

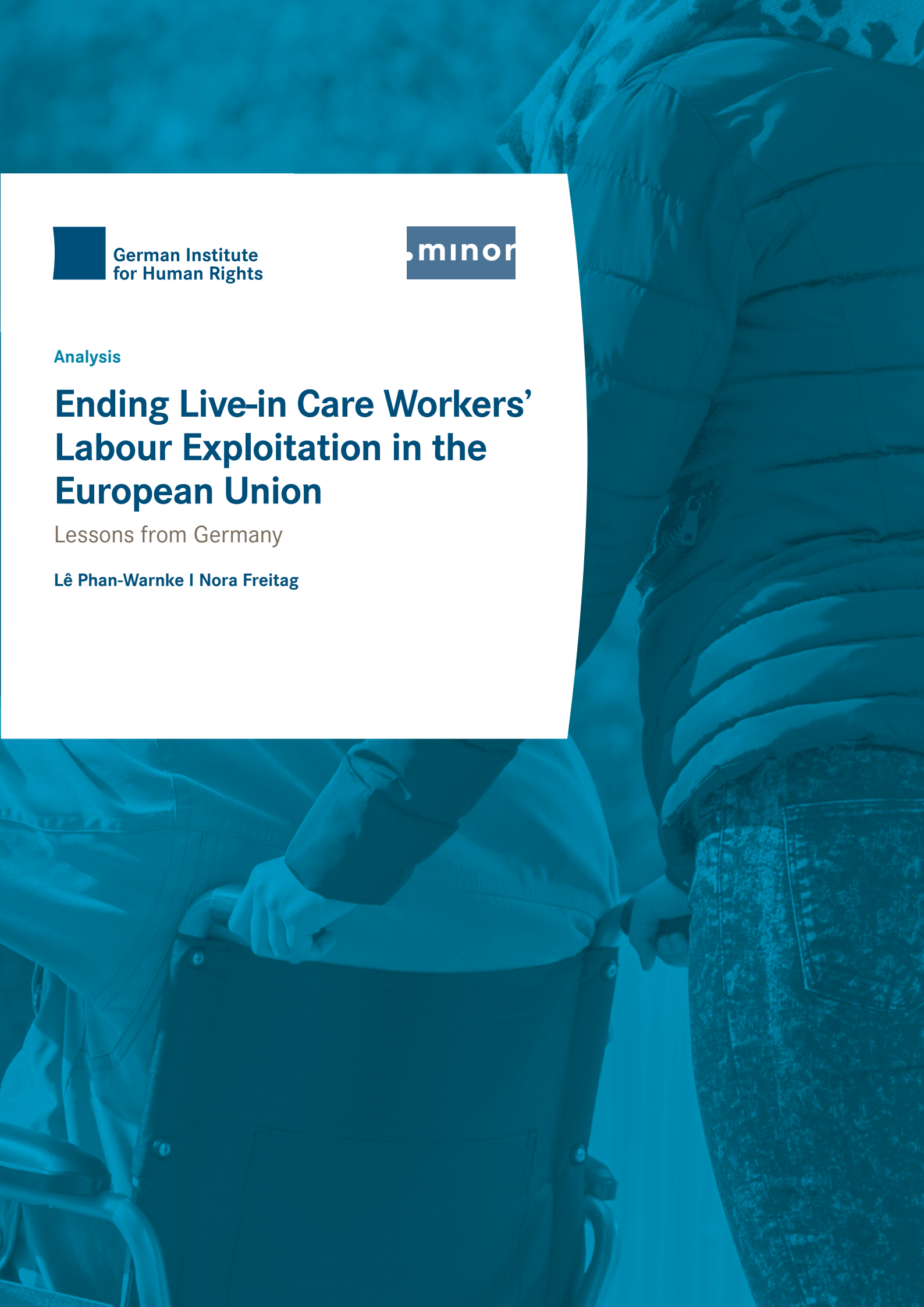


Analysis

# Ending Live-in Care Workers' Labour Exploitation in the European Union

Lessons from Germany

Lê Phan-Warnke | Nora Freitag



## The Institute

**The German Institute for Human Rights** is the independent National Human Rights Institution of Germany (§ 1 GIHR law). It is accredited according to the Paris Principles of the United Nations (A-status). The Institute's activities include the provision of advice on policy issues, human rights education, information and documentation, applied research on human rights issues and cooperation with international organisations. It is supported by the German Bundestag. The Institute is mandated to monitor the implementation of the UN Convention on the Rights of Persons with Disabilities and the UN Convention on the Rights of the Child and established Monitoring Bodies for these purposes.

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This analysis reflects the position of the German Institute for Human Rights.



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# Foreword

## German Institute for Human Rights

Across Europe, the COVID-19 pandemic demonstrated the crucial role of so-called essential and frontline workers. They work in the health and education system, in elderly care, in the food industry and other areas that we tend to take for granted and often overlook. At the same time, the pandemic revealed the precarious conditions and often insufficient protection measures against SARS-COV-2 for these workers. Among them, some completely fell through the cracks – those that have usually been invisibilised even before the pandemic hit: migrant workers.

In the European care economy, migrant women fill the care gap caused by the often insufficient public care infrastructure in many EU countries. They increasingly take care of elderly people in need and perform housekeeping duties. The so-called “live-in” model has emerged as a preference among German households and refers to a domestic and care worker who works and resides in the private household of the elderly person seeking care.

This socio-legal study on the living and working conditions of live-in workers in Germany develops legal and policy recommendations based on the lived realities of these women. They are regularly 24 hours on call while facing isolation, underpayment, insecure employment arrangements, ex-

ploitation and, in some cases, even violence. We must stop taking advantage of intra-EU income inequalities to exploit the labour of women from Eastern European countries for the physically and mentally highly demanding care work in Western Europe. European and international human rights law requires the EU and its member states to close protection gaps and hold transnational care agencies to account through coordinated and effective measures on the domestic, EU and UN levels in consultation with rights-holders and their representations, National Human Rights Institutions, trade unions and civil society. The areas of action identified in the study can serve as a starting point for policymakers.

The study’s findings are timely to inform, amongst others, current debates on an EU and UN binding framework on business and human rights and other European initiatives such as on the EU Minimum Income Directive. Together with the European Network of National Human Rights Institutions (ENNHRI) and our sister organizations across Europe, the German Institute for Human Rights continues to advocate for the realization of all human rights, including social rights, in Europe for that each resident can live and work in dignity.

### **Professor Dr. Beate Rudolf**

Director  
German Institute for Human Rights

# Foreword

## Minor – Project Office for Education and Research

Several hundred thousand domestic care workers (so-called live-ins) are employed in private German households, who come to Germany temporarily to work and many of whom are affected by severe labour exploitation on a large scale. Lack of language skills, unmanageable working hours, frequently changing work locations, as well as fear of authorities resulting from their insecure employment status are the reason why they may experience social isolation. The regularly changing and at times very strict (entry) restrictions imposed to contain the COVID-19 pandemic have a considerable impact on the living and working conditions of Eastern European live-ins in private households in Germany, and this can further increase their social isolation. Thus, exchange with other caregivers, participation in life outside the workplace and especially the search for up-to-date information has shifted even more to social media. In times of the COVID-19 pandemic, it has become increasingly clear how fragile and unstable employment models based on exploitation are and how easily they can falter as a result of external, and often unforeseen, circumstances.

Since December 2017, the model project “Migration Counselling 4.0 – Good Work in Germany” (MB 4.0) by Minor – Project Office for Education and Research, which is funded by the Office for the Equal Treatment of EU Workers of the Federal Government Commissioner for Migration, Refugees and Integration, has been conceptualising

and developing outreach information and counselling work in the preferred social media channels of EU immigrants in ten languages. Since July 2019, MB 4.0 has been supporting live-ins from Eastern Europe in exercising their rights. The expanded focus to include at least three more languages is currently being planned. In doing so, the project enables good access to the very hard-to-reach target group of 24-hour caregivers in Germany for the first time, by providing independent and legally verified advice where they communicate – on social media.

At the same time, MB 4.0 has set itself the goal of drawing attention to the grievances and existing exploitation of live-ins in order to help bring about necessary changes. As part of this, the German Institute for Human Rights was commissioned to produce an expert report in the form of processed model cases on the situation of Eastern European care workers in private households in Germany. The brochure illustrates the current situation and the difficult living and working conditions of live-ins, and makes recommendations for action. The aim is to raise public awareness of the issue in order to promote legal and fair working conditions and to improve the situation of live-ins significantly. MB 4.0 supports the revision and translation of the brochure and is pleased that the publication will be made available to a wider audience.

**Dr. Christian Pfeffer-Hoffmann**

Director

Minor – Project Office for Education and Research

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<sup>1</sup> The Equal Treatment Office was founded in 2016 and aims to support EU citizens in terms of the rights to which they are entitled in Germany under the principle of freedom of movement for workers. It is therefore focused primarily on EU workers and their family members, as well as specialists working in the existing advisory system. The Equal Treatment Office has been institutionally established as a unit within the working staff of the Federal Commissioner for Migration, Refugees and Integration (see <https://www.eu-gleichbehandlungsstelle.de/eugs-en>).

We would also like to thank Chrysanthi Tsolaki and Ruth Klötzel for their research assistance and Dr. Jessica Langner, Lilla Ozoráková, Sara Phung,

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# Summary

This study sheds light on the working and living conditions of so-called live-in care workers (“live-ins”) in Germany. Live-ins are usually female migrant workers who provide domestic and care work for elderly people in their private homes. They often complement the work of certified nursing care staff and have thus become an integral part of the care landscape in the European Union (“EU”). The case of Germany shows that, in practice, this type of work is heavily outsourced to women from Central and Eastern European countries though official figures are limited. The gender and socio-geographic dynamics of domestic care work within the EU are driven by income inequalities between EU member states and result in a care drain from Eastern to Western Europe. A supranational response is thus warranted given the Europeanization of the domestic care market through transnationally acting recruitment agencies and the failure of both home and host countries to address protection gaps along the EU’s care chain.

Live-ins often work without protection and safeguards as required under domestic and international labour and human rights law. Fuelled by employment arrangements in the legal grey zone, live-ins are regularly exposed to exploitative working conditions such as overwork; physical and psychological violence, including sexual harassment and other forms of gender-based violence; and a lack of access to adequate health services and housing. As domestic workers, they share a household with the person they are mandated to provide care for, which enhances their vulnerability due to the power asymmetries within the household, the dependency, isolation and language barriers – circumstances that were exacerbated by the COVID-19 pandemic and that simultaneously hamper live-ins’ access to justice institutions and advice services.

Drawing on these realities, legal and policy recommendations were developed for the EU and its member states based on their human rights

obligations under European and international instruments. Social rights, in particular rights at work, trade union rights, the right to social security, the right to health and the right to an adequate standard of living, must be realized under all available employment models for live-in arrangements, both de jure and de facto.

Regular dependent employment relationships ensure the highest level of transparency and protection for live-in care workers, but they remain the exception. EU member states should therefore proactively foster their use by reducing the administrative burden and scaling up advice services for households and individuals seeking live-in care. At the same time, states must clarify under which conditions self-employment is justified for live-in arrangements to address cases of bogus self-employment that leave live-ins in a disadvantageous position in terms of their labour and social security rights.

The most common recruitment model to date, where live-ins are posted by transnational care agencies, calls for tighter regulation on all governance levels. Under the human rights obligation to protect, both home and host countries must regulate private agencies, ideally under a common EU regulatory framework which holds recruitment agencies to account through legally binding human rights due diligence standards that also apply to small- and medium-sized enterprises, particularly if they operate in a high risk sector. Beyond complying with applicable legislation under their duty to respect human rights, recruitment agencies must conduct human rights risk assessments and act on their findings to prevent, mitigate and remedy human rights abuses. This study identifies several areas of action for EU states and agencies, including human rights-compliant sample contracts that do not discriminate based on the posting’s duration, tighter placement requirements that oblige agencies to hand out the A1 certificate and the EU health insurance card

before a workers' departure, a duty to inform on prospective working and living conditions, a set of minimum standards in private households and the introduction of grievance mechanisms within the agency.

Notwithstanding the employment model, all live-ins must be afforded special protection during the pandemic, ideally through harmonized EU occupational COVID-19 measures. In addition, EU member states must prevent workers' homelessness in case of an immediate termination of their employment contract.

To make rights enjoyment real for live-in care workers, effective monitoring and enforcement mechanisms must be put in place. Hence, EU member states should enhance their statistical capacities to collect data on informal transnational workers, strengthen national inspection services and the mandate of the European Labour Authority to enable cross-border controls. Moreover, states should facilitate access to remedies

for live-in care workers by dismantling domestic barriers to access justice and exploring easily accessible and affordable non-judicial grievance mechanisms. Besides, live-ins must be enabled to claim their social rights, which includes ending the structural discrimination they face as women, migrants and domestic workers. Recognizing domestic care work as a profession would also empower live-ins by elevating the social prestige of their vital work and allowing them to professionalize and unionize.

