9 Employer Sanctions

Instrument of Labour Market Regulation, Migration Control, and Worker Protection?

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Abstract

This chapter focusses on employer sanctions and examines the functioning of sanctions as a policy tool for migration control. Bernsten and De Lange challenge the idea that employer sanctions, as executed in the Netherlands, are a tool for migration control and analyse the extent to which they are tools for labour market regulation and/or a tool for migrant worker protection. This chapter is based on extensive case file research at the Dutch labour inspectorate combined with selected Dutch case law to illustrate how little is known about the effectivity of employer sanctions as measures of migration controls to deter, expose, and curb irregular migration; to protect local business and workers from unfair competition; and to fight the exploitation of workers.

Keywords: employer sanctions directive, labour inspectorate, case law analysis, implementation

1 Introduction

‘A key pull factor for illegal immigration into the EU is the possibility of obtaining work in the EU without the required legal status. Action against illegal immigration and illegal stay should therefore include measures to counter that pull factor.’² This is the opening statement of the EU Employer

¹ We would like to acknowledge Institute Gak for funding this research and to thank Joanne van der Leun for comments on an earlier version of this chapter.

² Preamble 2 of Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers

Sanctions Directive: a clear attack on illegal employment with the aim to control migration. This chapter focusses on these employer sanctions and examines the functioning of sanctions as a policy tool for migration control. We challenge the idea that employer sanctions, as executed in the Netherlands, are a tool for migration control and analyse the extent to which they are tools for labour market regulation and/or a tool for migrant worker protection. The way in which employer sanctions are executed in the Netherlands appears to prioritise labour market regulation over irregular migration control. This is, for instance, apparent from the government's reasoning behind its enforcement approach regarding illegal employment, and is reflected in the lack of any mention of illegal migration in the Dutch labour inspectorate's last three annual reports.³ This chapter is based on extensive case file research at the Dutch labour inspectorate combined with selected Dutch case law to illustrate how little is known about the effectiveness of employer sanctions as measures of migration controls to deter, expose, and curb irregular migration; to protect local business and workers from unfair competition; and to fight the exploitation of workers.⁴

Sanctions as policy instrument are often criticised. First of all, there are doubts about the effectiveness of sanctions as an instrument of migration control. The introduction or strengthening of sanctions has not led to a noticeable decrease in the number of irregular migrants.^{5,6} In its evaluation of the aforementioned EU Directive, the European Commission concluded: 'Following transposition of Directive 2009/52/EC, all Member States prohibit the employment of irregular migrants and impose financial, administrative or criminal sanctions on their employers. However, the severity of the

of illegally staying third-country nationals [2009] OJ L-168/24, p. 3.

3 When the government changed to administrative instead of criminal sanctions for illegal employment in 2005, four reasons for this tougher approach to illegal employment were given: 1) to curb substitution for the legal labour supply; 2) to stop violation of employment norms and standards and the exploitation of irregular migrant workers; 3) to end unfair competition; and 4) to discourage prolonged irregular stay. *Parliamentary Documents II* 2003/04, 29523, p. 3.

4 A. Bloch et al. (2015), 'Employer sanctions: The impact of workplace raids and fines on undocumented migrants and ethnic enclave' *CSP* 35(1); T. de Lange (2011), 'De verborgen schat van artikel 23 WAV', *Jaarboek Vreemdelingenrecht* 1(4).

5 By irregular migrants, we mean third-country nationals without a valid Dutch residence permit.

6 See, for instance, the reports from the *Clandestino* project (<http://irregular-migration.net>) and the Dutch country report specifically: J. van der Leun and M. Ilies (2008), 'Undocumented migration: counting the uncountable. Data and trends across Europe' in the Netherlands country report, *Clandestino Project*. Also: European Commission (22 May 2014), 'Communication from the Commission to the European Parliament and the Council on the application of Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third country nationals', COM(2014), 286 final.

