



Disconnecting agricultural workers' exploitation from migration policies: a trend towards a business and human rights approach in the European Union

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Abstract

Seasonal migrants' exploitation in Europe, especially in agriculture, is often seen as having its origins in failure of migration or labour policies. Indeed, the virtual impossibility to enter a country as a regular non-European Union (EU) worker coupled with the needs of agricultural work, requiring low-skilled workforce and short time notice for recruitment, generates a perfect environment for exploitation and the related phenomenon of gangmastering. However, work exploitation in agriculture is nowadays a structural problem, requiring structural changes in the way food is produced and intended by the agri-food supply chain as a whole. Indeed, a truly preventative approach needs not only to protect seasonal migrants from human rights violations, but also to involve agribusiness in tackling the root causes of migrants' exploitation. Building on international standards on business and human rights, the aim of this contribution is to propose a more holistic view of the phenomenon workers exploitation in agriculture. Recent European policies seem to have understood this need, calling enterprises and farmers to bear their responsibility by introducing an accountability discourse for the agribusiness and the food supply chain, either indirectly or directly. The new social conditionality clause in the Common Agricultural Policy, the Directive on Unfair Practices in Agriculture and the recent Commission proposal for a Directive on mandatory human rights due diligence should therefore be read in conjunction with major developments in international law that call for the responsibility of powerful private actors operating in agri-food sector.

Keywords: international law; business and human rights; work exploitation; agri-food supply chain; seasonal migrants

1. Introduction

The political debate about exploitation of migrants in agriculture is mostly focused on migration and labour laws, due to the common assumption that workers exploited in agriculture are irregular migrants ending in the hands of organised crime because of their status. At a closer look, however, the irregular status of migrants merely increases their vulnerability and consequent exposure to illegal recruitment, but it is not the determining factor of the structural exploitation that characterises agriculture. It is necessary to analyse instead the deeper causes of human rights violations in agri-food production, including the systemic resort to forced labour, by looking at the dynamics of the food supply chain. Indeed, work exploitation mainly exists because of the persistent and constantly growing request for cheap labour in food production, which is maintained and fostered by inequalities of food systems, pushing for cutting

food prices and narrowing margins for small farmers, while increasing the profits of large retailers.¹ The global food market requires a non-stop production of massive quantities of agricultural products, which are sold in supermarkets at the cheapest possible price, with no regard to the actual time and costs of production.

In this scenario, work exploitation in agriculture – and the related attraction of the most vulnerable as workers in the sector – cannot be tackled unless the private actors making the rules of food markets are held accountable for the indirect consequences of their commercial practices, resulting in human rights abuses in the lowest tiers of the production chain.

This contribution highlights how food supply chain dynamics are among the push factors for small-scale farmers to recruit low-cost workforce, fostering the phenomenon of migrants' exploitation in agriculture, and argues that holding lead companies of food supply chains accountable can be a game-changer in tackling structural failures of agri-food production.

The argument will proceed through the following steps. Section 2 will address selected narratives concerning migrants' exploitation in agriculture. Taking into account the Italian example, it will be shown that three structural problems involve both nationals and non-nationals: the absence of an institutionalised platform to match work demand with offer in the agricultural sector, the need for quick recruitment of low-skilled workforce to be employed during the harvesting season due to meteorological incumbencies and, most important, the inherent dynamics of the food supply chain. Section 3 will then explore how inequalities embedded in structural failures of food supply chains are the main drivers of human rights abuses in the agricultural sector, harming nationals and non-nationals alike, eventually disconnecting the issue from migration policies – which ultimately merely make migrants a highly vulnerable category to be exploited in agriculture, but are not the main cause of exploitation. In this context, international standards on business responsibility to respect human rights (BHR) will be described, as a possible way to change the paradigm and make the food supply chain accountable for human rights abuses in agriculture, from the small-scale farmer to lead companies in supply chain. This partial conclusion will lead to Section 4, in which three recent European Union (EU) initiatives will be looked at, as possibly implementing international principles on corporate responsibility with the aim to fight human rights abuses in agriculture, both directly and indirectly.

2. Structural problems of agri-food supply chains do not only affect migrants: lessons from the Italian context

In recent decades, agriculture has been one of the elective fields of migrants' employment both because the progressive abandonment of the countryside by locals has left the agricultural sector in need of workforce, and because it is relatively easier to integrate and find work in the sector compared to the dynamics of urban areas.²

In this scenario, distinct narratives about seasonal migrants employed in agriculture have emerged, contributing to the idea that reforming migration and labour policies is key to tackle exploitation in the agri-food sector. First, seasonal workers in agriculture are perceived as migrants arriving in the EU once a year to be employed for the harvesting season and going back to their country of origin when the season is over; accordingly, the Directive on seasonal migrants was adopted towards the goal of creating a harmonised framework for the temporary entry of foreign

¹The argument is clearly made in R Willoughby and T Gore, *Ripe for Change: Ending Human Suffering in Supermarket Supply Chains* (Oxfam 2018); R Wilshaw and R Willoughby, *Workers' Rights in Supermarket Supply Chains: New Evidence on the Need for Action* (Oxfam 2019); A Corrado, *Is Italian a 'Pull Factor' for Irregular Migration – And, If So Why* (Open Society Foundations 2018). On supply chain dynamics as one of the main causes of labour exploitation see G LeBaron, 'The Role of Supply Chain in the Global Business of Forced Labour' 57 (2021) *Journal of Supply Chain Management* 2; UN Human Rights Council, *Report of the Special Rapporteur on Contemporary Forms of Slavery, Including Its Causes and Consequences, on Her Visit to Italy*, UN Doc A/HRC/42/44/Add. 1 (25 July 2019), para 45.