Finally, EU member states should strengthen the normative protection framework by devising new instruments tailored to the situation of migrant care workers in Europe and supporting emerging EU initiatives, including on business and human rights or minimum income, and by ratifying existing UN human rights and ILO conventions such as the UN Convention on Migrant Workers and their Families or ILO Domestic Workers Convention No. 189.

# 1 Introduction

Demographic changes result in rapidly ageing societies in the European Union (EU): The number of residents aged 75–84 years is projected to expand by 56.1% from 2019 to 2050 and the number of those aged 65–74 years will likely increase by 16.6% during this period.<sup>2</sup> This has put care services for the elderly on the agenda of many European countries and revealed significant gaps and challenges in national care infrastructures to date. Optimizing mobility and independence for the elderly in need of care, a highly individualized solution to the problem sees growing demand among private households: the so-called live-in arrangement. The term live-in care worker (“live-in”) commonly refers to a female, migrant worker residing in a private household to assist an elderly person with domestic and care work.<sup>3</sup> Due to mostly informal arrangements as well as a lack of research and adequate data collection in EU member states, the number of live-in workers can however only be estimated.<sup>4</sup> In Germany, approximately 300,000 to 700,000 live-ins provide assistance to older people in need of care at home.<sup>5</sup>

Intra-European live-in mobility primarily takes place from Eastern to Western Europe, for example from Poland, Slovakia, Romania or the Czech Republic<sup>6</sup> to Germany, the Netherlands<sup>7</sup>, Austria<sup>8</sup>

or Italy<sup>9</sup>, and is particularly common between EU neighbour countries with high income inequalities such as from Poland to Germany or from Slovakia to Austria. However, the transnational care chain also extends beyond the European Single Market with live-in migration from third countries<sup>10</sup> into the EU such as from Ukraine and Belarus to both Western<sup>11</sup> and Eastern EU countries including Poland or Slovenia<sup>12</sup>. In the latter case, the demand for care services is aggravated by the extant care drain from Central and Eastern European countries to Western European countries. Although workers from third countries are often irregularly employed in private households across Europe, the scope of this study is limited to the situation of European live-ins. Workers without citizenship from an EU member state usually face worse working and living conditions and are in a more vulnerable position due to their precarious residency status.<sup>13</sup>

Germany can serve as an example for a country of destination for live-in workers in the EU. Its proportion of people above 65 years of age is one of the fastest growing across Europe.<sup>14</sup> In 2019, 4.1 million people were in need of care services with the majority, 80 percent, being cared for at their private home.<sup>15</sup> The demand for long-term care services

2 Eurostat (2020), p. 17.

3 Domestic workers who live in their own homes are referred to as “live-outs”: ILO (no year), p. 92.

4 Rogalewski / Florek (2020), p. 5.

5 Steiner et al. (2019), p. 5; Petermann / Jolly / Schrader (2020), p. 99–121.

6 Bruquetas-Callejo (2019), p. 109 and Gendera (2011), p. 96.

7 Bruquetas-Callejo (2019), p. 106.

8 Gendera (2011).

9 Boccagni (2018), p. 814.

10 According to German residency law, third states are those that do not belong to the European Economic Area (EEA). Members of the EEA include all member states of the European Union (EU), as well as Iceland, Liechtenstein and Norway.

11 Boccagni (2018), p. 816.

12 Information from the ENNHRI focus group.

13 Becker et al. (2021), p. 4.

14 Eurostat (2020a), p. 2.

15 Statistisches Bundesamt (2021).

risers, while the material and personnel resources for domestic care remain inadequate.<sup>16</sup> Governmental programmes such as the “Triple Win” project are supposed to address this deficit in certified staff by recruiting migrant care workers from third countries, i.e. from Serbia, Bosnia-Herzegovina, the Philippines, Tunisia and Vietnam. Such initiatives aim to provide relief to the situation in residential care homes, but they do not address the growing demand for domestic care services. The live-in model is very popular in Germany, because older people wish to remain living in their own home for as long as possible,<sup>17</sup> the capacities of female relatives to take on caregiving duties have decreased<sup>18</sup> and migrant workers from various countries are easily available as a result of improved EU labour mobility, for example due to EU Eastern enlargement.<sup>19</sup> These factors have ultimately led to a far-reaching externalization of domestic care work to women from Central and Eastern EU member states who are recruited to Germany mainly via private care agencies.<sup>20</sup> As a result, some authors propose reforming the German care system in order to reduce domestic care requests on the demand side.<sup>21</sup>

At the same time, the employment arrangements for live-ins often fall within a legal grey zone in Germany resulting in exploitative working and living conditions. Most evidently, other commonly used terms for live-in care workers in German are “round-the-clock care workers” or simply “care workers”. While these terms are misleading, since German labour law stipulates that no individual is permitted to work for 24 hours a day and the term “care worker” is reserved to certified staff, they indicate that live-in care workers face a broad

range of duties in practice and are often expected to be on call for work at all times.

As domestic workers, live-ins’ place of work and residence coincide rendering them particularly vulnerable for human rights abuses. The practice of live-in arrangements regularly violates domestic, European and international labour law, but also states’ obligations under European and international human rights law. Amongst others, it infringes on their social rights including the right to just and favourable conditions of work, the right to social security, the right to health, the right to an adequate standard of living, and the prohibition of discrimination, as enshrined in core international human rights treaties, in particular the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>22</sup>, and European instruments, including the (Revised) European Social Charter (ESC or RESC)<sup>23</sup>, the EU Charter of Fundamental Rights (EU Charter)<sup>24</sup>, the European Pillar of Social Rights (EPSR) and its Action Plan (EPSR AP)<sup>25</sup>.

The abusive working and living conditions of live-in care workers have been well-documented by scholars, civil society and the media; thereby brought to the attention of law and policymakers. However, EU governments continue to tolerate these practices and apply a conscious “laissez-faire policy” by failing to adequately regulate the EU’s transnational care economy.<sup>26</sup> Drawing on lessons from German regulatory gaps, the publication seeks to provide legal and policy recommendations for the EU and its member states that are informed by the multi-layered problems live-in care workers typically face in Germany as a country of destination. The original version of this

16 According to statistics from the German Federal Employment Agency, certified care workers are not available in sufficient numbers to meet the demand. The number of reported job advertisements for care workers for the elderly has risen 2.5 times over the past ten years: Bundesagentur für Arbeit (2019), p. 12.

17 Emunds (2016), p. 200.

18 Böning (2015), p. 309.

19 Lutz (2008), p. 33.

20 See e.g. Böning (2014), p. 11; Emunds (2016), p. 201, 212; Steiner et al. (2019), p. 2.

21 Cf. Emunds et al (2021), p. 6–7.

22 UN, International Covenant on Economic, Social and Cultural Rights (1966) (“ICESCR”).

23 Council of Europe (1961) (“ESC”) and Council of Europe (1996) (“RESC”).

24 European Union (2012) (“EU Charter”).

25 European Union (2017) (“EPSR”) and European Commission (2021) (“EPSR AP”).

26 Lutz / Pallenga-Möllenbeck (2015), p. 185.

study was published in German language in July 2020 based on desk research and two focus groups as well as telephone interviews between December 2019 and April 2020 with practitioners in organisations that provide advice, social and legal assistance to live-in workers and/or recruiting families in Germany, including trade union representations, welfare organisations and non-profit associations.<sup>27</sup> In the course of the translation and

revision of the original report, the findings were transposed to the European level and initially discussed in an online focus group with experts from other National Human Rights Institutions in Europe in January 2021 to identify common challenges and recommendations for the EU level.<sup>28</sup>

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<sup>27</sup> Freitag (2020).

<sup>28</sup> Participating NHRIs included Myria – the Belgian Federal Migration Centre, the Slovak National Centre for Human Rights, the Romanian Institute for Human Rights and the Human Rights Ombudsman of the Republic of Slovenia.

## 2 Live-in care workers in Germany

To set the scene for the subsequent case studies on live-in workers in Germany, a first overview of the working and living conditions of migrant live-ins in the domestic care sector shall be provided drawing on an in-depth literature review and empirical findings. The section then systematizes the three models employed to formally hire a live-in care worker in a private household and highlights how the German legal framework leads to arrangements in a legal grey zone, which is conducive to labour law and human rights violations.

### 2.1 Working and living conditions

While the literature provides some insight into the field, in fact very little robust data on the number of live-in workers and their working conditions is available due to underreporting and the often informal work arrangements. In addition, this area is characterised by high rates of turnover, since live-ins usually only work in Germany for a few months at a time. It can however be concluded from available data that the majority of live-ins in Germany are Polish women above 50 years of age. According to a 2018 survey of 255 Polish employees providing domestic care services, 93 percent of these workers are women, with an average age of 52. The majority of those surveyed said that they had several years' professional experience.<sup>29</sup>

The information provided by approximately 2,000 people seeking advice as part of an online consultation project gives a similar picture of Polish live-ins. Around 94 percent are female, and the majority are between 45 and 65 years old.<sup>30</sup>

Research findings also indicate that live-ins perceive their work in a private household in Germany as stressful and demanding. They are frequently victims of labour exploitation<sup>31</sup> irrespective of the form of their employment relationship. This is particularly evident from their low wages<sup>32</sup> and the systematic violation of maximum working hours requirements. Live-ins are often expected to be on-call at all times.<sup>33</sup> Due to the arrangement of both working and living in the same household, it is even harder to draw a clear line between working hours and free time. In some cases, the live-in is also expected to take on the role of a family member, and as such, to live together with the person requiring care.<sup>34</sup> It can also be seen from the literature that in some cases, duties go beyond those that have been contractually agreed, and that live-ins are also required to take on additional cleaning work, or to look after the children within the family.<sup>35</sup> The heavy workload leads to social isolation, which is aggravated where the household is in a remote location in a rural area and where language barriers persist due to inadequate German language skills.<sup>36</sup> According to

<sup>29</sup> Petermann / Jolly / Schrader (2020), p. 105. Comparable results also emerge from an online survey of 904 Polish care workers from 2017, cf. Petermann / Ebbing / Paul (2017), p. 13.

<sup>30</sup> Minor (2020a).

<sup>31</sup> The term refers to all forms of labour exploitation that are criminal under the legislation of a EU Member State in which the exploitation occurs. In Germany, Section 10, Subsection 1 of the Act to Combat Undeclared Work and Unlawful Employment (SchwarzArbG) or §15a of the Temporary Employment Act (AÜG) refer, for example, to working conditions that are clearly less favourable than those of German workers who carry out the same or a similar activity.

<sup>32</sup> From the offers made by a wide range of different recruitment agencies, Böning and Steffen have calculated that the average gross wage for live-ins is 1,400 euros (2014, p. 13); cf. also Hielscher / Kirchen-Peters / Nock (2017), p. 97; Emunds (2016), p. 216 and the case studies cited in this publication.

<sup>33</sup> See e.g. Emunds (2016), p. 208; Hielscher, Kirchen-Peters and Nock calculate that average daily working hours are 10 hours per day for support and care activities (2017, p. 61).

<sup>34</sup> Karakayli (2010), p. 116.

<sup>35</sup> Böning / Steffen (2014), p. 13.

<sup>36</sup> Information from the group discussion with experts.



some reports, live-ins are even housed in store rooms and unheated rooms.<sup>37</sup>

Critiquing live-in arrangements overall, scholars assert a fundamental power asymmetry between the live-in worker and the family, since live-ins are strongly dependent on the family, while the family primarily perceives the live-in worker as a means of satisfying their own needs.<sup>38</sup> Given their situation of dependence and subordination, working as a live-in is not only precarious in legal, financial and social terms, but also puts a strain on workers' private life. It shall not be forgotten that live-ins have their own families as well. For many women, being separated from their own family is a highly stressful experience.<sup>39</sup> In addition, the working and living conditions facilitate abusive and violent behaviour by the elderly person requiring care and their relatives. However, violence in the field of care work largely remains a taboo subject.<sup>40</sup> As part of an empirical survey conducted in 2006, 36 percent of care workers reported physical attacks by the person requiring care.<sup>41</sup> In light of these results, it can be assumed that live-ins are frequently exposed to diverse forms of violence including sexual and further forms of physical and psychological harassment and abuse, even if no disaggregated data is currently available.

