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Continuities of exploitation: seasonal migrant workers in German agriculture during the COVID-19 pandemic

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Abstract

Seasonal migrant agricultural workers were declared ‘essential’ in Germany at the very outset of the COVID-19 pandemic. Two harvest seasons later, continuing poor working conditions, infection outbreaks on farms, and a general exclusion from social security schemes show that the recognition of the ‘essential’ character of the job has not translated into any improvements for workers. Based on interviews with trade union-affiliated counselors for migrant workers across Germany and analysis of the policies and legal measures introduced during the pandemic, this article demonstrates how pre-existing institutional structures of exploitation in relation to seasonal agricultural work have been not only sustained but also reinforced.

1 | INTRODUCTION

Agricultural work in the Global North is to a large extent carried out by migrant (often seasonal) workers.¹ It is an example of intensive and often racialized

¹B. Anderson et al., ‘Rethinking Labour Migration: COVID-19, Essential Work, and Systemic Resilience’ (2021) 9 *Comparative Migration Studies* 1, at 2ff. See also J. Gelatt, *Immigrant Workers: Vital to the US COVID-19 Response, Disproportionately Vulnerable* (2020), at <<https://www.migrationpolicy.org/research/immigrant-workers-us-covid-19-response>>; G. G. Grimwood and T. McGuinness, *Migrant Workers in Agriculture* (2017) House of Commons Research Briefing 7987, at <<https://commonslibrary.parliament.uk/research-briefings/cbp-7987/>>; OECD, *COVID-19 and Key Workers: What Role Do Migrants Play in Your Region?* (2020), at <<https://www.oecd.org/coronavirus/policy-responses/covid-19-and-key-workers-what-role-do-migrants-play-in-your-region-42847cb9/>>.

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labour,² systemically devalued, both discursively and materially,³ to the detriment of migrant farmworkers' legal and political position, usually resulting in exploitative working and degrading living conditions. At the very beginning of the COVID-19 pandemic, travel bans threatened to prevent many seasonal migrant farmworkers from reaching their destinations, leaving farmers – temporarily, at least – to consider 'creative' solutions to 'save' their harvest.⁴ In Germany (which is the focus of this article), agriculture was declared a 'critical infrastructure' ('*kritische Infrastruktur*') and an industry of 'systemic relevance' ('*systemrelevante Branche*') at the start of the pandemic, due to its importance for overall food security.⁵ It followed that, being central to the functioning of the German agriculture industry, seasonal migrant farmworkers themselves were 'essential' ('*systemrelevant*') for food security during a global crisis.

During the first pandemic harvest season, the threat of a labour shortage, and consequently a potential food shortage, was averted through a political decision that approved flying in 80,000 seasonal farmworkers from Central and Eastern Europe.⁶ At the time, this decision made seasonal farmworkers almost the only exceptions to the travel ban in the midst of a general standstill at European airports.⁷ The decision to fly in workers and bring them together in shared accommodation facilities, canteens, and transportation, and on the fields, at a time when the 'social distancing' measures for the majority of the population applied in the strictest manner, raised serious ethical concerns about the treatment of an entire category of workers. These concerns were soon substantiated by several reports and unusually intensive media coverage of seasonal migrant farmworkers, revealing systemic labour rights violations, constant exposure to health risks, and degrading living conditions.

Given the overall structure of the German agricultural sector, which is heavily dependent on seasonal migrant work (predominantly from the Eastern European Union (EU) member states),⁸ this article seeks to understand how the overall position of seasonal migrant farmworkers in Germany documented during the pandemic has been to a large extent a result of pre-existing

² See D. Ashiagbor, 'Race and Colonialism in the Construction of Labour Markets and Precarity' (2021) 50 *Industrial Law J.* 506.

³ On the devaluation of work, see S. Currie, 'De-Skilled and Devalued: The Labour Market Experience of Polish Migrants in the UK Following EU Enlargement' (2007) 23 *International J. of Comparative Labour Law and Industrial Relations* 83. See also N. Sahraoui, 'Non-EU Migrant Workers in For-Profit Older-Age Care Facilities in London: Capital's Use of Multiple Borders for the Extension of Its Own Frontiers' in *Inclusion and Exclusion in Europe: Migration, Work and Employment Perspectives*, eds O. Feduk and P. Stewart (2018) 101.

⁴ For example, the 'Pick for Britain' campaign was meant to attract domestic workers as a replacement for seasonal migrant workers prevented from entering the country due to the COVID-19 restrictions: see A. Attack, 'Britain Looks to Replace Seasonal Workers Kept Away by the Virus' *New York Times*, 7 July 2020, at <<https://www.nytimes.com/2020/07/07/business/britain-looks-to-replace-seasonal-workers-kept-away-by-coronavirus.html>>. On the situation in Germany, see V. Bogoeski, 'The German Asparagus Saga' (2020) *J. for International Politics and Society (IPS)*, at <<https://www.ips-journal.eu/regions/europe/the-german-asparagus-saga-4321/>>.

⁵ German Federal Ministry for Food and Agriculture, Pressemitteilung No. 54/2020, 'Corona-Paket der Bundesregierung: wichtige Hilfen für die Land- und Ernährungswirtschaft erreicht' *Bundesministerium für Ernährung und Landwirtschaft*, 23 March 2020, at <<https://www.bmel.de/SharedDocs/Pressemitteilungen/DE/2020/054-coronapakett-der-bundesregierung.html>>.

⁶ More than half of those farmworkers entered the country during the harvest season in 2020: see Initiative Faire Landarbeit, *Initiative Faire Landarbeit Bericht 2020: Saisonarbeit in der Landwirtschaft* (2020) 8, at <<https://igbau.de/Faire-Landarbeit.html>>.

⁷ Bogoeski, op. cit., n. 4.

⁸ Id. See also n. 6; Initiative Faire Landarbeit, *Initiative Faire Landarbeit Bericht 2021: Saisonarbeit in der Landwirtschaft* (2021), at <<https://igbau.de/Binaries/Binary16991/2021-InitiativeFaireLandarbeit-Saisonarbeitsbericht.pdf>>.

structures of exploitation. While the increased media attention on seasonal farmworkers during the pandemic was striking, most structures giving rise to the problems that workers faced have already been in place for a long time. In this light, the article unpacks the myth that the exploitative working and unfit living conditions leading to mass COVID-19 infection outbreaks on farms were a result of the state of exceptionalism created by the pandemic. Focusing on two pandemic harvest seasons, the article explores how the governance of seasonal work during the pandemic has interacted with and reinforced existing structures of exploitation already forged by laws, regulations, and institutional and employers' practices. Based on written interviews with ten counsellors for migrant workers affiliated to trade unions across eight German federal states (conducted during May and June 2021) and analysis of the policies and legal measures adopted and implemented during the pandemic, the article shows that the recognition of the essential character of seasonal migrant farmwork has not resulted in an improvement of the overall working and living conditions. On the contrary, the evidence suggests further 'disembedding' and precarization of seasonal migrant labour in agriculture and reinforcement of pre-existing structures that facilitate the exploitation of seasonal migrant farmworkers.

The article is structured as follows. Section 2 outlines the conceptual framework, arguing that seasonal migrant labour on German farms and fields is a particularly 'disembedded' and commodified form of labour, existing within established institutional structures and practices of exploitation that characterize the German agricultural industry and its labour market. Section 3 outlines those structures, providing an overview of the existing regulatory and institutional framework governing work in German agriculture. Section 4 discusses the policy and legal measures adopted in Germany since the initial outbreak of COVID-19 in early 2020. Section 5, drawing on interview data, classifies and analyses the problems that seasonal migrant farmworkers have experienced during the two pandemic harvest seasons in 2020 and 2021. This section seeks to explain the relationship between those problems experienced by workers and the legal measures adopted during the pandemic as well as the pre-existing institutional structures. The final section discusses the findings and explains the relationship between the political response during the pandemic and pre-existing institutional structures of exploitation, which resulted in further 'disembedding' of seasonal migrant labour on German fields.