²Corrado (n 1).

workers.³ Second, most of the seasonal workers employed in agriculture are irregular and arrive in the EU through various forms of trafficking for the precise purpose of providing cheap labour in the fields. Third, seasonal migrants working in agriculture are mostly employed informally, fostering the black market.

Such narratives have led legislators to perceive exploitation in agriculture as a migration-linked phenomenon and therefore to contemplate solutions in the realm of migration policies, through interventions at various levels, with the view of promoting *ex post* regularisation of the residence status of foreign agricultural workers. By way of example, an extraordinary regularisation process was recently proposed by the Italian authorities allegedly to counter the shortages of workers denounced by agricultural employer associations after the onset of the Covid-19 pandemic.⁴ The measure proved to be ineffective in this regard, as the regularisation procedure has been used mostly for undeclared employment contracts of domestic workers rather than for the purported scope of tackling undeclared migrant work in agriculture.⁵

Indeed, the reality on the ground differs from the aforementioned narratives. The Italian experience shows that migrant seasonal workers employed in agriculture do not fit the definition of ‘seasonal migrants’ provided for in the relevant Directive,⁶ since they move within Italian borders to follow harvesting seasons from northern to southern Italy, depending on the products, most of them being in Italy as refugees or asylum seekers.⁷ For this reason, many migrant workers are regularly staying in the territory and are regularly employed with contracts.⁸ Nevertheless, below-standard wages and excessive workload are a widespread reality in agricultural employment.⁹

³The idea of non-EU migrant workers moving back and forth for the harvesting season is well reflected in the widely reported alleged shortage of agricultural workers caused by restriction of movement in pandemic times, see press release from *Confagricoltura*, 31 March 2020 <<https://www.confagricoltura.it/ita/area-stampa/comunicati/coronavirus-giansanti-emergenza-manodopera-nelle-campagne>> accessed 7 October 2022 and in the terms of the directive itself, providing for short term permits precisely designed for seasonal workers, see Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, OJ L 94/375 (28 March 2014).

⁴Art 103, Law Decree 19 May 2020, no 34, *Misure urgenti in materia di salute, sostegno al lavoro e all'economia, nonché di politiche sociali connesse all'emergenza epidemiologica da COVID-19* (implemented with Law of 17 July 2020, no 77) provided for either the possibility for employers to declare irregular employment relationship, leading to the release of a residence permit for the employed migrant, or the possibility for irregular migrants to request a renewal of an expired residence permit. The decree was the last of a series of amnesties issued by the Italian government, as an emergency tool to ‘regularise’ the status of irregular migrants already working in Italy. For a description of past and recent Italian praxis see W Chiaromonte and M D’Onghia, ‘Cronaca di una sanatoria in tempo di emergenza sanitaria: genesi, finalità e limiti’ (2020) 3 *Diritto, Immigrazione e Cittadinanza* 1.

⁵*Ibid.*, Chiaromonte and D’Onghia, reporting data from Italian Ministry of Interior according to which requests for regularisation of domestic workers accounted for roughly 85 per cent of the whole number of requests received available at <https://www.interno.gov.it/sites/default/files/2020-08/dlci_-_analisi_dati_emersione_15082020_ore_24.pdf> accessed 7 October 2022.

⁶The directive (Art 3, letter b) defines ‘seasonal worker’ as third-country nationals staying legally and temporarily in the territory of a Member State to carry out an activity dependent on the passing of the season under fixed-term contracts; volumes are still to be determined by each Member States and short-term visas can be rejected on this basis (Art 7).

⁷Data in this sense emerge from local associations statistics, such as those provided by Caritas Saluzzo Migrante referred to the Italian territory of Saluzzo, according to which 0.5 per cent of migrant workers in agriculture had a seasonal worker permit, while more than 30 per cent had humanitarian visas or refugee status, see <<http://www.saluzzomigrante.it/dati-conclusivi-2021/>> accessed 30 August 2022.

⁸L Palumbo, *Trafficking and Labour Exploitation in Domestic Work and the Agricultural Sector in Italy* (Technical Report, Global Governance Programme, TRAFFICKO, European University Institute 2016). Formal presence of contracts is not a guarantee against blurred forms of exploitation through so-called ‘grey’ labour, with under-declared working hours: nearly 30 per cent of agricultural workers formally declare less than 50 working days per year according to Osservatorio Placido Rizzotto, FLAI-CGIL, Quarto Rapporto Agromafie e Caporalato (2018).

⁹For an overview of the phenomenon in the Italian context, see UN Human Rights Council, Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises on Its Visit to Italy (Advance Unedited Version) UN Doc A/HRC/50/40/Add.2 (7 June 2022), para IV, sections A, B.

