortality among such workers. Remittances also play a central role.¹⁰⁵ Remittances “could contribute to lower levels of inequality, as they represent an important source of income for lower-income households” in many countries.¹⁰⁶ Still, low-skilled migrant workers in particular suffer from shortcomings with regard to decent work, including “violations of fundamental principles and rights at work and other infringements, when seeking to obtain employment abroad and during their stay in the country of employment”.¹⁰⁷

99 <https://ec.europa.eu/migrant-integration/news/immigrant-health-staff-indispensable-in-swedens-response-to-COVID-19>

100 <https://www.socialstyrelsen.se/statistik-och-data/statistik/statistikamnen/halso-och-sjukvardspersonal/>

101 Olle Jansson Organized interests and foreign educated professionals: the case of the associations for physicians and nurses in Sweden, IFAU rapport 2017: 18.

102 Annika Wilhelmsson Fredrik Tano, Intensivutbildning för nya svenskar ska minska bristen på vårdpersonal DN.se 2020.06.30 <https://www.dn.se/nyheter/sverige/intensivutbildning-for-nya-svenskar-ska-minska-bristen-pa-vardpersonal/>

103 <https://ec.europa.eu/migrant-integration/news/immigrant-health-staff-indispensable-in-swedens-response-to-COVID-19>

104 ILO 2017 (footnote 4).

105 Ibid p 15.

106 ILO, Inequalities in the world of work, Report IV, International Labour Conference 109, 2021, International Labour Office Geneva, para 37.

107 Ibid 2017 p 17.

The large supply of lower-skilled workers in relation to the jobs available abroad means that they tend to be recruited under temporary migration schemes, often after paying fees to labor recruiters, and into sectors characterized by non-standard forms of employment and greater informality, and where decent work is in short supply.¹⁰⁸ The risk of forced labor is higher for this group, in particular in sectors such as agriculture, domestic work, fishing and the electronics industry.¹⁰⁹

The continuing demand for this exploitative work exposes workers to the risk that unsatisfactory working conditions will continue to be applied and “low-skilled and low-paid jobs becoming the exclusive domain of migrants”.¹¹⁰ This is the case not only for domestic and seasonal workers – which we will touch upon in more detail below – but also other parts of the service industry, including construction.¹¹¹

Domestic Migrant Workers

Domestic workers are often in a very precarious situation – they are often hidden from the outside world and also, in some cases, ignored or overlooked by trade unions. The adoption process of ILO Convention No. 189 on decent work for domestic workers of 2011 highlighted the exploitation these workers face.¹¹²

During recent decades a number of scholars have dug deeper into the causes and effects of the laws governing – or not governing – the work of domestic workers.¹¹³ Migration law plays a crucial role in creating vulnerability, but it

108 Ibid p 17.

109 Ibid p 18.

110 ILO 2017 (footnote 4) p 23.

111 Ibid.

112 C189 - Domestic Workers Convention, 2011 (No. 189), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C189.

113 Bridget Andersson, *Doing the Dirty Work? The Global Politics of Domestic Labour* (Zed Books 2000) Adelle Blacket, *Promoting Domestic Workers' Human Dignity Through Specific Regulation in Antoinette Faive-Chamoux (ed) Domestic Work as a factor of European Identity: Understanding the Globalisation of Domestic Work 16th-21st Centuries* (Peter Lang Publishing 2004); H. Lutz (ed) *Migration and Domestic Work: A European Perspective on a Global Theme* (Ashgate 2008); Adelle Blacket *Introduction, Regulating Decent Work for Domestic workers Canadian Journal of Women and the Law Vol. 23 (2011)*; Catharina Calleman, *Domestic services in a Land of Equality: The Case of Sweden*, *Canadian Journal of Women and the Law*, Vol. 23, 2011; E Albin and V Matouvalou ‘The ILO Convention on Domestic Workers: From the Shadows to the Light (2012) 41 *ILJ* 67; Judy Fudge and Kendra Strauss ‘Migrants, Unfree Labour and the

is also important to note that domestic workers are not recognized as workers and thus are not covered by labor and social protection, including minimum wage regulation.¹¹⁴ The ILO, for example, reports that migrant female domestic workers in the Africa-GCC corridor may work, on average, as many as 115 hours per week.¹¹⁵ Female migrant domestic workers may also risk being exposed to sexual abuse and, as already mentioned, forced labor.

The Turkish report provides insights into the particular circumstances of domestic workers in Turkey. In Turkey, domestic work has increased along with the active participation of women in the labor force.¹¹⁶ The disintegration of the Soviet Union and the economic difficulties of former Soviet states have pushed their nationals to meet the domestic-work labor shortage in Turkey. They are hired mainly through intermediary agencies, which have been established specifically for that purpose in Turkey.¹¹⁷

From a labor law perspective, it is interesting to note that in Turkey there is a difference between the employment of migrant domestic workers on a monthly or a daily basis.¹¹⁸ The bulk of daily domestic work is performed informally.¹¹⁹ The legal nature of daily domestic work is a more debated issue, whether it comes under a part-time employment contract or service contract.¹²⁰ Monthly domestic workers work under an employment contract and are covered by the provisions of the Code of Obligations, rather than the Turkish Labor Act (No. 4857), which provides a higher level of protection than the Code of Obligations.¹²¹

Legal Construction of Domestic Servitude in Cathryn Costello and Mark Freedland (eds) *Migrants at Work* (Oxford University Press, 2014); Sandra Fredman, *Home from Home: Migrant Domestic Workers and the International Labour Organization Convention on Domestic Workers in Migrants at Work*, in C Costello and M Freedland (eds) *Migrants at Work* (Oxford University Press 2014); Vera Pavlou, *Migrant Domestic Workers in Europe – Law and the construction of vulnerability* (forthcoming Hart Publishing 2021).

114 ILO, *The Migrant pay gap: Understanding wage differences between migrants and nationals*, International Labour Office, Geneva, 2020, p 58, https://www.ilo.org/global/topics/labour-migration/publications/WCMS_763803/lang--fr/index.htm

115 ILO 2017 (footnote 4) p 20.

116 Dogan Yenisey, K., *National Report for Turkey*, 202.

117 *Ibid.*

118 *Ibid.*

119 *Ibid.*

120 *Ibid.*

121 *Ibid.*

Considering the health and safety risks that daily domestic workers are exposed to, a specific provision was inserted in Act No. 5510 on Social Insurance and General Health Insurance in 2015. Under this new model, if a domestic worker is recruited by a single employer for ten days or more in a month, they are compulsorily insured.¹²² According to supplementary Article 9 of Act No. 5510, if domestic worker works with part-time contracts for one or more employers, and if their entire hours of employment in a month total less than ten days, the house owner only has to pay contributions against the risk of industrial accident and occupational disease.¹²³

Domestic workers are protected by provisions regulating minimum wages and employers are obliged to protect their safety and take all necessary measures to protect them against sexual harassment and bullying.¹²⁴ They also benefit from social insurance schemes. All migrant workers who work under an employment contract in Turkey are compulsorily enrolled in social insurance, the same as Turkish citizens.¹²⁵ Act No. 5510 makes no distinction between nationals and non-nationals. Refugees and stateless persons are also ranked among non-nationals. Nevertheless, a general problem with domestic work is that it is outside the scope of the Labor Inspectorate, as Turkey has not yet ratified ILO Convention No. 189. There are thus no safeguards to prevent the abuse and exploitation of domestic workers.¹²⁶

Seasonal Migrant Workers

The working and living conditions that many migrant seasonal workers have long had to put up cannot be described as decent work. In the context of the pandemic, when their contribution to society has been made more visible, there is some hope that seasonal migrant worker schemes “could be redesigned to ... to fully embrace a human-centred approach.”¹²⁷ Their situation has been discussed by many researchers over the past decade.¹²⁸ In this section, however,

122 Ibid.

123 Ibid.

124 Ibid.

125 Ibid.

126 Ibid.

127 Ibid.

128 Sam Scott and Johan Fredrik Rye, Praised, prized, yet penalised: A critical examination of low-wage hiring queues in the global strawberry industry, *Journal of Rural studies*, May 2021; ACL Davies, *Migrant Workers in Agriculture: A Legal Perspective* in C Costello and M freedland (eds)

we will offer a short introduction to measures adopted by the EU to foster decent work for seasonal workers, but also look at experiences from the national reports.

Seasonal migrant work has been in the EU spotlight because of the unattractiveness of seasonal work for national workers and increasing demand for seasonal work in certain sectors, such as agriculture, construction, hospitality and tourism. Prior to the pandemic, the European Commission estimated that over 100,000 migrant workers are annually employed in seasonal work.¹²⁹ Taking into the account that seasonal workers often work in isolation from other parts of the labor market, and their limited internal labor mobility is often an obstacle to decent work, it is no surprise to find social dumping and labor market segregation in seasonal work.¹³⁰

In an effort to address some of the immigration and labor law issues arising from seasonal work and trying to increase EU competitiveness, Member States harmonized the rules of entry and residence and the common rights of seasonal workers in 2014 through the adoption of the Seasonal Workers Directive,¹³¹ a pioneer legal instrument aimed at achieving “supranational regulation for low-skilled temporary migration that gestures towards a circular migration program.”¹³²

Fudge and Herzfeld Olsson note that the Directive has a rather “flexible legislative style”¹³³ and in fact

limits the discretion of Member States to impose admission criteria and requirements of stay on third-country seasonal workers, although it leaves the

Migrants at Work (Oxford university Press 2014); C Woolfson, P Herzfeld Olsson, C Thörnqvist, Forced labour and migrant berry pickers in Sweden, *Int. J. Comp. Lab. Law Ind. Relat.* 28 (2), 2012; Judy Fudge, ‘Precarious Migrant Status and Precarious Employment: The paradox of international rights for migrant workers’, 34 *Comp. Lab. L. & Pol’y J.* 95 2012-2013; P Martin, Mexican workers and US agriculture: the revolving door, *International Migration Review* 36 (4), 2002.