2 | LEGAL AND INSTITUTIONAL STRUCTURES (DIS)EMBEDDING SEASONAL MIGRANT LABOUR IN GERMAN AGRICULTURE

To analyse the situation of seasonal migrant farmworkers in Germany during the COVID-19 pandemic, this article proposes a theoretical framework starting from the concept of 'embeddedness'. Karl Polanyi argued that markets are not only blends of economic relations but also socially embedded. Polanyi, as well as others who have built on his work, have argued that labour alongside the other 'fictitious' commodities (land and money) are embedded within a complex variety of social relations and institutions, so that the abstraction of these into commodities for sale on markets ignores the essence and function of the social embeddedness, to the detriment of the respective fictitious commodity.⁹ In addition to a variety of social relations, labour laws and a set of institutions socially embed labour, in that they provide protection and partly mitigate the commodifying and exploitative effects of the systemic and individual subordination of

⁹ K. Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (2001 [1944]) 57; S. Frerichs, 'Karl Polanyi and the Law of Market Society' (2019) 44 *Österreichische Zeitschrift für Soziologie* 197, at 200.

labour to capital, which is the essence of all work relations in capitalist economies.¹⁰ Agriculture is entangled in the overall value chain dynamics of food production globally.¹¹ In Germany, the combination of strong retail actors keeping food prices low and farmers' practices developed to accommodate those price pressures has resulted in intensified commodification of the workers involved, particularly when it comes to seasonal migrant workers.¹²

Developments in the post-war era in the Global North – a period that is referred to as 'embedded liberalism'¹³ or '*les Trente Glorieuses*' in the context of North-Western Europe – have resulted in politics and regulations that have socially embedded a significant portion of the overall working population in that part of the world.¹⁴ However, an equally significant portion of the working population has never been truly included within such socially embedding structures, or at least the embedding effect of those structures has been markedly less palpable.¹⁵ Migrant workers in general belong to this category of working people who have to a large extent remained outside of the embedding structures of the embedded liberalism era.¹⁶ Embedding institutions have even sometimes worked to the detriment of migrant workers.¹⁷ In spite of formal principles of equal treatment and various success stories of collective resistance,¹⁸ the extent to which migrant workers, let alone seasonal migrant workers, have been integrated into structures of collective representation such as trade unions or work councils has remained limited in most countries in the Global North.¹⁹ Even in the EU (or the European Communities, as it was known during *les Trente Glorieuses*), where free movement rights and principles of equal treatment have – in theory, at least – removed many of the obstacles that generally give rise to migrant workers' status as a

¹⁰ V. Bogoeski, 'The Revision of the Posted Workers Directive as a Polanyian Response to Commodification of Labor in Europe' (2021) 2 *Global Perspectives* 1.

¹¹ On this diagnosis, see T. Ferrando et al., 'Commons and Commoning for a Just Agroecological Transition: The Importance of De-Colonising and De-Commodifying Our Food Systems' in *Resourcing an Agroecological Urbanism: Political, Transformational and Territorial Dimensions*, eds C. Tornaghi and M. Dehaene (2021) 61.

¹² J. Schneider and M. Götte, *Are Agri-Food Workers Only Exploited in Southern Europe? Case Studies on Migrant Labour in Germany, the Netherlands, and Sweden* (2020) 7, at <<https://www.opensocietyfoundations.org/publications/are-agri-food-workers-only-exploited-in-southern-europe>>. An analysis of the relationship between the differing motivations of states, retailers, and farmers to keep prices low is beyond the scope of this article: see M. Fakhri, *Food Systems and Human Rights: Interim Report of the Special Rapporteur on the Right to Food* (2021) A/76/237, at <<https://www.ohchr.org/en/documents/thematic-reports/a76237-food-systems-and-human-rights-interim-report-special-rapporteur>>.

¹³ J. G. Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order' (1982) 36 *International Organization* 379; D. Ashiagbor, 'Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration' (2013) 19 *European Law J.* 303.

¹⁴ For a critique of uncritical reminiscence of this period, forgetting who was excluded from such embedding structures, and an absolute obliviousness regarding labour in the colonies and ex-colonies, see Ashiagbor, op. cit., n. 2; A. Blackett, 'Emancipation in the Idea of Labour Law' in *The Idea of Labour Law*, eds G. Davidov and B. Langille (2011) 420.

¹⁵ Blackett refers to the different categories of marginalized workers who fall outside of the domain of protection offered through labour law and protective institutions as the 'South in the North': Blackett, id., p. 428.

¹⁶ See the discussions in O. Fedjuk and P. Stewart (eds), *Inclusion and Exclusion in Europe: Migration, Work and Employment Perspectives* (2018).

¹⁷ In the UK context, see M. Dias-Abey, 'Determining the Impact of Migration on Labour Markets: The Mediating Role of Legal Institutions' (2021) 50 *Industrial Law J.* 532.

¹⁸ L. H. Adler et al. (eds), *Mobilizing against Inequality: Unions, Immigrant Workers, and the Crisis of Capitalism* (2014).

¹⁹ A. Gorodzeisky and A. Richards, 'Trade Unions and Migrant Workers in Western Europe' (2013) 19 *European J. of Industrial Relations* 239. See also the discussions in R. Penninx and J. Roosblad (eds), *Trade Unions, Immigration, and Immigrants in Europe, 1960–1993: A Comparative Study of the Attitudes and Actions of Trade Unions in Seven West European Countries* (2002).

source of vulnerability and exploitation (such as short-term visa regimes),²⁰ many disembedding aspects have still remained in place.²¹ In addition, legislation that applies to migrant workers in theory has often failed to protect them in practice due to different forms of structural isolation and exclusion as well as lack of systemic oversight and enforcement of this regulation.²²

Seasonal migrant workers, especially in agriculture, constitute an even more extreme example of disembedded and exploitable labour than other categories of more permanent migrant labour in other industries. The level of disembeddedness is even higher in comparison with most categories of non-migrant workers. Before delving into the specific aspects of disembeddedness in the context of seasonal migrant labour, I would like to briefly expand on the term ‘seasonal migrant work(er)’ in the context of German agriculture.

Seasonal migrant farmworkers are far from a new phenomenon on German fields as well as in the scholarly discourse. As early as the nineteenth century, when Max Weber commented on Polish migrant farmworkers on the East Elbian fields,²³ seasonal migrant farmworkers were essential for the functioning of German agriculture and food production.²⁴ Currently, German agriculture depends on around 300,000 seasonal workers every year, most of whom are migrant workers from the Central and Eastern EU member states.²⁵ While there are limited annual seasonal migrant quotas for countries outside the EU,²⁶ the majority of seasonal migrant farmworkers on German fields come from EU member states (mostly Romania, Poland, and Bulgaria).²⁷

Given the latter, one might ask, why then use the term ‘migrant workers’ and not ‘EU mobile workers’, ‘EU seasonal workers’, or something else that would imply that most of these workers are EU citizens and thus automatically have a greater set of rights applying to them than to migrant workers ‘proper’? I propose to use the term ‘seasonal migrant farmworkers’ as the ‘mobile worker’ designation might detract from the fact that these workers are indeed migrants, coming from a different social and legal context to undertake temporary work in another state. The term ‘mobile worker’ applied in this context downplays the level of structural disembeddedness of these workers from the social and institutional structures that embed labour in the place where the seasonal work is being undertaken. While recognizing that being subjected to a (short-term) visa regime exacerbates overall precarity in addition to the other challenges inherent to migrant worker status,²⁸ using the term ‘migrant workers’ has the function of indicating that these workers are facing

²⁰ B. Anderson, ‘Migration, Immigration Controls and the Fashioning of Precarious Workers’ (2010) 24 *Work, Employment and Society* 300.

²¹ I. Wagner and N. Lillie, ‘European Integration and the Disembedding of Labour Market Regulation: Transnational Labour Relations at the European Central Bank Construction Site’ (2014) 52 *J. of Common Market Studies* 403.

²² M. Kullmann, *Enforcement of Labour Law in Cross-Border Situations: A Legal Study of the EU’s Influence on the Dutch, German, and Swedish Enforcement Systems* (2015).

²³ M. Weber, ‘Developmental Tendencies in the Situation of East Elbian Rural Labourers’ (1979) 8 *Economy and Society* 177.

²⁴ J. Schmidt, “‘Man erntet, aber man weiß noch nicht, was man dafür kriegt’: Kalkulationen deutscher Landwirte und rumänischer Saisonarbeitskräfte’ in *Vernetzt, entgrenzt, prekär? Kulturwissenschaftliche Perspektiven auf Arbeit im Wandel*, eds S. Groth et al. (2020) 67, at 67. See also D. B. Anong, “‘Saisonarbeitskräfte dringend benötigt’: das Regime landwirtschaftlicher Saisonarbeit in Deutschland im Kontext der Corona-Pandemie’ (2021) IMIS Working Paper 09, 9.

²⁵ Schneider and Götte, op. cit., n. 12, p. 4. See also Initiative Faire Landarbeit, op. cit., n. 8, pp. 4, 6–7.

²⁶ In 2021, this included Georgia, in addition to the regular Bosnia-Herzegovina, North Macedonia, Serbia, and Turkey: see Schneider and Götte, id., p. 9. It also included Ukraine and Moldova: see Initiative Faire Landarbeit, id., pp. 7–8.

²⁷ Id.

²⁸ Anderson, op. cit., n. 20.

most of the challenges that any seasonal migrant worker would confront, notwithstanding the fact that they might have a formal right that gives them the opportunity to move freely across Europe, which is objectively a privilege compared to workers within different visa schemes. However, the restrictions on movement (the prohibition of leaving fields and accommodation facilities) and the increased dependence on employers witnessed during the pandemic in the context of seasonal migrant work in Germany (including even the seizure of passports and identification documents (IDs)) confirm the centrality of the migrant reality to seasonal workers' experience.