As a matter of fact, entry policies for migrant workers may incentivise their employment in agriculture through illegal recruitment and exposure to exploitation practices.¹⁰ In the Italian experience, the entry of migrant workers is based on controlled volumes set by governmental decrees (the so-called periodic ‘flow decrees’) allowing entries on the basis of sector of employment and country of origin. In 2021, the number of working permits for non-EU citizens amounted to 69,700, 42,000 of which were allocated to seasonal workers in agricultural and tourist services sectors.¹¹ Within this quota, 14,000 spots were reserved for the agricultural sector upon request of agricultural organisations of employers. This circumstance alone would already suffice to render the system completely unfit for the real needs of the agricultural market, considering that numbers of non-EU workers in the sole agricultural sector yearly exceed 370,000 units.¹²

In addition, the procedural requirements to recruit non-EU workers make it definitely impossible for farmers to regularly employ migrants through the formal ‘quotas’ mechanism. The authorisation to employ non-EU workers should be required and obtained in advance and the employee-to-employer match should happen before the migrant has entered the Italian territory. The system is further complicated by the fact that there is no long-term planning of quotas and no specific link between the actual need of workforce for the agricultural sector and the number of migrants allowed by decree to enter Italy to work in agriculture. The result is that the system is not able to guarantee the necessary manpower in the fields.

The work need in agriculture is naturally highly variable, depending on weather conditions and biological features of food production, and farmers often need short-notice and short-term labour force to carry out the harvest, without delay. It is therefore virtually impossible to wait for the process provided for in the aforementioned flow decrees and even to rely on formal mechanisms for matching work offer and demand, thus leaving to informal recruitment the largest part of work supply in agriculture.¹³

It appears that migration policies are only the top of the iceberg of a broken system that has its origins in the way in which food is produced, consumed and distributed on the market, causing structural deficiencies that perpetuate the need for work exploitation involving agricultural workers. The framework that emerges makes it clear that low wages and excessive working hours have now become systemic features of agricultural production, whether or not involving seasonal

¹⁰See UN Human Rights Council, *Trafficking in Persons in the Agriculture Sector: Human Rights Due Diligence and Sustainable Development: Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, Siobhán Mullally*, UN Doc A/HRC/50/33 (25 April 2022), para 14–16 affirming that submissions received highlighted ‘the increasing numbers of temporary visas issued for agricultural migrant workers reflects continuing demand and market needs yet limited access to secure residence status, citizenship, or to strengthened labor protection for agricultural workers’ and that ‘visa regimes established by States continue to place migrant workers and their families in precarious situations’ and that ‘the short-term, temporary nature of employment and the likelihood of being in an irregular migration situation create high risk of exploitation’. For an overview of the phenomenon in Italy, see Amnesty International, *Exploited Labour: Migrant Workers in Italy’s Agricultural Sector* (2012) 12. In the context of supply chain dynamics, on poverty, identity and discrimination as root causes of exploitation on the supply side, see LeBaron (n 1) 32.

¹¹Decree of the Prime Minister of 21 December 2021, Art 6.1, GU Serie Generale no 12 (17 January 2022). The volume of allowed entries is further restricted by referring to citizens from States specified in Art 3.1 letter a) of the Decree.

¹²Accounting for roughly 27 per cent of agricultural workforce in Italy, according to data referred to 2020 reported in ML Augère-Granier, *Migrant Seasonal Workers in the European Agricultural Sector*, European Parliament Briefing Note (2021). Partially different data emerge from MC Macri, *L’impiego dei lavoratori stranieri nell’agricoltura in Italia: Anni 2000–2020* (CREA 2022), according to which in 2020 foreign workers employed in agriculture accounted for 18.5 per cent of agricultural workers in Italy. Similarly, the latest Italian general census on agriculture by ISTAT (*7° Censimento generale dell’agricoltura*) referred to years 2019–2020 showed that almost 20 per cent of workers in Italian agriculture are non-EU nationals (more than 250,000), the vast majority of which (almost 70 per cent) are occasionally employed <<https://www.istat.it/it/archivio/272404>> accessed 30 August 2022.

¹³UN Human Rights Council (n 1) para 43, analysing the causes of labour exploitation in the agricultural sector in Italy recognises that seasonality, flexibility, and short-notice work are among the main difficulties of matching supply and demand through formal intermediaries such as public employment centres, thus fostering gangmaster mechanisms and related exploitation practices.

migrants, as there is a high demand for low-skilled, low-cost and readily available workers. Structural failures need structural changes, tackling the whole food value chain through a systemic approach. Understanding the root causes of this broken system is essential to transform the way in which agricultural work is currently carried out.

In this light, the next pages in this contribution analyse the systemic failures of the food supply chain as a whole. Section 3 illustrates how low prices of food on the global market, unbalanced profit sharing along the supply chain and unfair trading practices imposed by powerful actors squeezing small farmers' profits all contribute to triggering a cascade of human rights violations at the expenses of agricultural workers. Interestingly, the EU legislator is beginning to pay holistic attention to such failures: in recent years several legislative initiatives have been undertaken with the goal of preventing human rights abuses in business activities, highlighting how tackling the entire food supply chain instead of looking at the last ring of the chain may be the key to challenge a broken agricultural system that is based on cheap labour. Section 4 below will delve into such developments.

3. Actors, powers, and BHR standards in agri-food supply chains

The vulnerability of migrant workers resulting from their precarious conditions of stay is certainly a push factor for their exploitation in agriculture. Still, in order to tackle the root causes of migrants' labour exploitation in agriculture it is necessary to look at their position within the agricultural supply chain, rather than at their migrant worker status. This change in perspective shifts the focus to the whole system of food production and its structural failures that constitute the real root causes for work exploitation in agriculture, generating a cascade effect that ultimately impacts all agricultural workers, whether migrants or not.