129 European Parliament, More rights and better working conditions for non-EU seasonal workers, Press release, 2014, <https://www.europarl.europa.eu/news/en/press-room/20140203IPR34619/more-rights-and-better-working-conditions-for-non-eu-seasonal-workers>

130 ILO 2017 (footnote 4) p 23.

131 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, *Official Journal of the European Union*, L 94/375, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex%3A32014L0036>.

132 *Ibid*, p 440.

133 Fudge, J., Herzfeld Olsson, P., The EU Seasonal Workers Directive: When Immigration Controls Meet Labour Rights, *European Journal of Migration and Law* 16 (2014) 439–466, p 466.

actual numbers admitted within the jurisdiction of Member States. It is this constraint on national sovereignty over admission criteria and conditions of stay that is relatively rare in a binding international agreement.¹³⁴

The Seasonal Workers Directive did not regulate some of the crucial aspects of seasonal migrant work, such as recruitment channels, which are identified as particularly questionable, as well as multi-layered intermediary structures that make it difficult for seasonal and domestic migrant workers to benefit from fundamental rights, as well as employment and labor rights protection. The Directive also attracted criticism because of its regulation of equal rights in a situation in which “the labour force in the seasonal work sector almost entirely consists of third-country nationals and there are almost no nationals doing seasonal work for comparison”.¹³⁵ Similarly, there are low labor protection standards and low wages in the seasonal sector for all workers in the various Member States, so that all “migrant workers are entitled to is equally poor treatment”.¹³⁶ Additional criticisms have been raised about the absence of intra-EU mobility, family reunification and changes in employer rights for seasonal migrant workers in the EU.¹³⁷

Given the particular vulnerability of seasonal migrant workers to labor exploitation because of the temporariness of their residence in the country of employment, we cannot speak of proper labor rights protection without complaints mechanisms and detachment of residence rights from specific employers. The latter is particularly challenging in temporary work, such as seasonal employment. Therefore, it is crucially important to ensure

effective complaints mechanisms for seasonal migrant workers, permitting a trade union representative or a labour inspector to lodge complaints on behalf of seasonal workers, as well as external monitoring systems to ensure that the weakest party – the migrant seasonal worker – does not bear the entire burden of ensuring that employers meet their legal obligations under the Directive.¹³⁸

134 Ibid, p 440.

135 Zoetewij-Turhan, M. H. The Seasonal Workers Directive: ‘... but some are more equal than others’ *European Labour Law Journal* 2017, Vol. 8(1) 28–44, p 35.

136 Fudge, J., Herzfeld Olsson, P.(footnote 134) p 464.

137 Zoetewij-Turhan, M. H., (footnote 136) pp 36-39.

138 Fudge, J., Herzfeld Olsson, P. (footnote 134) p 460.

New criteria for seasonal temporary programs have been adopted. In Ireland, a new scheme had to be developed because the salary threshold for a work permit could not be met in the horticultural sector.¹³⁹

The national reports discuss national experiences and efforts within the sector.

In Serbia, seasonal migrant workers are eligible to work under special conditions in accordance with the Law on Simplified Employment in Seasonal Jobs in Certain Economic Sectors.¹⁴⁰ The law regulates work engagements without entering into an employment relationship, or more specifically, it refers to migrant workers hired for seasonal jobs in agriculture, forestry and fishing and who are entitled to work without a work permit.¹⁴¹

North Macedonian seasonal migrant workers are mainly nationals of neighboring countries (that is, Serbia, Turkey, Albania, and Kosovo), with a majority starting seasonal work with a valid work permit. Over time, however, for various reasons they tend to become undocumented and legally unprotected.¹⁴² The sectors in which seasonal workers in North Macedonia are employed include seasonal agriculture, tourism, waste collection, manual work, cleaning, construction, craft jobs, resale and retail trade, and taxi services.¹⁴³ The Labor Inspectorate has highlighted several risk sectors for labor exploitation, such as seasonal work in agriculture and construction.¹⁴⁴ The National Report for North Macedonia highlights examples of illegal employment in construction and agriculture, where informal deals between private persons lead to the recruitment of 10 to 15 workers, whom the employer pays informally agreed monetary compensation, but avoiding social security contributions.¹⁴⁵

Legally employed seasonal workers in North Macedonia are eligible for social protection, but their access to social security schemes and benefits may

139 OECD 2019 (footnote 27), p. 52.

140 Official Gazette of the RS, no. 50/18, cited in: Kovačević, Lj., Latković, B., National Report for Serbia, 2021, p 8.

141 Ibid.

142 Todorova, B., National Report for North Macedonia for the World Congress of Labour and Social Law, 2021.

143 Ibid.

144 Ibid.

145 Ibid.

depend on their labor status and they might not enjoy effective social security.¹⁴⁶ Seasonal migrant workers enjoy access to health care benefits, with co-payments for medicine and interventions in tertiary care amounting to 20 percent of total costs.¹⁴⁷ The Law on Contributions to Mandatory Social Insurance provides an entitlement to a sickness cash benefit with a minimum insurance period of six months. This requirement is impossible to fulfil for seasonal migrant workers who are employed on six-month contracts and obliged to leave North Macedonia after expiry.¹⁴⁸ Seasonal construction workers, who exceptionally are allowed to stay for nine months, might not be entitled to sickness benefits either if the employer has not paid regularly mandatory health insurance contributions (the delay might not be longer than 60 days).¹⁴⁹ In case of employment injury, no insurance period is required and seasonal workers can receive full sickness insurance benefits.¹⁵⁰ Another labor law area of concern is the inability of migrant workers to join and fully participate in collective bargaining. Organizing migrant workers in trade unions is difficult in North Macedonia because employers often hamper the establishment of trade unions. Todorova reports that in North Macedonia support among trade unions for unionizing migrant workers depends on the existence of labor surpluses or shortages.¹⁵¹

In South Korea, the 16-year-old Employment Permit System has been a major platform for bringing in foreign workers from 16 countries to meet labor shortages in the manufacturing, agricultural and fishing sectors. These low-skilled jobs are often shunned by Korean workers because of their poor working conditions and low pay.¹⁵² Migrant workers who enter South Korea through the EPS are tied to their current employer and can change jobs only with their written consent.¹⁵³ Extending their stay of three years by another 22 months also requires employer consent. The EPS does not allow migrant workers to be accompanied by family members.¹⁵⁴ The second major migrant labor issue in South Korea is sub-standard housing for migrant workers, which occasionally

146 Ibid.

147 Ibid.

148 Ibid.

149 Ibid.

150 Ibid.

151 Ibid.

152 Kwang-Taek, L., National Report for South Korea, 2021.

153 Ibid.

154 Ibid.

comes to public attention when accidents occur.¹⁵⁵ Recent data shows that roughly 30 percent of businesses employing migrant workers currently do not meet the minimum requirements for living and working conditions.¹⁵⁶

Being a coastal country, Croatia has significant seasonal labor needs, primarily in tourism and hospitality, construction and agriculture. Therefore, since 2012 Croatia has implemented a voucher employment system for national short-term agricultural workers. An employer buys voucher of a certain value which is a legally binding document for agricultural seasonal employment. The employer is obliged to pay social security contributions and minimum daily remuneration is set by law.¹⁵⁷

The second important point in relation to seasonal employment concerns tourism and hospitality. Prior to changes in the Aliens Act and the replacement of the quota system with a labor market test system, the last Decision on Approved Yearly Quota for Migrant Workers in 2020 was set at 78,470 work permits, of which 64,604 were newly issued, with 33,300 in construction and 18,370 in tourism and hospitality.¹⁵⁸

According to information from the National Employment Office, a significant problem for low-skilled migrant workers in Croatia is that they may be given the wrong information on pay and working conditions by employment agencies in their home countries. For example, the expected gross salary is presented as net; workers are informed that after a year of working in Croatia they have free access to the labor markets of other EU member states; and there have been reported cases of concluding contracts or issuing dismissals exclusively in Croatian. This is a major cause of legal uncertainty for workers who do not speak Croatian.¹⁵⁹

Seasonal migrant workers residing in Croatia for less than three years are not eligible for child allowance, even though they are required to contribute to the Croatian social security system.¹⁶⁰ This is not in line with the decision

155 Ibid.

156 Ibid.

157 Špadina, H. National Report for Croatia, 2021.

158 Ibid.

159 Ibid.

160 Špadina, H. Croatian Migration Law: Over-normativity in Search of a Balance between Migration Control and Migrant Rights, in: Foblets, M.C., Carlier, J.Y (eds.), *Law and Migration in A Changing World*, Springer, ISBN 978-3-319-99508-3, <https://www.springer.com/gp/>

of the European Court of Justice (ECJ) in C-611/10 *Hudzinski*, in which the Court held that the applicable EU Regulation had to be interpreted in a manner favourable to migrant workers, in the sense that the law could not have the effect of precluding a Member State, even if it is not the competent state, from granting social benefits to workers in accordance with its national legislation. In general, all compulsorily insured migrant workers have access to health care. This does not include the situation of temporary residents, where health insurance contributions have not been paid for 30 days or longer, so that such residents are eligible only to emergency health care (Article 8 paras 1 and 2 of the Compulsory Health Insurance Act). In 1998, however, the Constitutional Court decided that limitations to emergency health care for insured nationals who have not paid health care contributions are unconstitutional and in violation of fundamental rights. This decision is in line with international human rights standards and should be equally applicable to all categories of insured persons, regardless of nationality, but that is not yet a case.¹⁶¹

In Sweden seasonal migrant workers comprise one of the largest groups of labor migrants from third countries entering Sweden every year. They constitute more than a third of the labor migrants from outside the EU. A lot of attention has been given, for example, to the thousands of Thai berry pickers who come to the remote Swedish forests every year to pick wild blueberries and lingonberries. Over the years there has been a number of reports of exploitation and even wage theft.¹⁶² The trade union responsible for this sector – the Swedish municipality workers’ union – has taken on the task of concluding a collective agreement for these workers and also monitors their working conditions, even though very few of these workers are trade union members.¹⁶³ The situation has improved even though research shows that the workers do not always get the remuneration they are entitled to.¹⁶⁴ But while the situation of the Thai berry pickers has improved,

book/9783319995069, in press, cited in Špadina, H, National Report for Croatia, 2021.

