



## CHAPTER 2: ELIGIBILITY

**This chapter contains:**

- Defining eligibility criteria
- Exclusions from eligibility
- Challenges in the application of the eligibility criteria
- The role of evidence in determining eligibility criteria
- Eligibility in case of death of victims of forced labor

## INTRODUCTION: THE KNOWN AND THE UNKNOWN

Defining clear eligibility criteria is a cornerstone of all reparations and compensation programs. Eligibility criteria define who shall receive compensatory payments from the program and for which human rights violations the payments are to be made. In many instances, these criteria also define the amount of the compensation for the respective beneficiaries.

In the case of the German forced labor compensation program, a number of the eligibility criteria were agreed on during the negotiations, such as which groups would be eligible for the compensation payments and what maximum amounts would be foreseen for each payment category. The program's eligibility criteria differentiated between different situations involving forced labor and this resulted in two broad beneficiary categories — so-called categories A and B (category A: forced labor in concentration camps, comparably bad detention camps, ghettos; category B: forced labor in industry after deportation). Different amounts were foreseen based on very broad assumptions of the hardship involved; for example, the highest amounts were allocated to former inmates of concentration camps or ghettos. At the same time, it was possible for partner organizations to define additional groups of eligibility (category C, the so-called opening clause). Whereas the definition of categories at the outset provided for transparency and predictability, the flexibility of the opening clause may have increased acceptance of the overall program.

This chapter provides an overview of the main eligibility features of the German program. It outlines the eligibility criteria that were formulated in the Foundation Law and discusses how these provisions impacted the design of the program. It explains how the beneficiary categories of the compensation program relate to the different kinds of crimes in relation to forced labor. Finally, it discusses why some groups were excluded from the program and what compensation was provided in the case of death of eligible beneficiaries.

## DEFINING ELIGIBILITY CRITERIA

One of the main challenges of defining eligibility criteria for the forced labor compensation program was that — due to the long time passed since the crimes — potential beneficiaries were very old and finding and collecting evidence for the claims was expected to be difficult. For the drafters of the Foundation Law, this meant that there was an intense time pressure and that expectations of victims would be high. Consequently, it was emphasized repeatedly by the drafters that procedures for determining eligibility had to be non-bureaucratic and expedient. Still, certain delays resulted from the fact that not all aspects were defined predefined by the Foundation Law which hence left open some questions for subsequent interpretation.

The different eligibility categories in the German program were based on broad criteria relevant for the gravity of the situation and the conditions in which forced labor took place. At the time of the negotiations, it was known that forced labor took place practically from the outset of the Second World War in September 1939, when the Third Reich had systematically installed branches of the German employment agencies in newly occupied territories with a view to recruiting workforce. Persons recruited were lured by false promises into labor contracts and their rights were restricted by contracts and ordinances, or they were deported from their homes to other places where they were then forced to work. They were prevented from returning to their region of origin, and were exposed to harsh living conditions in poor barracks or camps, often with insufficient nutrition. When they were held in concentration camps, people mostly were forced to work under atrocious conditions until they died. During the course of the Second World War, more than 20 million persons were forced to work in the Third Reich or Germany's occupied territories, particularly in mining, the war industry, and in agriculture, but also in small businesses, households and other places.

The harsh living conditions were exacerbated for some groups who were specifically persecuted by the Nazi regime. In particular, pursuant to the Nazi ideology, Jews and Sinti and Roma faced “extinction through labor.” Slavic peoples, in particular from Poland and the Soviet Union, were regarded as a sub-human race (“*Untermenschen*”); they faced extremely harsh treatment in camps and barracks. These issues played a prominent role in the definition of the eligibility criteria.

### Provisions of the Foundation Law

The cornerstone of eligibility was the basic historical situation of forced labor for the German industry by persons who were detained or deported. Other situations were added in the course of the negotiations, either following pressure by certain victims groups (for instance, forced labor in agriculture) or in order to extend the reach of legal closure linked to the program (for instance, medical experiments). The scope of the program was, on the other hand, limited by the fact that only victims alive at a specific date were eligible. The various compensation amounts were the result of the negotiations and included the basic premise that victims of forced labor in concentration camps and ghettos should receive a higher sum than those who were subjected to forced labor in other circumstances.