The characteristics of seasonal migrant labour in agriculture that result in such high levels of disembeddedness and exploitability, not only during the pandemic but in general, are manifold. Some are typical for many categories of migrant labour, particularly the language barrier or the lack of familiarity with the legal and social context of the 'host' society. Though not entirely foreign to other categories of migrant labour, other characteristics are more typical of or significantly exacerbated in the case of seasonal migrant farmwork. Within the latter category, I consider (1) the short-term nature of seasonal work, which renders familiarization with the local social and institutional context almost impossible; (2) the two-fold isolation of seasonal migrant farmworkers – both isolation from their usual social networks and support systems in their home societies, and also physical isolation from the host (German) society, as farms and accommodation facilities are physically far away from most places where social interaction occurs; (3) the high degree of financial precarity, as many seasonal farmworkers are not in employment in their home countries;²⁹ (4) the high level of dependence on employers, given the previous characteristics; and (5) the lack of collective organization (partly due to the short-term nature of the job) and limited access to collective structures that may offer protection and representation to seasonal migrant workers.

Disembedded in this way, seasonal migrant labour in agriculture is easily exploitable, as atomized workers, mostly external to structures of collectively organized labour, are employed for short periods of time as a 'disposable resource'.³⁰ The EU's core-periphery constellation, with palpable material inequality between the North-Western core and (particularly) the Eastern periphery, sustains such treatment of seasonal migrant workers, as the conditions of poverty in particular regions in the East create the impression of an abundance of available workers who would accept work under any conditions as long as it might improve their livelihoods in the long run.³¹

Those structural conditions that facilitate the disembedding and commodification of labour³² render seasonal migrant workers easily exploitable and result in their actual exploitation. The term 'exploitation' in this context describes the practice of systemically taking advantage of workers due to their precarious position in a given labour market.³³ For the purpose of this analysis, a particular practice is considered to be exploitative not only when it takes a most extreme form, as in the cases of slavery and forced labour, but also when several factors combine to determine

²⁹ V. Bogoeski, 'Harvesting Injustice' *Verfassungsblog*, 20 April 2021, at <<https://verfassungsblog.de/harvesting-injustice/>>.

³⁰ R. Bejan, 'COVID-19 and Disposable Migrant Workers' *Verfassungsblog*, 16 April 2020, at <<https://verfassungsblog.de/covid-19-and-disposable-migrant-workers/>>. For a broader discussion of disposability, see M. W. Wright, *Disposable Women and Other Myths of Global Capitalism* (2006).

³¹ Bogoeski, op. cit., n. 4.

³² S. Rosewarne, 'Globalisation and the Commodification of Labour: Temporary Labour Migration' (2010) 20 *The Economic and Labour Relations Rev.* 99.

³³ For a broader discussion of the term 'exploitation', see J. Wolff, 'Structures of Exploitation' in *Philosophical Foundations of Labour Law*, eds H. Collins et al. (2019) 175. On the legal forging of structures of exploitation, see V. Mantouvalou, 'Legal Construction of Structures of Exploitation' in *Philosophical Foundations of Labour Law*, eds H. Collins et al. (2019) 188.

workers' precarious position and foreclose the possibility of improving that position individually or collectively.

It is crucial to stress that the disembedding structures that lead to exploitation are not a natural or inevitable result of markets, or of labour markets in particular.³⁴ On the contrary, the disembedding, commodification, and exploitation that occur come as a result of political choices, legal measures, and their enforcement (or the lack thereof), which together give rise to the complex structures that govern work in a particular industry.³⁵ For the purpose of this article, these institutional structures are to be understood as the aggregate of practices (by farmers, agribusiness, and governing institutions), laws, and policy instruments, as well as the institutions that secure their implementation, that directly or indirectly place groups of workers in a special position of vulnerability that employers systemically exploit. The following sections outline these structures of exploitation in the context of seasonal migrant farmworkers in Germany prior to and during the pandemic.

3 | INSTITUTIONAL STRUCTURES PRIOR TO THE PANDEMIC

Before outlining the institutional framework, it is important to acknowledge that seasonal migrant farmworkers are a diverse category rather than a homogeneous group of working people, as the phrase itself might imply. The varying demographic characteristics and the particularities of harvesting specific vegetables or fruits that imply different levels of strenuousness of the work and ultimately different working conditions might be obscured by the umbrella term 'seasonal farmwork', which refers to all workers as a single group. However, the article still regards seasonal migrant farmworkers as a category, as it discusses the structures and changes during the pandemic that apply to most seasonal migrant farmworkers regardless of the differences between, for instance, EU and non-EU seasonal workers, or workers from different branches of agriculture or regions in Germany.

Germany has not yet ratified International Labour Organization (ILO) Convention No. 184 on Safety and Health in Agriculture, though this is something that the new coalition government has recently announced will change.³⁶ Hence, the country currently has no comprehensive source of regulation of worker protection in agriculture, but instead a rather fragmented regulatory regime. From the EU legal framework, in addition to general free movement principles and associated rights, the Seasonal Workers Directive,³⁷ for instance, is relevant for the German context, though the majority of seasonal farmworkers are from EU member states.³⁸

³⁴ For a critical discussion of markets as natural order in neoclassical economics tradition, see B. E. Harcourt, *The Illusion of Free Markets: Punishment and the Myth of Natural Order* (2011).

³⁵ This may be read as a legal institutionalist perspective. For a detailed discussion of legal institutionalism in the context of labour markets and migration, see Dias-Abey, op. cit., n. 17.

³⁶ V. Bogoeski, 'Essential, and yet on the Margins' *Verfassungsblog*, 21 December 2021, at <<https://verfassungsblog.de/essential-and-yet-on-the-margins/>>.

³⁷ Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the Conditions of Entry and Stay of Third-Country Nationals for the Purpose of Employment as Seasonal Workers [2014] OJ L94/375 (Seasonal Workers Directive).

³⁸ It is still overall a very important instrument even in Germany, as third-country nationals are present and their presence could increase in the future, as demonstrated by the recruitment of Georgian workers in 2021: see G. Lomsadze, 'Germany's New Gastarbeiters: Georgians' *Eurasianet*, 19 March 2021, at <<https://eurasianet.org/germanys-new-gastarbeiters-georgians>>. The bilateral agreement set a quota of 5,000 Georgian workers, but fewer than 200 worked on German farms during the harvest season in 2021: Initiative Faire Landarbeit, op. cit., n. 8, p. 4.

Social Security Regulation 823/2004 and its later additions (Regulation 987/2009 as well as Regulation 1231/2010, which extended the former to short-term third-country national (TCN) migrant workers residing and working in another EU member state) provide for a principle of equal treatment regarding social security, with the possibility for exception in the case of family benefits and unemployment benefits according to Article 23(2)(i).³⁹ The recently revised Posted Workers Directive⁴⁰ and the Seasonal Workers Directive both contain provisions on accommodation facilities, but the transposed legislation does not directly apply to EU short-term seasonal workers.⁴¹ Finally, unions see some hope in the recent political agreement between the EU Commission, the Council of the EU, and the European Parliament to adopt the social conditionality clause for funding under the Common Agricultural Policy (CAP), though it remains to be seen how this policy will be implemented in the future.⁴²

In principle, many of the minimum protection standards and rules in German (labour) law apply to seasonal workers. The most relevant ones include the Working Time Law,⁴³ the National Statutory Minimum Wage Law,⁴⁴ the Workplace Regulation (including provisions on housing),⁴⁵ and the Social Code regarding social, health, and pension security.⁴⁶ In 2015, a minimum wage for seasonal farmworkers was introduced through a collective agreement,⁴⁷ and the national statutory minimum wage has applied to seasonal migrant farmworkers since 2018.⁴⁸

This legal structure operates within an institutional context of entangled political and business actors⁴⁹ as well as control and enforcement authorities, which play a crucial role in its development and implementation. The Customs Office (Zollamt) and the Financial Control and Undeclared Work Unit (Finanzkontrolle Schwarzarbeit (FKS)) monitor payment, working time documentation, and social security requirements. There are also local public health authorities (*Gesundheitsämter*) that monitor conditions in the accommodation facilities, work-related transportation, and safety at the workplace. In addition, at the EU and national level, social partners such as trade unions and employers' organizations have influence over legislative

³⁹ H. Verschueren, 'Employment and Social Security Rights of Third-Country Nationals under the EU Labour Migration Directives' (2018) 20 *European J. of Social Security* 100, at 109.

⁴⁰ Directive 2018/957/EU of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC Concerning the Posting of Workers in the Framework of the Provision of Services (Text with EEA Relevance) [2018] PE/18/2018/REV/1 OJ L173 (Posted Workers Directive), pp. 16–24.

⁴¹ Initiative Faire Landarbeit, op. cit., n. 6, p. 9.

⁴² EU Commission, 'Political Agreement on New Common Agricultural Policy: Fairer, Greener, More Flexible' *EU Commission*, 25 June 2021, at <https://ec.europa.eu/commission/presscorner/detail/en/IP_21_2711>. See also Initiative Faire Landarbeit, op. cit., n. 8, pp. 30–31.

⁴³ Working Time Law 1994 (Arbeitszeitgesetz (ArbZG)), last revised through Art. 6G, 22 December 2020, I 3334.

⁴⁴ National Statutory Minimum Wage Law 2014 (Mindestlohngesetz (MiLoG)), last revised through Art. 1, 28 June 2022, I 969. Since July 2022, the national gross hourly wage has been €12. This can be higher or lower according to sectoral collective agreements and exceptions to the national statutory minimum wage.

⁴⁵ Workplace Regulation 2004 (Arbeitsstättenverordnung (ArbStättV)).