161 Ibid.

162 Woolfson et al (footnote 129).

163 P Herzfeld Olsson, Towards Protection of vulnerable labour migrants in Sweden – the case of the Thai berry pickers, in Rijken & de Lang (eds) Towards a decent labour market for low-waged migrant workers (Amsterdam University Press 2018).

164 C Hedberg, L Axelsson, M Abella, Thai berry pickers in Sweden: A migration corridor to a low-wage sector (DELMi report 2019).

other categories of berry pickers outside state control because of EU freedom of movement rules have faced more severe exploitation.¹⁶⁵

5. URGENT PRE-PANDEMIC CHALLENGES

It is clear that migrants are among the groups that are “over-represented among low-income households and disproportionately from inequality”.¹⁶⁶ In Europe, for example, migrants from outside the EU “face a risk of poverty that is multiple times higher than that of EU nationals and tend to have lower average income levels.”¹⁶⁷ In many places in the world migrants are more likely to be in temporary employment and work in the informal sector.¹⁶⁸ Low remuneration and unsecure employment often also lead to very weak “social protection, savings and to contingency measures that would allow them to support themselves during periods without work.”¹⁶⁹ We shall try to present a clearer picture of migrants’ experience of wage gaps, informality and atypical employment.

5.1. Wage Gaps between Nationals and Migrant Workers

Wage gaps between migrant workers and nationals is one area in which labor market discrimination against migrant workers is most visible. Despite the ambitious Sustainable Development Goal targets 8.5 and 8.8, calling for equal pay for work of equal value and protection of labor rights for all workers, including migrant workers (in particular women migrant workers and those in precarious employment within the framework of the United Nations agenda for 2030), very little attention has been directed towards the development of international, regional and national legal instruments aimed at reducing wage differences between migrant workers. In 2020, the ILO presented a comprehensive global analysis of the migrant pay gap based on data from 49 countries (33 high income countries or HICs, and 16 low- and middle-income countries, or LMICs) and about a quarter of wage employees worldwide. These countries host nearly half of all international migrants and roughly 33.8 percent of migrant

165 <https://www.svt.se/nyheter/lokalt/norrbottnen/50-tal-barplockare-lurade-till-i-alvsbyn-barn-bor-i-talt-pa-parkering>.

166 ILO, *Inequalities and the World of Work*, 2021, (footnote 107) para 34.

167 Ibid.

168 ILO Flagship Report, *World Employment and Social Outlook, Trends 2021*, p. 102.

169 Ibid.

workers worldwide.¹⁷⁰ The study shows that the migrant pay gap has widened in many HICs compared with previous ILO estimates.¹⁷¹ Among the 20 countries with the most significant migrant pay gaps, the estimated gap has widened in more than half of them, compared with previous estimates reported in the ILO Global Wage Report 2014/15.¹⁷² The pay gap in these countries has increased by 1.3 to 26.4 percentage points. Migrant workers in HICs earn about 12.6 percent less than nationals, on average, with significant variations among countries and across different wage groups, with migrant workers earning as much as 42.1 percent less than nationals on average (in Cyprus), and 71 percent less than nationals among low-skilled workers.¹⁷³ Among LMICs, migrant workers tend to earn about 17.3 percent more than nationals on average (with notable exceptions), partially due to the significant proportion of temporary high-skilled expatriate workers among the total migrant population in some countries, who tend to push up the average wage of migrant workers.¹⁷⁴

Women migrant workers face a double wage penalty, both as migrants and as women. The pay gap between male nationals and migrant women is estimated at 20.9 percent, which is much wider than the aggregate gender pay gap in HICs (16.2 percent), while the pay gap between migrant care workers and non-migrant care workers is about 19.6 percent compared with the aggregate migrant pay gap of 12.6 percent.¹⁷⁵

Despite similar levels of education, migrant workers in HICs tend to earn less than nationals within the same occupational category and are more likely to work in lower-skilled and low-paid jobs that do not match their education and skills. Higher-educated migrant workers in HICs are also less likely to attain jobs in higher occupational categories relative to non-migrant workers. This reflects the fact that migrants in HICs are likely to be affected by skills mismatch and have difficulties transferring their skills and experience across countries, in large part because of the lack of an adequate skills recognition systems for qualifications of migrant workers.¹⁷⁶

170 ILO, *The migrant pay gap: Understanding wage differences between migrants and nationals*, 2020, (footnote 115)

171 *Ibid.*, p 1.

172 *Ibid.*

173 *Ibid.*

174 *Ibid.*

175 *Ibid.*

176 *Ibid.*

An ILO study claims that a significant part of the migrant pay gap remains unexplained because gaps arise for multiple and complex reasons that differ from one country to another and vary at different locations in the overall wage distribution.¹⁷⁷ This makes it very difficult to properly address wage discrimination between migrants and nationals. Still, the ILO report shows that the migrant pay gap would generally remain narrow if migrant workers were remunerated equally with nationals for their labor market characteristics, which in turn would reduce working poverty among migrants, help enhance their skills and jobs matching, and improve equality, economic productivity and development.¹⁷⁸

The ILO report that in the Arab States, the sub-region with the largest proportion of migrant workers, the income gap between migrants and nationals is particularly high.¹⁷⁹

In terms of wage discrimination between migrants and nationals in Turkey, a recent study shows that Turkish nationals earn 63 percent more than Syrian refugees.¹⁸⁰ In terms of working hours, the working hours of nationals in the informal sector are about 55.8 hours a week and those of Syrian refugees 55 hours.¹⁸¹ Both groups are working beyond the legal limits (maximum weekly working time is 45 hours), but at a similar level in this respect at least. Syrian refugees with tertiary education are those with the highest wage gap compared with nationals.¹⁸²

In Switzerland, the wage gap between nationals and migrant workers is also significant. Migrants initially earn significantly less than nationals, but manage to increase their income during the first years of residence. The income gap is never fully closed, however.¹⁸³ People of migrant background obtain fewer social security benefits than nationals,¹⁸⁴ and have a poverty rate twice as high as

177 Ibid. p 9.

178 Ibid.

179 ILO, *Inequalities and the world of work*, 2021, (footnote 107) para 19.

180 Dogan Yenisey, K., *National Report for Turkey for the World Congress of Labour and Social Law*, 2021.

181 Ibid.

182 Ibid.

183 Federal Statistical Office, *Rapport statistique sur l'intégration de la population issue de la migration*, p. 11, 12, 29, 30, cited in: Pétremand, S., *National report for Switzerland*, 2021.

184 Kolly, M., Brunner-Patthey, O., *Des contributions supérieures aux prestations*, in: *Assurance Sociale Suisse*, p. 8. Federal Statistical Office, *Panorama de la société suisse*, pp. 79 and 81, cited in: Pétremand, S., *National report for Switzerland*, 2021.

that of Swiss nationals from the age of 40 onwards (although it decreases with higher levels of education)¹⁸⁵

In Sweden, in-work poverty is higher among the foreign-born population than among others.¹⁸⁶ Problems are not confined to low wage sectors. Also high skilled migrants seem to suffer from wage gaps, including both labor migrants¹⁸⁷ and foreign-born professionals in general.¹⁸⁸ However, it seems that for professionals the wage gap is smaller for female workers than for male workers.¹⁸⁹

5.2. Informality and Non-standard/Atypical Employment

Informality is a deep structural problem in low-income countries, affecting both nationals and migrant workers. Its negative consequences are significantly higher for the latter, however, because of the risk of immediate deportation and loss of the possibility of obtaining outstanding remuneration from employers in cases of informal and thus irregular employment. The number of migrant workers in relative terms is also often higher than nationals. A recent ILO study showed that in some countries (14 LMICs and two HICs), 62.4 percent of migrant wage workers are informally employed compared with 50.8 percent of nationals. Informal employment is higher among migrant women than among their male counterparts.¹⁹⁰

In Turkey, more than one-third of employment is in the informal sector, which gives rise to considerable divergence between the legal framework and its implementation.¹⁹¹ It has been observed that since the entrance of Syrian refugees to the Turkish labor market, the likelihood of having an informal job

185 Ibid, p 35.

186 Ann-Christine Hartzén, National Report Sweden, Working Yet Poor project, 2021, p 4 et seq

187 P Herzfeld Olsson, Equal treatment of highly qualified labour migrants, IFAU 2019, pp 45-50. [file:///C:/Users/petra/Downloads/wp-2019-14-equal-treatment-for-highly-qualified-labour-migrants%20\(1\).pdf](file:///C:/Users/petra/Downloads/wp-2019-14-equal-treatment-for-highly-qualified-labour-migrants%20(1).pdf)

188 Josefin Edström och Galina Pokarzhevskaya, SACO (Swedish confederation of professional associations), Lönegap mellan akademiker med svensk och utländsk bakgrund, - en analys av Sacoförbundens medlemmar, 2017.

189 Ibid p. 16.

190 ILO, The migrant pay gap: Understanding wage differences between migrants and nationals, 2020, https://www.ilo.org/global/topics/labour-migration/publications/WCMS_763803/lang--fr/index.htm, p 2.