The COVID-19 pandemic has exacerbated the vulnerability of live-in workers to exploitative living and working conditions. Due to the lack of access to and exchange with professional care providers on site, it has been more difficult for live-ins to obtain information, protective equipment and tests for SARS-COV-2 than for care workers from certified mobile care services, exposing them to enhanced occupational health risks. In addition, entry restrictions and quarantine regulations have

severely impacted the mobility of live-ins and caused significant psychological stress. On the one hand, live-ins might feel pressured to endure exploitative work environments, since either no successor might be found to take their place, or because it is not certain whether they will be able to re-enter Germany from abroad. On the other hand, the pandemic has intensified both the workload and the degree of live-ins' social isolation, since their contact to relatives and friends diminished in order to contain infection risks. Given this enormous pressure to protect themselves and the person they are caring for from COVID-19, live-ins have been more anxious and required more counselling than previously.<sup>42</sup>

## 2.2 Legal framework and employment models

In Germany, approximately 90 percent of live-in care is informally organized.<sup>43</sup> For live-ins in formal employment, basically three types of regular employment models apply:<sup>44</sup> Live-ins are either posted to Germany from another EU country via a recruitment agency, or they work on a self-employed basis, or they are employed directly by the private household. According to estimates, two thirds of regularly employed live-in care workers come to Germany via a posting.<sup>45</sup> Under all three employment models, the responsibilities of live-ins with no professional training or other recognised qualification in Germany are formally restrained to basic care and housekeeping duties such as cleaning, doing laundry and shopping. Duties beyond basic body care that involve medical treatment, such as performing injections, checking blood pressure and dressing wounds, may only be conducted by certified care workers, and must be

37 Rogalewski / Florek (2020), p. 21.

38 Emunds (2016), p. 210.

39 Lutz (2018), S. 64 quoted from Städtler-Mach (2020), p. 176.

40 Der Paritätische Sachsen (2018).

41 Görgen et al. (2012), p. 30.

42 Minor (2020b).

43 Becker et al. (2021), p. 25.

44 The focus groups and telephone interviews have demonstrated that there is a broad spectrum of different contracts within these three employment models, which is, in part, due to the differing conditions in the countries of origin of the live-ins. For this reason, the description of the employment models is not be exhaustive.

45 Benazha et al. (2021), p. 27.

documented accordingly (Section 37, German Social Code, Book V<sup>46</sup>).<sup>47</sup>

### 2.2.1 Posting within the EU

In the literature, it is assumed that the majority of live-ins who work in private households in Germany are posted from other EU countries by a company based in the country of origin.<sup>48</sup> At the European level, directives relating to minimum protection standards for these employees were passed with a view to the free movement of workers within the EU (Directives 96/71/EC, 2014/67/EU and (EU)2018/957).<sup>49</sup> While the law of the posting country generally applies in such cases, the EU Posted Workers Directives as transposed by the German Posted Workers Act<sup>50</sup> grant the posted individual certain rights in their host country with regards to maximum working hours, minimum paid annual leave, minimum wage, occupational health and safety, protection for pregnancy and maternity, children and young adults, gender equality and other non-discrimination provisions, as well as the right to file a legal action in Germany, for example in order to assert their right to receive the statutory minimum wage. For postings within the EU, the posting company must submit an application for a so-called A1 certificate for the worker to prove their social security and health insurance coverage in the home country, usually before the posting.<sup>51</sup> In a judgement from 2000, the European Court of Justice declared that these certificates are also valid retroactively.<sup>52</sup>

If a person is posted for less than 12 months<sup>53</sup>, the social insurance law of the country of origin

applies.<sup>54</sup> The same also applies to the provision of healthcare services. Posted workers can however arrange for treatment in the host country. For this purpose, they need a European health insurance card and the A1 certificate to provide evidence that they are covered by health insurance in their country of origin.<sup>55</sup> In order to comply with the posting requirements, the posting company must also offer employment in the country of origin. Work instructions may only be issued by the posting company, and not by the person requiring care themselves or their family members, since they are only the client and not the employer.

Postings are organised in various ways depending on the country of origin and the company, but the companies regularly attempt to keep social security contributions as low as possible. The case studies in this publication focus on the practice of Polish recruitment agencies posting Polish live-ins to Germany. In recent years, this practice has become widespread albeit it has been repeatedly criticised by experts. There is no direct contractual relationship between the live-in care worker and the household requiring care. Instead, the posting agency concludes a “service agreement” with the prospective live-in care worker.<sup>56</sup> The Polish recruitment agencies are usually contractually affiliated with a German recruitment agency that provides contact to client families in Germany. From a consumer’s perspective, this model may involve a private household requesting recruitment services from a German recruitment agency. This agency then recommends candidates, and after a live-in care worker is selected, a service

46 Sozialgesetzbuch (SGB), Fünftes Buch (V) (1998, last amended 2021).

47 Schreyer (2020), p. 50.

48 Information from the group discussion with experts; EU Office for the Equal Treatment of EU Workers (no year); Steiner et al. (2019), p. 5.

49 European Community (1996), European Union (2014), European Union (2018).

50 Arbeitnehmer-Entsendegesetz (2009, last amended 2020).

51 Generalzolldirektion (General Customs Authority) (no year b).

52 European Court of Justice (2000).

53 In exceptional cases 18 months, see § 13b (2) German Posted Workers Act (Arbeitnehmer-Entsendegesetz) (last amended 2020).

54 § 13b (1) German Posted Workers Act (Arbeitnehmer-Entsendegesetz) (last amended 2020).

55 European Union (2019a).

56 According to experts in the field, the employment relationships known in Polish as Umowa Zlecenie are dependent employment arrangements to which the statutory protections according to labour law do not apply. The Polish term is translated into German as “Dienstleistungsvertrag” (“service agreement”), but also “Dienstvertrag” (“service contract or agreement”) or “Auftragsvertrag” (“mandate agreement”). In German law, these are contracts that contain elements of both a mandate and a service agreement. To date, there has been no judicial clarification as to how these agreements should be evaluated in Germany. For reasons of clarity, reference is made in this publication to so-called “Dienstleistungsverträge” (“service agreements”).

agreement is signed between the family and the Polish agency.<sup>57</sup>

### 2.2.2 Self-employment

In the case of self-employed live-in care workers, elderly people who require care and their relatives sign a contract directly with the live-in. Usually, these contractual relationships are brokered by private agencies.<sup>58</sup> It is also possible for the live-in to post themselves as a self-employed person from an EU country, which requires that they run a registered business in their country of origin, and that they work in a similar role there.<sup>59</sup>

There is a high risk of bogus self-employment when this type of employment model is selected for live-in care.<sup>60</sup> Self-employment is considered not genuine when live-ins are contracted as self-employed on paper, while in practice, their employment relationship in the private household is equivalent to that of a dependent employee. The circumstances speak for a worker being a dependent employee when the people in the private household issue work instructions to the live-ins, or when the live-ins are firmly integrated into the daily household routine.<sup>61</sup> Further criteria for drawing the line between self-employment and dependent work in Germany include the bearing of entrepreneurial risks and self-determination over working hours as well as over the place, duration and methods of work. If the self-employment is retroactively deemed as a dependent relationship in the course of an inspection, the employer, i. e. the private household, is required to pay arrears of tax and social security contributions for the entire duration and scope of the employment.

### 2.2.3 Dependent employment

Live-in care workers can also be employed directly either by an agency or a private household. In this case, the employer is usually the person requiring care or their family members. Among other things, the employer is responsible for the social security registration, tax payments and all payroll accounting. A dependent employment relationship provides the most comprehensive legal protection against labour exploitation, since German labour and social security law fully applies, including provisions on maximum working hours, the statutory minimum wage, social security contributions, the statutory accident insurance scheme, paid regular leave and paid sick leave as well as protection against unlawful dismissal. However, our case studies show that written contracts often stipulate lower working hours than is practically required and performed in order to keep social security contributions low or circumvent regulations on maximum working hours. In a landmark case from June 2021, the German Federal Labour Court found that on-call-times for live-in care workers are to be considered regular working hours and must be remunerated in line with the applicable statutory minimum wage.<sup>62</sup> Despite the legal certainty, transparency, and fairness provided by the dependent employment model, it is rarely used in practice since households requiring care do arguably not have the financial and administrative capacities to do so.<sup>63</sup>

57 Example: Pflegehelden Berlin (2020).

58 Brors / Böning (2015), p. 846; Verbraucherzentrale Rheinland-Pfalz / Verbraucherzentrale NRW (2019).

59 Verbraucherzentrale Rheinland-Pfalz / Verbraucherzentrale NRW (2019); European Commission (2013), p. 15–16.

60 Verbraucherzentrale Rheinland-Pfalz / Verbraucherzentrale NRW (2019); Verbraucherzentrale Berlin (2019).

61 Section 7, Subsection 1 of the Social Code, Book IV (Sozialgesetzbuch (SGB) Viertes Buch (IV) (1976, last amended 2021)).

62 German Federal Labour Court (2021)

63 Information from the expert focus groups.

## 3 Case Studies from Germany

The case studies in this section illustrate common problems faced by live-in care workers in Germany. Each problem area will first be outlined and then followed by case studies in highlighted boxes. The examples are taken from the field and based on anonymized real-life cases from the practice of live-in advisory services. While in practice, the women involved face complex and often interconnected problem areas in their work in private households, for the purpose of this publication, each case study puts an emphasis on one central aspect. The case studies centre on the lived experience of the worker. Only one example, related to bogus self-employment, is presented from the viewpoint of the relatives of an elderly person requiring care. Their perspective is crucial, since elderly people and their families are often overwhelmed with the care landscape and not sufficiently informed about the impacts of different live-in employment models.

### 3.1 Exploitative contractual provisions

When live-ins are posted by private recruitment agencies, the conditions for the employment relationship are determined in different ways in the agreements. The examples given below of Ms F. and Ms X. illustrate how so-called service agreements concluded between live-in workers and Polish agencies are designed. It is controversial whether and which agreement provisions are lawful under Polish labour law<sup>64</sup>, and how these should be assessed in Germany.<sup>65</sup> The contractual content is frequently known to the German agencies involved in the recruitment of the live-ins.

Experts therefore criticise that German agencies fail to take responsibility for the implementation of the employment relationship of the live-ins in Germany despite their knowledge of the situation.<sup>66</sup>

It is often the case that only low-level social security contributions are paid for live-ins, such as Ms F. and Ms X., if at all. These social security contributions<sup>67</sup> are paid in Poland by the recruitment agency on the specified monthly earnings, but not on the per diem rate.<sup>68</sup> The case of Ms F. shows how the division between the monthly salary and the per diem rates is used to formally comply with the statutory minimum wage in Germany. It was moreover reported that social security contributions are made as a one-time payment for the entire period of employment of the live-in care worker, whereby the agency officially declares the first month's wage as an advance payment with the result that no social security contributions are due on the amount of the advance payment.<sup>69</sup> The way in which service agreements are usually drafted is therefore interpreted among experts as an attempt by the Polish recruitment agencies to keep their obligation to pay social security contributions in Poland as low as possible. This has a particularly negative impact on future pension claims to which live-in care workers such as Ms F. are entitled to in Poland.

Many agreements with the recruitment agencies include provisions on contractual penalties. If disputes arise with the person requiring care or their relatives, the situation for the posted live-in becomes particularly precarious. In this case, they are not only exposed to difficulties such as physical overexertion, the threat of losing their place of

64 Information from the telephone interview with OPZZ.

65 On the evaluation of these agreements, see footnote 51 above.

66 Rogalewski / Florek (2020), p. 21.

67 With regard to the social insurance contributions in Poland, see the EURES network of the European Commission EURES (2011).

68 Information from the telephone interview with OPZZ.

69 Information from the telephone interview with Minor.

residence or various forms of violence, but must also live in fear of having to pay high contractual penalties if they themselves terminate the agreement with immediate effect. According to experts in the advice centres, such contractual penalties serve to put pressure on the live-in care workers and in this way, to ensure that they do not complain or leave the place of work prematurely.<sup>70</sup>

### Ms F. from Poland

Ms F. is approximately 50 years old, comes from Poland and is a trained care worker. Before leaving for Germany, Ms F. did not check whether her professional qualification would be recognised. For this reason, it is not clear whether she is allowed to act as a certified care worker in Germany to provide either residential or mobile care. Ms F. signed a so-called service agreement with a Polish recruitment agency from Warsaw for a six-week period of work as a domestic help, and sought information about the conditions set out in the contract from an advice centre for domestic care workers from Poland shortly before she left for Germany. In the contract, a salary of 374.08 euros per month, plus board and lodging, was agreed. In addition to this salary, a per diem rate of 49 euros was specified. The contract contains no information about the number of working hours or on-call periods. However, the contract does contain a clause that stipulates a contractual penalty of 4,000 euros if Ms F. fails to report to work, stops working prematurely or exposes the person requiring care to a health risk or death, either intentionally or through gross negligence. The contract furthermore grants the client the right to terminate the employment without notice. However, no reference is made to the fact that Ms F. also has such a right if she has important grounds for doing so. Despite the unfavourable contractual provisions, Ms F. travelled to Germany and began working in the private household.

### Ms X. from Poland

Similar to the case of Ms F., the contract between Ms X. and a Polish recruitment agency contained a penalty clause. This clause would apply if Ms X. left the household without observing the notification period for termination of the contract.