sanctions as determined by law varies considerably between Member States. This raises concerns whether sanctions can always be effective, proportionate or dissuasive and will therefore have to be further assessed.⁷ Even when sanctions are severe, as in the Dutch case, we question their effectiveness as an instrument of migration control.⁷ Second, Klap and De Lange have argued that the employer sanction in the Netherlands is an instrument of labour market regulation, rather than one of migration control.⁸ A failure to comply may not just lead to financial penalties, it can also result in the exclusion of employers from the labour market, taking away their right to hire migrant workers legally. Third, tying in to the previous point, studies on the impact of sanctions have shown that it may increase workers' vulnerability and push them into more exploitative working arrangements.⁹ This led Bacon to conclude that workers – rather than employers – have paid the price for the enforcement of employer sanctions.¹⁰ Fourth, the obligation of authorities to ensure that irregular workers can actually recover outstanding remuneration is hardly ever met in actual practice.¹¹

This chapter starts off with a description of employer sanctions as a policy instrument in EU and Dutch law. Section 3 presents new data on inspections performed by the Dutch labour inspectorate that may lead to employer sanctions, and on illegal employment in the Netherlands. The next three sections discuss employer sanctions as a tool for labour market

7 Sanctions are not always issued promptly after a workplace inspection. By law, they should be issued within five years after a violation takes place, art. 5:45 Dutch General Administrative Law Act (GALA). However, as soon as a formal report of violation has been communicated to the offender, the government has 13 weeks to decide on the fine, art. 5:51 GALA.

8 A. Klap and T. de Lange (2008), 'Marktordening via het werkgeversbegrip van de Wet Arbeid Vreemdelingen', *SMA*.

9 M. LeVoy and S. Craenen (2007), 'Undocumented Migrants in the Workplace: A Rights-Based Approach', available at <https://heimatkunde.boell.de/2007/11/18/undocumented-migrants-workplace-rights-based-approach>; Migrants' Rights Network (MRN) (2009), *Irregular migrants: the urgent need for a new approach*; P. Dwyer, H. Lewis, L. Scullion, and L. Waite (2011), 'Forced Labour and UK Immigration Policy: Status Matters?' Joseph Rowntree Foundation, University of Salford; J. van der Leun and R. Kloosterman (2006), 'Going underground: Immigration policy changes and shifts in modes of provision of undocumented immigrants in the Netherlands', *Tijdschrift voor Economische en Sociale Geografie* 97(1); A. Bloch et al. (2015), 'Employer sanctions: The impact of workplace raids and fines on undocumented migrants and ethnic enclave', *CSP* 35(1).

10 D. Bacon (2008), *Illegal People: How Globalization Creates Migration and Criminalizes Immigrants*, Beacon Press, p. 6.

11 T. de Lange (2011), 'The privatization of control over labour migration in the Netherlands: in whose interest?' *European Journal of Migration and Law*, 13(2); European Commission (22 May 2014), 'Communication from the Commission to the European Parliament and the Council on the application of Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third country nationals', COM (2014), 286 final.

regulation, as a tool for migration control, and the role of the Inspectorate in protecting irregular workers, rounding off with the conclusion in Section 7.

2 Legal Structure of Employer Sanctions

In the literature, employer sanctions have been justified as a policy instrument in the fight against illegal employment as 1) a labour market regulation mechanism intended to protect local businesses and national workers by eliminating unfair competition from cheap labour, and to collect otherwise missed tax revenues in order to maintain the viability of the welfare state; 2) an instrument of migration control that aims to reduce the pull factors that draw the migrants who enter irregularly, and to deter prolonged irregular residence; and 3) since the transposition of the EU Employer Sanctions 2009/52/EC (hereafter ESD) directive, as a mechanism to protect migrant workers from exploitative employment conditions.¹²