191 Dogan Yenisey, K., National Report for Turkey, 2021.

has declined by 2.2 percent for locals.¹⁹² As Turkey has not issued work permits to the vast majority of Syrian refugees, they are overwhelmingly employed in Turkey's already large informal sector and refugees appear to have displaced workers from informal employment.¹⁹³ Nevertheless, the informality for locals is still quite high. Among those who are employed, the informality rate not including Syrians is 17.1 percent and including Syrians stands at 20.1 percent. The nationwide informality rate, including self-employed persons, is about 34.34 percent without and 36 percent with Syrians.¹⁹⁴ Higher informality rates are observed in certain sectors, such as garments, construction, food and beverage services.¹⁹⁵

The legal regulations and policy measures have affected Syrians' reliance on informal jobs, through the regulation of access to the labor market by the Temporary Protection Regulation from 2014 and the Regulation on Work Permits for Foreigners under Temporary Protection Status from 2016, regulating the procedures for granting work permits (with exemptions in seasonal agriculture and stockbreeding).¹⁹⁶ Dogan Yenisey points out that the legal framework on the access of Syrian immigrants to the labor market reveals a multilayered system of spatial, sectoral and quota restrictions.¹⁹⁷ Spatial restrictions mean that work permits may be granted only in provinces where these workers are allowed to reside (Art 7 RRWPFTPS). The quota system aims to control the number of temporary status beneficiaries at workplaces and in sectors, so that the number of temporary status beneficiaries cannot exceed 10 percent of the Turkish citizens working at the same workplace, unless the employer can prove that there is no qualified Turkish citizen in the province who can perform the same job

192 E. Ceritoğlu/H. Gürçihan-Yüncüler/H. Torun/S. Tümen, 2017, "The Impact of Syrian Refugees on Natives' Labor Market Outcomes in Turkey: Evidence from a Quasi Experimental Design", Central Bank of Turkey, cited in: Dogan Yenisey, K., National Report for Turkey, 2021.

193 Ceritoglu, Evren, H. Burcu Gurcihan Yunculer, Huzeife Torun, and Semih Tumen. 2017. "The Impact of Syrian Refugees on Natives' Labor Market Outcomes in Turkey: Evidence from a Quasi-Experimental Design." *IZA Journal of Labor Policy* 6 (1): 5; Del Carpio, Ximena V., and Mathis Wagner. 2015. *The Impact of Syrian Refugees on the Turkish Economy: Regional Labour Market Effects*. Policy Research Paper 7402, World Bank, Washington, DC, cited in: The World Bank, *Migration and Brain Drain*, 2019, pp. 46-47.

194 Dogan Yenisey, K., National Report for Turkey, 2021.

195 L. P. Caro, 2020, *Syrian Refugees in the Turkish Labour Market*, ILO Report, pp. 13-14, cited in: Dogan Yenisey, K., National Report for Turkey, 2021.

196 Dogan Yenisey, K., National Report for Turkey, 2021.

197 Ibid.

as the migrant worker.¹⁹⁸ Quotas also exist for work permit exemptions and the Regulation authorizes the Ministry of Family, Labor and Social Services to set a quota on the number of jobs and provinces for which work permit exemptions may be granted.¹⁹⁹ Thus, Syrian nationals have to pass through a triple set of restrictions – spatial, sectoral and quota – and only if they manage to do so will they be able to find employment, mainly in garment production, construction, food and beverages, and agriculture. These are, it should be noted, so-called “3D” sectors, in which jobs are dirty, dangerous and demeaning.²⁰⁰

Unexpectedly, some refugee protection mechanisms have adverse effects on migrants’ employability, pushing them into informal work and perhaps lowering their incentives to engage in formal employment.²⁰¹ One example is a humanitarian program Emergency Social Safety Net (ESSN), established in 2016 between Turkey and the European Union, which was designed to provide cash assistance to all refugees in Turkey outside refugee camps, under international protection or temporary protection, but on condition that none of the family members has formal employment. This is aimed at preventing many Syrians under temporary protection who are eligible for ESSN aid from applying for jobs in the formal sector.²⁰² Turkey’s approach towards Syrian refugees, eschewing reliance on camps, has enabled forcibly displaced persons to secure their own homes and livelihoods despite all its drawbacks from the perspective of decent work.²⁰³ The COVID-19 crisis, however, has revealed the fragilities of job informality as those in the informal sector missed out on labor protection.²⁰⁴ By presidential decree, dismissals were prohibited during the pandemic, but employers were able to suspend the employment contract unilaterally.²⁰⁵ Recent research conducted by SGDD-ASAM, the Association of Solidarity with Asylum-Seekers and Migrants,²⁰⁶ shows that 82 percent of all

198 Ibid.

199 Ibid.

200 Ibid.

201 Caro, L. P., *Syrian Refugees in the Turkish Labour Market*, ILO Report, 2020, pp 13-14.

202 DSP-IGAM, 2019, *Working towards self-reliance: Syrian refugees’ economic participation in Turkey*, March 2019.

203 World Bank Report, 2015, *Turkey’s Response to the Syrian Refugee Crises and the Road Ahead*, December 2015; M. M. Erdoğan, 2019, “Türkiye’deki Suriyeli Mülteciler”, Konrad Adenauer Stiftung, p 12.

204 Dogan Yenisey, K., *National Report for Turkey*, 2021.

205 Ibid.

206 Survey cited as per: http://en.sgdd.org.tr/?page_id=1276.

refugees and asylum seekers in Turkey were working before the pandemic, but at the current stage of the pandemic, a mere 11.41 percent are still working.²⁰⁷

In Sweden, foreign-born workers are more likely to be in temporary employment than others (25 percent/ 14 percent).²⁰⁸ For temporary labor migrants, research indicates that the level of temporary employment differs between different skill groups. A report on cleaners and restaurant personnel in Stockholm indicates that most of the labor migrants concerned had been offered permanent contracts.²⁰⁹ Another study about highly qualified workers mainly in the IT sector showed the opposite, however.²¹⁰ This is surprising as labor migrants can only obtain a temporary work and residence permit for a maximum of two years. One explanation could be that the low skilled workers wish to stay in Sweden on a permanent basis, which is possible after extensions up to four years, while the high skilled workers have other priorities.

In Switzerland, the first-generation migrant population between the ages of 15 and 64 – especially low-skilled workers from Eastern and South-Eastern Europe and from non-European countries, as well as the non-migrant population over the age of 65 in managerial or executive positions – are most affected by non-standard or atypical work (on-call work in particular).²¹¹

6. PRE-PANDEMIC ANSWERS TO SOME CHALLENGES – MIGRATION PARTNERSHIP AGREEMENTS

The New York Declaration on Refugees and Migrants, adopted in 2016 by the 193 UN Member States, recognizes the need for a comprehensive approach to human mobility and enhanced cooperation at the global level. A second important regulatory mechanism is the Global Compact for Safe Orderly and Regular Migration, adopted in December 2018. Implementation of the objectives of this Global Compact will be reviewed every four years in the UN General Assembly, with the first review in 2022.

207 Ibid.

208 SCB, *Lämna ingen utanför*, 2020, p 71, https://www.scb.se/contentassets/992b5ef6a28a451286cfff1672acea73/mi1303_2020a01_br_x41br2002.pdf

209 Olle Frödin och Ander Kjellberg, *Arbetskraftsinvandring från tredje land i restaurang- och städbranscherna in Arbetskraft från hela världen* (Calleman and Herzfeld Olsson eds) DELMI 2015, pp 181-182.

210 P Herzfeld Olsson, *Equal treatment of highly qualified labour migrants*, IFAU 2019, p 25 et seq.

211 Federal Statistical Office, *Rapport statistique sur l'intégration de la population issue de la migration*, p 37, cited in: Pétremand, S., *National report for Switzerland*, 2021.

Two Global Compact objectives are particularly relevant for research into skilled migration partnership agreements: objective 18 (“Invest in skills development and facilitate mutual recognition of skills, qualifications and competencies”) and objective 23 (“Strengthen international cooperation and global partnerships for safe, orderly and regular migration”). To this end, the Global Compact on Migration underlined the need to build global skills partnerships among countries that strengthen the training capacities of national authorities and relevant stakeholders, including the private sector and trade unions, and also foster the skills development of workers in their countries of origin and those of migrants in destination countries, all with a view to preparing trainees for employability in the labor markets of all participating countries.

Labor migration partnerships should be developed carefully, with clear safeguards to prevent a brain drain in less developed countries of origin of migrant workers. The win-win partnership agreements “should be based on long-term planning and shared costs: the countries of destination need to invest in sending countries, train the workforce in countries of origin, ensure ownership of sending countries and considering sending countries’ perspectives and needs.”²¹²

Bilateral and multilateral labor mobility partnership agreements are the main tool for ensuring the labor and social protection of migrant workers, so that their migration is safe, orderly, fair and regular.²¹³ The ILO provides a list of 75 bilateral labor mobility agreements currently in force.²¹⁴

One example of a successful bilateral migration partnership agreement is Germany’s “Triple Win” project, under which nurses were recruited to work in Germany for a limited period under agreements with several countries, including Serbia, Bosnia and Herzegovina and the Philippines. Serbia was the first country to sign up to the “Triple Win” project or the Agreement on Recruitment and Temporary Employment of Citizens of the Republic of Serbia in Germany in 2013, covering the employment of nurses, doctors and other medical staff (such as medical technicians and specialized health workers) from

212 EMN – JRC – DG HOME Briefing Paper, Roundtable on the EU labour migration policy: time to move from a skill-based to a sector-based framework? 5 November 2020, https://emn.ie/wp-content/uploads/2021/01/00_labour_migration_roundtable_briefing_paper.pdf

213 ILO, https://www.ilo.org/africa/areas-of-work/labour-migration/thematic-areas/WCMS_679989/lang-en/index.htm

214 <https://www.ilo.org/global/topics/labour-migration/policy-areas/measuring-impact/agreements/lang-en/index.htm>

Serbia.²¹⁵ From 2013 to 2019, 784 Serbian nurses and medical personnel were recruited through the “Triple Win” project, and GIZ was in charge of getting the selected health-care workers ready to go to Germany, providing them with initial support in order to facilitate their integration into the new work environment and German society.²¹⁶ The German Federal Employment Agency had to check the credibility of the employers before starting the recruitment process, as well as to prepare the bilingual employment contracts. The Serbian workers were assisted with language and professional preparation.²¹⁷ Kovačević and Latković point out that, when the Agreement entered into force, there was no lack of health-care workers in the Serbian labor market, but that is no longer the case, and currently it is being reconsidered.²¹⁸ Health-care workers will still be able to find employment in Germany through other accredited employment agencies, however.²¹⁹

Multilateral (usually regional) labor mobility partnership agreements are of crucial importance for enabling and facilitating workers’ international mobility. In June 2020, the European Union launched Talent Partnerships, a key initiative under the New Pact on Migration and Asylum to address skills shortages in the European Union and to strengthen mutually-beneficial partnerships on migration with third countries.²²⁰ The main idea behind the EU Talent Partnership is to provide a tailor-made policy and funding framework with specific key countries and regions to facilitate matching the skills of third-country skilled migrant workers, students and graduates with labor market needs inside the EU.²²¹ EMN/JRC/EC emphasized that the EU Talent Partnership might face difficulties in implementation “when establishing partnerships that span across all EU countries due to different demographics, labor market needs and difficulties of harmonizing training.”²²²

215 Kovačević, Lj., Latković, B., Legal Position of Migrant Workers in the Republic of Serbia, with Special Reference to Time of COVID-19 Epidemic Outbreak, National Report for Serbia for the World Congress of Labour and Social Law, 2021.