Ms X. already ran into difficulties on the day of her arrival. Since the bus was late, Ms X. only arrived at the home of family Y. in southern Germany at around 11pm. The elderly Ms Y., who was in need of care, was already asleep. Ms X. therefore contacted the daughter of the elderly woman, who lived about a hundred kilometres away. The daughter informed Ms X. that since she had arrived late, she would have to wait until the morning. Ms X. had no other option than to spend the night on the garden furniture on the terrace of the house. During the first few days, there were repeated disagreements between the relatives of Ms Y. and Ms X. The son had taken leave from work to introduce Ms X. to her duties in the household. In a conversation with the advice centre, Ms X. later said that in the son's opinion, Ms X. was doing everything wrong. In her opinion, she was unable to get anything done, however, because the son got in her way.

After a short time, following a more serious dispute, the son of Ms Y. called the police and asked them to remove Ms X. from his mother's home. Ms X. then telephoned the advice centre and asked for help. She reported that she was still owed 400 euros in wages for the work she had already performed. The son intended to pay this wage to the recruitment agency. However, due to the contractual penalties agreed in the contract with the recruitment agency, Ms X. feared that she would not receive the wages due if it were sent to the agency. She therefore insisted that the amount be paid directly to her in cash. At first, Ms X. was afraid when the police arrived. The adviser on the telephone was able to translate for Ms X. and helped de-escalate the situation overall. Thanks to the involvement of the

<sup>70</sup> Information from the expert focus group.

advice centre, an agreement was reached with the son of Ms Y. As a result, Ms X. did not have to leave immediately, and the wages owed were paid directly to her. Ms X. then travelled back to Poland.

### 3.2 Irregular employment

Irregular employment<sup>71</sup> is difficult to identify and is therefore also difficult to quantify reliably, precisely because it is not declared. Even if no precise data is available, it is indisputable that forms of irregular employment are not uncommon in private households. According to an estimate from 2010, based on data provided by the German Federal Employment Agency/Central Mini-job Bureau<sup>72</sup> and the national accounts, 70 percent<sup>73</sup> of all domestic workers are informally employed, in live-in care up to 90 percent<sup>74</sup>. As well as individuals living alone, older people living together as couples make up the largest group on the demand side, which is why it can be assumed that in the majority of cases, the type of domestic support required is basic care and housekeeping duties.<sup>75</sup> Another source cautiously estimates that the number of migrants in irregular employment who look after elderly people in need of care in German private households amounts to 300,000 to 400,000.<sup>76</sup>

The grey care market also thrives because live-in care workers are frequently ill-informed about their labour rights in Germany. Emunds and others describe how irregularly employed live-ins in particular are left vulnerable and unprotected against their employers.<sup>77</sup> Advice centres providing assistance with labour and social security law frequently only

come into contact with those affected at the start or the end of the employment relationship, i.e. at a point in time where exploitation has already occurred – as was the case with Ms M. The following example of Ms M. shows that irregularly employed EU citizens are particularly vulnerable due to their insecure working and living conditions. Irregular employment conditions mean that no social security contributions – and therefore also no health insurance payments – are made at all.

The case of Ms M. shows the difficulty of gaining access to the required social security subsistence payments following a sudden termination of an irregular employment relationship by the employer. When applying for social security benefits, EU citizens who have lived in Germany for less than five years must provide evidence that their residency is not limited to the purpose of seeking employment. This presents a challenge to women in irregular employment relationships, since proof of their work is scarce if it exists at all. In most cases, there are no written contracts nor witnesses. In the wake of an immediate termination, live-ins such as Ms M. not only lose their source of income, but also their accommodation.

The irregular status and the isolation involved in this form of employment enhance the risk of discrimination and abuse, particularly when – unlike in the case of Ms M. – there are no relatives living nearby.<sup>78</sup>

71 According to the German Act to Combat Undeclared Work and Unlawful Employment (“SchwarzArbG”), undeclared work is deemed to have been engaged in by any persons who, in performing or commissioning work or services, for example, fail, in their capacity as an employer, business, or self-employed person to fulfill the social security, tax reporting or contribution obligations or fail, in their capacity as a taxpayer, to fulfil the tax obligations that arise from the work or services, cf. § 1 (2) of the German Act to Combat Undeclared Work and Unlawful Employment (“SchwarzArbG”).

72 The Central Minijob Bureau (“Minijob-Zentrale”) is the central collection and reporting office for all “Mini-jobs” (explained in section 3.4) in Germany.

73 Gottschall / Schwarzkopf (2010), p. 23.

74 Becker et al. (2021), p. 25.

75 Gottschall / Schwarzkopf (2010), p. 25 and 26–27.

76 Satola / Schywalsk (2016), p. 128.

77 Emunds et al (2016), p. 212.

78 Cf. the case study in ch. 3.5.

### Ms M. from Romania

Ms M. is a Romanian citizen and a member of the Sinti and Roma communities. She is 50 years old and has two grown-up children, who live in Germany with their own families. Ms M. moved to Germany in August 2017 in order to be close to her daughter. There, she came into contact with a family in which an elderly woman required care as well as help with housekeeping. She moved in and started working the household. She performed house-keeping duties such as cleaning and shopping, and also performed basic care duties, such as showering and dressing and the administration of medication. She also regularly made sure that the woman requiring care was kept entertained. All other care-related duties were the responsibility of the family members and a mobile care service. Ms M.'s working hours were between 10 and 12 hours per day. She lived with the family for three months. During this time, she worked seven days a week for a monthly wage of 400 euros, plus board and lodging. After this initial period, at the insistence of her daughter, she moved out of the home of the woman requiring care and came to live with her daughter. She then continued to work five days a week for the same wage. Ms M. never received a written employment contract from the family. She was not registered in Germany for the period of her employment, and was not covered by health insurance.

Following a verbal termination of the employment relationship by the family in February 2018, Ms M. sought help at a social advice centre, since she wanted to apply for unemployment benefits as an interim measure. Since Ms M. has only basic knowledge of German and has difficulty reading and writing, she needed help to fill out the application and compile the necessary documents. At first, Ms M. had a major problem providing evidence to the

job centre<sup>79</sup> that she really had been employed by the family. With the help of the advice centre, Ms M. was able to persuade her former employers to produce confirmation of her employment. Her bank accounts also showed that she had received a monthly wage. The job centre then approved social security payments for a limited period of six months. Currently, the social advice centre helps Ms M. to look for a new job.

### 3.3 Access to health care

Often, live-in care workers face obstacles in accessing health care in Germany. They either cannot provide adequate documents proving that they are covered by a social security and health insurance policy, or they have not been sufficiently informed about the preconditions for receiving health care in Germany. This applies in particular to those who are posted to Germany for a shorter period of time, as illustrated below by the two case studies involving Ms B. and Ms G.

For postings within the EU, companies should apply, as far in advance as possible, for an A1 certificate for the posted worker from the responsible social security agency.<sup>80</sup> However, in Germany, there is no legal requirement for foreign companies to apply for this certificate before the start of employment.<sup>81</sup> According to the advice centres, some Polish recruitment agencies refrain from applying for the A1 certificate, amongst others, because they want to avoid having their compliance with the posting preconditions for a A1 certificate assessed.<sup>82</sup> Without an A1 certificate, or evidence that an application has been made, the live-ins have no proof after arriving in Germany that they are covered by Polish social security and health insurance, which together with the European health insurance card is required in Germany in order to receive medical treatment.

79 So-called "job centers" are local authorities in Germany responsible for providing support to jobseekers and for administering unemployment benefits.

80 In Germany, this is usually the area of responsibility of the Deutsche Verbindungsstelle Krankenversicherung Ausland (DVKA), and in Poland – as in the case of Ms B. and Ms G. – the Zakład Ubezpieczenia Społecznych (ZUS).

81 Bundesministerium für Arbeit und Soziales (2019), p. 2–3.

82 Cf. ch. 2.2.1 above.

Some live-ins report to the advisers that they have formally authorised the recruitment agencies to apply for the A1 certificate and the European health insurance card on their behalf, and that as a result, they think that they have done everything necessary to obtain health insurance protection. Many of the live-ins, including Ms B. and Ms G. in the examples below, receive no information at all from the recruitment agencies about the opportunities for accessing health care in Germany. Despite being severely ill, Ms B. and Ms G. do not visit a doctor in Germany, which diminishes their chances for a recovery. The advice centres also reported that as a result of being insufficiently informed, some live-ins take out additional private foreign health insurance.<sup>83</sup>

### **Ms B. from Poland**

Ms B. is 60 years old and comes from Poland, where she worked as a primary school teacher. After taking early retirement, Ms B. received a pension of approximately 400 to 500 euros per month. Due to her very precarious financial situation, Ms B. decided to earn extra money as a live-in care worker in Germany. As there are numerous agencies in Poland and Germany who recruit care and domestic workers for German private households, Ms B. quickly received offers of work. The contract with a Polish recruitment agency in the town where Ms B. lived was attractive as it provided a monthly wage of approximately 1,000 euros, plus a daily allowance, 20 working hours per week and health insurance in Poland. Ms B. signed several so-called “service agreements” with the posting recruitment agency, each of which were limited to two months. Ms B. spent the two-week breaks in between contracts in Poland. When she was recruited to work for family U., the job description specified that basic care duties and housekeeping tasks were involved, although these were not described in greater detail. Ms B. was never issued with the A1 certificate required for the posting, and she was not informed as to whether an application had been made for the certificate in the first

place either. Ms B. was not advised on her right to a European health insurance card. Following her arrival at the home of family U. in Germany, it quickly became clear that Ms B.’s working hours extended far beyond what had been agreed in the contract, and that this was in effect a round-the-clock job.

During the course of her employment with the family, Ms B. fell seriously ill and required medical treatment. Since the recruitment agency had not informed Ms B. about her health insurance protection, Ms B. did not know that she had recourse to a European health insurance card, which would have enabled her to access medical emergency treatment in Germany. She contacted a trade union advice centre by telephone. Since she was already in considerable pain by this point in time, she decided two days later to travel to Poland to find a doctor there. Ms B. did not receive paid sick leave by the recruitment agency. When she became ill, she thus immediately lost the salary that would otherwise have supplemented her low pension.

### **Ms G. from Poland**

Ms G. is 65 years old and has worked as a live-in care worker for different families in Germany. Ms G. was always posted to Germany by a Polish recruitment agency. In total, she signed 14 labour and so-called “service agreements” with the agency, all of which were limited to two months. She spent a month in Poland between each of these contracts. During this period, another care worker took over Ms G.’s job in the private household concerned.

For her work, Ms G.’s final salary amounted to 920 euros per month, plus a per diem rate of 12 euros as compensation for her daily expenses. Board and lodging were not covered by the contract, although Ms G. did not pay for them. No provisions on working hours, on-call duty, paid leave or leisure time were included

<sup>83</sup> Information from the group discussion with experts.



in the contract. Since Ms G. was expected to be on call 24 hours a day in the home, her working hours significantly exceeded the limits specified in the German Hours of Work Act. Yet she never complained about her working conditions. Through her work, she earned enough to live on and also tried to provide financial support to her children.

Due to the heavy burden of work caring for the elderly, Ms G. fell severely ill in 2017. Since Ms G. could neither prove that she had health insurance, nor present the A1 certificate for posted workers, she did not even attempt to consult a doctor in Germany. Finally, her son contacted an advice centre and asked for help. After an initial consultation, contact with Ms G. however ceased. The adviser assumes that due to her poor health, Ms G. moved back to Poland to receive medical treatment there.

### 3.4 Mini- and Midi-jobs

In Germany, live-in care workers are also employed as so-called Mini- or Midi-jobbers in private households. These are two models of low-wage dependent employment designed to reduce bureaucratic overhead for employers. For a Mini-job, the monthly remuneration either does not exceed 450 euros or the employment is envisaged to last for a maximum of three months or 70 workdays per calendar year<sup>84</sup> (seasonal employment).<sup>85</sup> If an employee regularly earns between 450.01 and 1,300 euros per month, they are in a transitional area qualifying the employment as a so-called Midi-job. The number of Mini-jobbers in private households registered with the Central Mini-job Bureau has trebled since 2004.<sup>86</sup> These are mainly women aged above 50 years, and a large number does not hold the German citizenship.<sup>87</sup> The statistics provide no

indication of how many of these employment relationships are live-in care arrangements.

In general, live-ins who work as Mini-jobbers in private households have to be registered with the Central Mini-job Bureau. Otherwise, the employer risks a fine of up to 5,000 euros. Under the terms of this employment relationship, live-in care workers are not covered by statutory health insurance. However, since everyone living in Germany is required to have health insurance, Mini-jobbers such as Ms T. in the case below have to pay contributions to the voluntary health insurance out of their own pocket. In the case of Midi-jobbers, the employers pay the full amount for health insurance; as a result, the live-ins are at least covered by the statutory mandatory health insurance. Due to the low wages in both these employment models, the level of social security contributions is accordingly low resulting in small pension benefits in the future for the women concerned, which fuels the gender pension pay gap and fosters gendered old-age poverty.