The Foundation Law broadly defined two main categories of eligibility related to forced labor (categories A and B). Questions concerning the interpretation of the eligibility criteria that would arise during the compensation program had to be resolved by the EVZ Foundation and its Board of Trustees. Their decisions were then implemented by the partner organizations.

### *Category A: Forced labor in concentration camps*

Category A comprised beneficiaries who performed forced labor and were detained in a concentration camp, a ghetto, or another place of confinement characterized by inhumane conditions of detention, insufficient nutrition and lack of medical care.

Within this first category, “concentration camps” were designated by reference to a list used in an earlier German national compensation program pursuant to the Federal Law on Compensation (*Bundesentschädigungsgesetz*, or BEG, 1956), which had addressed situations of racial persecution. This was, however, not a comprehensive list, and it was clear from the outset of the forced labor program that there were other comparable camps that would have to be covered under category A.

Camps which were previously not known and the existence of which was revealed in the course of the compensation program could be defined as “other places of confinement” if the nature of their provisions were characterized by inhumane detention conditions, lack of sufficient nutrition, and medical care. In this case, the living conditions in the other places of confinement were considered comparable to those in concentration camps, and survivors of them would be eligible for payment under category A as well. The Foundation Law had foreseen that such classification should be decided by the Board of Trustees of the EVZ Foundation. This proved to be impractical, however, since the Board of Trustees met only twice per year and it also lacked the necessary historical expertise. This task was therefore delegated to the Board of Directors of the EVZ Foundation. Decisions were based on historical expertise and/or information gathered from a relevant number of individual claims for payment and their descriptions of the living conditions in a particular place of detention. In the course of the implementation of the program, more than 3,800 detention camps were thus designated to have been “other places of confinement” for specific periods of time.

### *Category B: Forced labor in the German industry*

Category B included all persons who were deported from their home country, kept in detention, detention-like or comparable “harsh living conditions” and forced to work. It referred to all types of work except in agriculture and households.

The deportation criterion suggested that only persons who were forced to *leave* their home area against their will qualified, but not those who were not allowed to *return* after they had arrived voluntarily in Germany. In practice, however, particularly for workers from Eastern Europe, there was no differentiation between those who were able to show that they were transported away from their home country against their will and those who had agreed formally with this transfer as long as there was no clear indication for collaboration. This was based on the fact that people transferred from Eastern Europe frequently were forced to act

as a “volunteer” by exerting pressure on their family or village. Moreover, these people were completely misled as to the conditions awaiting them in Germany or its occupied territories. It was therefore clear that, typically, there was no real consent given to the transfer. Also, there was no difference in exploitation and harsh conditions of life and work between the deported and these “volunteers” in the Third Reich.

In addition, certain differentiation within the legal categories was possible by the creation of sub-categories for category B. The Foundation Law allowed partner organizations to establish sub-categories in which they could determine a different compensation amount according to the severity of suffering.<sup>1</sup>

### *The opening clause (Category C)*

The situation of forced labor during the Second World War was very complex and it was already clear during the negotiation phase that the two categories A and B would not cover a number of people who were also victims of forced labor but did not fall into these categories. A large number of Polish and other citizens, for example, were forced to work in German agriculture, but were not eligible in either category A or B.

Therefore, it was necessary to expand the eligibility criteria in order to find a solution for the (potentially) large number of people who would fall outside the core categories but had suffered from forced labor. This was done by creating a so-called “opening clause” that allowed the partner organizations to allocate certain amounts of money to eligibility categories they could establish themselves according to their specific context. It is important to point out that the inclusion of the opening clause was in large parts due to the initiative of victims’ organizations that were present during the negotiation phase. This shows the importance of including different stakeholders in the design process of a compensation program. Thus, in addition to the two main categories, the opening clause became part of the Foundation Law.