2.1 Employer Sanctions in Europe

The ESD is based on art. 79 Sections 1 and 2 c) of the Treaty on the Functioning of the EU (the former article 63.3.b of Title IV of the EC Treaty on Visas, Asylum, Immigration and Other Policies Related to the Free Movement of Persons). The Treaty text obliges the EU to develop measures aimed at ‘the prevention of, and enhanced measures to combat, illegal immigration’. Carrera and Guild have problematised this legal basis of the ESD: ‘While the paramount goal is “taking action against illegal immigration”, the principal focus is employment and working conditions. One must ask, therefore, whether the current legal basis really is the most appropriate one.’¹³ The ESD provides for sanctions against employers of illegally resident third-country nationals.¹⁴ The ESD sets minimum standards, meaning that the Member States are free to impose stricter obligations on employers. Third-country nationals (TCN, meaning non-EU nationals) that legally reside in a Member State fall outside the scope of the Directive, regardless of whether they

12 See A. Bloch et al. (2015), ‘Employer sanctions: The impact of workplace raids and fines on undocumented migrants and ethnic enclave’, *CSP* 35(1); P.J. Krop (2014), *De handhaving van het verbod op illegale tewerkstelling. De verhouding tussen strafrechtelijke en bestuursrechtelijke handhaving in de Werkgeverssanctierichtlijn, Nederland en Duitsland*, Boom Juridische uitgevers.

13 S. Carrera and E. Guild (2007), ‘An EU Framework on Sanctions Against Employers of Irregular Immigrants: Some Reflections on the Scope, Features & Added Value’, CEPS Policy Brief, p. 140.

14 Art. 3 ESD.

are allowed to work.¹⁵ The Directive is without prejudice to national law prohibiting the employment of legally resident TCN who work in breach of their residence status.¹⁶

Employer sanctions are exemplary of a governance shift: a shift of responsibility from the public to the private sphere making employers liable for migration status checks.¹⁷ Member States should oblige an employer to check the TCN's residence permit or other authorisation for stay prior to employment and to keep a copy of those documents for at least the duration of the employment.¹⁸ According to the Directive, the employer should face financial sanctions, meaning a financial penalty (penal or administrative) and be forced to pay the costs of repatriation, if a return procedure is carried out. It is up to the Member States to set the level of fines, which is why these vary from Member State to Member State.¹⁹ In addition, the Member States may use other sanctions, such as exclusion from entitlements (such as EU subsidies) or public contracts, or recovery of public benefits. Another sanction mentioned is the temporary or permanent closure of the establishments that have been used to commit the infringement, or temporary or permanent withdrawal of a license to conduct the business activity in question, if justified by the gravity of the infringement.²⁰ Where the employer is a subcontractor, and this would also be the case for agency work, Member States shall ensure that the contractor of which the employer is a direct subcontractor may, in addition to or in place of the employer, be liable to pay the financial sanction and any back payments to the migrant worker.²¹ Although the Directive mentions only one subcontractor, in practice, there can be a chain of subcontractors, if national law provides for chain liability. Finally, the sanctions should be of a criminal law nature if the infringement is committed intentionally and either continues or is persistently repeated; if it involves a significant number of illegally staying TCNs; if it is accompanied by particularly exploitative working conditions; if

¹⁵ Preamble 5 ESD.

¹⁶ Preamble 5 ESD.

¹⁷ T. de Lange (2011), 'The Privatization of Control over Labour Migration in the Netherlands: In Whose Interest?', *European Journal of Migration and Law*, 13(2); J. van der Leun (2006), 'Excluding illegal migrants in The Netherlands: Between national policies and local implementation' *West European Politics* 29(2); W.J. Nicholls (2015), 'Policing Immigrants as Politicizing Immigration: The Paradox of Border Enforcement', *ACME: An International Journal for Critical Geographies* 14(2).

¹⁸ Art. 4 ESD.

¹⁹ A. Sommarribas, R. Petry, and B. Nienaber (2017), *Illegal employment of third-country nationals in the European Union* (EMN Synthesis Report 2017).

²⁰ Art. 7, para. 1(a-d) ESD.