To widen the horizon of this inquiry, it is necessary to climb up the food supply chain to its very top and understand its dynamics. Indeed, the offer of low-cost manpower in agriculture is a direct consequence of the market's demand for such a cheap workforce. It is therefore essential to look at the roots of such demand, following the routes of agricultural products up to supermarket retailers, where the widest share of food products is sold worldwide.¹⁴

It has been observed that out of the cost of a single food product, less than 14 per cent of the price paid by end consumers goes to small-scale farmers and producers, who directly employ agricultural workers, while prices paid by supermarkets to farmers do not even cover the basic costs of production.¹⁵ Thus, the weakest rings of the chain are forced to squeeze production costs where they can be most easily cut, ie at the level of social and labour rights. This major driver of labour exploitation in agriculture cannot be tackled through the lens of migration or labour law, but requires a wider sharing of responsibility along the food supply chain.

For too long the responsibility for work exploitation of migrants in agriculture has been seen as a problem to be faced at the exploiter-level¹⁶ or as a matter of human trafficking for the purpose of

¹⁴This is the main food distribution channel where likely 70 per cent of food products are sold in Italy, as reported in UN Human Rights Council, Report of the Special Rapporteur on the Right to Food on Her Visit to Italy, UN Doc A/HRC/43/44/Add.5 (31 August 2020), para 34. For a deep investigation on the Italian supermarket system and its impacts on small farmers and agricultural workers, see F Ciconte and S Liberti, *Supermercati, il grande inganno del sottocosto*, Internazionale (2017). <<https://www.internazionale.it/reportage/fabio-ciconte/2017/02/27/supermercati-inganno-sotto-costo>> accessed 5 August 2022.

¹⁵Willoughby and Gore (n 1) 17; T Ferrando, 'Gangmastering Passata: Multi-Territoriality of the Food System and the Legal Construction of Cheap Labour Behind the Globalized Italian Tomato' 14 (2021) Florida International University College Law Review 536.

¹⁶Through initiatives to counter gangmastering, such as the Italian law against *caporalato* reformed in 2016 (Law no 199/2016 introducing Art 603 bis of the Italian Criminal Code punishing gangmastering and work exploitation).

work exploitation.¹⁷ All these measures are not working on prevention of labour exploitation of migrants, rather they work on punishment, and their deterrent function cannot be sufficient to tackle the phenomenon in its deeper causes.

The agri-food sector has been increasingly evolving towards a market concentration model that grants few large supermarkets the power to control the agri-food market, against the interest of a multitude of small-scale farmers and agricultural workers around the world.¹⁸ Bargaining inequalities in agri-food chains have made the ‘race to the bottom’ the new model of food production: big players making prices and conditions of the market are asking producers to meet quality requirements while cutting prices below the minimum production cost.¹⁹ It is therefore necessary to recognise the accountability of the food supply chain as a whole, taking a reverse approach: setting the responsibility from the top, lead companies, that govern the way in which food is produced, paid, delivered and consumed in order to address the demand of cheap labour, by regulating the conduct of those actors creating the rules of the market.

International standards on BHR that have emerged in the last ten years may effectively tackle work exploitation, addressing the root causes of low prices and incomes in agriculture by introducing a supply chain accountability. As of today, the main reference to a ‘global standard of expected conduct’ in business activities is provided by the Guiding Principles on Business and Human Rights of the United Nations (UNGPs) endorsed in 2011 by the United Nations (UN) Human Rights Council.²⁰ The same principles are set out in the Guidelines on Multinational Enterprises (Guidelines)²¹ adopted by the Organisation for Economic Co-operation and Development (OECD) for business operating in OECD member countries and especially developed in the Guidance on Responsible Agricultural Supply Chain,²² which takes into account the peculiarities of agricultural supply chains.

The UNGPs and the OECD Guidelines both focus on the process of due diligence as a mean to realise corporate responsibility to respect human rights along the whole value chain,²³ instead of limiting the accountability for human rights violations to those companies directly responsible for human rights abuses. The UNGPs provides that companies are responsible for human rights violations that they ‘contribute to’ or that are ‘directly linked to’ their operations by virtue of a business relationship.²⁴ This entails a responsibility that overcomes the direct relationship between the farmer and the exploited agricultural worker, but extends to all those companies whose conduct

¹⁷Even the only case on exploitation in agriculture decided by the European Court of Human Rights ended up in considering the issue under the trafficking lens, instead of a structural problem of food production, see *Chowdury and others v Greece*, app no 21884/15 (ECtHR, 30 March 2017).

¹⁸P Mooney, *Too Big to Feed: Exploring the Impact of Mega-Mergers, Consolidation and Concentration of Power in the Agri-Food Sector* (iPES FOOD 2017); J Clapp, ‘The Problem with Growing Corporate Concentration and Power in the Global Food System’ 2 (2021) *Nature Food* 404; J Clapp and J Purugganan, ‘Contextualizing Corporate Control in the Agri-food and Extractive Sectors’ 7 (2020) *Globalizations* 17, 1265. For an analysis of the problem under the lens of competition law see I Lianos, A Ivanov and D Davis (eds), *Global Food Value Chains and Competition Law* (Cambridge University Press 2022).

¹⁹See Willoughby and Gore (n 1) 10; A Corrado, C De Castro and D Perrotta, ‘Cheap Food, Cheap Labour, High Profits’ in A Corrado, C de Castro and D Perrotta (eds), *Migration and Agriculture: Mobility and Change in the Mediterranean Area* (Routledge 2017) 7.

²⁰Annex to UN Human Rights Council, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, UN Doc A/HRC/17/31 (21 March 2011).