⁴⁶ Social Code 1976 (Sozialgesetzbuch (SGB)), Book IV.

⁴⁷ Schneider and Götte, op. cit., n. 12, p. 7.

⁴⁸ Since July 2022, the national gross hourly wage that applies to seasonal migrant workers in agriculture has been €10.45: Third Ordinance for Adjustment of the Minimum Wage Level (Dritte Mindestlohnanpassungsverordnung (MiLoV3)), 13 November 2020.

⁴⁹ For example, the extension of the social security exemption was a result of successful lobbying by the agricultural sector: see Initiative Faire Landarbeit, op. cit., n. 6, p. 4.

proposals,⁵⁰ while at the local level unions can access workers for information campaigns and to observe working conditions (albeit not without difficulties).⁵¹ Though still marginal, there are a variety of formal and informal networks, independent or union based, offering different kinds of support to migrant farmworkers.⁵² Finally, labour courts – in theory, at least – are also part of the overall institutional framework.

In a context in which several powerful retailers dominate the market and maintain low prices of food products and thus low costs for the overall production process,⁵³ such employer practices as normalized overtime work, cutting overtime hours from payrolls, calculating wages based on piecemeal work, and charging high rents for crowded accommodation facilities (often as wage deductions) were widespread in agricultural work long before the pandemic.⁵⁴ This was largely because of the general lack of oversight from enforcement authorities, mostly due to capacity issues (the authorities being chronically understaffed and underfinanced);⁵⁵ limited union access (as most workers are non-members); and ultimately structural limitations inhibiting seasonal migrant farmworkers' access to the labour courts.⁵⁶ The next sections examine how the effects of this pre-existing legal and institutional framework that disembeds seasonal migrant labour have been exacerbated during the COVID-19 pandemic.

4 | DEVELOPMENTS DURING THE PANDEMIC: POLITICAL RESPONSES AND LEGAL INTERVENTIONS

There have been two main categories of changes regarding the German legal framework regulating conditions of seasonal agricultural work during the pandemic. The first concerns the safety conditions at the workplace and in the accommodation facilities, and the second relates to the social security rules applying to seasonal workers.

The so-called 'Concept Paper' published by the Ministry for Food and Agriculture and the Ministry of the Interior, which was released during the initial COVID-19 outbreak in early 2020,

⁵⁰ However, institutions of collective worker representation can still be systemically excluded from policy- and law-making processes. For instance, the relevant trade union representing agricultural workers (IG BAU) was not invited to be part of the Future Commission Agriculture (Zukunftskommission Landwirtschaft). The commission was a body of experts and stakeholders constituted by Chancellor Merkel in response to farmers' grievances against the agricultural politics of the federal government: see Initiative Faire Landarbeit, op. cit., n. 8, pp. 28–29.

⁵¹ Initiative Faire Landarbeit, op. cit., n. 6. Members of the Fair Work in Agriculture Initiative (Initiative Faire Landarbeit) reported that during the second pandemic harvest season (2021) it was particularly difficult to reach workers, as employers often prevented access: Initiative Faire Landarbeit, op. cit., n. 8, p. 16.

⁵² See for example the Fair Mobility (Faire Mobilität) network of trade union-affiliated counselling services for migrant workers from Central and Eastern Europe, whose counsellors were interviewed for this research.

⁵³ Schneider and Götte, op. cit., n. 12, p. 7.

⁵⁴ Schmidt, op. cit., n. 24. See also Section 5 below.

⁵⁵ The trade union Vereinte Dienstleistungsgewerkschaft (ver.di) has pointed out this problem: ver.di, 'ver.di setzt sich für eine Stärkung der Finanzkontrolle Schwarzarbeit ein' ver.di, 12 January 2021, at <<https://www.verdi.de/presse/pressemitteilungen/++co++af9cc802-54d4-11eb-b026-001a4a160129>>.

⁵⁶ See later the discussion of the interviews in Section 5 below. For some observations on general issues with access to courts for EU migrants, see C. Barnard and S. Fraser Butlin, 'The Rule of Law and Access to the Courts for EU Migrants' (2020) 58 *J. of Common Market Studies* 1621; C. Barnard and A. Ludlow, 'Enforcement of Employment Rights by EU-8 Migrant Workers in Employment Tribunals' (2016) 45 *Industrial Law J.* 1.

introduced the main changes in response to the new circumstances of the pandemic.⁵⁷ First, the paper implemented a 14-day ‘quarantine with the possibility of working at the same time’ upon arrival. This form of ‘group quarantine’, permitting limited contact only between a strictly designated group of workers at the workplace and in the accommodation facilities, was criticized for the possibilities that it entailed for the spread of infection. In practical terms, groups of up to 20 people were set to work and live separately from other groups, regardless of whether individual workers were arriving from different cities and regions, possibly infecting each other.⁵⁸ Moreover, during the period of quarantine, employers had to provide catering. Visits to the farm premises, including the accommodation facilities, were prohibited. Room occupancy had to be at ‘half capacity’. Given that overcrowded accommodation facilities were typical for German agriculture during harvest seasons prior to the pandemic, this rule was very vague, because it was not entirely clear what ‘half capacity’ meant in terms of actual numbers.

In addition to regulations on social distancing and hygiene as well as on transportation from and to the fields, the Concept Paper decreed that entry into and exit from Germany had to be registered exclusively by employers, with the federal police or via the official portal set up for this purpose. This resulted in increased dependence on employers, as free movement rights for seasonal workers from EU member states, enabling them to enter and leave Germany at will, were no longer in place. Workers could neither leave their farms nor the country if things were not going as expected or desired. The requirements for registration through employers and most of the mobility restrictions were lifted in 2021 (though general testing and quarantine requirements remained in place).⁵⁹

The legally allowed working time was extended throughout all essential industries and professions up to 60 hours weekly and 12 hours daily, without an extra approval or permit that employers would ordinarily need. Daily resting time was shortened to nine hours and, albeit only permitted in exceptional circumstances, maximum working time was extended up to 12 hours a day, six days in a row.⁶⁰

At the EU level, after a Resolution of the EU Parliament on 19 June 2020,⁶¹ the European Commission released guidelines on seasonal migrant workers in relation to the pandemic on 16 July 2020.⁶² These guidelines encouraged countries to better protect seasonal workers, particularly urging improved social security protection – something that was especially critical in the German

⁵⁷ Ministry for Food and Agriculture and Ministry of the Interior, ‘Konzeptpapier: “Saisonarbeiter in der Landwirtschaft im Hinblick auf den Arbeits- und Gesundheitsschutz” Bundesministerium für Ernährung und Landwirtschaft, 10 June 2020, at <https://www.bmel.de/SharedDocs/Downloads/DE/_Landwirtschaft/konzept-saisonarbeitskraefte-corona-200610.html>.

⁵⁸ Id. Further regulations issued by the Ministry for Food and Agriculture specified that there should be four workers in a group but permitted larger groups of up to 15 workers where particular machines required it: Ministry for Food and Agriculture, ‘Rahmenbedingungen für Saisonbeschäftigte in der Landwirtschaft im Hinblick auf die Corona Pandemie’ Bundesministerium für Ernährung und Landwirtschaft, 15 November 2021, 4, at <<https://www.bmel.de/DE/themen/landwirtschaft/agrarsozialpolitik/informationen-saisonarbeitskraefte-corona.html?sessionid=A59B02B2FF86A90E05663884CE2C2963.live922>>.

⁵⁹ Ministry for Food and Agriculture, id.

⁶⁰ Ministry for Food and Agriculture and Ministry of the Interior, op. cit., n. 57.

⁶¹ European Parliament Resolution of 19 June 2020 on European Protection of Cross-Border and Seasonal Workers in the Context of the COVID-19 Crisis (2020/2664(RSP)).

⁶² European Commission, *Guidelines on Seasonal Workers in the EU in the Context of the COVID-19 Outbreak* (2020) C(2020) 4813, at <https://ec.europa.eu/info/sites/default/files/guidelines_on_seasonal_workers_in_the_eu_in_the_context_of_the_covid-19_outbreak_en.pdf>.

context. In fact, one of the most controversial changes to make the already precarious position of seasonal migrant farmworkers in Germany even worse was the intervention in the social security rules. The original period of 70 working days (three months) during which employers of seasonal migrant workers were generally exempted from mandatory social insurance requirements prior to the pandemic was extended to 115 working days during the first pandemic harvest season in 2020. One year later, on 22 April 2021, the Parliament (Bundestag) adopted a Proposal of the Ministry for Food and Agriculture, according to which the period of exemption was reduced to 102 working days (four months).⁶³

Before delving into a discussion of the actual and potential consequences of the extension of the social security exemption, it is worth considering its origin and the broader context within which such general exemption was originally introduced and applied to the reality of seasonal migrant work. Seasonal work in Germany falls into the category of ‘short-term marginal employment’ (*‘kurzfristige Beschäftigung’*).⁶⁴ Since the introduction of the Social Security Code (SGB IV) in 1976, short-term marginal employment was completely excluded from the general social security system on two conditions. First, any short-term marginal employment had to be limited to a maximum of 50 workdays (two months) per year, and second, it could not be the worker’s ‘primary employment activity’ (*‘berufsmäßig ausgeübt’*), only a supplementary source of income.⁶⁵ The second condition implies that those in short-term marginal employment already have social security arrangements elsewhere (as students or pensioners or through their main employment or family insurance schemes). In 2014, the maximum duration was extended to 70 working days (three months) per year.⁶⁶