The opening clause did not mention “forced labor” specifically and left the definition of details mainly to the partner organizations implementing the program. In fact, the wording of the Foundation Law provided little guidance on which other groups of victims of Nazi injustice could be defined as eligible by the partner organizations. Only by way of example, forced laborers in agriculture were mentioned. The only limitation to the potential scope of the clause was the requirement of a minimum similarity with one of the criteria underpinning the categories defined by Foundation Law (detention, deportation, or forced labor). The opening clause also required the consideration of certain financial limitations, which meant that partner organizations would only include the opening clause if they had sufficient money in the funds allocated to them. Thus, the option to define criteria for additional categories under the opening

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 1 See Annex 1, Section 9 (8) of the Foundation Law.

clause meant that cases not involving any kind of forced labor could also be covered by this provision if another type of persecution, deportation, or detention existed.

In practice, a broad interpretation of similarity with the legally defined criteria was applied. For instance, with regard to persons who went into hiding, it was accepted that this implied detention-like living conditions. Other examples were children who were deported with their parents but did not perform forced labor, persons who were detained under appalling conditions without being forced to work, or persons who were forced from their homes to another area within the same country.

An advantage of the opening clause was the flexibility it allowed the partner organizations to address particular situations that had not been specifically addressed during the negotiations. Partner organizations could thereby react to or avoid pressure from the public or victims organizations and cover situations which did not fall under any of the other categories but which were important for their context. This, in turn, improved the acceptance of the program in the public discourse in the respective country.

<b>Categories and amounts disbursed by the Foundation for Polish-German Reconciliation (FPNP)</b>			
	<b>Total amount in €</b>	<b>1. installment € (75 %)</b>	<b>2. installment € (25 %)</b>
<b>Legal categories*</b>			
<b>Category A</b> Prisoners in concentration camps and ghettos	7,669.38	5,752.03	1,917.34
<b>Subcategory A</b> Prisoners in "Polish camps" in Silesia, in penal camps and ZALJ, in AELs and penitentiaries/prisons (other place of confinement)	7,269.37	5,452.03	1,817.34
<b>Subcategory A</b> Prisoners of the camp Lebrechtsdorf (including satellite camps in Thorn and Smukula – other place of confinement)	4,218.16	3,163.62	1,054.54
<b>Category B</b> Deported forced laborers in the commercial and public sector	2,249.68	1,687.26	562.42

\* Inside the legal categories and the opening clause the categories are ordered hierarchically by amounts.

<b>Categories and amounts disbursed by the Foundation for Polish-German Reconciliation (FPNP)</b>			
	<b>Total amount in €</b>	<b>1. installment € (75 %)</b>	<b>2. installment € (25 %)</b>
<b>Opening Clause</b>			
<ul style="list-style-type: none"> <li>■ Children up to the age of 16, who were detained in a transit camp for at least 180 days</li> <li>■ Prisoners from prisons and detention centers</li> <li>■ Persons who were persecuted on racial grounds (outside ghettos, concentration camps and “other place of confinement”)</li> </ul>	2,556.46	1,917.34	639.11
Forced laborers who lived outside the administrative borders of Poland that were implemented for the period of occupation and who were dislocated and had to work in an industrial or another commercial enterprise or in the public sector	2,249.68	1,687.26	562.42
Deported and dislocated forced laborers who worked in the agricultural, forestry and service sector or in private households	1,124.84	843.63	281.21
Children up to the age of 12, who were deported or dislocated with their parents or who were born while subjected to forced labor	1,124.84	843.63	281.21
Children up to the age of 16 forced to work in the heavy and armament industry at their place of residence	1,022.58	766.94	255.65
Children up to the age of 16 who were detained in a transit camp for at least 180 days	562.43	421.82	140.61

Table 1: Categories and amounts disbursed by the Foundation for Polish-German Reconciliation (FPNP) as an example of how partner organizations were able to include different groups of victims according to the context. Note: Chapter 3 explains more in detail the two-installments system.