²¹OECD, *OECD Guidelines for Multinational Enterprises* (OECD Publishing 2011).

²²OECD/FAO, *OECD-FAO Guidance for Responsible Agricultural Supply Chains* (OECD Publishing 2016).

²³UNGPs, Principle 17 ff. On the concept of due diligence see further below.

²⁴UNGPs, Principle 13: ‘The responsibility to respect human rights requires that business enterprises: (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts’.

may cause, incentivise, facilitate or increase the risk of human rights harm committed by other companies, failing to prevent and cease the said contribution.²⁵

A paradigmatic example of conduct possibly contributing to human rights abuses is that of large food retailers imposing short delivery schedules or below-production cost prices to perishable agricultural products, increasing the risk that suppliers recruit overtime-employed workers to respect the imposed deadline and cost in order not to be excluded by the distribution channel.²⁶

4. Implementing BHR standards in agri-food value chains through EU legislation

Both the UNGPs and the OECD Guidelines described in the paragraph above are soft law instruments, as they do not impose direct international obligations upon enterprises or States.²⁷ Nonetheless, the last years have witnessed a ‘hardening’ process of such soft principles,²⁸ both through judicial interpretation of existing national laws on corporate liability for human rights abuses and, most importantly, through proper incorporation into domestic hard laws providing for mandatory human rights due diligence in supply chains.²⁹ The same standards towards an accountability of the whole agri-food supply chain seem to be now implemented in the EU, whether indirectly creating incentive mechanisms to respect human rights in agri-food production, as per the recently adopted reform of the Common Agricultural Policy (CAP) and the Directive on unfair trading practices in agriculture, or directly and expressly recalling business and human rights international standards, as in the newly proposed Directive on mandatory human rights due diligence for corporations.

A. Incentivising social sustainability of agri-food production through the new common agricultural policy

On 2 December 2021, the European Parliament and the Council adopted the new CAP regulations,³⁰ after reaching a political agreement on the content of the new policy in June 2021. Besides reviewing the already existing environmental conditionality clause that includes high climate

²⁵For an overview of the meaning of such conducts within international standards on business and human rights see T Van Ho, ‘Defining the Relationships: “Cause, Contribute, and Directly Linked to” in the UN Guiding Principles on Business and Human Rights’ 43 (2021) *Human Rights Quarterly* 634.

²⁶The example is provided in both OECD/FAO (n 22) 37 and OECD, *OECD Guidance for Responsible Business Conduct* (OECD Publishing 2018) 70–1.

²⁷For reflections on the soft nature of the UNGPs see J Nolan, ‘The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law?’ in S Deva and D Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013) 138–161.

²⁸C Macchi and C Bright, ‘Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislation’ in M Buscemi et al (eds), *Legal Sources in Business and Human Rights: evolving dynamics in International and European Law* (Brill 2020), 218–46; M Fasciglione, ‘The Enforcement of Corporate Human Rights Due Diligence: From the UN Guiding Principles on Business and Human Rights to the EU Countries Legal Systems’ 1 (2016) *Human Rights and International Legal Discourse* 94. As for States’ obligation to protect human rights in the context of business activities, a legally binding international agreement is currently under negotiations within the UN <<https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf>> accessed 2 September 2022. For comments and perspectives on the drafting of an international binding instrument see *ex multis* N Carrillo Santarelli and Č Letnar (eds), *The Future of Business and Human Rights: Theoretical and Practical Considerations for a UN Treaty* (Intersentia 2018); S Deva and D Bilchitz (eds), *Building a Treaty on Business and Human Rights: Context and Contours* (Cambridge University Press 2017).

²⁹As of the beginning of 2022, mandatory human rights due diligence laws have been adopted or legislative initiatives are underway in several European States. See the comparative table drafted by European Corporate Justice Coalition, *Corporate Due Diligence Laws and Legislative Proposals in Europe* <<https://corporatejustice.org/wp-content/uploads/2022/03/Corporate-due-diligence-laws-and-legislative-proposals-in-Europe-March-2022.pdf>>.

³⁰Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021 establishing rules on support for strategic plans to be drawn up by Member States under the common agricultural policy (CAP Strategic Plans) and financed by the European Agricultural Guarantee Fund (EAGF) and by the European Agricultural Fund for Rural Development (EAFRD) and repealing Regulations (EU) No 1305/2013 and (EU) 1307/2013, OJ L 435 and Regulation (EU) 2021/2116 of the European

ambitions in line with the climate policy of the EU (in particular the Green Deal and the related Farm to Fork Strategy), the new CAP seems to finally pay attention to the social sustainability of agriculture as well.³¹ The issue is recalled and emerges in a variety of provisions in the regulations. The preamble of Regulation 2021/2115 calls for the introduction of mechanisms integrating social concerns in order to contribute to the development of socially sustainable agriculture and provides that national principles of social and labour systems should be taken into account when establishing the social conditionality mechanism.³²

The social conditionality clause provided in Article 14, Section III, envisages that States include in their CAP Strategic Plans a mechanism of administrative penalties if beneficiaries of payments under the CAP do not comply with obligations prescribed by provisions referred to in Annex IV. The latter includes two main areas of safeguards related to employment and health and safety of workers. Each area has specific references to relevant provisions of Directive 2019/1152 on transparent and predictable working conditions,³³ Directive 89/391/EEC on measures to encourage improvements in safety and health of workers,³⁴ and Directive 2009/104/EC on minimum safety and health requirements for use of work equipment by workers.³⁵

As it is, the social conditionality clause that will be implemented by Member States in their national CAP Strategic Plans will hopefully create an incentive for farmers to comply with minimum safeguards on labour standards in agriculture. Therefore, it may work as an indirect tool to promote socially sustainable agriculture, deterring employers from imposing unfair working conditions on agricultural workers.³⁶

However, the mechanism has some clear shortages. First, from a procedural point of view, it works as an *ex post* control of farmers' compliance with said provisions and it is left to national authorities to control and annually report violations of the recalled minimum standards. Penalties and revocation of income support would be possible only in case of reported and ascertained violations, at the end of a domestic procedure. A proper conditionality mechanism would have better served its scope if construed as a preventative mechanism, asking for respect of minimum standard of work as a precondition to access the income support.