Live-ins employed on the basis of a Mini- or Midi-job such as Ms P. and Ms T. generally work for months without a break. The two case studies below indicate that the amount of time required to care for an elderly person in need of support cannot be covered by a single individual in the form of a Mini- or Midi-job. According to the German Minimum Wage Act, as of 1 January 2021<sup>88</sup>, every employee has the right to claim a gross payment of 9.50 euros per hour. With Mini-job earnings of 450 euros per month, as was initially agreed with Ms P. and Ms T., this results in a maximum of 47 working hours per month, i.e. approximately 12 hours per week. Since this is not sufficient time to adequately care for someone who is bedridden or has Parkinson's, for example, the period of time spent working by live-ins such as Ms P. and Ms T. is significantly higher in practice. For Mini-job arrangements in particular, it is evident that this

84 From 1 March 2020 to 31 October 2021, the temporal limitations for Mini-jobs were raised to 4 months or 102 days per calendar year in order to allow for more flexibility and meet the growing demand for seasonal workers during the COVID-19 pandemic.

85 Minijob-Zentrale (2019a).

86 Minijobzentrale (2019), p. 9.

87 Minijobzentrale (2019), p. 10.

88 In Germany, the statutory minimum wage is currently increased twice a year. The Third Ordinance on the Adjustment of the Minimum Wage (Dritte Mindestlohnpassungsverordnung – MiLoV3) regulates the amount of the adjustments.

employment model can at best serve as a means of complementing existing arrangements in private households. This conflicts with the general expectation that live-ins should be on call 24 hours a day, which would even be illegal in case of a dependent full-time employment.

### Ms P. from Bulgaria

Ms P. is 50 years old and was hired, through private connections, to work for the elderly and bed-ridden Ms S. in a household in Germany in September 2016. As reimbursement for her work, the family of Ms S. signed a contract with her with a salary of 450 euros per month, plus accommodation, and registered the employment relationship with the Central Mini-job Bureau.

The short one-page contract contained and no specific information regarding the tasks to be completed by the employee. In reality, the hours worked by Ms P. significantly exceeded those of a Mini-job. As the statutory minimum wage amounted to 8.50 euros per hour in 2016, Ms P. would have been contractually obliged to work for approximately 53 hours per month. In January 2017, the contract was amended, and the monthly gross salary was increased to 850 euros. Ms P.'s job was now classified as a Midi-job. While the number of working hours was set between 11 and 20 hours per week, Ms P.'s effectively worked much longer hours. Every day, she was given sole responsibility for groceries shopping and preparing meals, as well as basic care duties such as washing Ms S. and changing her clothing. Ms P. was actively working or on call around the clock, and only had a few hours of free time over the weekend. The employment relationship was terminated by family S. immediately after Ms P. was involved in a traffic accident. As a result of the accident, Ms P. suffered severe injuries to her arm and had to undergo multiple surgeries. Due to the support of an advice centre, she avoided becoming homeless following her discharge from hospital. Ms P. was

able to compensate a part of the salary she was owed with the benefits received from the accident insurance over several months. However, despite the assistance offered by the advice centre, Ms P. never submitted a legal claim for the wage arrears owed to her by the family.

### Ms T. from Romania

Like Ms P., Ms T. also signed a Mini-job contract over 450 euros monthly salary, plus accommodation, in this case for the care of an elderly woman in a private household who was suffering from Parkinson's. However, her actual duties and working hours significantly exceeded the contractual scope. With the support of an advice centre, the contractually agreed salary was raised to 451 euros gross after three months, as a result of which social security contributions for Ms T. had to be paid in full. Since Ms T. was only employed as a Mini-jobber during the first three months in Germany, she was not covered by health insurance for this period. She was not aware of this obligation. The health insurance provider demanded a retroactive payment of contributions for this three-month period, which Ms T. paid off in instalments, since she was unwilling to take legal action against her employer.

## 3.5 Overwork and violence

Overwork and exposure to violence in domestic care work are often brought up as a sidenote in counselling settings.<sup>89</sup> However, live-ins will frequently suffer from overwork when the person requiring care has a complex illness such as dementia, which is characterized by confused and aggressive behaviour, screaming, sleep disorders and apathy. Research on caregivers for dementia sufferers show that such behaviour causes particularly high levels of stress.<sup>90</sup> In the literature, emphasis is also placed on the severe psychological

<sup>89</sup> Information from the telephone interview with FIZ.

<sup>90</sup> Halek / Bartholomeyczik (2006), p. 9.

burden that results from employment relationships of this nature.<sup>91</sup> It can be assumed that many live-ins, as the case of Ms L. below illustrates, are neither trained nor prepared for this complex situation in private households, and that they are not adequately informed and supported during their placement.

In addition, live-ins are repeatedly exposed to diverse forms of violence in the private household. A study by the German NGO network against trafficking in human beings<sup>92</sup> sets out a series of circumstances that render live-in care workers more vulnerable to sexual violence. The main factors include the limited visibility of live-ins who are thus hard to reach by advice servers, a lack of colleagues at their place of work, confined working and living spaces and, in some cases, a personal relationship to the perpetrator.<sup>93</sup> Live-ins also report that they are insulted, forbidden to make contact with neighbours and friends, and threatened with being hit.<sup>94</sup> In such cases of physical, psychological and sexual abuse, it is particularly difficult for a live-in care worker to get in touch with advice centres or the authorities due to their isolation. Even if live-ins are willing to take legal action, they frequently lack witnesses who can back up their claims.<sup>95</sup>

### Ms L. from Bulgaria

Ms L. is approximately 60 years old and comes from Bulgaria, where she draws a small early retirement pension. An acquaintance informed her about a German agency recruiting live-ins to care for elderly people in private households. On the suggestion of the recruitment agency, Ms L. was given the job of caring for Mr G. in his home. Mr G. suffered from severe dementia. The agency signed an employment contract with Ms L. and a service agreement with the family of Mr G. Working for and living

with Mr G. placed a great strain on Ms L. Due to the severity of his dementia, Ms L. had to be on call around the clock, and just enjoyed three hours of leisure time per week. The strain on Ms L. was not only caused by Mr G.'s behaviour that resulted from his illness and his need for round-the-clock care, but also from violent attacks on her. Mr G. regularly struck Ms L. on her hands.

Only a year later, Ms L. contacted an advice centre for women by email. She asked for advice relating to her heavy physical work, the severe psychological strain involved in caring for Mr G. with his dementia and the humiliation that she suffered as a result of Mr G.'s violent behaviour. The advice centre contacted Ms L., listened to her description of the situation, and discussed next steps with her. Ms L. then stopped working and left the private household. The advice centre assisted her in her search for a new job in Germany.

## 3.6 Bogus self-employment

If the live-in is formally recruited on a self-employment basis, there is a high risk of bogus self-employment.<sup>96</sup> In many cases, live-ins care for a person in a private household around the clock and are firmly integrated into the daily routine there. Items and equipment from the home are also used when fulfilling work-related tasks. Another key factor is that live-ins are usually obliged to follow instructions from the elderly person requiring care or from their relatives.<sup>97</sup> Furthermore, live-ins usually have just one client, and are financially dependent on this contractual relationship. All these factors speak against genuine self-employment.

If the criminal court decides in the case of Ms K. that there was an dependent employment relation-

91 Karakayali (2010), p. 117.

92 KOK – Bundesweiter Koordinierungskreis gegen Menschenhandel e.V.

93 Mitwalli (2016), p. 26.

94 Karakayali (2010), p. 118.

95 Mitwalli (2016), p. 26.

96 Cf. ch. 2.2.2.

97 Emunds (2016), p. 205; Haberstumpf-Münchow (2020), p. 17.

ship between the live-in care worker and Ms K., Ms K. may be subject to a penalty fee, and following further administrative proceedings, Ms K. may be obliged to pay the social security contributions retroactively for the entire duration of the employment. Advice centres report that it is often not clear to the elderly people in need of care and their families that employment relationships that follow the self-employment model, as arranged by recruitment agencies, are often illegal. In some cases, those affected only notice that the contracts are not correct, and that the description of duties that they contain does not match the work actually done in the household, when an unusual situation arises.

On the one hand, the case of Ms K. illustrates the financial burden incurred by people requiring care and their families as a result of such recruitment arrangements. On the other hand, it shows that live-in care under the self-employment model results in exploitation of the worker given that the statutory minimum wage and other labour protections do not apply. The live-ins have to cover their entire social security contributions and bear any other costs on their own, such as the cost of travel to and from their place of work.

### Ms K. from Germany

Ms K. is an elderly person in need of care who wishes to remain at home. She therefore signed a contract with a Polish agency covering the recruitment of care workers for her own household for three-month periods. In this contract, reference was made several times to the fact that all care workers recruited were self-employed and that they were not subject to instructions regarding their work. The live-in was assigned the task of providing care and support to Ms K., but the duties involved were not named in detail. Instead of working hours, the right to several hours of free time per day and one rest day per week was agreed. Ms K. paid

an agency fee of 500 euros, as well as 250 euros every six months for the recruitment of care workers.<sup>98</sup> An additional contract, which was valid for three months, was signed between Ms K. and the live-in. This was based on a sample contract issued by the recruitment agency, which corresponded to the wording of the contract signed between Ms K. and the recruitment agency. In these contracts, it was also agreed that the live-in would work independently and would pay all social security contributions herself. The agreed per diem rate for the live-in was 50 euros. It is not clear whether a further contract was signed between the live-ins and the recruitment agency.

Ms. K. confided in a neighbour when, after one and a half years in this care arrangement, she received a letter from the German special monitoring unit for undeclared work<sup>99</sup>. The reasons for their examination of Ms K.'s situation remain unclear. It is likely that Ms K.'s case attracted attention during the course of a detailed inspection of a recruitment agency already known to the authorities. After examining the contracts in greater detail, the advice centre said that this was probably a case of bogus self-employment, because, amongst other reasons, the costs paid by the agency for the travel of the live-in to Germany were deducted from the salary paid by Ms K. to the live-in. Another indicator for bogus self-employment was the fact that Ms. K assigned the live-in care workers' tasks on a daily basis. However, the contact with the advice centre stopped.

<sup>98</sup> The costs for recruiting a live-in can allegedly amount to over 1,000 euros per year for the person and/or their families (Verbraucherzentrale Berlin 2019).

<sup>99</sup> Finanzkontrolle Schwarzarbeit (FKS). For information about the role of the special monitoring unit for undeclared work (Finanzkontrolle Schwarzarbeit), see Generalzolldirektion (General Customs Authority) (no year a).

## 4 The International Human Rights Protection Framework

All EU member states are bound by social rights as codified in European and international human rights law. Furthermore, private actors such as recruitment agencies in the care sector are increasingly held to account for their operations under the business and human rights framework.

### 4.1 Human rights obligations of EU member states

On the international level, all EU countries have ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR), the core international human rights treaty on social rights.<sup>100</sup> They also ratified other core human rights treaties relevant to the treatment of live-in care workers such as the International Covenant on Civil and Political Rights, the UN Convention on the Elimination of All Forms of Discrimination against Women and the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>101</sup>

On the European level, EU member states are bound by the EU Charter of Fundamental Rights (EU Charter)<sup>102</sup> and EU secondary legislation, i.e. EU directives and regulations related to social rights. A number of EU policy documents provide further guidance on the realisation of social rights within the EU such as the European Pillar of Social Rights (EPSR) and its Action Plan (EPSR AP).<sup>103</sup> As members of the Council of Europe, each EU country has either ratified the 1961 European Social Charter (ESC) or the Revised Charter (RESC)<sup>104</sup>, albeit with varying acceptance levels of Charter provisions.<sup>105</sup> To a certain extent, the safeguards provided in the European instruments overlap and reinforce one another.<sup>106</sup>

Beyond domestic labour law or constitutional social rights guarantees, European and international law obliges EU member states to respect, protect and fulfil live-in workers' social rights, including their rights to work<sup>107</sup> and at work<sup>108</sup>, trade union rights<sup>109</sup>, their rights to adequate health<sup>110</sup>, housing<sup>111</sup> social security<sup>112</sup>, and non-discrimination<sup>113</sup>. Under the obligation to protect, states

<sup>100</sup> UN, International Covenant on Economic, Social and Cultural Rights (1966) ("ICESCR").

<sup>101</sup> UN, International Covenant on Civil and Political Rights (1966); UN, Convention on the Elimination of All Forms of Discrimination against Women (1979); UN, International Convention on the Elimination of All Forms of Racial Discrimination (1965).

<sup>102</sup> European Union (2012).

<sup>103</sup> European Union (2017); European Commission (2021).

<sup>104</sup> Council of Europe (1961) and Council of Europe (1996).

<sup>105</sup> Council of Europe, European Social Charter country profiles web page.