²¹ Art. 8 ESD.

it is committed while knowing the TCN is a victim of trafficking in human beings; or if the infringement concerns the illegal employment of a minor.²²

While employer sanctions punish employers for illegal employment, the ESD also includes provisions that protect the rights of migrants at work, despite their legal status. According to the ESD, the employer should be required to pay any outstanding remuneration, taxes, and social security contributions.²³ This back pay includes the difference between what they were paid and the legal minimum wage, or its equivalent in actual practice. The Member States should also ensure that the worker can actually recover outstanding remuneration.²⁴ The Directive does not include an obligation to impose a financial sanction on the employer for undercutting the minimum wage (if applicable) or failing to meet tax obligations, as that would go beyond the scope of migration control.

2.2 Dutch Sanctions on Illegal Employment

According to the Dutch Foreign Nationals Employment Act (*Wet Arbeid Vreemdelingen, WAV*), an employer is prohibited from employing a migrant (EU or TCN) without a work permit or a single permit for work and residence under Directive 2011/98/EU. Illegal employment in the Dutch context can include both legal and illegally resident TCNs. A TCN can have (temporary) legal residence in the Netherlands and not be allowed to work without a work permit. This is, for instance, the case for TCNs with a tourist visa, TCN students,²⁵ or TCNs with a residence permit for another EU Member State.²⁶ The prohibition has many exceptions, inter alia for EU nationals using their free movement rights. The scope of the prohibition includes EU nationals who are not yet eligible for free movement rights pursuant to the transitional measures after accession to the EU by their Member State.²⁷ Although a large share of employer sanctions cases in the Netherlands

22 Art. 9 ESD.

23 Art. 6 ESD. The logic of back pay as an instrument of migration control was also central in the Case C-311/13 *Tümer* [2014], published with annotation by C.A. Groenendijk & T. de Lange (2015) in *Jurisprudentie Vreemdelingenrecht* 2015/2.

24 Art. 13 ESD.

25 On students, see T. de Lange (2015), 'Third-Country National Students and Trainees in the EU: Caught between Learning and Work', *IJCLIR* 31(4).

26 On illegal employment of TCN from other Member States, see L. Della Torre and T. de Lange (2017), 'The "Importance of Staying Put": Third Country Nationals' Limited Intra-EU Mobility Rights', *JEMS* DOI: 10.1080/1369183X.2017.1401920.

27 Schrauwen & Houwerzijl and Cremers & Dekker discuss internal EU migration in this volume.

concern EU nationals during these transitional periods, our focus in this chapter is on employer sanctions related to illegally staying TCNs.²⁸

As of 1 July 2016, employer sanctions are raised by 50 per cent if the violation concerns an illegally staying TCN.²⁹ The standard sanction of 2000 euros for the illegal employment of a domestic worker by a natural person is, for instance, raised by 50 per cent if the worker is an illegally staying TCN. On the other hand, employer sanctions can be reduced by 25, 50, or 75 per cent, depending on the nature and degree of the violation, the degree of culpability, and proportionality.³⁰ A sanction can be reduced by 50 per cent if the employer can establish that the employment was marginal and incidental (employment of limited duration and size), was unpaid, or that the work only took place once³¹ – if, for instance, someone's brother, while visiting on a tourist visa, lends a hand unpacking restaurant supplies.³²

Figure 1 Standardized sanctions for illegal employment

Offender	Standard sanction (in €)
Natural person, who has a migrant perform a domestic or personal service	2,000
Natural person, who has a migrant perform labour for him/her in the fulfilment of official, professional or business duties	4,000
Public Benefit Organisation, that has a migrant perform labour for its benefit although the labour did not take place within the sphere of business	4,000
Legal person that has a migrant perform labour for its benefit in the fulfilment of official, professional or business duties	6,000
Other legal entities	8,000

Source: *Staatscourant* 14 July 2016, nr. 37043³³

28 From 2010–2014, Bulgarians and Romanians were the main nationalities encountered illegally working by the Dutch labour inspectorate. In 2012 and 2013, half of the fine reports concerned illegal employment of Bulgarians and Romanians, in 2010, 2011, and 2014 this was one third. Inspectorate SZW (labour inspectorate), *Annual report 2012*; Inspectorate SZW (labour inspectorate), *Annual report 2013*; Inspectorate SZW (labour inspectorate), *Annual report 2014*.