Second, from an objective point of view, referring to the aforementioned specific provisions of selected directives extremely restricts the scope of application of the social conditionality clause. Indeed, labour contracts, as written, may pay lip service to such provisions, while violations occur on the ground and also involve indirect adverse impacts on human rights of agricultural workers. For example, the practice of under-declaring working hours makes it de facto impossible for workers to access social benefits, housing or health care.

Third, mechanisms of detection and denunciation of non-compliance will greatly vary from State to State and possibly perpetuate existing failures in control of work exploitation practices.

Parliament and of the Council of 2 December 2021 on the financing, management, and monitoring of the common agricultural policy and repealing Regulation (EU) 1306/2013, OJ L 435.

³¹The turn in favour of a social conditionality clause, hailed as a victory by associations for the protection of agricultural workers, was the result of long-lasting negotiations, see the open letter signed by international and European organisations *The new CAP needs social conditionality*, <<https://effat.org/wp-content/uploads/2021/02/Open-Letter-The-new-CAP-needs-Social-Conditionality-With-signatories-1.pdf>> accessed 6 August 2022.

³²Regulation 2115/2021, Preamble, para 45, 48.

³³Regulation (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, OJ L 186/105.

³⁴Council Directive of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (89/391/EEC), OJ L 183/1.

³⁵Directive 2009/104/EC of the European Parliament and of the Council of 16 September 2009 concerning the minimum safety and health requirements for the use of work equipment by workers at work (second individual Directive within the meaning of Art 16(1) of Directive 89/391/EEC), OJ L 260/5.

³⁶On the need of a social conditionality clause in the CAP and its relevance to tackle exploitation of migrants in agriculture see J Hunt, 'Making the CAP Fit: Responding to the Exploitation of Migrant Agricultural Workers in the EU' 2 (2014) *International Journal of Comparative Labour Law and Industrial Relations* 30, 131.

Again referring to the Italian example, the draft CAP strategic plan³⁷ points to different national authorities (*Ispettorato nazionale del lavoro*, VVFF and ASL for each of the three aforementioned directives respectively), who will deliver the relevant information to national bodies in charge of managing and controlling expenses based on CAP funds (*organismi pagatori*). Labour inspecting agencies in particular are facing well-known difficulties in tracing the widespread human rights violations in agriculture.³⁸

A true preventative approach, instead of a punishment mechanism, would rather require actions devoted to eradicating power imbalances and inequalities along the supply chain, as those provided by the Directives that will be discussed in the following sections B and C.

B. Tackling root causes of work exploitation through the directive on unfair trading practices in agriculture

Climbing up the food supply chain primarily requires abandoning the focus on the relationship between the employer and its employees and instead looking at the relationship between business entities operating along agri-food supply chain. As previously mentioned, the first step is to address those failures of the food market that may prompt small farmers to water down workers' human rights in agriculture, in order to fit the prices imposed by buyers and be included in food distribution channels.

The factual premise of this strategy is that food supply chains are characterised by a deep asymmetry of power between stakeholders. While a plethora of small and medium enterprises works in primary production of raw materials and food products, a restricted number of large enterprises controls the market conditions and prices, generating deep imbalances in bargaining power between supplier and buyers. In this light, the EU adopted the directive on unfair trading practices in the agricultural and food supply chain,³⁹ recognising that unjust contractual arrangements can have a negative impact on the larger agricultural community, triggering a cascading effect.⁴⁰

The primary scope of this directive is to tackle business-to-business unfair commercial practices, occurring in relation to sales of agricultural and food products, that are particularly widespread in food supply chain due to the power imbalance between the various actors of the chain. The express aim of the directive is indeed the improvement of the position of farmers, as the last tier of production.

To this end, the directive requires Member States to enact relevant laws banning illegal practices identified in Article 3, such as practices related to late payments for food products, cancellations of orders, unilateral changes of terms of supply, or charge for deterioration or loss. Besides blacklisted practices, other potentially unfair arrangements should be prohibited unless expressly and clearly agreed in advance between the supplier and the buyer (Article 3.2).

Besides direct banning of unfair practices, the directive has a clear secondary effect. Enhancing the position of small farmers in the chain, increasing their bargaining power, is crucial to tackle illegal behaviour of employers who are incentivised or motivated to cut workers' rights in order to comply with supply conditions imposed by large buyers and supermarket chains. Such an effect may be better understood taking into account the Italian example, related to the implementation of the directive. Legislative decree no. 198/2021 introduced in the Italian legal system a list of prohibited practices; in addition, other practices are allowed only if expressly agreed, in accordance with the directive. The decree particularly bans the recourse to electronic double auction

³⁷The document is available at <https://www.reterurale.it/downloads/PSN_PAC_31-12-2021.pdf> accessed 6 August 2022.