The different partner organizations could set different priorities when including particular victim groups in the compensation program. For example, in Ukraine and in Poland, the inclusion of forced labor in agriculture was crucial. The JCC, which was responsible for Jewish victims worldwide, on the other hand, chose to forgo the possibility of the opening clause in order to maximize benefits for those who performed forced labor in labor camps. The significance of the opening clause is illustrated by the fact that almost half of the 1.66 million beneficiaries received compensation through the opening clause, constituting almost 22 percent of the financial resources of the compensation fund.

However, there were also practical consequences of the opening clause which were not intended. In the forced labor compensation program, delegating the decisions on the opening clause to partner organizations had the consequence that, to a significant degree, eligibility depended on the geographical responsibility for an applicant. What is more, whether a partner organization was able to use an opening clause depended not only on its political will but also on the level of its funding. As explained in Chapter 3, each partner organization received a fixed amount for implementing the program, which was based on estimates of the numbers of beneficiaries. Depending on how accurate those estimates were, some partner organizations had funds available to incorporate extra eligibility categories, whereas others did not. In practice, this meant that claimants who had suffered the same fate, but were living in different countries — and therefore under the responsibility of different partner organizations — received different compensation amounts, or in some cases no compensation at all. Also, the opening clause posed serious challenges for outreach activities: not having all the criteria for eligibility clearly defined at the start of the program risked turning away potential beneficiaries too early, or on the other hand raised expectations which were not met in the implementation of the program.

## EXCLUSIONS FROM ELIGIBILITY

Eligibility criteria may also entail provisions that exclude certain groups of people. Even though the German compensation program focused on victims of forced labor, there were certain individuals who fit this criterion but were nevertheless excluded from compensation. For example, one principle of the German program was that prisoners of war were not eligible for payment: “Eligibility cannot be based on prisoner-of-war status,” as stated in the Foundation Law (Section 11 (3)). However, the Foundation Law included those who were prisoners of war at some point, but were subsequently either forced to work *as civilians* or who were persecuted on racial grounds. This situation applied to many Polish prisoners of war who were detained at the beginning of the war and then “released” into a civilian status and forced to work under that status.<sup>2</sup>

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2 As mentioned in Chapter 1, this was an issue of much debate during the negotiations and it was finally excluded from this program for political considerations. It was feared that if prisoners of war were made eligible for the compensation program, German prisoners of war could ask for compensations as well. In the end, the debate on this issue continued until in 2015, fifteen years after the Foundation Law, a compensation program was set up by Germany for both foreign and German prisoners of war forced laborers.



## CHALLENGES IN THE APPLICATION OF THE ELIGIBILITY CRITERIA

Even though the eligibility criteria seemed very straightforward at the beginning of the compensation program, challenges in their interpretation and application arose in the course of program implementation.

First, when establishing eligibility criteria, it is important to review the historical context thoroughly. For example, the wording of the Foundation Law defined “deportation to the territory of the German Reich in its borders of 1937 or to territories occupied by the German Reich” as a criterion for eligibility. Problems arose concerning the application of the criterion in cases where applicants had been deported not to an area within the German Reich or its occupied territories but to the territory of a State *allied* to the German Reich, for instance Romania or Slovakia. A similar question in this context was how to address situations where persons were deported from their home area not to another country but another area within their home country. Due to the unequivocal phrasing of the Foundation Law, individuals with this fate were not eligible for compensation.

Second, the specific nature of the crime should be adequately reflected in the eligibility criteria. “Harsh living conditions” was another significant criterion in those cases under the second category (category B) where workers were not detained. With respect to the interpretation of this term, it is important to note that the Foundation Law is underpinned by the purpose to deliver a gesture of late justice in particular to victims in Central and Eastern Europe after they had been cut off from any compensation scheme for several decades, due to political reasons. To this end, according to the explanatory reports in the legislative process, the term “harsh living conditions” was aimed at reflecting the systematic discrimination of people of Slavic origin.<sup>3</sup>

Consequently, the criteria were interpreted as not covering forced laborers of “non-Slavic origin” which many saw as unfair. As a result of this decision, Western Europeans and other persons considered to be “non-Slavic” under the ideology of the Third Reich were found not to be eligible under the program for lack of deportation and discriminating living conditions. This was applied in an undifferentiated manner irrespective of harsh treatment in practice and led to problematic exclusions. For example, the particularly degrading conditions of Greek forced laborers were not covered in the program, and advocates for these groups continue to date to ask for compensation. By contrast, the Austrian Reconciliation Fund applied a comparably low threshold for including forced laborers originating from Western Europe in their compensation scheme. For example, bombing raids also had affected a lot of Western European workers in Germany and were accepted as a sufficient example of harsh living conditions in the Austrian program.