29 Art. 2 Beleidsregel boeteoplegging WAV 2016.

30 Art. 10 Beleidsregel boeteoplegging WAV 2016.

31 Decree of the Minister of Social Affairs and Employment on the adoption of the Beleidsregel boeteoplegging WAV 2016. *Stcrt.* 2010, 37043, explanatory memorandum.

32 District Court Utrecht 22 November 2007, ECLI:NL:RBUTR:2007:BB9096.

33 Decree of the Minister of Social Affairs and Employment on the adoption of the Beleidsregel boeteoplegging WAV 2016. *Stcrt.* 2010, 37043.

Sanctions target employers – not the individuals whose work activities are illegal. In the Netherlands, neither illegal stay nor illegal work are considered a (criminal) offense of the TCN. Even if the migrant is staying illegally, the work contract is binding and, since 1995, therefore, prior to the implementation of the ESD, a provision on illegally staying TCN's entitlement to six months back pay has been included in Dutch legislation, in article 23 WAV.³⁴

3 The Labour Inspectorate's Reports

This chapter draws on case file research conducted at the Dutch labour inspectorate, known as the Inspection of Social Affairs and Employment (*Inspectie Sociale Zaken en Werkgelegenheid*). The empirical study comprises an analysis of all files closed in 2014 that concerned violation of the WAV.³⁵ These files contain so-called fine reports drawn up when a labour inspector is of the opinion that an employer has violated the WAV. The fine reports contain information on the labour inspectors' observations at the workplace. The fine reports do not contain information on the imposed employer sanctions. Employer sanctions are determined by another division of the labour inspectorate. The majority of fine reports do, however, result in employer sanctions being imposed³⁶, although they can later be overturned in court.³⁷

The empirical study covers 1179 fine reports in 803 case files.³⁸ The fine reports were systematically analysed making use of a checklist to retrieve

34 T. de Lange (2011), 'De verborgen schat van artikel 23 WAV', *Jaarboek Vreemdelingenrecht* 1(4); T. de Lange (2018), 'Blurring the public/private law divide in checks of migrants' right to work in the Netherlands' in B. Ryan (ed.), *Migration and Employment Law*, Hart Publishing, forthcoming.

35 Our sample included only fine reports that involved the employment of a TCN worker without a valid work permit (violation of art. 2 WAV). Other violations, such as a failure to provide notification of the employment of a TCN (violation of art. 2a WAV) were excluded.

36 9 per cent of fine reports in 2016 were not followed up with an employer sanction because of lack of evidence or lack of culpability. Inspectorate SZW (labour inspectorate), *Annual report 2016*, p. 61.

37 During the period from 2011 through 2014, the inspectorate noted an increase in objection and appeal procedures after the imposition of WAV sanctions. In 2011, objections to fines were lodged in 37 per cent of cases, increasing to 55 per cent in 2014. In 2011, 6 per cent of cases led to appeals procedures, increasing to 30 per cent in 2014. While this tendency toward legal escalation has been on the rise for the enforcement of other labour laws as well, the increase is highest for WAV cases. Inspectorate SZW (labour inspectorate), *Annual report 2014*, p. 18.

38 If there are multiple employers involved (because of subcontracting or temporary agency work), there are multiple fine reports included in a case file. Fine reports are drawn up for each employer in the chain of contractors.

information on the illegally employed migrants encountered by the labour inspectorate. We recorded, among other things, the nationality and gender of the migrant, the type of workplace, job function, duration of employment³⁹, the means of entering the Netherlands, (previous) residence permit, current residence status, nationality of the employer, whether or not there was a familial relationship with the employer, whether there was any police involvement during/after the workplace inspection, whether a check on minimum wage and holiday payment had been performed, and if a related fine report had been drawn up.⁴⁰ Wage information and working hours were recorded if mentioned in the reports, but that was not often the case.⁴¹