³⁸Corrado (n 1) 21; UN Human Rights Council (n 9), para 43.

³⁹Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, OJ L 111/59.

⁴⁰*Ibid.*, recital 7.

processes for agricultural and food products.⁴¹ This ban was the result of a long-lasting struggle by some dedicated associations, which recognised this practice as one of the main triggers of sales of agricultural products below their production cost, thus exerting a downward pressure on labour wages.⁴² Indeed, the ban of double electronic auctions was a top priority of the Italian Government in tackling gangmastering and work exploitation in agriculture, along with a general ban on the sale of agricultural products below their production costs.⁴³ The practice is listed as one of the primary causes of below-standard remuneration of work in agriculture, as an indirect effect of unfair practices in the agricultural supply chain.

C. The potential of the EU commission proposal for a directive on mandatory human rights due diligence

After several delays, on 23 February 2022 the European Commission issued its first draft directive on a mandatory human rights due diligence (HRDD) in global value chains.⁴⁴ The proposal is an express attempt to ‘harden’ soft law on business and human rights, given that existing voluntary international standards did not result in large-scale improvements in tackling social and environmental impacts of business activities.⁴⁵

Towards the goal of preventing human rights abuses, instead of merely providing *ex post* remedies or deterrent measures, the proposed directive envisages obligations that are primarily aimed at preventing human rights adverse impacts of industrial activities – including agricultural and food related ones – by imposing HRDD obligations upon EU-based companies and non-EU companies with turnover generated in the EU.

The HRDD is an ongoing process of identifying, managing, and responding to the human rights adverse impacts that an enterprise may cause or contribute to or that are directly linked to its activity through the operations of a business partner. This process is at the core of both the UNGPs and the OECD Guidelines for Multinational Enterprises, as part of the ‘smart mix’ of measures that is necessary to tackle human rights abuses in global value chains.⁴⁶ In other words, the HRDD is meant to be the tool through which all enterprises fulfil their responsibility to

⁴¹Art 5.1 a) of Legislative Decree 198/2021.

⁴²See F Paniè and G Mininni (eds), *#ASTEnetevi: Grande distribuzione organizzata – dalle aste on-line all’inganno del sottocosto*, Associazione Terra!, FLAI CGIL, daSud (November 2017) <<https://www.associazioneterra.it/wp-content/uploads/2017/03/astenetevi.pdf>> accessed 6 August 2022.

⁴³Italian Ministry of Labor and Social Policies *Piano Triennale di Contrasto allo Sfruttamento Lavorativo in Agricoltura e Caporalato 2020–2022*, Priority Action no 2, 24 <<https://www.lavoro.gov.it/priorita/Documents/Piano-Triennale-contrasto-a-sfruttamento-lavorativo-in-agricoltura-e-al-caporalato-2020-2022.pdf>> accessed 2 September 2022.

⁴⁴Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final. The proposal builds on European Parliament, Resolution of 10 March 2021 with Recommendation to the Commission on Corporate Due Diligence and Corporate Accountability (2020/2129(INL)). For some recent comments on the proposal, see C Methven, O’Brien, and O Martin-Ortega, Commission Proposal on Corporate Sustainability Due Diligence: Analysis from a Human Rights Perspective, European Parliament In-depth Analysis (May 2022) <[https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702560/EXPO_IDA\(2022\)702560_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702560/EXPO_IDA(2022)702560_EN.pdf)>; M Fasciglione, ‘Luci e ombre della proposta di direttiva europea sull’obbligo di due diligence d’impresa in materia di diritti umani e ambiente’, SIDIBlog (26 May 2022), <<http://www.sidiblog.org/2022/05/26/luci-ed-ombre-della-proposta-di-direttiva-europea-sullobligo-di-due-diligence-dimpresa-in-materia-di-diritti-umani-e-ambiente/>> accessed 6 August 2022; C Methven, O’Brien and J Hartmann, ‘The European Commission’s Proposal for a Directive on Corporate Sustainability Due Diligence: Two Paradoxes’ EJIL:Talk! (19 May 2022) <<https://www.ejiltalk.org/the-european-commissions-proposal-for-a-directive-on-corporate-sustainability-due-diligence-two-paradoxes/>> accessed 7 October 2022.

⁴⁵See the explanatory memorandum attached to the draft proposal of the directive.

⁴⁶For a deep understanding of the concept of HRDD within the UNGPs see J Bonnitca and R McCorquodale, ‘The Concept of ‘Due Diligence’ in the UN Guiding Principles on Business and Human Rights’ 28 (2017) European Journal of International Law 899.

respect human rights, with a view to preventing human rights abuses and implementing actions to cease, mitigate, and remedy real and potential harm.

In accordance with the indications of the OECD Due Diligence Guidance for Responsible Business Conduct, the proposed directive provides that the due diligence process encompasses several steps such as (i) integrating due diligence into policies and management systems, (ii) identifying and assessing adverse human rights and environmental impacts, (iii) preventing, ceasing or minimising actual and potential adverse human rights, and environmental impacts, (iv) assessing the effectiveness of measures, (v) communicating, and (vi) providing remediation.⁴⁷

The proposal is a potential game-changer,⁴⁸ as drawing from the international standards on corporate responsibility set by the UNGPs, it will require the identification of potential human rights abuses along the whole supply chain.⁴⁹ This is particularly important, as human trafficking and related forced labour practices have been widely recognised as a ‘whole-of-supply-chain’ problem,⁵⁰ one that does not merely concern the last tiers of food production. Particularly in the food sector, EU-based enterprises are mostly lead companies of agri-food chains whose conduct has a cascade impact several tiers down.