<sup>106</sup> European Committee of Social Rights (2014).

<sup>107</sup> Arts. 15, 29 of the EU Charter; Principle 4 of the EPSR; Arts. 1, 18 of the ESC; Art. 1, 18 of the RESC; Art. 6 of the ICESCR.

<sup>108</sup> Arts. 5, 30–32 of the EU Charter; Principles 5–7, 9–10, 14 of the EPSR; Arts. 2–4 of the ESC; Arts. 2–4, 21–22, 24–26 of the RESC; Art. 7 of the ICESCR; cf. also UN, Committee on Economic, Social and Cultural Rights, General Comment No 23 (2016).

<sup>109</sup> Arts. 27–28 of the EU Charter; Principle 8 of the EPSR; Arts. 5–8 of the ESC; Arts. 5–8, 28–29 of the RESC; Art. 8 of the ICESCR.

<sup>110</sup> Art. 35 of the EU Charter; Principle 16 of the EPSR; Art. 11 of the ESC; Art. 11 of the RESC; Art. 12 of the ICESCR; cf. also UN, Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000).

<sup>111</sup> Art. 34.3 of the EU Charter, Principle 19 of the EPSR; Art. 16 of the ESC; Art. 31 of the RESC; Art. 11 (1) of the ICESCR; cf. also UN, Committee on Economic, Social and Cultural Rights, General Comment No. 4 and Nr. 7.

<sup>112</sup> Art. 34 of the EU Charter; Principles 12–13, 15 of the EPSR; Arts. 12–14 of the ESC; Arts. 12–14 of the RESC; Art. 9 of the ICESCR; cf. also UN, Committee on Economic, Social and Cultural Rights, General Comment No. 19 (2008).

<sup>113</sup> Arts. 21, 23 of the EU Charter; Principles 2–3 of the EPSR; Art. 19 of the ESC; Arts. 19–20, 27 of the RESC; Arts. 2 (2), 3 of the ICESCR, cf. also UN, Committee on Economic, Social and Cultural Rights, General Comment No. 20 (2009).

must protect live-in care workers from infringements by third actors. This obligation thus requires them to prevent or counter conduct by businesses that leads to social rights abuses or that has the foreseeable effect of doing so.<sup>114</sup>

## 4.2 Corporate human rights due diligence of recruitment agencies

Mirroring states obligations to protect live-ins' rights, private businesses also bear responsibilities to respect human rights under the UN Guiding Principles on Business and Human Rights.<sup>115</sup>

Under corporate human rights due diligence, private recruitment agencies are expected to continuously identify, prevent, mitigate and remedy violations of live-in care workers' human rights caused by, contributed to or directly linked to their own operations. While the UN Guiding Principles on Business and Human Rights are not a binding instrument in themselves<sup>116</sup>, the European Commission plans to introduce a legislative instrument to regulate the conduct of companies active in the EU in 2021<sup>117</sup>, which likely encompasses the operations of recruitment agencies of all sizes within its scope.<sup>118</sup>

114 UN, Committee on Economic, Social and Cultural Rights, General Comment No. 24 (2017), para. 18.

115 UN, Office of the United Nations High Commissioner for Human Rights (OHCHR) (2011), Second Pillar.

116 Attempts at the UN level have not led to a binding UN treaty on business and human rights yet. For current development cf. OHCHR (2021) and OHCHR (2021a).

117 For an overview of current developments cf. Business & Human Rights Resource Centre (2021).

118 Cf. ch. 5.2.1 below.

## 5 Conclusion and Recommendations

The study reveals the power asymmetries between private care agencies or the individual employers, respectively, and the live-in care workers. Legal, policy and implementation gaps must be addressed to ensure the adequate protection of live-ins during their transnational recruitment, posting and employment in a private household, taking into account the enhanced vulnerability to labour exploitation as well as different forms of violence including physical and psychological violence that they face as women, migrants and domestic workers.

It is crucial that social rights are realized under all available employment models for live-in care arrangements, that they are secured in the respective employment contracts and implemented on the ground. In particular, EU member states must safeguard live-ins' rights at work by ensuring safe and healthy working conditions, fair wages that provide for a decent living, weekly and annual rest and leisure, periodic holidays with pay, as well as remuneration for public holidays.<sup>119</sup> Notwithstanding their type of employment, all workers must be covered by all branches of social security during their entire working period,<sup>120</sup> have access to local health services and adequate accommodation, and be adequately protected from COVID-19. To make rights enjoyment real for live-in care workers, EU member states must put in place effective monitoring and enforcement mechanisms, facilitate access to justice, empower live-ins and further strengthen normative frameworks on all governance levels.

### 5.1 Fostering adequate employment models for decent work

The literature and our case studies indicate an increased risk of exploitation when live-in care workers are recruited by private agencies abroad or when they work under self-employment arrangements. The employment model with the greatest level of protection and degree of legal security is a formal, dependent employment with the elderly person or their family members acting as the direct employer. Since this model is widely underused, EU countries should facilitate access to regular dependent employment and clarify conditions for legal self-employment to address the widespread challenges with bogus self-employment and informal work in the live-in care sector.

#### 5.1.1 Facilitating access to formal dependent employment

Often complicated and lengthy administrative procedures and high expenses discourage private individuals from hiring live-in care workers in a regular way. EU member states should therefore reduce the burden on private households interested in hiring live-in workers and improve advice services for older persons concerned.

#### Reducing the administrative burden on private households

In Germany, many families are overwhelmed and deterred by their legal obligations as employers, such as applying for a business registration number, registering their live-in care worker with social insurance, taking out accident insurance, calculating and forwarding wage taxes to the tax office. EU member states should therefore ease the administrative burden on interested private households while upholding the labour rights and social protection of the live-in care workers, including

<sup>119</sup> UN, Committee on Economic, Social and Cultural Rights, General Comment No 23 (2016).

<sup>120</sup> Council of the European Union (2019).

through health insurance coverage and adequate social security contributions. The existing models for so-called minor employment in Germany, such as the Mini-job, are therefore not a solution conducive to social rights fulfilment. In the literature, there are a number of proposals to facilitate the recruitment of live-ins by families requiring care, including simplifying tax and social security laws and regulations, providing wage subsidies for private employers, or simplifying procedures for establishing and managing an employment relationship, for example with human rights compliant sample contracts. Promising practices emerge from a number of EU countries<sup>121</sup>: Belgium adopted a measure to promote legal hiring with a payment instrument which is co-financed by the national authorities and operated through a state-controlled intermediary (“titre-service”). The Swedish government pays a 50 percent benefit of the cost to an employer who legally hires a domestic worker to encourage formal employment. The EU could facilitate an exchange of such practices between EU member states to reduce incentives for irregular employment of live-ins and promote their regular hiring by interested families.

### Supporting elderly people and families with recruitment

To enhance the use of regular dependent employment contracts, elderly people in need of care and their families should also be better informed about their role and obligations as employers and given support in realising their right to quality care. For example, Germany initiated flagship projects such as CariFair and vij-FairCare, offering families support to employ a live-in in their own household and thus help live-ins gain regular employment in Germany. CariFair provides continuous support to families and live-ins for the entire duration of the employment, manages the registration procedure as well as the correspondence with state authorities and insurance providers. They assist with monitoring working conditions and compliance with domestic employment and social security legislation. Apart from sample employment

contracts, the organizations also developed a sample weekly work plan to prevent overwork and illustrate to recruiting families the amount of work a full-time live-in care worker can effectively handle. CariFair is also a contact point for other institutions that seek to create legal employment relationships for live-ins. EU member states should provide funding to roll out or strengthen consumer advice centres and care advisory services on site and online so that they become available across the EU, including in rural areas, to support all interested families in the recruitment of live-in care workers.

### 5.1.2 Clarifying conditions for self-employment

Live-in care workers enjoy the greatest protection of labour rights in formal employment contracts. However, due to its widespread use, there is an urgent need to concretize criteria for the legal use of the self-employment model in live-in care work. For example, Switzerland only allows live-in care arrangements in dependent employment relationships, whereas Austria permits live-in self-employment, which has de jure formalized many care arrangements but has not shown to be beneficial to the labour rights of live-in care workers in practice.<sup>122</sup> In Germany, self-employment does not provide the same benefits with regard to labour standards and social protection as dependent employment: The minimum statutory wage does not apply, and workers must cover their social security contributions, travel expenses and food themselves and are not entitled to paid leave. In practice, the classification between self-employment and dependent employment can be difficult requiring a case by case approach.<sup>123</sup> To detect bogus self-employment, EU states’ national legislation should set clear and feasible definitions and rules about liability in the event of bogus self-employment or bogus posting.<sup>124</sup> In cases of a disguised dependent employment relationship, i.e. where live-ins appear as self-employed on paper, even though their working conditions indicate a dependent employment relationship, domestic

121 OHCHR, Regional Office for Europe (no year), p. 18.

122 Emunds et al (2021), p. 7–8.

123 Cf. also submission by Myria, the Belgian Federal Migration Centre.

124 European Economic and Social Committee (2008), 5.1.2.



labour law standards for dependent employment should apply, especially concerning statutory minimum wage, social security contributions and paid leave. To reduce bogus self-employment, domestic care subsidies could be made conditional on a dependent employment relationship or the implementation of quality standards for decent work, as done in Belgium.<sup>125</sup>

## 5.2 Ensuring decent work for posted EU workers

Our findings indicate that postings by private agencies in home countries, often in cooperation with agencies in host countries, is the most widespread practice to recruit live-in care workers.<sup>126</sup> The operations of transnational care agencies have multiplied in recent years and are best addressed on the European level given that the care market has itself been Europeanized.<sup>127</sup> The case of Germany shows that regulatory gaps have engendered rights abuses, as these companies often use bogus placement models and fraudulent practices to circumvent labour law and undermine social security standards at the expense of middle-aged women workers who seek to make a living. Interviewed experts, familiar with the extent and various forms of exploitation from years of counselling experience, emphasise the need for regular and systematic monitoring of the employment agencies based on binding quality standards.

### 5.2.1 EU member states: Holding recruitment agencies to account through binding standards

The operations of transnational care agencies remain largely unregulated in the EU. The EU and its member states should therefore establish a harmonized regulatory framework, strive towards legally binding human rights due diligence standards on the domestic, EU and international level

and qualify domestic care work as a high-risk sector in the EU.

### Strengthening the EU regulatory framework for recruitment agencies

To strengthen the EU's regulatory framework for recruitment agencies and harmonize national frameworks, the EU should consider introducing a targeted EU Directive on private recruitment agencies modelled on the ILO Private Employment Agencies Convention No. 181<sup>128</sup> and aligned with European and international labour and human rights law.<sup>129</sup> An EU-wide regulatory framework for recruitment agencies would ensure compliance with common standards in both home and host countries of live-in care workers. Such a framework should ensure the agencies' proper registration, mandatory minimum standards when offering a position and guarantee that workers are not charged any fees. EU member states should also strengthen cross-border cooperation in the investigation and prosecution of criminal and employment law offences committed by transnationally acting recruitment agencies.<sup>130</sup>

### Introducing binding human rights due diligence on all governance levels

Voluntary certification systems for care agencies are insufficient to realize human rights on the ground. The experience from similar sectors, such as the placement of au pairs, has shown that only few employment agencies choose to take part in voluntary commitments and certification. Moreover, independent regular auditing often poses a challenge in practice. A more effective instrument is requiring recruitment agencies to apply for a compulsory licence to operate in the care economy, which would allow for sanctions in case of violations and creates greater transparency for both the live-ins and the families in need of care services. A national licensing and monitoring body should operate under harmonized European standards for recruitment agencies to avoid diverging

125 Adriaenssens, Stef / Theys, Tobias / Verhaest, Dieter / Deschacht, Nick (2021).

126 Corroborated for Belgium by the submission by Myria, the Belgian Federal Migration Centre.

127 Rossow / Leiber (2017).

128 International Labour Organization, C181 (1997). The Convention was ratified by 13 EU member states: Belgium, Bulgaria, Czechia, Finland, France, Hungary, Italy, Lithuania, Netherlands, Poland, Portugal, Slovakia, and Spain.

129 Cf. German Trade Union Federation (2020), p. 5.

130 UN, Human Rights Council (2017), para. 93.

protection levels across the EU. From a human rights perspective, it is crucial to consult various governmental and non-governmental actors working in the field as well as live-in care workers as rights-holders themselves in the development, continuous review and monitoring of such standards. In Austria, for example, guidelines for the award of so-called quality certificates have been developed jointly by the Ministry of Social Affairs, the Chamber of Commerce and welfare organisations.