In our case file study of the year 2014, we counted 756 illegally employed TCNs. While the ESD only applies to illegal employment of illegally staying TCNs, the Dutch legislation on employer sanctions applies to the illegal employment of TCNs regardless of residence status, as well as to EU nationals during transitional periods after accession, as we discussed in the previous section. The legal residence status of a migrant encountered by the Inspectorate is not always clear from the information in the fine reports. However, we tried to extract the migrant status from the information at our disposal. We found that 44 per cent of the 756 illegally employed TCNs ($n = 332$) were illegally resident⁴²; 39 per cent ($n = 292$) were legally resident, but working in violation of the conditions of their residence permit; 11 per cent ($n = 86$) were involved in a legal procedure and therefore non-deportable; and, in 6 per cent of the cases ($n = 46$), we were unable to determine the legal status of the migrant. In the following, we analyse the working conditions of the 332 illegally staying TCNs.

39 Wherever possible, we used the statement from the case file given by the TCN involved, unless someone else (an employer or a witness) indicated that the TCN had worked for the employer for a longer period of time.

40 It must, however, be noted that not all information needed for our checklist could be retrieved from every case file.

41 In the subsequent analysis, we counted all retrieved data items using statistical software.

42 This number may have been higher. Of the 756 illegally employed migrants, 112 migrants had a residence permit issued by Italy or Spain. When the fine report mentioned that the migrant had resided for more than three months in the Netherlands, the migration status was coded as irregular in our analysis. In many cases, there is either no information available on the duration of stay in the Netherlands, or the migrant indicated that his or her stay in the Netherlands was for less than three months. The latter may, however, be inaccurate. There are indications that migrants sometimes use (an application for) a residence permit as a jumping-off point for further intra-EU migration (see Dela Torre and De Lange, 2017). Of the 76 migrants with an Italian or Spanish (application for a) residence permit, whose migration status was coded as legal in our analysis, fully one-third indicated that it just so happened to be the first day they were working at that workplace when the labour inspectorate encountered them.

3.1 Illegal Employment of Illegally Staying TCN in the Netherlands

Compared to other EU Member States, the shadow economy in the Netherlands is considered to be relatively small; 9 per cent compared to the 18 per cent average in the EU.⁴³ Nonetheless, the number of sanctions issued in the Netherlands for the illegal employment of both legal and illegally resident migrants is among the highest when compared to other EU Member States: in 2014, 1084 sanctions were issued, and, in 2015, 981.⁴⁴ Still, given the estimated number of irregular migrants in the Netherlands of around 35000,⁴⁵ the detection of a mere 332 irregularly staying TCNs by the labour inspectorate in 2014 indicates an overall low risk of getting caught for the illegal employment of irregular migrants.

The workplace inspections are informed by the risk analysis performed by the Inspectorate, which is in turn based on information gathered during previous inspections, information and knowledge obtained from other government bodies, research reports, and the expertise of the labour inspectors themselves. Sectors considered to be especially at risk of falling prey to illegal employment practices are the labour intensive, low-skilled jobs at the bottom of the labour market, and sectors where demand for flexible labour is high. The sectors considered to be at risk for illegal employment are inter alia construction, retail, the catering industry, temporary employment agencies, agriculture and horticulture, the metal industry, cleaning (with specific focus on fast-food restaurants and hotels), transportation and logistics.⁴⁶ This focus is also reflected in the WAV fine reports. The main type of businesses where illegally staying TCNs were detected in 2014 was the restaurant sector (n = 108). This was followed by market stalls (n = 29), hair

43 F. Schneider (2015), 'Size and Development of the Shadow Economy of 31 European and five other OECD Countries from 2003 to 2015: Different Developments', *JSME* 3(4).