216 Ibid.

217 Ibid.

218 Ibid.

219 Ibid.

220 European Commission, 2020, https://ec.europa.eu/commission/presscorner/detail/es/IP_21_2921.

221 Ibid.

222 EMN – JRC – DG HOME, 2020, (footnote 221) p 6.

Serbia has entered into several bilateral agreements that regulate employment procedures, working conditions and social protection, as well as remittances.²²³

North Macedonia currently has 23 bilateral agreements on social security system coordination, 14 with EU Member States, 18 bilateral agreements on health insurance on the basis of temporary employment, tourism or business travel, education, science and cultural cooperation and, out of them, nine agreements on the European Health Insurance Card.²²⁴ In the 2020 Progress Report (on EU accession) the European Commission highlighted positive developments regarding ratification of seven bilateral agreements on the social protection of migrant workers.²²⁵

Turkey has 13 bilateral labor agreements, regulating general provisions related to worker exchange rather than regulating foreign labor supply to some sectors.²²⁶ The high national unemployment rate – approximately 15 percent – reveals a very limited need there for external workers.²²⁷ Nevertheless, the Turkish government aims to attract high skilled migrants using specific legal provisions to facilitate their admission, but without having a well-defined migration policy.²²⁸

7. MANAGEMENT OF LABOR MIGRATION DURING THE COVID-19 PANDEMIC

7.1. General Impact of the Pandemic on Labor Migration

The COVID-19 pandemic has globally affected almost all workers through, among other things, sudden changes in their work status (essential and non-essential workers); changes in their place of work (remote working); or the economic consequences of the restrictions imposed on movement and temporary closure of businesses, leading to furloughs or layoffs. Vulnerable workers, including migrant workers, have been the most affected and the first

223 European Commission, 2020, https://ec.europa.eu/commission/presscorner/detail/es/IP_21_2921.

224 Between North Macedonia and Slovenia, the Czech Republic, Federal Republic of Germany, Republic of Bulgaria, the Grand Duchy of Luxembourg, the Kingdom of Belgium, the Kingdom of the Netherlands, Republic of Austria, and Slovak Republic, cited in: Todorova, B., National Report for North Macedonia for the World Congress of Labour and Social Law, 2021.

225 Ibid.

226 Dogan Yenisey, K., National Report for Turkey, 2021.

227 Ibid.

228 Ibid.

to lose their jobs. The ILO has estimated that lockdown measures have affected almost 2.2 billion workers or 68 percent of the global workforce.²²⁹ While it is still too early to estimate the consequences of the pandemic overall, we know that the pandemic has had severe effects on migrant workers. The combination of closed borders, work shortages, exposure to the virus, health care availability concerns and unsafe working conditions has hit migrant workers hard.

The informal sector has been severely impacted and its workers have suffered massive income losses. On top of that they have little or no access to social benefits or other income support.²³⁰ Lower skilled occupations have generally borne the brunt rather than higher paid managerial and professional ones.²³¹

An estimated 800 million people depend on migrant workers' remittances.²³² The impact of the COVID-19 pandemic on remittances is expected to be massive. The first estimates of the fall in global migration remittances indicate an overall decrease of 7 percent, amounting to US\$666 billion in 2020, compared with US\$717 billion in 2019.²³³

For migrant workers already in destination countries, the situation is even more dire. They have been faced with sudden termination or suspension of often fixed-term or temporary employment contracts as a result of unexpected business closures and have had to deal with uncertainty, whether related to eligibility for visas or work permits or residence permit extensions without having a job. In ASEAN countries, migrant workers have largely been excluded from the job retention, wage subsidies and income and unemployment relief measures implemented by governments.²³⁴ The ILO's rapid assessment survey on the impacts of the COVID-19 pandemic on ASEAN migrant workers found that 97 percent of respondents in destination countries had not had access to any social security support, leading to reliance on food relief provided by governments, trade unions, and NGOs.²³⁵

229 ILO, "COVID-19 and the World of Work, Third Edition: Updated Estimates and Analysis". ILO Monitor, 29 April 2020.

230 ILO, Inequalities and the world of work, International Labour Conference, 109th Session 2021, Report IV, International Labour Office Geneva, para 12

231 Ibid

232 MPI, 2020 (footnote 72).

233 ADBI, OECD, ILO, Labour Migration in Asia, 2021, pp 26 and 33.

234 Ibid, p 10.

235 Ibid.

The ILO reports that migrant workers have been among the hardest hit by the economic downturn associated with the pandemic, in terms of both employment losses and a decline in earnings for those who have remained in employment. The measures taken have to a great extent affected the most vulnerable migrant workers, such as seasonal and irregular workers. A number of exemptions to the travel restrictions have been put in place, however, notably for cross-border workers, seasonal workers and health professionals.²³⁶ A number of important measures have been taken in the OECD countries to respond to the unique situation. It has been clear that migrant workers carry out work that is crucial for their host countries. In order to safeguard the harvest, for example, exemptions in entry bans have been adopted with regard to seasonal agricultural workers. These workers are performing essential services.

The ILO reports both higher risks and hope regarding migrant work in the agricultural sector as a result of the pandemic. On one hand, “[t]he urgency of maintaining food production and the food supply chain is ... adding risks of exploitation in agriculture, a sector with a history of forced labour in some locations.”²³⁷ On the other, there is hope that the pandemic will provide “an opportunity to revisit traditional understandings of migration and development” that have guided much of the policy thinking in recent decades.²³⁸ This hope is particularly relevant for rules governing seasonal work in the agricultural sector.²³⁹ The closure of borders during the pandemic has made it clear that many societies depend on the work done by migrant seasonal workers.

The pandemic has increased the risks for domestic workers, too.²⁴⁰ The danger of losing work and income is high, in particular for domestic workers in the informal sector. There are also reports of “increased incidents of physical and sexual violence” and of “homelessness and legal limbo when they lose their live-in jobs but are unable to return to their home countries.”²⁴¹

236 OECD, *Managing international migration under COVID-19*, Update 10 June 2020, , p 2.

237 ILO, *Issue paper on COVID-19 and fundamental principles and rights at work*, Geneva, ILO, 2020, p 13.

238 ILO Brief, *Seasonal Migrant Workers’ Schemes: Rethinking Fundamental principles and Mechanisms in light of COVID-19*, May 2020, International Labour Office, Geneva, 1.

239 Ibid.

240 ILO, *Issue paper on COVID-19 and fundamental principles and rights at work*, Geneva, ILO, 2020, p 12

241 Ibid.

The health emergency poses a threat to the national public health care systems of all countries, regardless of their capacities and level of economic development. No country has sufficient health-care workers to deal with the record pressure on the system. In those circumstances, pre-pandemic labor shortages in the sector have been exacerbated by virus-infected health-care personnel, who had to undergo precautionary quarantine, and new needs to contact patients, contact-tracing and provide information about the virus. Therefore, health-care providers have had to engage into innovative practices such as the engagement of retired medical personnel or medical students. Certain countries, such as the United States, have experimented with expanding temporary access to immigrant and refugee health professionals already resident in the United States, licensing them to practice medicine during the pandemic.²⁴² The Migration Policy Institute estimates that 263,000 multilingual, internationally trained doctors, nurses, and therapists are currently legally present in the United States, but not employed in the health sector because of strict licensing requirements and prohibitive costs.²⁴³ This pool of ready-to-deploy health experts could potentially compensate for labor shortages in future similar public health crises.

7.2. Entry Conditions and Access to the Labor Market during the COVID Crisis

Since the outset of the pandemic, migrant workers have been in a precarious position because their access to labor market has been restricted by strict entry regulations, re-introduction of visas, suspended admission of low skilled migrant workers or suspended deployment of migrant workers from virus-affected countries of origin.²⁴⁴ The only exception was admittance of essential migrant workers in the health, agriculture and transport sectors.²⁴⁵

In Belgium, from October 2020 third-country nationals were not allowed to enter the country for non-essential travel. During one period, EU nationals

242 MPI, Fix, M., Batalova, J., Fernández-Peña, J.R., The Role of Immigrant Health-Care Professionals in the United States during the Pandemic, 2020, <https://www.migrationpolicy.org/news/role-immigrant-health-care-professionals-united-states-during-pandemic>

243 Ibid.

244 ILO, Protecting migrant workers during the COVID-19 pandemic Recommendations for Policy-makers and Constituents, 2020; ILO, “COVID-19 and the World of Work, Third Edition: Updated Estimates and Analysis”. ILO Monitor, April 2020. ADBI, OECD, ILO, Labour Migration in Asia, 2021, p 3.