The scope of the draft directive would be limited to companies reaching a high-threshold size in terms of employees and net turnover,⁵¹ as small and medium enterprises would be left out of the scope of the directive if the current text is maintained. However, the supply chain accountability set forth with mandatory HRDD, which imposes control of human rights abuses happening along the whole supply chain, will necessarily call small and medium enterprises to be involved in the HRDD process, by cooperating with their suppliers in identifying and addressing human rights adverse impacts.⁵²

In the agri-food supply chain, recognised as being a high-impact sector,⁵³ the size threshold of companies subject to mandatory HRDD obligations is in fact lower.⁵⁴

⁴⁷Recital no 16, recalling the HRDD steps defined by the OECD Due Diligence Guidance for Responsible Business Conduct.

⁴⁸For an overview of the potential effects of mandatory human rights due diligence norms in tackling work exploitation in agriculture see D Augenstein and C Macchi, *The Role of Human Rights & Environmental Due Diligence Legislation in Protecting Women Migrant Workers in Global Food Supply Chains* (Oxfam and ActionAid 2021) with particular focus on women in agriculture; on the challenges of HRDD policies in having an impact on the ground, see V Nelson, O Martin-Ortega and M Flint, *Making Human Rights Due Diligence Work for Small Farmers and Workers in Global Supply Chains*, Report commissioned by Fair Trade Advocacy Office and Brot für die Welt, (June 2020); IRISS-CNR, WeWorld, HRIC, *The Role of the Future EU Legislation on Mandatory Human Rights and Environmental Due Diligence in the Agriculture and Food Supply Chain* (2022), <<https://www.weworld.it/en/what-we-do/publications/the-role-of-the-future-eu-legislation-on-mandatory-human-rights-and-environmental-due-diligence-in-the-agriculture-and-food-supply-chain>> accessed 2 September 2022.

⁴⁹Although doubts have been raised on the effectiveness of the current wording of the proposal when applied to the agricultural sector, when unduly restricting the scope of the HRDD along the supply chain compared to the standard provided in the UNGPs, see D Augenstein and C Macchi, *Ibid.*, 41; similar concerns are expressed in UN Human Rights Council (n 10) para 45.

⁵⁰ILO, OECD, IOM and UNICEF, *Ending Child Labour, Forced Labour and Human Trafficking in Global Supply Chains* (12 November 2019), 72.

⁵¹Art 2.1 letter a) set the threshold in companies with more than 500 employees on average and with a net worldwide turnover of more than 150 million euros in the last financial year.

⁵²For this reason, by way of example, the American Bar Association (ABA) has long established model contract clauses to include HRDD standards in global supply chain contracts, so that suppliers may actively identify and manage risks of human rights abuses, advocating for abandoning traditional models of standard representations and warranties that too often end up in ‘tick box exercise’. See the report of the ABA Working Group to Draft Model Contract Clauses to Protect Human Rights in International Supply Chains, <https://www.americanbar.org/content/dam/aba/administrative/human_rights/contractual-clauses-project/mccs-full-report.pdf> accessed 2 September 2022.

⁵³Recital no 22.

⁵⁴Art 2(1) b) provides that the directive also applies in case at least 50 per cent of net turnover of more than 40 million euros is generated in the agri-food sector, with more than 250 employees on average.

5. Concluding remarks

The analysis carried out in this contribution underlines how work exploitation is endemic in agri-food production and migration policies alone cannot tackle systemic failures that pertain to the way in which food is produced and consumed. So far, migration and labour laws have proven ineffective or inadequate to meet the demand for flexibility of the agricultural labour market and protect human rights of workers at once. This is partially due to unavoidable conditions of food production, linked to seasonality, biological processes of growth, and unpredictability of weather conditions that pave the way to informal recruitment and related human rights abuses, to which vulnerable groups are easily exposed.

Therefore, preventing – rather than merely punishing – human rights abuses along the whole agri-food chain is key to obtaining long-term results towards a socially sustainable food production.

Indeed, human rights violations related to forced labour mostly occur in production of raw materials. However, the whole burden of accountability for such violations cannot be borne by small farmers alone through punishment and deterrence practices, such as those introduced by anti-gangmastering laws and the new CAP regimes. A real and long-term impact on the ground can only be achieved if accountability for such violations is fairly shared between all the actors of the food supply chain, climbing up the production life cycle from the field to the supermarket.

International instruments on business and human rights already provide for soft-law standards that recognise such supply chain accountability, tackling the conduct of lead companies that may facilitate or incentivise adverse impacts of agri-food production, by imposing conditions that determine or increase the risk of human rights violations on the ground. Supermarkets' mark-downs and unilaterally determined discounts, double auction bids lowering food price and related unfair practices should all be seen as possible causes of human rights violations and should lead to the liability of relevant multinational groups and lead companies controlling agri-food chains.

Recent legislative developments in the EU seem to have finally grasped this holistic approach, introducing harmonised standards to tackle the root causes of work exploitation in agriculture.⁵⁵ While long-term changes on the ground will possibly emerge in the future, such developments are to be welcomed as a decisive step towards eradicating a widespread form of modern slavery.

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⁵⁵In the same view, the EU Commission has recently issued a legislative proposal for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market, COM (2022) 453 final (14.9.2022).