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3 See explanations on Section 11 (1) of the draft of the Foundation Law, Register of the German Parliament, BT-Drs 14/3206, p. 15, <http://dipbt.bundestag.de/doc/btd/14/032/1403206.pdf> (accessed 30 March 2017).

Third, eligibility criteria itself need to be applied consistently and fairly throughout the implementation period. The example of the so-called Italian Military Internees (IMIs) illustrates that inconsistent interpretation of eligibility criteria may not only have led to frustration of claimants but also caused more work and costs for the compensation program itself. Large numbers of Italian soldiers were detained and forced to work by German troops after Italy agreed on concluding a cease-fire agreement with the Allied Forces in 1943. At the time they were denied prisoner of war status even though it was clear that they were prisoners of war under applicable international law. Yet, even though these IMIs were forced to work, had a civilian status and were exposed to very harsh conditions, they were not recognized as eligible in the compensation program with the reason that they were prisoners of war. Moreover, this decision was taken after some 100,000 compensation claims of all IMIs were already registered under the forced labor compensation program. This meant that the already filed applications had to be rejected with the consequence that many members of the group were deeply frustrated and many of them filed appeals against these rejection decisions. The matter was brought before the courts in Italy as well as before the International Court of Justice (see Chapter 10). Such experiences show that it should be clear from the outset of a program, not only who is responsible for determining and interpreting eligibility, but also that such decisions are taken in a transparent, predictable, and fair way.

## EVIDENCE

During the process of designing eligibility criteria, it is quite important to take into account what evidence is available to support the claims. It would be meaningless to establish elaborate eligibility criteria when they are difficult to prove or at least to be made credible. As experience of other programs shows, the standard of proof has an important impact on the balance between individual justice and expediency of the process: strict evidentiary standards will increase accuracy whereas more relaxed standards will increase expediency. One example of how availability of evidence, or lack thereof, influenced eligibility criteria in the forced labor compensation program was that no distinction was made between different *lengths* of the suffering by victims of forced labor. In none of the categories was thus a differentiation made between, for instance, a person who was subjected to forced labor for years and a person only detained for a few months. This decision also was made in anticipation of a lack of evidence in this respect.

Generally, the German forced labor compensation program provided for a *relaxed standard of proof* because it was conscious of the fact that much time had elapsed since the historical events and that the type of injustices which the program addressed were difficult to prove. Moreover, the long time since the events also implied that the survivors had a very advanced age. Against this background, it was a matter of fairness not to rely on documentary evidence or public records only and that applicants were allowed to support eligibility with a variety of evidentiary means, including credible statements. Chapter 6 describes in detail which evidence was accepted in the program and how it was evaluated.

## ELIGIBILITY IN CASE OF DEATH OF VICTIMS OF FORCED LABOR

In every compensation program, provision needs to be made for the case that a claimant passes away during the process. Also, it should be decided early on, if and how descendants of victims are eligible for compensation. In the case of the German program, many of those subjected to forced labor had already passed away before the start of the program. Also, as the majority of the survivors of forced labor were very old, it was likely that many would not be alive when the payments would be made.