Prior to the pandemic, seasonal work of up to 70 working days per year was almost automatically treated as short-term marginal employment and was thus excluded from the generally mandatory social security requirements. Ironically, the principles of equal treatment from EU Social Security Regulation 823/2004⁶⁷ partly allow seasonal work, including that undertaken by foreign seasonal workers, to be treated in the same way as short-term marginal employment. While this purported ‘equal treatment’ is mainly founded on the short-term duration of the employment in seasonal farmwork, the current reality of seasonal migrant farmworkers does not correspond to the work relations originally targeted by the neoliberal labour market policies, according to which social security exemption in the case of short-term marginal employment was justified to stimulate employment and overall economic activity.⁶⁸

Currently, the main criteria for treating seasonal migrant workers as short-term marginal employees are rarely satisfied, for two reasons. First, the requirement that the short-term employment should not be the ‘primary employment’ (*‘berufsmäßig’*) and should only serve as a supplementary source of income (*‘Hinzuverdienst’*) is mostly not fulfilled, as seasonal migrant workers from Europe’s Eastern periphery are often unemployed in their home countries and so the

⁶³ Beschlussempfehlung und Bericht des Ausschusses für Ernährung und Landwirtschaft (10. Ausschuss) zu dem Gesetzentwurf der Bundesregierung: Drucksache 19/26840 – Entwurf eines Vierten Gesetzes zur Änderung des Seefischereigesetzes, 21 April 2021, para. 132, at <<https://dserver.bundestag.de/btd/19/268/1926840.pdf>>.

⁶⁴ SGB, op cit., n. 46, Book IV, Art. 8, ‘Kurzfristige Beschäftigung’.

⁶⁵ Id.

⁶⁶ Introduction of SGB, id., Book IV, para. 115 into Tarifautonomiestärkungsgesetz, Art. 9 from 11 August 2014.

⁶⁷ Seasonal Workers Directive, op. cit., n. 37, Art. 23.

⁶⁸ W. Eichhorst et al., *Geringfügige Beschäftigung: Situation und Gestaltungsoptionen* (2012).

seasonal work is their main source of income.⁶⁹ Second, the non-fulfilment of the first condition almost automatically means that the assumption that workers are integrated in a social security system elsewhere is also inaccurate. These false assumptions on which the current exclusion of seasonal migrant farmworkers rests are sustained through politics ignoring the reality (which is documented through various sources but not official and reliable state-level data) and a lack of systemic oversight and controls.⁷⁰ For example, certifications that prove that social security is paid in workers' home countries, such as A1 forms, are not systematically checked,⁷¹ and the authenticity of such documents often cannot easily be verified.⁷²

5 | SEASONAL MIGRANT FARMWORKERS' EXPERIENCES DURING THE PANDEMIC

Unrelated to the pandemic, there is, in general, a lack of official and reliable data on seasonal farmworkers in Germany.⁷³ Between 15 March and 15 June 2020, 40,318 seasonal workers entered the country (at least, that is the number of workers who were registered by their employers), which was fewer than the originally expected 80,000.⁷⁴ The Association of South German Asparagus and Strawberry Farmers (Verband Süddeutscher Spargel- und Erdbeeranbauer (VSSE)), based on a survey conducted among their members, estimates that during the 2020 harvest season for asparagus and berries there were 28 per cent fewer seasonal workers compared to the year before.⁷⁵ This increased pressure on the workers present on the fields.⁷⁶

This article aims to partly fill the gap regarding data and current knowledge about the situation of seasonal migrant farmworkers on German fields through introducing new data collected by means of written interviews conducted with counsellors for migrant workers from trade union-affiliated counselling centres. It is important to make clear that though the article speaks of migrant farmworkers' experiences, we learn about these experiences not from first-hand sources, which would be the workers themselves, but through intermediaries – namely, the counsellors. Trade union-affiliated counselling centres, which offer information and counselling services in all Central and Eastern European languages, are often the first point of contact for seasonal migrant farmworkers experiencing work-related problems or seeking general information while

⁶⁹ Deutscher Gewerkschaftsbund, 'Miserable Bedingungen für Saisonarbeitnehmer*innen beenden: DGB und IG BAU fordern sozialversicherungspflichtige Beschäftigung' *DGB*, 25 February 2022, at <<https://www.dgb.de/themen/++co++9ae2a64a-728c-11eb-be71-001a4a160123>>. See for example *Emerging Europe*, 'Destination Germany: Desperate to Leave Romania, Farm Workers Besiege Airports' *Emerging Europe*, 10 April 2020, at <<https://emerging-europe.com/news/destination-germany-desperate-to-leave-romania-farm-workers-besiege-airports/>>; Initiative Faire Landarbeit, op. cit., n. 8, p. 15.

⁷⁰ Bogoeski, op. cit., n. 29.

⁷¹ On the issue of a lack of controls, see Initiative Faire Landarbeit, op. cit., n. 8, p. 11.

⁷² This has been established in studies and discussions on the East–West posting of workers in various sectors: see for example N. Rennuy, 'Posting of Workers: Enforcement, Compliance, and Reform' (2020) 22 *European J. of Social Security* 212. See also Bogoeski, op. cit., n. 29.

⁷³ Schneider and Götte, op. cit., n. 12, p. 4.

⁷⁴ Initiative Faire Landarbeit, op. cit., n. 6, p. 9.

⁷⁵ According to their research, the VSSE estimates that there were 106,000 seasonal workers, where usually there would be 146,000: id., p. 8.

⁷⁶ Id. This was also often reflected in the responses of the interviewed counsellors for migrant workers.

working in Germany. Having processed dozens of cases involving seasonal migrant workers and having had direct contact with numerous workers over the years, these counsellors are well (if not best) placed to observe the developments affecting the working and living conditions of seasonal migrant workers during the pandemic.

During May and June 2021, I collected information from ten such counselling centres, based in eight federal states in Germany, which offer counselling services for migrant workers related to labour and social law concerns. Each counsellor answered 35 questions in writing. Eight of the ten counsellors belong to the Fair Mobility (Faire Mobilität) network of counselling centres, which is institutionally linked to the German Trade Union Confederation (Deutscher Gewerkschaftsbund (DGB)).⁷⁷ These Fair Mobility counselling centres are in Mannheim (Baden-Württemberg), Stuttgart (Baden-Württemberg), Frankfurt am Main (Hesse), Oldenburg (Lower Saxony), Kiel (Schleswig-Holstein), Munich (Bavaria), Dortmund (North Rhine-Westphalia), and Nuremberg (Bavaria). The other two are the Good Work Counselling Centre (Beratungszentrum Gute Arbeit), affiliated to the regional branch of the DGB in Berlin, and the Work and Living Counselling Centre (Beratungszentrum Arbeit und Leben) in Potsdam (Brandenburg), affiliated to the regional branch of the DGB. The counsellors document the contacts and cases that they process each month, and from this data the Fair Mobility network generates annual statistics.⁷⁸ Interviewing counsellors from eight federal states and thus eight different agricultural regions ensures the geographical representativeness of the data. Though the interviewed counsellors are based in eight federal states, they receive calls and counselling requests from workers in regions outside the federal state in which they are based. Hence, the ten counsellors process requests from all over Germany. During the pandemic, access to farms and accommodation facilities was very limited, making it difficult or even impossible to interview workers directly. The counsellors were the closest source of information to seasonal migrant workers themselves, as they directly witnessed the workers' experiences. Moreover, the counsellors were perfectly placed to assess changes during the pandemic as they had experience of counselling seasonal migrant farmworkers for many years prior to the COVID-19 outbreak.

One might expect that the increased media focus on the topic of seasonal farmwork since the beginning of the pandemic might have led to increased numbers of cases at the counselling centres. However, most interviewed counsellors noticed no changes in 2021 compared to the previous year – and, interestingly, to the years prior to the pandemic, with some relatively insignificant exceptions.⁷⁹ The counselling centres, with some small differences, have had similar experiences with seasonal migrant workers in terms of numbers. At the time that the interview data was collected (May and June 2021), none of the centres had experienced a large number of contacts/calls from seasonal migrant workers; the number remained within the range of 1 to 8 per cent of the total number of cases processed at the counselling centre. In terms of actual case numbers, that means on average between two and eight (or more in some instances) counselling requests per month, depending on the counselling centre. According to the interview data, most requests were

⁷⁷ See *Faire Mobilität*, at <<https://www.faire-mobilitaet.de/en>>.

⁷⁸ Some annual statistics are available at *Faire Mobilität*, 'Studien Faire Mobilität' *Faire Mobilität*, at <<https://www.faire-mobilitaet.de/ueber-uns/++co++af7d0f74-fb2b-11e5-b0c3-52540023ef1a>>.