44 A. Sommaribas, R. Petry, and B. Nienaber (2017), *Illegal employment of third-country nationals in the European Union* (EMN Synthesis Report), p. 14. These sanctions apply to the illegal employment of both TCNs with and without legal residence as well as to the illegal employment of EU nationals working during the transitional period after EU accession. Sanctions across the Member States vary in terms of whether they are financial, administrative, or criminal in nature, and are therefore not precisely comparable. The number of sanctions imposed is about the same in Belgium, and the only country with a higher number of sanctions imposed is France. It must be noted that the number of illegally staying TCNs in both France (2311 in 2014) and Belgium (769 in 2014) is higher than the 332 counted during our case file study of 2014.

45 These are the most recent estimates on the number of irregularly staying TCNs in the Netherlands, see P. van der Heijden, M. Cruyff, and G. van Gils (2015), *Schattingen illegaal in Nederland verblijvende vreemdelingen 2012-2013*, Utrecht.

46 Inspectorate SZW (labour inspectorate) (2014), *Meerjarenplan 2015-2018*.

salons ($n = 20$), and cleaning ($n = 18$).⁴⁷ The main nationalities encountered by the Inspectorate were from China (19 per cent), India (8 per cent), Turkey (8 per cent), Egypt (7 per cent), Morocco (6 per cent), Ghana (5 per cent), Indonesia (5 per cent), Philippines (5 per cent), Pakistan (4 per cent), Iraq (4 per cent), Russia (3 per cent), Brazil (3 per cent), Ukraine (2 per cent), Afghanistan (2 per cent), and Surinam (2 per cent), with the remaining 18 per cent from other countries. In addition, the majority of the detected migrants were male (84 per cent). Chinese migrants were predominantly represented in the restaurant sector ($n = 41$), and all migrants encountered working at Chinese restaurants ($n = 27$) were Chinese nationals. Also, 12 of the 15 migrants employed in beauty and/or massage salons were Chinese.

We also examined the actual work activities performed by the migrants who were detected by the Inspectorate. Sometimes, migrants are found cleaning at a café, for example.⁴⁸ Cleaning ($n = 73$) and food preparation ($n = 64$) were the main activities performed.⁴⁹ While Egyptian migrants were the second largest nationality group ($n = 13$) found working in restaurants, only two of them were actually preparing food. In general, almost half of the Egyptian migrants were involved in cleaning activities. Almost 60 per cent of the encountered Ghanaian migrants were involved in cleaning activities ($n = 10$), and so were five of the ten Brazilians and six of the sixteen Indonesians.

In 20 per cent of the cases, there is no information in the fine reports on the length of time the migrant had been working at the specific workplace. In the event a migrant denies being at work and is only there to lend a hand, there is no information on the (alleged) duration of employment. Of all the illegally staying TCNs encountered during the workplace inspections in 2014, 17 per cent ($n = 55$ migrants) stated that it was their first day working there. A third of the migrants mentioned that they had worked there for one week or less. The information provided by the migrants themselves on the duration of their employment is thus probably not always reliable.

47 Followed by shipping ($n = 14$), massage and/or beauty salons ($n = 14$), retail ($n = 12$), construction ($n = 11$), wholesale ($n = 10$), bakery ($n = 9$), car repair ($n = 8$), agriculture ($n = 7$), au pair/babysitting ($n = 7$), hospitality ($n = 6$), temporary employment agency ($n = 6$), butcher ($n = 5$), domestic work ($n = 4$), laundry mat ($n = 4$), and other ($n = 40$).

48 We need to mention here that migrants sometimes state to the inspectors who run into them that they are not working at that workplace. When this was the case, we noted down the description that the inspector of the work activities observed the migrant performing during the workplace inspection.

49 These are followed by handyman/small-scale construction work ($n = 26$), sales at market stalls ($n = 26$), hairdresser ($n = 20$), employment on a ship ($n = 16$), masseur ($n = 12$), and sales in general ($n = 12$).