245 EMN OECD, The impact of COVID-19 in the migration area in EU and OECD countries, April 2021, p 2.

were also prohibited from entering Belgium on the same grounds.²⁴⁶ The only exception were specialized migrant workers, in accordance with Annexes 2 and 3 of the Ministerial Decree, which provide a list of all forms of essential travel, including for health workers, seasonal workers in agriculture and horticulture, frontier workers, personnel in transportation, professional athletes, cultural sector professionals, diplomats and journalists.²⁴⁷ All other migrant workers needed a special permit from the regional governments (Flanders, Wallonia or Brussels) or prove that they fulfil all conditions for an exemption for such a permit.²⁴⁸

Health professionals, health researchers and care workers for the elderly, frontier workers, athletes, and personnel in the transport sector from third countries were able to enter the Republic of Croatia during the pandemic.²⁴⁹ It has not been reported that migrant workers were expected to leave Croatia because of the pandemic, but it is likely that some who lost their jobs because of the reduced workload and thus their accommodation and residence status related to employment did have to leave Croatia.²⁵⁰

In Sweden, an entry ban was introduced during the pandemic with exceptions for specific functions, such as health-care professionals and foreigners working in the agricultural, forestry or gardening industry.²⁵¹

7.3. Right to Remain in the Country of Employment during the Pandemic

In some countries, migrant workers have been entitled to remain even though their original permit has expired (Australia, Greece, Israel, Italy, Norway, the Czech Republic and the USA).²⁵² Similar measures were taken in Belgium and Canada. Migrants who were previously forbidden to work were henceforth entitled to do so, in certain places. In other countries, short-term or permanent

246 Article 21, Ministerial Decree of 28 October 2020 concerning the urgent measures to limit the spread of coronavirus COVID-19, Belgian Official Gazette, 28 October 2020, cited in: Jorens, Y., National Report for Belgium for the World Congress of Labor and Social Law, 2021.

247 Ibid.

248 Article N3 (Annex 3), 11°, second paragraph, Ministerial Decree of 28 October 2020, *ibid.*

249 According to information provided by the National Employment Office, cited in: Špadina, H. National Report for Croatia, 2021.

250 Ibid.

251 <https://polisen.se/en/the-swedish-police/the-coronavirus-and-the-swedish-police/travel-to-and-from-sweden/#Non-EEA>

252 OECD, Managing international migration under COVID-19, Update 10 June 2020, (footnote 245), p 2 4.

regularization measures have been taken – in Greece, for example – “to help address urgent labour needs in agriculture.” As hitherto it has sometimes been difficult for migrants to access immigration authorities, “blanket relief measures or the possibility to remain” have been offered. In some countries, the possibility to remain must be applied for and applies only to those who cannot return home. Italy has undertaken “a potentially large-scale regularisation programme.”²⁵³ Employment restrictions have been eased. The ceiling on students’ maximum hours of work has been removed in a number of countries. In others, the rules on changing employers, reducing hours or working for lower wages if the change in employment is COVID-related have been loosened.²⁵⁴ Regularization measures have been taken in Portugal to make it possible to offer migrants free health care.²⁵⁵

Because of the pandemic, in 2020 the Croatian government introduced an urgent procedure to amend Article 140 of the Aliens Act, stipulating extension of residence permits for third-country nationals. Unfortunately, when the new Aliens Act was adopted in January 2021, the automatic extension provision was not transposed and, although the pandemic continues, migrant workers were obliged to renew their residence permits as before the declaration of the pandemic.²⁵⁶

In Sweden the conditions of remaining have not changed during the pandemic. This means that if a labor migrant loses their job to which the permit is connected, they have three months to find a new job. If they succeed, they can apply for a new permit from within Sweden. If no new job is found the migrant will lose their residence permit and be forced to leave Sweden.²⁵⁷

The OECD has suggested that the gradual exit from lockdown will not lead to a rapid return to “business as usual.” With regard to labor migration, they suggest that “pending work authorisations may become ineligible due to changes in the labour market situation – either because the employer no longer needs the worker or because a weaker post-pandemic labour market leads to

253 Ibid 5.

254 Ibid.

255 ILO, Social Protection Spotlight, Social protection for migrant workers: A necessary response to the COVID-19 crisis, 2020.

256 Špadina, H. National Report for Croatia, 2021.

257 <https://www.migrationsverket.se/English/Private-individuals/Working-in-Sweden/Employed/If-you-are-in-Sweden/Extending-a-permit.html>

more restrictions on recruitment from abroad.”²⁵⁸ Labor migrants “may have been unable to depart and overstayed their visa, making them ineligible for further extensions.” Those who benefited from a temporary, pandemic-related extension of their visa may find themselves in an uncertain situation at the end of the shutdown, with limited prospects for return.²⁵⁹ This will also affect highly skilled workers.²⁶⁰

7.4. Social Security Rights of Migrant Workers during the COVID-19 Pandemic

Prior to the pandemic, migrant workers faced various degrees of limitation on social security rights, depending on their migration status, nationality, length of employment or residence in a country, the nature of their employment and the work they were performing in the destination country, the existence of bilateral or multilateral social security agreements or any other applicable requirement for access to social security benefits.²⁶¹ During COVID, social security vulnerabilities were even more apparent because of migrant workers’ higher exposure to infection in their frontline work or work in sectors with increased health risk,²⁶² coupled with limited access to health care providers, depending on the regularity of their migration status. The ILO recommends not only the provision of affordable health care to migrant workers, but also access to the full range of maternity care, paid sick leave, sickness benefits and full access to COVID testing and vaccines/immunization.²⁶³

Furthermore, the ILO reports on general worldwide difficulties among migrant workers in accessing employment-based social protection, including unemployment benefits. This may force them into informality.²⁶⁴ Therefore, social protection during unemployment and income support should be available to all workers, including migrant workers. The ILO recommends that countries ease administrative procedures, adapt or relax eligibility criteria (such as length

258 . OECD, Managing international migration under COVID-19, Update 10 June 2020, (footnote 245) p 7.

259 Ibid.

260 Ibid 8 f.

261 Cf. ILO, Social Protection Spotlight, Social protection for migrant workers:A necessary response to the COVID-19 crisis, 2020.

262 WHO. 2020. Interim Guidance for Refugee and Migrant Health in relation to COVID-19 in the WHO European Region.

263 ILO, Social Protection Spotlight, June 2020.

264 Ibid.

of employment, duration of stay or minimum contribution period), remove discriminatory obstacles or extend visas or residence permits in order to allow migrant workers to benefit from existing social protection schemes or introduce new benefits.²⁶⁵ In that vein, bilateral labor mobility agreements could be further used to provide an expanded legal framework for social security benefits in health care, safety at work, income support measures, unemployment protection, and portability of social security benefits for migrant workers.²⁶⁶

Finally, we should not underestimate the legal consequences and complexity of European regulations on the coordination of social security systems, which raises problems of application for Swiss companies and migrant workers in Switzerland who come mainly from EU countries, especially in the case of multiple jobs and atypical employment. In response, in March 2020 Switzerland entered into temporary agreements with France, Germany, Italy, Austria and Liechtenstein on the flexible application of European coordination regulations on social security. It was agreed that migrant workers who were no longer able to work in Switzerland because of the COVID-19 pandemic are not subject to any change in the applicable social security legislation. These agreements have been extended until June 30, 2021. Furthermore, the Swiss authorities have also decided that the fact that a migrant worker is prevented from working in Switzerland because of the pandemic will not change the applicable social security legislation under a bilateral social security agreement between Switzerland and the migrant's country of origin. In the event that no bilateral or multilateral social security agreement has been concluded, the Swiss federal administration has decided to apply the principle of territoriality to migrant workers, who are now compulsorily insured with the AVS (first pillar of the Swiss pension system).

7.5. Labor and Unemployment related rights of Migrant Workers during the Pandemic

From the OECD report and elsewhere it is clear that the pandemic has adversely affected migrant workers, and in particular migrant workers with temporary permits. Other reports show that settled migrants have also been hit hard

265 ILO, "Social Protection Responses to the COVID-19 crisis: Country Responses and Policy Social Protection Spotlight 12 Social protection for migrant workers: A necessary response to the COVID-19 crisis Considerations," April 2020.

266 Ibid.

by the pandemic because what have come to be called “frontline occupations” during the pandemic are held in large part by migrants.

On one hand, reports show that the already very poor working and living conditions for many seasonal workers in the agri-food sector have led to a very high exposure to risks related to COVID-19, and in many cases it seems that no protective measures have been taken. Farm workers and their representatives from Italy, the United Kingdom, the United States and Canada have even faced increased vulnerabilities because of the lack of adequate – or any – safeguards against COVID-19.²⁶⁷

Other groups of workers – in particular, the less skilled – have suffered increasingly during the pandemic. There are, for example, reports of Ethiopian domestic workers in Lebanon being left outside the Ethiopian embassy. Their former employers can no longer afford to pay them and so opted to leave them at the door of their home embassy, which then failed to address the problem.²⁶⁸ Other examples are more hopeful, however. Many countries have adopted measures to ease the situation of migrant workers during lockdown.²⁶⁹ The changes highlight, in some cases with almost unbearable clarity, the shortcomings of existing systems and the cruelty that is all too often part and parcel of so-called “managed migration.” However, there are also examples of adopted measures that have long been demanded. Is the pandemic also providing opportunities for the relevant authorities to learn how to strike a fairer balance between the interests at stake? We should also keep in mind that the negative tendencies identified before the outbreak of the COVID-19 pandemic have in many ways been exacerbated by it.

In Belgium, a system of temporary unemployment benefits has been created for the employees temporarily unemployed as a result of the crisis. Two systems have been developed: benefits for unemployment due to *force majeure*, which means the employer had to close by government order, and benefits for unemployment due to economic circumstances, in which case the employer did not

267 See for example the recording from a seminar on farm workers experiences of COVID-19 organised by Tomaso Ferrando, Manoj DiasAbay and Brid Brennan supported by Bristol university and TNI etc. - <https://www.youtube.com/watch?v=mAom91BiG1E>.

268 Colson, T., Ethiopian maids are being dumped onto the street by once wealthy Lebanese families who can no longer afford servants, 21 June 2020, Business insider: <https://www.businessinsider.com/lebanon-ethiopian-maids-dumped-onto-the-street-as-crisis-intensifies-2020-6?r=US&IR=T>.