⁷⁹ From the interview data that I collected, for example, the counsellor from Fair Mobility Stuttgart reported a slight increase in the number of times that they had been contacted by seasonal migrant farmworkers during the pandemic, while the counsellors based in Kiel and Munich reported a slight decrease.

made by seasonal workers from Romania and Poland, followed by those from Bulgaria, Croatia, and Ukraine.⁸⁰

Drawing on the content of the requests and queries with which seasonal migrant workers reached out to counselling centres, I classify the problems faced by workers into two categories (Table 1). The first covers problems that were already well known and prominent in the period prior to the pandemic, while the second includes problems that only arose during the pandemic. However, as the analysis of the data later in the article demonstrates, both categories are interrelated. Most problems that seem to be pandemic specific are related to and often come as a result of structures that gave rise to the more general problems that existed in the period prior to the pandemic.

5.1 | Payment-related concerns

According to the interviews, the most frequent problem with which seasonal migrant workers reached out to the counselling centres was partly or entirely unpaid wages. This is a problem well known from the pre-pandemic era,⁸¹ and one that, according to the interviews, seems to mainly occur systemically due to the flawed implementation and enforcement of the current laws and regulations, rather than the laws and regulations themselves. The counsellors reported that irregularities with payment occur due to several practices that are widespread among farmers, such as non-transparent documentation and compensation of working hours or paying out a significant amount of the overall payment only immediately prior to workers' return to their home countries. According to the counsellors, workers often receive their payslips as well as the full amount of their pay only at the very end of the season, or at least at the end of their 'shift' during a particular season.⁸² That is often the point at which workers reach out to the counselling centres for assistance, as it is only then that they discover that they have been paid for fewer hours than they believe that they have worked.

Several features of seasonal migrant work in German agriculture facilitate such practices. The language barrier certainly hampers or even completely prevents communication between workers and administrative staff, let alone directly between workers and employers.⁸³ This leaves workers having to rely on designated 'foremen' who usually speak their particular language and are often long-term confidants of employers.⁸⁴ Furthermore, since workers often do not obtain evidence of their documented working time regularly, discrepancies between perceptions or even self-documentation by workers and what is ultimately compensated according to the official payslips can rarely be identified until shortly before workers depart. As the counsellor from Fair Mobility Nuremberg submitted, 'Very often people come to us on the day of payment. Usually they

⁸⁰ These numbers are also reflected in the demographics observed by the Fair Work in Agriculture Initiative, which reached around 2,500 seasonal workers with information campaigns during the harvest seasons of 2020 and 2021: see Initiative Faire Landarbeit, op. cit., n. 8, pp. 12–13.

⁸¹ See Initiative Faire Landarbeit, op. cit., n. 6; Schmidt, op. cit., n. 24.

⁸² Particularly stressed by the counsellors from the Fair Mobility centres in Kiel and Nuremberg.

⁸³ On the role of language, see M. Sargeant and E. Tucker, 'Layers of Vulnerability in Occupational Safety and Health for Migrant Workers: Case Studies from Canada and the UK' (2009) 7 *Policy and Practice in Health and Safety* 51.

⁸⁴ Reported by the counsellor from Fair Mobility Kiel.

TABLE 1 Overview of the most frequent problems with which migrant farmworkers reached out to trade union-affiliated counselling centres in Germany in 2020 and 2021

Rank	Problem that seasonal migrant farmworkers experience	Category: general/pandemic specific
1	Wages partly or entirely unpaid ^a	General
2	Substantial deductions for accommodation and food (among other things) ^b	General, exacerbated by the pandemic
3	Accommodation-related problems (poor accommodation conditions) ^c : several beds per room, poor hygiene conditions, disregard of social distancing rules	General, exacerbated by the pandemic
4	No payment during mandatory quarantine ^d	Pandemic specific
5	Obscurity and disregard of quarantine rules ^e	Pandemic specific
6	Working time (12–14 working hours daily) ^f	General, exacerbated by the pandemic
7	Health insurance ^g	General, exacerbated by the pandemic
8	Sick pay during quarantine (or in general) ^h	Pandemic specific
9	Non-transparent payslips ⁱ	General
10	Withholding of employment-related or personal documents (ID or travel documents) ^j	Unclear
11	Mobility restrictions during and after the mandatory quarantine ^k	Pandemic specific
	Other issues: minimum wage circumvented through piece rate/wage; ^l workplace accidents; ^m other deductions from wages (e.g. 'littering' costs); ⁿ taxes; ^o difficulties with the termination of the employment relationship during quarantine; ^p termination of employment in general; ^q no employment-related documentation issued (no employment contracts); ^r lack of information about COVID-19; ^s deductions for transport from Romania and intermediary services. ^t	

Note: The problems are ranked from most to least frequent according to my interview data. a: reported by all ten counsellors; b: reported by the counsellors from the Fair Mobility counselling centres in Mannheim, Stuttgart, Frankfurt am Main, Kiel, and Dortmund, and the counsellors from the Good Work Counselling Centre in Berlin and the Work and Living Counselling Centre in Potsdam; c: reported by the counsellors from the Fair Mobility counselling centres in Mannheim, Frankfurt am Main, Oldenburg, Munich, and Kiel, and the counsellor from the Good Work Counselling Centre in Berlin; d: reported by the counsellors from the Fair Mobility counselling centres in Stuttgart, Nuremberg, Munich, and Dortmund; e: reported by the counsellors from the Fair Mobility counselling centres in Munich, Oldenburg, and Kiel, and the counsellor from the Work and Living Counselling Centre in Potsdam; f: reported by the counsellors from the Fair Mobility counselling centres in Frankfurt, Dortmund, and Nuremberg; g: reported by the counsellors from the Fair Mobility counselling centres in Stuttgart and Kiel; h: reported by the counsellors from the Fair Mobility counselling centres in Nuremberg and Munich; i: reported by the counsellors from the Good Work Counselling Centre in Berlin and Fair Mobility Nuremberg; j: reported by the counsellors from the Good Work Counselling Centre in Berlin and Fair Mobility Munich; k: reported by the counsellor from the Good Work Counselling Centre in Berlin; l: reported by the counsellor from Fair Mobility Frankfurt am Main; m: reported by the counsellor from Fair Mobility Kiel; n: reported by the counsellor from Fair Mobility Munich; o: reported by the counsellor from Fair Mobility Stuttgart; p: reported by the counsellor from the Good Work Counselling Centre in Berlin; q: reported by the counsellor from Fair Mobility Kiel; r: reported by the counsellor from Fair Mobility Munich; s: reported by the counsellor from Fair Mobility Munich; t: reported by the counsellor from Fair Mobility Munich.

contact us through the hotline. Only then do they realize that the employer does not want to pay everything.⁸⁵

The following statement from the counsellor from Fair Mobility Kiel offers a summary of the techniques used to undermine working time documentation and remuneration rules, and also reflects the experience of some of the other interviewed counsellors:

Generally, seasonal workers receive the payslip after the completion of their engagement in a given harvest season and the final amount on said payroll often does not add up. The payslips show high deductions from the wages, [and] a number of hours that does not correspond to the actual one (overtime is not recorded, [and] weather-related work absences are not paid according to § 615 BGB).⁸⁶ The whole thing is further complicated by piecework calculations. The verification and calculation of the correct amount of wages is very difficult in practice and that is why the claims are so rarely enforced.⁸⁷

Fixed piecework rates are allowed as an exception and as long as they do not undermine the hourly minimum wage set by law or collective agreement.⁸⁸ This means that fixed piecework rates are only legal when they allow workers to earn more than what they would if calculated by hourly minimum wage. However, according to the interview data and reports by the Fair Work in Agriculture Initiative, seasonal migrant farmworkers are often remunerated only in line with fixed piecework rates. The rates are regularly set very high, at a level that is practically impossible to meet, so workers end up earning less than the statutory hourly minimum wage.⁸⁹

Another frequently mentioned concern related to reducing pay and making wage calculations opaque were the substantial deductions from wages on several grounds, most often for accommodation (€250–300 per person/bed for shared rooms per month)⁹⁰ and food, but also for work clothes.⁹¹ There are even entirely incomprehensible deductions, such as for ‘littering’.⁹²

Even if the authorities identify irregularities and fine employers, workers always need to claim unpaid wages or make other demands individually.⁹³ While it is important to understand the structural conditions that allow this practice of ‘wage theft’,⁹⁴ understood as unjustified cuts to actually performed working hours on final payslips, it is equally important to understand the options that workers have to claim their rights in such cases. From the experiences shared by the counsellors, there are three possible courses of action that can be taken to assist workers in their

⁸⁵ Reported by the counsellor from Fair Mobility Nuremberg (my translation from German).

⁸⁶ German Civil Code (Bürgerliches Gesetzbuch (BGB)), para. 615.

⁸⁷ Reported by the counsellor from Fair Mobility Kiel (my translation from German).

⁸⁸ *Arbeitsrechte*, ‘Was heißt Leistungsorientierte Bezahlung?’ *Arbeitsrechte*, 24 August 2022, at <<https://www.arbeitsrechte.de/leistungsorientierte-bezahlung/>>.

⁸⁹ The counsellor from Fair Mobility Munich reported piecework rates of ‘16 kilograms of asparagus per hour’ that she encountered in her counselling practice.