Moreover, the EU and its member states should use the current momentum to introduce legally binding standards for the operation of recruitment agencies under the business and human rights framework. The case of transnationally acting care agencies demonstrates that the EU and international frameworks in place proved insufficient to protect live-in care workers effectively. To strengthen their position as rights-holders, EU member states and EU institutions, including the EU Parliament and EU Commission, should work towards the inclusion of strong language on measures, monitoring and sanctions in the current debates on an EU Directive and EU action plan on business and human rights. While an EU directive levels the playing field among European recruitment agencies, a strong global framework is required to ensure that agencies based in third countries, such as in Ukraine where many live-in care workers are posted to Eastern European states, do not take advantage of exploitative practices.

### **Qualifying the domestic care sector as a high-risk sector**

To close protection gaps, all recruitment agencies in the care sector notwithstanding their size should fall under the protection scope of the prospective EU Directive on business and human rights. For this purpose, the EU could qualify operations of private care agencies as a high-risk sector to include not publicly listed small and medium-sized agencies in this field.<sup>131</sup> Our findings

show that live-in care workers are regularly exposed to elevated risks of labour exploitation and violence due to a number of circumstances, including their gender, migration status and occupationally induced isolation in private households. These dimensions reinforce each other leaving live-in care workers disproportionately exposed to and impacted by rights abuses. The high-risk nature of the care sector became evident in the course of the COVID-19 pandemic that further exacerbated these vulnerabilities.

### **5.2.2 EU care agencies: Implementing human rights due diligence**

Corporate human rights due diligence requires private recruitment agencies to go beyond fulfilling legal requirements. Care agencies must regularly conduct human rights risk assessments to prevent and mitigate actual or potential adverse human rights impacts that they might cause, contribute to or that are directly linked with their operations. This should be done with the meaningful participation and consultation of rights-holders, trade unions, national human rights institutions and civil society actors. Based on these findings, care agencies must design appropriate and effective measures to prevent violations. On the one hand, the live-in care sector warrants a gender sensitive and intersectional approach to due diligence that takes into account the particular vulnerability of live-ins as women, migrants and domestic workers. On the other hand, the rights of older persons to autonomy and dignity in care<sup>132</sup> must be upheld considering their disproportionate exposure to physical, mental, sexual and financial abuse in Europe.<sup>133</sup> Finally, recruitment agencies must ensure access to a grievance mechanism and remedy.

### **5.2.3 Areas of action for EU member states and agencies**

While states should ensure regulatory standards under their human rights obligation to protect, agencies must comply with labour law, respect human rights and implement their corporate due diligence. Our empirical research identified a

<sup>131</sup> Wolters, European Parliament, Committee on Legal Affairs (2021), Footnote of p. 21.

<sup>132</sup> Beyond their rights to bodily and mental integrity and health, elderly people also have the right to live independently and be included in the community, participate in social life and to social protection; cf. Art. 25 of the EU Charter; Art. 23 of the RESC Art. 19 of UN, Convention on the Rights of Persons with Disabilities (2006).

<sup>133</sup> WHO (2011), p. 13.

number of areas of action that need to be tackled by decisionmakers in the EU and its member states as well as by private actors in the live-in care sector.

### Developing human rights-friendly sample contracts

As in the other employment models, working conditions for an EU placement can be improved with human rights-friendly contracts that are concluded between the recruitment agency and a live-in care worker. Our empirics show that provisions in these so-called service agreements are often kept vague providing workers little transparency about the prospective working and living conditions, the identity of their employer<sup>134</sup> or the level of care required by the elderly person. In line with EU Directive (EU) 2019/1152 on transparent and predictable working conditions<sup>135</sup>, EU member states should develop human rights compliant guidelines on the content of such agreements and make sample contracts publicly available as best practice examples.<sup>136</sup> Sample contracts should spell out explicitly and concretely, in a language understandable and accessible to the live-in care worker, the job requirements, duration of employment, probation period, dismissal conditions, average weekly working hours, remuneration, rules on board and lodging, paid leave and reimbursement of travel expenses to and from work.<sup>137</sup> Tasks for live-in care workers and those delegated to family members or other service providers, as well as the live-in's core working hours and on-call periods, must be clearly defined in advance.<sup>138</sup> Additional criteria include the written documentation of working hours, compliance with the minimum wage in the host country excluding per diems/ expenses and a replacement strategy in case of the live-ins' illness or leave. Written contracts

must be issued and provided to the worker prior to their placement.

From a human rights law perspective, the content of these contracts should not discriminate between long-term and short-term placements as all workers require an adequate level of labour protection. Our case studies confirm that, in practice, agencies issue live-ins several short-term contracts in a row rendering them de facto long-term mobile workers while they appear as short-term posted workers on paper.<sup>139</sup> This discriminatory protection gap must be closed. EU member states should therefore ensure that transposed provisions of EU Directive (EU) 2019/1152 on transparent and predictable working conditions also apply to placements with a duration of less than four weeks.<sup>140</sup> The incorporation of the revised posted workers Directive (EU) 2018/957 into national legislation should afford equal protection to all live-in care workers, notwithstanding their placement duration, under the host country's domestic labour law. For example, the German Posted Workers Act was amended in 2020 to include the right to equal remuneration based on the statutory minimum wage or collective wage agreements from the first day of a worker's posting.<sup>141</sup>

### Tightening placement requirements

Like France or Austria, all EU member states should require EU recruitment agencies to apply for A1 certificates prior to the placement. The application process for the A1 certificate can serve as a yardstick to determine whether the agency complies with the conditions for posting an EU worker. In this case, recruitment agencies must prove that the live-in care worker has been registered with the social security provider and health insurance in the home country and that all contributions have been made there.

<sup>134</sup> Submission by Myria, the Belgian Federal Migration Centre.

<sup>135</sup> European Union (2019b).

<sup>136</sup> In the German CariFair project, pro-forma contracts are already in use and proved valuable for dependent employment.

<sup>137</sup> Submission by the Romanian Institute for Human Rights. See also German Trade Union Confederation (2020), p. 6.

<sup>138</sup> Cf. recommendation on a suggested "care mix" involving a pool of live-out care workers and digital monitoring and alert options for the elderly person, in Emunds et al (2021), p. 3–4.

<sup>139</sup> As a rule, live-in care workers are posted for a short period of time. See also Böning / Steffen (2014), p. 12.

<sup>140</sup> According to Art. 1 (3) of the Directive, member states can decide whether they include employment relationships with a predetermined and actual working time of or less than an average of three hours per week in a reference period of four consecutive weeks within the scope of application.

<sup>141</sup> Cf. §§ 2 (1), 3 of the German Posted Workers Act (AEntG).

Correspondingly, care agencies should be obliged to hand out the A1 certificate and European health insurance card to the worker before the posting. As live-ins are usually placed for a duration of less than 12 months, they necessarily rely on the A1 certificate and European health insurance card to access the health system in the host country.<sup>142</sup> As seen in our empirical cases, recruitment agencies and private households must also be prevented from undermining social security contributions, for example by requiring excessive unpaid overwork or by making use of high per diem rates while the monthly salary is kept at a minimum. To protect the live-in care workers' right to social security, host countries and, in the case of the posting model, home countries must ensure that the social security contributions are based on the entire and actual earnings. The EU must close regulatory gaps that allow companies to take advantage of reduced and capped social security contributions for posted workers such as in Slovenia.<sup>143</sup> The German Trade Union Federation suggests the introduction of a European electronic real-time register and a European social security number.<sup>144</sup>

### Implementing a duty to inform

Beyond using human rights compliant service agreements, agencies should provide information to live-ins prior to departure, in an accessible language, about their labour and social security rights, applicable occupational health and safety measures in the host country, their working environment, accommodation, travel and the duties of the agency and families.<sup>145</sup> The type and scope of the elderly person's need for support must be assessed in advance to ensure that live-in care workers are adequately informed, skilled and trained to provide the required services.<sup>146</sup> Live-ins also need guidance on how to deal with challenging situations in the private household. They should thus be informed about the location and offers of advice centres, civil society organisations

and emergency hotlines dealing with the main problem areas found in the study including labour exploitation, harassment and violence. The agencies must document compliance with their duty to inform.

### Ensuring minimum standards in private households

Prior to the placement, care agencies must ensure that private households can guarantee minimum standards in line with European and international human rights law, namely the right to an adequate standard of living. The live-in care worker should have at least one room of their own that meets certain standards with regards to minimum size, access to water and sanitation and heating. The German Trade Union Federation suggests a binding EU initiative on accommodation for EU mobile workers.<sup>147</sup>

### Setting up grievance mechanisms

Care agencies should set up internal grievance mechanisms. They must be accessible during regular working hours and via an emergency telephone number. Contact persons should be available to advise both the live-ins and their families during the entire period of the placement. If mediation services prove to be beneficial, agencies may want to consider them.<sup>148</sup> They should also have a concept in place for dealing with psychological, physical and sexual violence in private households, including access to free and multilingual professional counselling for exposed workers. As live-ins are usually women, counselling must be gender-sensitive to tackle the often complex situations of abuse that might also involve sexual violence.

## 5.3 Protecting live-in care workers from COVID-19

To protect all live-in care workers from COVID-10, they must have access to the health system of the

142 Cf. ch. 2.2.1 above.

143 Cf. German Trade Union Confederation (2020), p. 3.

144 German Trade Union Confederation (2020), p. 4.

145 Cf. German Trade Union Confederation (2020), p. 5.

146 Information from the ENNHRI focus group.

147 German Trade Union Confederation (2020), p. 2.

148 PICUM and others (2018), p. 7.

host country notwithstanding the employment model or formality of work. Posted workers must be equipped with the European Health Insurance Card before the placement. As frontline workers at particular risk of infection, live-ins must be protected from occupational health risks during the pandemic through protective measures against COVID-19 at their workplace.<sup>149</sup> They must be equipped with personal protective equipment including masks, disinfectants and tests, and should be systematically prioritized for primary and booster vaccination against COVID-19 to protect themselves and the elderly persons they share a household with. In Germany, live-in care workers were only considered for priority access to COVID-19 vaccines based on the goodwill of the older person they cared for who had to name them as a contact person, not on the nature of their work, as they are not technically classified as care professionals.<sup>150</sup> EU member states could harmonize occupational COVID-19 measures through the EU Commission's Senior Labour Inspectors' Committee, the European Agency for Safety and Health at Work and the Advisory Committee on Safety and Health at Work.<sup>151</sup>

## 5.4 Preventing live-in care workers from homelessness

Apart from ensuring adequate standards in private households, host countries and agencies must also protect workers from homelessness, for example in the case of an immediate termination of the employment contract or posting as occurred in one of the case studies. Under the right to adequate housing, live-in care workers should also be provided access to temporary shelters tailored to the needs of migrant women so that they are able to leave abusive employers.

## 5.5 Monitoring and enforcing human rights standards

To accompany legal obligations and make rights real for live-in care workers on the ground, effective mechanisms must be put in place to monitor the working and living conditions of live-ins.

### 5.5.1 Innovating inspection in private households

EU member states should set up a system of systematic checks to ensure compliance with labour law and human rights in private households. They should develop mechanisms with the support of respective labour inspectorates, social inspection services, civil society, rights-holders and National Human Rights Institutions. Beyond strengthening national inspection services, the EU should concretise the mandate of the European Labour Authority to support national efforts with cross-border controls and provide guidance on the place of jurisdiction for transnational employment relationships.<sup>152</sup> To ensure cohesive and effective control systems across the EU, EU institutions and member states should work towards European minimum standards for domestic inspection infrastructures, modelled for example on ILO-Convention 187<sup>153</sup>.<sup>154</sup> However, checks and inspections should not sanction live-ins without formal employment under protectionist labour market policies, but should serve to enhance the realization of live-ins' rights at work.

Inspection in European private households must respect an individual's privacy and right to respect for private and family life, home and correspondence.<sup>155</sup> Novel approaches do not always necessitate on-site visits to the families' homes: Among these are the employer's regular reporting to authorities on the working and living situation of live-ins, as well as interrogating workers outside of the private house or through digital means. Other

149 European Committee of Social Rights (2020).

150 Cf. ch. 5.7.2.

151 German Trade Union Confederation (2020), p. 7.

152 German Trade Union Confederation (2020), p. 7.

153 International Labour Organization, C187 (2006). 13 EU member states ratified the Convention: Austria, Belgium, Cyprus, Czechia, Denmark, Finland, France, Germany, Portugal, Slovakia, Slovenia, Spain, and Sweden.