269 OECD, Managing international migration under COVID-19 (footnote 245) p 1.

have to close, but has experienced economic hardship.²⁷⁰ If unemployment was due to *force majeure*, all employees were eligible for government unemployment benefits and retention of their labor contract, including legally employed migrant workers. Migrant workers were excluded from the obligation to fulfil the usual, pre-COVID conditions of regular unemployment benefits.²⁷¹ Migrant workers who became unemployed a second time because of economic circumstances, however, had to fulfil all conditions to receive unemployment benefits again.²⁷² Migrant workers without a labor contract when the pandemic started had to prove that they had previously worked a certain of days, with a minimum of 212 days in the 21 months prior to the application, as well as that they legally resided in Belgium and that they are allowed to work there.²⁷³ Because of the pandemic, certain labor law conditions for migrant workers have been eased; for example, labor shortages in certain sectors meant that asylum seekers did not have to wait four months in order to apply for a work permit.²⁷⁴ In Belgium, the consequences of the pandemic for the labor market overall during 2020 were relatively limited,²⁷⁵ but in order to mitigate the negative impact on third-country migrant workers, the Socio-economic Council of Flanders suggested improving the services provided by the *VDAB* (Flemish Job Placement Service), as well as accelerated digitalization and inclusion of migrant workers in digital processes, and inclusion of migrant workers in educational programs.²⁷⁶

In Sweden, many workers with work permits employed at hotels and restaurants have been hard hit by the pandemic.²⁷⁷ Migrant workers at companies receiving support under the short-time working scheme could also benefit as long as they met the general qualification criteria. Workers on both permanent

270 Jorens, Y., National Report for Belgium, 2021.

271 Ibid.

272 Ibid.

273 Ibid.

274 Royal Decree of 23 April 2020 concerning the temporary ease of the conditions, among which the unemployed, whether or not with company allowances, can be employed in vital sectors and concerning the temporary freeze of the full employment benefits, Belgian Official Gazette, 30 April 2020, cited in: Jorens, Y., National Report for Belgium, 2021.

275 Statbel, Gevolgen van de COVID-19-crisis voor de Belgische arbeidsmarkt in 2020 blijven globaal genomen beperkt, 29 March 2021, see: <https://statbel.fgov.be/nl/themas/werk-opleiding/arbeidsmarkt/werkgelegenheid-en-werkloosheid>

276 SERV, Impact van Corona op personen met een migratie-achtergrond en personen met een arbeidsbeperking, 21 December 2020, see: https://www.serv.be/sites/default/files/documenten/COM_DIV_20201221_Impact_corona_kansengroepen_NOT.pdf

277 <https://www.hotellrevyn.se/riskerar-utvisning-pa-grund-av-corona/>

and temporary contracts can receive the allowance if employed for at least the previous three months.²⁷⁸ The requirements for qualifying for both basic and income-based unemployment benefits have been reduced, which benefits all workers with more precarious status, including labor migrants.²⁷⁹ No specific measures have been implemented for the benefit of migrants, however, which means that those who do not meet the criteria (six months' work) do not qualify for the basic allowance.²⁸⁰

In Croatia, according to NGO representatives, the pandemic has increased the rate of dismissal of refugees, who are employed mainly in services, usually in the lowest paid jobs, with precarious working conditions and fixed-term employment contracts.

The new Aliens Act of 2021 abolished the previous quota system for the employment of foreigners and replaced it with a labor market testing system (Article 98). The onset of COVID-19 disrupted the labor market. For example, there was for the time being no need for mass employment in Croatia's seasonal employment sectors. It is very likely that employers only kept migrant workers in existing jobs and did not hire new ones.²⁸¹

Despite the increasing need for health workers during the pandemic, no initiative has been launched to accelerate the recognition of professional qualifications of persons under international protection who are qualified health care professionals. Nor has any initiative been launched to facilitate the employment of other categories of migrants.

Croatian employers employing migrant workers during the pandemic have had the same access to job support or job retention incentives as for national workers. Migrant workers who were dismissed in accordance with the Labor Market Act (OG 118/18) under the same conditions as other workers are entitled to unemployment benefits, if they have residence status in the Republic of Croatia. Migrant workers from other EEA Member States or Switzerland

278 See more on these allowances in: Caroline Johansson and Niklas Selberg, COVID-19 and Labour Law: Sweden, update 7 June 2020, Italian Labour Law e-journal, Special Issue 1, Vol. 13 (2020)

279 Ibid.

280 <https://www.sverigesakassor.se/unemployment-benefits-in-sweden/>

281 Ibid.

may transfer the benefit to another Member State for a period of up to three months.²⁸²

Despite labor shortages, it is not expected that domestic workers will fill the skills gap and easily replace migrant workers after the pandemic in sectors such as construction and tourism, although a certain number of domestic workers might undergo the relevant vocational training.²⁸³

The COVID-19 health emergency in Serbia revealed that migrant workers enjoyed the same rights and protections as other workers, but also publicly exposed the risk of labor exploitation of migrant workers by revealing loopholes in sub-contractual employment relations in the construction sector. But migrant workers are often hired exactly because of the lower standards of legal protection and the possibility of exploitation.²⁸⁴ The National Report on Serbia details one high profile case of labor exploitation of 150 migrant construction workers from India during the pandemic.²⁸⁵

Upon the declaration of the state of emergency, important measures were adopted to ease the situation of migrant workers in Serbia. They included extending the validity of residence and work permits on the basis of the Decision on Declaration of the State of Emergency.²⁸⁶ This was particularly important for laid-off migrant workers, and was in accordance with provisions of the ILO Convention No. 143, ratified by Serbia, stipulating that migrant workers who have resided legally in the territory for the purpose of employment shall not be regarded as being in an irregular situation merely because they have lost their job as a result of the economic impact of the pandemic. That is, loss of employment does not in itself entail withdrawal of residence rights or work permit.²⁸⁷

For Serbian employers, the sharp downturn or even collapse due to the state of emergency resulted in the redundancy of temporary agency workers, as well as termination of the civil law contracts under which many migrant workers were engaged without the status of employees.²⁸⁸ With many, employers

282 Ibid.

283 Ibid.

284 Kovačević, Lj., Latković, B., National Report for Serbia, 2021.

285 Ibid.

286 Ibid.

287 Ibid, ILO Migrant Workers Convention, 1975 (No.143), Art. 8, par. 1.

288 Kovačević, Lj., Latković, B., National Report for Serbia, 2021.

concluded an agreement for the voluntary termination of employment in order to circumvent the law on collective redundancies (social program, notice period, severance payments, and so on).²⁸⁹ Dismissals (including dismissals of migrant workers as the most vulnerable) were limited through regulations providing financial incentives to employers who did not cut jobs by more than 10 percent from the outset of the state of emergency.²⁹⁰

During the state of emergency, legal insecurity had been increased by certain contradictory measures contained in the new laws, and the failure of the competent authorities to protecting workers further, or at least to notify employers and their employees in good time of their rights and obligations during the state of emergency. This problem was even more pronounced for migrant workers because of their lack of information on government emergency measures, as they were not officially translated into languages that some migrants understand or made available in accommodation facilities.²⁹¹

Serbia has not adopted any measures aimed at supporting workers in the informal economy, leaving them without means of subsistence and deprived of adequate health and safety at work. They fear that they will face retaliation

289 Ibid.

290 Serbian Government passed the Regulation on Fiscal Benefits and Direct Aid to Businesses in the Private Sector and Financial Aid to Citizens to Mitigate the Economic Impact of COVID-19 (Official Gazette of the RS, No. 54/20 and 60/20), which allowed postponement of payment of wage taxes and social security contributions incurred during the state of emergency until the end of 2020. As of January 2021 the businesses have an option to further postpone the payment of taxes and contributions by another 24 months with no interest. Regulation also stipulates employment retention measures, such as: a) all entrepreneurs and micro and small enterprises are entitled to grants in the amount equivalent to one minimum wage per employee (250 EUR/month), for each of the three months of duration of the state of emergency, provided that they haven't dismissed more than 10% of their employees; b) all large private enterprises who have been in position to refer the employees to the leave due to the discontinuation of work or work decrease during the state of emergency, can be granted upon request, compensation equivalent to the 50% of minimum monthly wages of the employees, cited in: Kovačević, Lj., Latković, B., National Report for Serbia, 2021.

291 M. Pajvančić et al., Gender Analysis of COVID-19 Response in the Republic of Serbia, 2020, 25. This requirement is confirmed in the ILO Migration for Employment Recommendation (Revised), 1949 (No. 86), par. 5 (2). It is also in line with the WHO Considerations for Public Health and Social Measures in the Workplace in the Context of COVID-19 (Annex to Considerations in adjusting public health and social measures in the context of COVID-19), which asks that special attention be paid to reaching out to and engaging vulnerable and marginalized groups of workers, such as those in the informal economy and migrant workers, cited in: Kovačević, Lj., Latković, B., National Report for Serbia, 2021.

from the employer if they request appropriate protective equipment or initiate proceedings to assert their labor rights.²⁹²

The pandemic in Spain led to an increase in unemployment among migrant workers and receipt of unemployment benefits. Remote working by civil servants led to changes in the way expired residence and work permits are processed and the government tried to prevent residence irregularities, adopting specific legislation under which the expiry date of residence and/or work permits was “automatically extended” during the state of emergency and until six months after the end of the state of emergency (that is, until December 2020).²⁹³

The crisis has made the Spanish government more lenient regarding job or means-test requirements for residence permits. The Government adopted proceedings to make compliance more flexible, for example by allowing job retention even if migrant workers become unemployed or had their working hours reduced, especially in the case of domestic workers, who were also eligible for public financial support in case of unemployment.²⁹⁴ In Catalonia, legislation has been introduced to subsidize house owners hiring migrant domestic workers in an irregular situation, provided that being hired is a way for them to obtain residence and work permits.²⁹⁵

Because the pandemic has led to a significant decrease in the agricultural labor supply, usually provided by seasonal workers, legislation was adopted to make temporary hiring in this sector easier. These workers include migrants whose work permits expired during the state of emergency or young third-country nationals aged 18–21 with regular immigration status.²⁹⁶

Finally, the Spanish government has again passed a law for 2021 permitting the hiring of migrant workers for seasonal work or harvesting, or for temporary work or services, on condition they pledge to return to their country of origin.²⁹⁷

292 S. Bradaš, M. Reljanović, I. Sekulović, *The Impact of the COVID-19 Epidemic on the Position and Rights of Workers in Serbia with Particular Reference to the Frontline and Informal Workers and Multiply Affected Workers Categories*, 2020, pp 42-43, cited in: Kovačević, Lj., Latković, B., *National Report for Serbia*, 2021.