⁹⁰ Reported by the counsellor from Fair Mobility Mannheim.

⁹¹ *Id.*

⁹² Reported by the counsellor from Fair Mobility Munich.

⁹³ Initiative Faire Landarbeit, *op. cit.*, n. 8, pp. 12–13.

⁹⁴ For a theoretical discussion of the concept of ‘wage theft’, see B. Rogers, ‘Toward Third-Party Liability for Wage Theft’ (2010) 31 *Berkeley J. of Employment and Labor Law* 1.

struggle for recognition of working hours that have not been fully documented and compensated by employers. The first is to confront the employer with the wage claims, where counsellors, in cooperation with the relevant local trade unions, represent the interests of a specific worker or of a group of workers from the same workplace in the same situation, seeking to obtain recognition and compensation for undocumented working time in an out-of-court negotiation. Second, depending on the specific case, if a larger group of workers is involved, counsellors together with the relevant trade unions can offer assistance by organizing an ad hoc (collective) action, potentially with media coverage that might pressure employers into reconsidering and revising payslips and documented working hours. The third course of action – in theory, at least – is the judicial one. Almost none of the ten counsellors had had experience of a counselling case that had made it to the German labour courts, let alone one that had been successful.⁹⁵ The structural reasons why the judicial course of action often remains a priori foreclosed as an option are manifold: a lack of financial means, language barriers and a lack of basic knowledge to navigate a complex legal and institutional system, general mistrust of the authorities,⁹⁶ the usual length of the process, and the short duration of the workers' stay that implies a return to their home countries at the end of the harvest season.⁹⁷

5.2 | Accommodation facilities and mandatory quarantines

The problem of poor and unacceptable conditions in collective accommodation facilities for seasonal migrant workers working on German farms and fields has long been known.⁹⁸ Cramped rooms in stuffy containers in the summer heat have been identified as not only degrading but hazardous by unionists, counsellors, activists, and journalists over the years.⁹⁹ The conditions in the shared accommodation facilities were one of the main concerns with regards to letting seasonal migrant workers travel to Germany after the general travel ban during the first lockdown, as it was clear that the standard practice of having several beds per room would create ideal conditions for mass COVID-19 infection outbreaks.¹⁰⁰ Despite the rules that required accommodation facilities to operate at only half capacity,¹⁰¹ counsellors reported cases where rooms were still shared by a

⁹⁵ The only exception was reported by the counsellor from Fair Mobility Munich. Another prominent exception was a group of 18 Georgian seasonal workers who, assisted by German and Georgian trade unions as well as counsellors for migrant workers, filed a lawsuit at the labour court in Ravensburg (Baden-Württemberg) in 2021. The court decided the case in favour of the workers, but the employer has appealed the judgment. The case is still in progress at the time of writing. See *Zeit Online*, 'Arbeit: Georgische Erntehelfer klagen vor Arbeitsgericht Ravensburg' *Zeit Online*, 2 December 2021, at <<https://www.zeit.de/news/2021-12/02/georgische-erntehelfer-klagen-vor-arbeitsgericht-ravensburg>>; IG BAU, 'Nach Erfolg von Georgischen Saisonarbeiter*innen vor Gericht: Arbeitgeber legt Berufung ein' *IG BAU*, 4 August 2022, at <<https://igbau.de/Nach-Erfolg-von-georgischen-Saisonarbeiter-innen-vor-Gericht-Arbeitgeber-legt-Berufung-ein.html>>.

⁹⁶ Barnard and Fraser Butlin, op. cit., n. 56, p. 1631.

⁹⁷ For a comparison with the difficulties related to access to courts for EU-8 migrant workers in the UK, see Barnard and Ludlow, op. cit., n. 56.

⁹⁸ See the annual reports published by the Fair Work in Agriculture Initiative since 2015: see <<https://www.peco-ev.de/veroeffentlichungen/>>.

⁹⁹ See id. For the case concerning the degrading living conditions in an accommodation facility in Baden-Württemberg where 24 Georgian workers were staying, see Initiative Faire Landarbeit, op. cit., n. 8, p. 23.

¹⁰⁰ Bogoeski, op. cit., n. 4.

¹⁰¹ See Ministry for Food and Agriculture, op. cit., n. 57. The Ministry for Food and Agriculture's new framework conditions (as of November 2021) contain a vague formulation that single rooms should be the norm, but in cases where that is not

larger number of workers, charged several hundred Euros each.¹⁰² The model by which farmers have been outsourcing accommodation and meals for workers to subcontractors has had negative consequences for workers for years, as the subcontractors have sought to maximize profits by squeezing as many workers as possible into each room and charging high prices for beds and food.¹⁰³

In addition to these well-known problems, mandatory quarantines were introduced during the pandemic. There were two kinds. First, at least at the beginning of the pandemic in 2020, all workers were quarantined in groups together for two weeks upon arrival, during which they also worked, staying with the same group. The second type of mandatory quarantine applied when a worker showed symptoms of possible COVID-19 infection or was confirmed to be sick, or there was a larger outbreak on the farm. Most interviewed counsellors pointed out the general fear of infection among workers and the different problems arising from the quarantines. For example, the counsellor from Fair Mobility Munich explained:

The pandemic exacerbated the problems and brought them to light. People were afraid to stay in Germany or to fall ill. It was not possible to go home at any time because of the controls and border closures, but also because farmers seized workers' identity cards. The isolation in quarantine made workers very insecure because they did not know the regulations and were not informed about them in their native language. During quarantine, workers were often separated from people they may have known.¹⁰⁴

Though the quarantines – in theory, at least – were introduced for the safety of workers, they soon became part of the structures increasing workers' precarity. Uncertainty, isolation and separation from the rest of the world, and (most importantly) dependence on employers for food, shelter, finances, and overall movement were severely exacerbated by the quarantines. Prior to the pandemic, dependence on employers in the case of seasonal agricultural work was already very high, creating a range of disadvantages for workers. Though most workers were EU citizens and did not need a visa or a work permit (which expires when one loses the job), they were isolated from communities on often remote farms and accommodation facilities, and always had to rely on employers for basic necessities, most obviously accommodation and meals, to which they might instantly lose access in case of a conflict or termination of the employment.

The quarantines also made it difficult for counsellors or unions to reach out to workers, or to conduct information campaigns as they used to do in previous years.¹⁰⁵ As summarized by the counsellor from Fair Mobility Nuremberg, 'The dependence of seasonal workers has increased. The quarantine is just one example of how quickly seasonal workers are cut off from the world. As

possible and multiple workers are sharing a room, they need to be from the same work group: see Ministry for Food and Agriculture, *op. cit.*, n. 58, p. 5.

¹⁰² Reported by several counsellors. See also Initiative Faire Landarbeit, *op. cit.*, n. 6; Schneider and Götte, *op. cit.*, n. 12.

¹⁰³ Initiative Faire Landarbeit, *op. cit.*, n. 8, pp. 21–25.

¹⁰⁴ Reported by the counsellor from Fair Mobility Munich (my translation from German). See also the report on a case of confiscation of travel documents in Lower Saxony: Initiative Faire Landarbeit, *op. cit.*, n. 8, p. 20.

¹⁰⁵ Reported by the counsellor from the Work and Living Counselling Centre in Potsdam, who stated that 'conditions have worsened – seasonal migrant farmworkers are even more isolated and difficult to reach due to the pandemic' (my translation from German).

a counselling centre, we can no longer make contact so easily.¹⁰⁶ The most severe isolation and dependence in the case of the quarantines occurred after symptoms or an illness were suspected or diagnosed. This was well explained by the counsellors from the Fair Mobility counselling centres in Dortmund and Munich respectively:

He was in quarantine for three weeks, he did not receive any food from the employer, and in the end he did not receive any pay for this period. He was alone in a room the whole time; his colleagues provided him with food.¹⁰⁷

People were isolated and left alone for weeks. The authorities did not provide interpreters or translations. Wages during the period of quarantine were often not paid or only a fixed amount was paid.¹⁰⁸

There are no official reports on how strict the social distancing measures during working hours on the fields were, or on how rigorously they were implemented in transportation or in the accommodation facilities. From counsellors' observations, it follows that social distancing measures could rarely be complied with, which increased the risk of infection for workers. The counsellor from Fair Mobility Frankfurt am Main noted:

During the field visits, workers told us that they were being tested 1–2 times a week, the accommodation was half occupied and upon arrival they had to stay in working quarantine. But what I observed is that they continued to enter the fields in minivans carrying 5–6 workers and were often not wearing a mask.¹⁰⁹

This new form of increased dependence on employers and overall exacerbated vulnerability through the mandatory quarantines demonstrate that the assumed advantages of EU citizenship and free movement were significantly limited in the case of seasonal workers during the pandemic. Anderson's concept of the 'production of institutional uncertainty'¹¹⁰ might well capture the way in which the new measures reinforced the existing institutional structures, which had already cast seasonal migrant farmworkers in Germany as a precarious and easily exploitable category of workers.