154 German Trade Union Confederation (2020), p. 7.

155 Art. 8 of the ECHR.

measures for preventing overwork and exploitation include a reliable working time recording system that is accessible to the worker, preferably electronically<sup>156</sup>, and monthly check-ins by the agencies with the live-in and the families to review working hours and adapt the work plan if required.<sup>157</sup> The role of the local community and general public in preventing and informing on cases of abuse should also be harnessed.<sup>158</sup>

The EU should facilitate an exchange between host and home countries to discuss promising practices for effective monitoring. For example, in the Philippines, migrant domestic workers need to register their contracts before leaving their country of origin, so that their embassy in the host country can follow up on its legality and working conditions.<sup>159</sup> Inspiration can also be drawn from the Irish approach where obtaining a visa for employment (for non-EU workers) requires a declaration by the employer accepting an inspection.<sup>160</sup> For diplomatic households, a memorandum of understanding can be used which states that the diplomatic household will comply with labour regulations, allow inspections and participate in mediation, if needed.<sup>161</sup> In Belgium, Myria (the Federal Migration Centre) recommends that domestic workers in a diplomatic household receive a special identity card which is renewed annually by the Belgian Protocol Service, where they can be regularly informed about their labour rights and have the opportunity to report potential abuses.<sup>162</sup>

### 5.5.2 Collecting data and reporting to human rights bodies

More quantitative and qualitative data are needed to address the challenges and demands of live-in care workers in a more adequate and efficient manner. To capture the majority of live-in care arrangements, EU member states must enhance

their statistical capacities to render informal work more visible. They should also support regular exchange and collaboration among National Human Rights Institutions, particularly those based in the most common home and host countries for transnational live-in care workers, to improve the data situation. Finally, EU member states can use their periodic reporting duties to European and International human rights bodies, such as the European Committee of Social Rights, the UN Committee on Economic, Social and Cultural Rights, the UN Committee on the Elimination of Discrimination against Women, the UN Committee on the Elimination of Racial Discrimination or the UN Human Rights Committee, as a valuable opportunity to submit information on informal live-in care work for review and reflect upon domestic protection gaps as well as progress made in this field on a regular basis.

## 5.6 Facilitating effective access to justice

Our findings show that live-ins are frequently subjected to non-payment of wages, overwork, exploitation or abuse while legal and factual barriers to inspections in private homes, a lack of evidence or witnesses, stigma or shame will likely lead to underreporting and -prosecution of such cases, despite the assistance currently offered by advice centres. Live-in care workers typically lack the financial and social capital to pursue a case through the legal system in host countries over an extended period of time.

Under European human rights law, live-ins have the right of access to a court<sup>163</sup>, which includes the right to legal aid in civil proceedings if legal assistance proves indispensable for an effective

156 German Trade Union Confederation (2020), p. 7.

157 Emunds et al (2021), p. 3.

158 Submission by Myria, Belgian Federal Migration Centre and the Romanian Institute for Human Rights.

159 UN, OHCHR, Regional Office for Europe (no year), p. 19.

160 UN, OHCHR, Regional Office for Europe (no year), p. 19.

161 Diplomatic households enjoy immunity based on international law and bilateral agreements exempting them from labour regulations and inspections in the destination country. Cf. PICUM and others (2018), p. 5.

162 Myria, Federal Migration Centre (2020), p. 30.

163 Art. 6 (1) of the ECHR.

access to court<sup>164</sup> or a lack thereof would deprive the litigant of a fair hearing<sup>165</sup>, for example by creating a distinct disadvantage as compared with the opposing party.<sup>166</sup> In particular, domestic legal aid schemes should grant specific protection and assistance to vulnerable people.<sup>167</sup> The Council of Europe recommended to support advice centres in underprivileged areas, and enable non-governmental organisations or voluntary organisations to provide legal assistance to those without financial means.<sup>168</sup> Finally, as members of the Council of Europe, EU states should ratify the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints<sup>169</sup>, which would entitle social partners at the national and EU level and non-governmental organizations with participatory status with the Council of Europe to lodge complaints with the European Committee of Social Rights.

Beyond removing domestic barriers in access to justice, EU member states should also consider introducing easily accessible and affordable non-judicial grievance mechanisms in consultation with live-in care workers and advice centres.<sup>170</sup> Non-judicial complaints mechanism in the German care sector have so far put a focus on elderly people living in residential care homes or served by professional mobile care services.<sup>171</sup> They are not yet designed to register or process claims of live-in care workers.

## 5.7 Empowering live-in care workers

Given the power asymmetries, live-in care workers should be empowered by addressing systemic discrimination, recognizing domestic care work as a profession and improving advice services. Empow-

ered live-ins will more likely self-organize and seek remedies for violations of their labour and human rights.

### 5.7.1 Addressing intersectional discrimination

Live-in care workers often live at the margins of society facing intersectional discrimination as migrant, women and domestic workers and, as such, they are disproportionately exposed and vulnerable to labour exploitation.<sup>172</sup> Sharing a household with their employers, they are particularly affected by isolation, harassment and further forms of physical and psychological forms violence. EU member states must take special measures to protect live-ins from both direct and indirect discrimination based on their nationality, gender or social status.<sup>173</sup> In particular, they must ensure that nationality is a prohibited ground for discrimination in domestic legislation with regards to access to employment, working conditions and trade union activity, access to social protection, health, education and training.<sup>174</sup> To address underlying stereotypes and dismantle the intersecting social, racial and gender inequalities reflected in live-in care work, host countries must take adequate measures, for example by raising public awareness on the lived realities of these workers, and training public officials.

### 5.7.2 Recognizing live-in care work as a profession

Empirical research from Germany has shown a gratification crisis, a disbalance between efforts and rewards in terms of financial compensation and social prestige, for care professionals, which is reinforced by their sense of overcommitment and abstention from striking. It can be assumed that these findings are aggravated in the case of

164 European Court of Human Rights (1979), §26.

165 European Court of Human Rights (2002), §51.

166 European Court of Human Rights (2021), §§ 101, 107.

167 Council of Europe (2021), §§ 8, 20 of the Guidelines.

168 Council of Europe (1993).

169 Council of Europe (1998).

170 As set out above, posted live-in care workers should have access to their agency's grievance mechanism.

171 Meyer / Jordan (2021), p. 10–11.

172 UN, Committee on the Elimination of Discrimination against Women, General recommendation No. 26 (2008).

173 UN, Committee on Economic, Social and Cultural Rights, General Comment No. 20 (2009), UN Human Rights Committee, General Comment No. 15 and UN Committee on the Elimination of Racial Discrimination, General recommendation No. 30.

174 Cf. Directive 2014/54/EU.

live-in care workers as they are socially more invisibilised and lack formal recognition as care professionals impeding any potential unionization efforts. Our case studies show that live-ins often take on a wide range of work, from basic care, to managing the household and caring for the children in the family, while they are equipped with highly diverse qualifications and professional experience. A formal recognition of their physically and mentally highly demanding work would not only enhance their social status and professional prestige, but also help to demarcate job requirements and career trajectories. EU member states could consider a European-wide accreditation as a care worker or assistant care worker and foster the recognition of qualifications, diplomas and trainings obtained abroad. However, these measures should not lead to protectionist restrictions on the labour market and hinder EU mobility by denying live-ins' access to employment where they lack a specific certification. Lack of certification could instead be compensated by recognising relevant work experience of a fixed minimum length.

Finally, recognizing live-in care work would result in a professionalization in the area, which provides benefits to all parties involved. Professional recognition, on the one hand, ensures high quality standards in live-in care for the aged. On the other side, it would provide opportunity for live-in care workers to continue their professional development. Subsidized language classes, in particular, would assist migrant live-ins in carrying out their employment tasks and strengthening their position with the employer and authorities in the host country. These opportunities should be tailored to live-ins' needs and schedule and ideally be provided online or in the evenings. As part of a specific occupational group, such as the so-called SAHGE professions<sup>175</sup> in Germany, live-in care workers would have an institutional infrastructure to organize collectively, to exchange experiences

and coping strategies that would foster their political and economic empowerment.

### 5.7.3 Improving advice services to live-in care workers

According to our findings, live-in care workers are frequently unaware about the applicable labour law in their host countries or available assistance with translation and interpreting, taxes, access to health care and social security. EU states should establish or strengthen independent, accessible and multilingual advice services to provide comprehensive information and support to live-in care workers in cases of labour and human rights abuses.<sup>176</sup> In Germany, for example, trade union representations, welfare organisations and non-profit associations, provide a variety of services in person, by phone or online through social networks. Given the placement of live-in care workers in various regions including in rural and sparsely populated areas, it is critical to make use of creative, low-threshold and targeted methods to reach as many workers as possible, such as posting information in their native language in trains or other modes of commuting and travel<sup>177</sup>, or by developing online spaces where workers can connect, communicate openly and support one another. Other stakeholders in the care sector can also provide information to live-ins about available emergency and support services. To this end, awareness must be raised among all actors including certified care workers and advisers, staff in mobile care services, general practitioners, employment agencies and insurance providers.

## 5.8 Strengthening normative protection frameworks

This chapter has demonstrated how current legislation can be interpreted and applied in light of EU member states' obligations under international human rights treaties to prevent protection gaps.<sup>178</sup> If the various legal frameworks were read jointly

<sup>175</sup> This includes professionals in social work, domestic services, health and care work, education and training.

<sup>176</sup> Submission by the Romanian Institute for Human Rights.

<sup>177</sup> Information from the ENNHRI focus group.

<sup>178</sup> As set out above, existing EU acquis such as EU Directives 2014/54/EU, (EU) 2019/1152, (EU) 2018/957 and (EU) 2018/957 must be incorporated into national law in light of international human rights law. In particular, transposition acts should not discriminate based on the duration a worker is officially posted.



and coherently with one another, live-in care workers would enjoy a high level of legal protection. However, in order to clarify and reinforce human rights, the EU and its member states should explore developing new instruments adapted to the situation of migrant care workers in Europe. This would not only legally empower live-ins, but it would also increase scrutiny at the European and international levels which in turn contributes to ensuring domestic responses. For this reason, EU member states should consider ratifying existing ILO and UN human rights instruments as well as working toward tailored EU legislation.

### UN Convention on Migrant Workers and their Families

While all EU member states are bound by the majority of the core international human rights treaties, none have ratified the UN Convention on Migrant Workers and their Families. The majority of the provisions of the Convention are already included in those instruments in force throughout the EU. Nonetheless, it provides for a specific and comprehensive framework of protection tailored to the specific challenges faced by migrant domestic workers and applies to all stages of their work migration including family reunification which is particularly relevant when live-in care workers from third are recruited to the EU. Its treaty monitoring body, the UN Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families, would also provide an additional accountability mechanism with its periodic states reporting and individual complaints procedure.

### ILO Domestic Workers Convention

ILO conventions complement international human rights instruments by specifying the required

measures to implement social rights, especially the human rights to work and at work and the right to social security. Several ILO Conventions<sup>179</sup> are relevant to the situation of live-in care workers, however only half the EU member states have ratified them, including the aforementioned ILO Conventions Nos. 181 and 187. The most important one, ILO Domestic Workers Convention No. 189 from 2011, has only been ratified by seven EU member states to date.<sup>180</sup> The Convention sets out measures for the effective protection of human rights for all domestic workers notwithstanding their employment model. Provisions for a minimum wage (Article 11) and a weekly minimum rest period of 24 consecutive hours (Article 10, paragraph 2), among other things, are explicitly spelled out.<sup>181</sup> According to Article 2(2) of the Convention, governments may choose to exclude particular categories of workers from the Convention's scope of application. Germany availed itself of this opportunity excluding "workers living in a common household with those for whom they are responsible to raise, look after, or care for" (Section 18, Subsection 1, No. 3 of the German Hours of Work Act<sup>182</sup>). It remains unclear whether live-in care workers fall under this category of excluded workers.<sup>183</sup> To avoid legal uncertainty, EU member states should ratify ILO Convention No. 189 and ensure that live-in care workers are not excluded from the scope of protection under Article 2 (2) of the Convention.

### EU instruments

In the EU, the rights of live-in care workers might be improved by a binding EU instrument on corporate due diligence<sup>184</sup>, as well as other efforts such as an EU minimum wage framework directive<sup>185</sup>, a European social security register or an initiative on decent accommodation for mobile workers. In

179 Cf. for an overview of ILO Conventions relevant to the situation of domestic workers, UN, OHCHR, Regional Office for Europe (no year), p. 17–18.

180 International Labour Organization, C189 (2011a). The Convention was ratified by Belgium, Germany, Finland, Ireland, Italy, Portugal and Sweden.

181 International Labour Organization (2011a); cf. also related recommendation no. 201 of the International Labour Organization (2011b).

182 Arbeitszeitgesetz (1994, last amended 2020).

183 In an assessment published in 2016, the Research Services of the German Bundestag found that the exclusion clause in the German Hours of Work Act does not apply to live-in care workers: Deutscher Bundestag, Wissenschaftliche Dienste (2016). Cf. also submission by the German Trade Union Confederation and concerns expressed by the ILO Committee of Experts on the Application of Conventions and Recommendations (2017).

184 Cf. ch. 5.2.1.

185 Cf. European Commission (2020).

particular, adequate minimum wages, as well as improved monitoring and enforcement across the EU, would ensure a decent standard of living for live-ins and their families by addressing structural underpayment in the highly gendered care sector and reducing wage and income disparities between EU countries, which are fuelling the care drain from Eastern European countries.<sup>186</sup>

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<sup>186</sup> Cf. European Commission (2021), p. 19 and Annex I.

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