The compensation program took a pragmatic stance, in this respect, by focusing in principle on compensating individuals who were still alive at a certain date. This meant that, generally, descendants and family members of former forced laborers were not eligible for compensation. However, during the negotiations the German delegation announced on 16 February 1999, the date of the establishment of the Foundation Initiative of the German Industry, that all persons who were alive on that day would be eligible for compensation. On a practical level, this meant that in all cases where victims of forced labor passed away after this “inclusion date,” certain close relatives were eligible to apply for compensation. Notwithstanding a more fundamental discussion if such a strategy is fair to the families of already deceased victims of forced labor, this was a sensible decision at a time when it was not clear how long it would take to finalize the negotiations.<sup>4</sup>

What the program still had to do was to define which legal successors would be eligible in case of death of a victim. The Foundation Law stated that only certain close relatives or heirs under a will were so eligible:

In a case where the eligible person has died after February 15, 1999, (...) the surviving spouse and children shall be entitled to equal shares of the award. If the eligible person left neither a spouse nor children, awards may be applied for in equal shares by the grandchildren, or if there are no grandchildren living, by the siblings. If no application is filed by these persons, the heirs named in a will are entitled to apply. (Section 13 (1))

With this, the Foundation Law established a so-called “self-contained regime” with its own definition of “legal successors” which could, and in a number of cases did, differ from national inheritance laws. This system was not uncontested since it meant disappointing persons who were heirs according to their respective national inheritance law including those who were designated as a beneficiary in the will of the deceased person. However, given the large number of beneficiaries, the system avoided the challenge of having to establish first, which

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4 It was also a solution lobbied for by the victims’ associations. If descendants were made eligible for compensation payments, the amount of individual compensation payments would have been drastically reduced.

national inheritance law applied, and then who was an heir under such national inheritance law. It would have been very difficult, time consuming, and costly for the partner organizations to identify and then apply different national inheritance laws, particularly for those partner organizations that covered a large number of countries, like the IOM and JCC.

The above provision, together with the “inclusion date,” made sure that eligibility would not cease in case of the death of a potential beneficiary. It also prevented any impression that, by delaying the negotiation process, the negotiators had tried to “save money.” However, some partner organizations decided to maximize the sums to be paid to victims still alive by establishing sub-categories for legal successors with reduced compensation amounts. This benefitted the elderly survivors, but also gave rise to criticism by the affected heirs.

## SUMMARY

Eligibility criteria for the German compensation program had to keep in mind the need for expedient procedures. Therefore, broad categories were established rather than detailed criteria that would have allowed for multiple differentiations of fates. Moreover, while some of the groups to be covered — and the criteria for their definition — were agreed on rather easily, in the international negotiations, regional expectations sometimes varied as to which additional groups were supposed to be covered under a program addressing the injustice of forced labor. Rather than addressing all these by the definition of detailed legal criteria, an opening clause was adopted allowing for some regional flexibility. The need for expediency of the process also paved the way for a relaxed standard of proof. Finally, the decision to focus on those victims still alive allowed for maximizing the individual sums while keeping with the overall ceiling amount. And lastly, by defining for the program itself who would be the legal successors in case of death of a claimant, the intricacies of adhering to numerous inheritance law systems in a worldwide compensation program were avoided.

## CHALLENGES AND LESSONS LEARNED

- Many aspects of a large scale compensation program, such as criteria for eligibility, standards of proof, deadlines for applications need to be carefully chosen in order to strike a fair balance between addressing individual injustice and achieving overall fairness for the claims program as a whole.
- The definition of eligibility criteria impacts on the expediency of the process and, thereby, on the acceptance of a program. Clear definition of eligibility criteria is important for expectation management and for providing a fair chance to submit a claim.

- A certain flexibility in the eligibility criteria can be helpful, particularly in cases where the historical situation is complex and regional expectations may not be foreseeable comprehensively at the time of the establishment of the program. However, such approaches should be allowed for only with great caution as they bear the potential of unequal treatment and dissatisfaction by partner organizations or beneficiaries. Moreover, such flexibilities complicate outreach.
- The possibility of establishing an opening clause may have contributed to preserving a positive image of the program in the countries which had been affected most severely.
- Since not every issue is foreseeable at the outset of a program, it will be helpful to have a monitoring body which has the authority to decide questions that arise only during the implementation phase.
- In the case of death of a potential beneficiary, eligibility criteria should be clear from the outset of a program. Particularly in the case of transnational programs, it will be useful to adopt a “self-contained regime” that avoids the application of national inheritance laws, thereby preventing unnecessary delay and costs.