5.3 | Health insurance and overall social security

As we are still living through the pandemic despite protective measures being quite abruptly lifted across Europe, including in Germany, the question of access to health care and health insurance for seasonal migrant farmworkers remains crucial. One of the most controversial changes, making the already precarious position of seasonal migrant farmworkers even worse, has been the reform of the social security rules, including on health insurance, that apply to seasonal migrant

¹⁰⁶ Reported by the counsellor from Fair Mobility Nuremberg (my translation from German).

¹⁰⁷ Reported by the counsellor from Fair Mobility Dortmund (my translation from German).

¹⁰⁸ Reported by the counsellor from Fair Mobility Munich (my translation from German).

¹⁰⁹ Reported by the counsellor from Fair Mobility Frankfurt am Main (my translation from German).

¹¹⁰ Anderson, op. cit., n. 20, p. 311.

farmworkers. As discussed in the previous section, the original exemption of 70 working days was extended to 115 working days during the first pandemic harvest season in 2020, and reduced to 102 working days in 2021.¹¹¹

From the interview data, one could conclude that it might still be too early to assess the real effects of the extension of the social security exemption on seasonal migrant farmworkers. The fact that there is no official and reliable data on the duration of the stay of each individual seasonal worker makes it difficult to know whether workers actually stayed longer than the usual three months during the two pandemic harvest seasons. The official justification for the extension was to limit the movement of seasonal workers and thus prevent the spread of COVID-19, while maintaining food security during the pandemic. Though we have no data on how many workers actually stayed longer than usual, based on previous experience, it is safe to say that the extension of the exemption, particularly in the case of health insurance, was by no means a positive development for workers. This comment from the counsellor from Fair Mobility Munich summarized some of the concerns:

This is bad. The sick people will be neglected and eventually dismissed, as they have been until now. Those who can no longer work will be replaced. Some farmers don't take their workers to the hospital and leave them in the accommodation because they want to save costs.¹¹²

Given that most workers have neither social security nor health insurance in their home countries,¹¹³ having no health insurance in Germany will mean that they will either intentionally avoid receiving treatment in the event of illness or be burdened with high costs if they do receive it.¹¹⁴ Moreover, the lack of social security and pension insurance will inevitably lead to exclusion from unemployment benefits upon return to their home countries and the general prospect of old-age poverty in already impoverished regions of Europe because the time spent on German fields will not count towards a retirement pension.¹¹⁵ The latter is destined to have wider socio-economic and political consequences, as it will exacerbate Europe's core-periphery dynamics of growing inequality among regions, particularly along the East-West axis.¹¹⁶

6 | CONCLUSION

The analysis of the interviews with the counsellors as well as of the policy measures and legal interventions concerning seasonal migrant farmworkers in Germany during the pandemic demonstrates that the responses to the pandemic have reinforced the existing structures shaping the disembeddedness and exploitability of seasonal migrant labour in agriculture.

¹¹¹ See n. 63.

¹¹² Reported by the counsellor from Fair Mobility Munich (my translation from German).

¹¹³ Reported by the counsellor from Fair Mobility Dortmund.

¹¹⁴ J. Maurin, '80.000 Euro von armer Erntehelferin' *taz*, 28 February 2022, at <<https://taz.de/!5837192/>>.

¹¹⁵ Bogoeski, op. cit., n. 29.

¹¹⁶ See the discussions in D. Kukovec, 'Law and the Periphery' (2015) 21 *European Law J.* 406; C. Bruzelius, 'Taking Emigration Seriously: A New Agenda for Research on Free Movement and Welfare' (2021) 28 *J. of European Public Policy* 930; C. Bruzelius, 'Why the EU Must Debate and Address the Challenges Arising from Emigration' *EUROPP*, 24 June 2019, at <<https://blogs.lse.ac.uk/europpblog/2019/06/24/why-the-eu-must-debate-and-address-the-challenges-arising-from-emigration/>>.

Language barriers, limited knowledge of the institutional system, physical isolation (remote farms and accommodation facilities), non-transparent documentation, and practices of piecework pay calculations that mostly remain undetected due to a lack of systemic oversight and enforcement had all already created an environment in which seasonal migrant farmworkers could be exploited even before the pandemic began. This article has analysed what components of the regulatory framework, practices, and institutionalized relations were in place prior to the pandemic, and how they have been reinforced during the pandemic. The further disembedding of seasonal work and reinforcement of the structures that facilitate exploitation have occurred in two main ways. First, most political interventions undertaken to prevent the spread of COVID-19 have negatively affected seasonal migrant farmworkers, resulting in increased dependence on employers, increased isolation, overall uncertainty, increased workload, and problems related to pay. In addition, the social distancing and movement restrictions have led to even less institutional oversight and fewer opportunities for collective action. The second way in which the existing structures have been reinforced has been the instrumentalization of 'essential worker' status to extend the general social security exemption to the disadvantage of seasonal migrant farmworkers, leaving them without (proper) health insurance and social security during a global crisis.

As is evident from the responses from the interviewed counsellors, the isolation that has resulted from the circumstances created by the pandemic and the social distancing rules in place have affected seasonal migrant farmworkers both individually and collectively. In addition to being out of their home environment, through the quarantines, mobility restrictions, and arbitrary grouping upon arrival, individual workers have been separated from fellow seasonal workers whom they have known from their home communities prior to departure.¹¹⁷ Opportunities to gather and exchange experiences and information collectively have also been significantly reduced, making existing practices such as unjust wage deductions, non-transparent working time documentation, and working hour cuts on payslips more difficult to detect.

In addition, unions and counselling services themselves have had much more limited access to the farms and accommodation facilities, as farmers have instrumentalized the safety and social distancing rules to prevent access to workers, even when this has been for the purpose of providing information on labour rights, as with the counsellors participating in the Fair Work in Agriculture Initiative.¹¹⁸ Counsellors reported that the already lax oversight by the authorities¹¹⁹ has become even more lax during the pandemic, as a result of the limitations imposed by the safety and social distancing measures, on the one hand, and the staff shortages that these institutions chronically have, on the other.¹²⁰ For instance, counsellors explained that the decrease in the number of seasonal migrant workers who have been able to travel to the German fields due to the pandemic has directly led to an increase of the working hours of those who have been able to come,¹²¹ which has in some cases not been acknowledged in working time documentation and payslips. This

¹¹⁷ Particularly stressed by the counsellor from Fair Mobility Dortmund.

¹¹⁸ Initiative Faire Landarbeit, op. cit., n. 6.

¹¹⁹ Reported by the counsellor from the Good Work Counselling Centre in Berlin. See also Initiative Faire Landarbeit, op. cit., n. 8, p. 11.

¹²⁰ D. Böcking, 'Schwarzarbeit: warum bei der Zoll-Einheit FKS Frust herrscht' *Spiegel Online*, 15 July 2019, at <<https://www.spiegel.de/wirtschaft/soziales/schwarzarbeit-warum-bei-der-zoll-einheit-fks-frust-herrscht-a-1276872.html>>; S. Vetter, 'Mindestlohn wird oft unterlaufen' *Saarbrücker Zeitung Online*, 21 September 2017, at <<https://bund-laender-nrw.verdi.de/bund/bundesfinanzverwaltung/++co++e1514d94-a2d2-11e7-a8bb-525400423e78>>.

¹²¹ Particularly stressed by the counsellor from Fair Mobility Frankfurt am Main: 'Efficiency pressure has increased' (my translation from German).

combination of workers' isolation not only internally (from other workers and groups of workers) but also externally (from unions and oversight authorities) means that exploitative practices established prior to the pandemic are even less likely to be detected, reported, and addressed by workers, unions, and authorities in charge of oversight and enforcement.

As we have seen particularly from the discussion around the extension of the social security exemption affecting short-term marginal employees, particularly seasonal migrant farmworkers, the recognition that this category of worker was essential for food security and thus the overall functioning of society during a pandemic has actually been instrumentalized to workers' disadvantage. The fact that they were considered essential for food security was used by the Ministry for Food and Agriculture to argue for the necessity to keep workers longer on German fields, under the pretext of limiting worker movement and the spread of COVID-19. Workers' essentiality has not helped them to obtain the protection of the German welfare state. The extension of their exclusion from the social security system has exacerbated the negative consequences of working with no social, health, and pension insurance. With not being insured in Germany, and the majority not being within the social and health insurance frameworks in their home countries,¹²² workers are severely vulnerable in the event of illness. Counsellors reported cases where workers were not taken to hospital but merely isolated in an accommodation room. The case of the Romanian worker who died after an infection with COVID-19 in 2020 demonstrates clearly what can happen when access to the necessary medical assistance is unavailable.¹²³ Together with increased isolation and dependence on employers, as well as increased difficulties for oversight and enforcement authorities with controlling the situation on the ground, the pandemic has reinforced the pre-existing structures, rendering seasonal migrant workers in agriculture even more exploitable.

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¹²² Reported by the counsellor from Fair Mobility Dortmund.

¹²³ A. Ulrich and B. Felix, 'Rumänischer Erntehelfer nach Corona-Infektion gestorben' *Spiegel Online*, 15 April 2020, at <<https://www.spiegel.de/panorama/gesellschaft/coronavirus-rumaenischer-erntehelfer-in-baden-wuerttemberg-nach-corona-infektion-gestorben-a-7ca0532c-6acd-49b3-b443-bcb806816bb7>>.