293 Ferran Camas Roda, *National Report for Spain*, 2021.

294 *Ibid.*

295 *Ibid.*

296 *Ibid.*

297 *Ibid.*

In Switzerland, the pandemic has created job opportunities for migrant workers in the agricultural, mail order, health, medical research, pharmaceutical, IT and logistics sectors.²⁹⁸ For example, the two largest groups in the Swiss retail sector (Migros and Coop) were not able to meet demand due to logistical problems (supply, storage, insufficient means of delivery).²⁹⁹ The pandemic has helped to highlight major opportunities for improvement in IT and logistics, particularly in the distribution sector. It has also shown that the supply of migrant workers from neighboring EU countries is essential for the normal functioning of the Swiss health care system.³⁰⁰

In Turkey, COVID-19 has had an impact on daily domestic services. Many families have had to stop hiring migrant domestic workers due to health risks.³⁰¹ On the other hand, domestic workers in Turkey do not benefit from unemployment insurance, so they have been unable to rely on state-funded unemployment insurance payments and other short-term allowances.³⁰² Migrant domestic workers who were able to continue working were exposed to long hours and unpaid overtime, particularly during curfew weekends.³⁰³

Finally, discriminatory treatment of migrant workers has been reported in South Korea, where the Provincial Government of Seoul issued an administrative order requiring all migrant workers in the city to undergo diagnostic tests in March to prevent the spread of COVID-19. Medical experts were shocked by the Seoul city government's decision to mandate coronavirus tests for all foreign workers in the city, saying it is discriminatory, scientifically unjustifiable and may even violate human rights.³⁰⁴

Substantial teleworking might lead to “an increasing disconnect between countries of nationality, residence and work, particularly for highly skilled workers” to whom virtual employment platforms will be offered, with certain social protection and benefits. Currently, Croatia, Estonia and Greece have digital nomad visas for migrant workers who choose to work remotely and live

298 Pétremand, S., National Report for Switzerland, 2021,

299 Ibid.

300 Ibid.

301 Dogan Yenisey, K., National Report for Turkey, 2021.

302 Ibid.

303 C. Güler, 'Ev İşçileri Dayanışma Sendikası COVID-19 Raporu, Peki Ya En Alttakiler ...' [http://www.evid-sen.org/2020/04/23/evid-sen-COVID-19-raporu-peki-en-alttakiler /](http://www.evid-sen.org/2020/04/23/evid-sen-COVID-19-raporu-peki-en-alttakiler/)

304 Kwang-Taek, L., National Report for South Korea, 2021.

in a more affordable country, with certain earnings thresholds (usually much higher than the host country's average salary).³⁰⁵

8. POSSIBLE LESSONS LEARNED FROM THE PANDEMIC AND WAYS FORWARD FOR LABOR MIGRATION

Looking back at labor migration before the pandemic, discussions focused on such issues as regularity of employment and residence status, sanctioning of employers for illegal employment of migrant workers, obstacles to unionization of migrant workers, prevention of exploitation mainly of low-skilled migrant workers, wage gaps between migrant workers and nationals, and particular sectors of employment in which migrant workers worked because they are not appealing to national workers. In the previous ISLSSL Report, special emphasis was put on the vulnerability of migrant workers.³⁰⁶ Four years later we have not only previous layers of labor and social law related to vulnerabilities, exploitation and inequality of migrant workers, but we have new layers of novel vulnerabilities of migrants due to the tectonic changes in the world of labor caused by the pandemic. All migrant workers have been affected, some in a positive way thanks to the swift reaction of host countries that promptly realized that migrant workers should be treated equally to nationals, even in such a health emergency. They extended to them state wage subsidies, full health protection coverage, protection from unemployment and secure residence status. Others realized how fragile the international and regional legal framework is for the protection of migrant workers' rights. In practice, it collapsed with the first lockdown, leaving migrant workers without basic labor and social security rights in host countries. This showed us what Professor Dogan Yenisey called the "discrepancy of rights" between different migration statuses. The available research shows that highly skilled migrant workers enjoyed a higher level of COVID-related benefits and wage subsidies than lower skilled migrant workers. Discrepancy of rights gained another new aspect because higher skilled migrant workers were able to practice remote working, thus protecting them from exposure to the virus. They also had more job security than lower skilled migrant workers, who often work in frontline jobs or jobs impossible to do remotely and thus faced a higher rate of dismissals

305 EMN, 2021, p 35-36.

306 Dogan Yenisey, K., *Safeguarding the Rights of Migrant Workers: Another Challenge for Labour Law?* Bulletin of Comparative Labour Relations – 105 Transformations of Work Challenges for the Institutions and Social Actors, eds. Casale, G, Treu, T., Wolters Kluwer, 2019.

due to business closures. In the most dramatic situations, migrant workers were the first to be furloughed and left without employment and residence status and income in the host country, besides being unable to return home due to travel restrictions and border closures. Therefore, four years after the previous ISLSSL report on Migrant Workers, we still have “regulated precarity” and a lack of legal protection for the most vulnerable migrant workers, who need legal protection the most. The difference is that the pandemic has made the existing short comings of the system even more visible.

This report highlights wage gaps and educational attainment gaps, while the previous one highlighted unionization gaps between migrant workers and nationals. All of this remains in place. New gaps related to the public health emergency include a remote-working gap, a digital-divide gap and a public-health gap. The remote-working gap affects migrant workers who are unable to do their jobs at home, either because of their housing situation or the nature of their job. They are thus subject to additional status vulnerability in case of disruptions of regular work processes. The digital-divide gap is specific to migrant workers who have no access to digital tools and equipment. Finally, the health gap excludes foreigners in general, including migrant workers, from access to testing and immunization health care in public health care emergencies. This can have detrimental consequences for the health of migrants, their families, and the host community in general.

The COVID-19 health crisis, besides its many problems, has also gifted us an unprecedented learning opportunity. First, it has highlighted the contribution of migrants’ work, the importance of labor migrants in essential services, and the necessity of building resilient labor migration systems.³⁰⁷

Secondly, it has provided an opportunity to rethink labor migration management overall and to build on the lessons learnt to create a new, improved and fairer labor mobility framework. The pandemic may give policymakers the chance to overhaul existing models and systems, and to design a more resilient labor migration governance to respond better to future crises and their effects on migration, migrant workers, and their families.³⁰⁸

307 Anderson, Poeschel and Ruhs, 2020, <https://cadmus.eui.eu/handle/1814/68235>, cited in: EMN – JRC – DG HOME, 2020, p 4.

308 OECD (footnote 245), ILO (footnote 253), p 33.

Thirdly, the pandemic has made us aware –once again – how vulnerable migrant workers are in terms of labor and social protection. Therefore, it is essential to do more research on various aspects of the current health crises, insofar as it affects migrant workers. Legal policies regulating the labor and residence rights of migrant workers are key to a more precise assessment of what will be involved in reopening labor markets to migrant workers. Fair wages, equal treatment in social protection, and decent living conditions should be key considerations when admitting migrants.³⁰⁹ Wage protection systems may prevent underpayment by requiring employers to pay workers' wages electronically via authorized financial institutions, to make payments transparent and traceable.³¹⁰ In countries where migrant workers do not enjoy the legal right to minimum wages, as stipulated by ILO Convention No. 131 on Minimum Wage Fixing, there is a need to extend minimum wage provisions to all workers, and strengthen freedom of association and collective bargaining. International labor standards guarantee all migrant workers, irrespective of their immigration status, equality of treatment in respect of rights arising out of past employment as regards remuneration, social security, and other benefits, including severance pay, employment injury benefits, compensation in lieu of any holiday entitlements, and reimbursement of any social security contributions (ILO Migrant Workers [Supplementary Provisions] Convention, 1975 [No. 143], Article 9, and Migrant Workers Recommendation, 1975 [No. 151]). All migrant workers, irrespective of their immigration status, must also be able to seek redress for wage-related violations. The ILO points out how essential it is to guarantee these principles in national labor laws, and to ensure that these rights are not undermined by immigration laws requiring swift repatriation of workers whose work permits have expired or been cancelled due to job loss. This is of particular importance in all kinds of emergencies, including a health emergency.³¹¹

The COVID-19 pandemic has underlined the importance of responses to ensure migrant workers' rights, at their workplace and in the host country,³¹² as well as their social protection, primarily health care coverage and protection from unemployment. It is of crucial importance to use the crisis to further ex-

309 Ibid, p 50.

310 Ibid.

311 Ibid, p 52 and ILO, Supporting Migrant Workers During the Pandemic for a Cohesive and Responsive ASEAN Community. Draft Thematic Background Paper for the 13th ASEAN Forum on Migrant Labour, 2020.

312 Ibid.

tend migrant workers' social protection, in line with ILO standards for the equal treatment of nationals and migrant workers in social protection. This is a key element in crisis preparedness and response.³¹³ The pandemic has highlighted the importance of extending unemployment insurance to cover migrant workers, especially in times of crisis or emergency.³¹⁴

The pandemic has rapidly and almost completely digitalized many lives and this swift digitalization might have a significant impact on migration management. E-visas from Australia, New Zealand, Canada, the United States and Turkey have been complemented by the widespread development of online applications for visas and residence permits.³¹⁵ New options for the digitalization of labor migration include matching tools, migrant status verification systems for employers, and assessment of qualifications and skills.³¹⁶

Finally, health requirements might become more pressing for residence permit applications.³¹⁷

313 Ibid, p 54.

314 ILO, Supporting Migrant Workers During the Pandemic for a Cohesive and Responsive ASEAN Community, 2020.

315 EMN, 2021, p 35.

316 Ibid.

317 Ibid.