4 Sanctions as a Tool for Labour Market Regulation?

Employment in the ESD is 'the exercise of activities covering whatever form of labour or work regulated under national law of in accordance with established practice for or under the direction and/or supervision of an employer.' In the preamble (7), one reads that the definition of employment should encompass its constituent elements, namely activities that are or ought to be remunerated. The definition of 'employer' in Dutch legislation is broader, namely: anyone, a company, natural person, or governmental organisation, having a migrant perform a job – however marginal the job – irrespective of an employment contract or remuneration. It is even irrelevant if the so-called employers are aware that they are enabling a migrant to perform this job on their behalf.⁵⁰ This is odd, because awareness of the infraction is usually part of, or is at least assumed to be, an essential element of an infraction. This broad definition of the term 'employer' was adopted in order to deal with situations with multiple employers (in the event of agency work or subcontracting) and to fight bogus self-employment.⁵¹ The wide definition was initially challenged: it would be disastrous for business because it was not just an instrument of *labour* market regulation but of market regulation in general.⁵² Some courts felt that externalised migration control could not include an obligation for all consumers and business partners, when they use services provided in the marketplace, to verify at all times that these services do not, at any point, enable a migrant worker to be employed illegally. Ultimately, the case law indicates that this cannot be expected of consumers, but that, in a business-to-business relationship, there is an obligation to inspect for compliance with the WAV. This has resulted in the development of a private workplace inspection industry, a certification industry, and has created a market for legal advice on contractual liability in the event of noncompliance, especially geared to bigger projects that often involve intra-EU labour.⁵³

50 The definition reads: 'an employer in the sense of the WAV is the [legal or natural] person who in fulfilment of official, professional or business duties has another person do labour for him, and the natural person who has another person perform household or personal duties for him.'

51 *Parliamentary Documents II* 1993/94, 23574, 3, p. 13.

52 A. Klap and T. de Lange (2008), 'Marktordening via het werkgeversbegrip van de Wet Arbeid Vreemdelingen', *SMA*.

53 T. de Lange (2011), 'The Privatization of Control over Labour Migration in the Netherlands: In Whose Interest?' *European Journal of Migration and Law*, 13(2).

So, which employers and which labour market sectors come under scrutiny as far as illegally employed, illegally staying TCNs are concerned? The Inspectorate works in a programme-based manner, targeting activities in areas that are considered at risk for unfair, unhealthy, or unsafe working conditions.⁵⁴ In most of the case files we examined, the reason for the workplace inspection was not recorded in the fine report (63 per cent). In 17 per cent of cases, the fine report was written up following a police investigation (the fine report is, in this case, usually based on the official report of police findings). In nine cases (3 per cent), the reason given was an anonymous tip.⁵⁵ In eight cases (2 per cent), the reason was a statement by the labour inspector that someone with a foreign (non-European) appearance had been observed working.⁵⁶ According to the Inspectorate, giving this as a reason for a workplace inspection is not in line with the policy and instructions of the Inspectorate. The Dutch Council of State, the highest administrative court, ruled that gathering evidence during a workplace inspection that was held based on the foreign appearance of the worker resulted in unlawfully gathered evidence and was in violation of the nondiscrimination clause in the Dutch constitution.⁵⁷ In five cases, suspicion of human smuggling was the reason given for the workplace inspection. This involved four Indonesian domestic workers and one Brazilian national employed by an agency offering erotic services.

Our case file analysis shows that the illegally staying TCNs encountered by the labour inspectorate are mostly employed in smaller-sized business establishments, with more than half of the migrants working at places with fewer than five employees, and more than 80 per cent at a workplace where fewer than ten people are employed. In more than 60 per cent of cases, the migrant is the only person at the workplace found by the labour inspectorate to be employed without a work permit, and, in more than 80 per cent of cases, only one or two are found. In 40 per cent of cases, the employer is a Dutch national. In 25 per cent of cases ($n = 85$), the employer

54 Inspectorate SZW (labour inspectorate) (2014), *Meerjarenplan 2015-2018*, p. 4.

55 The anonymous tip involved three migrants from Morocco (working in a bakery, a hair salon, and a riding stable), two from Turkey (one working in construction and the other at a laundromat), one from Afghanistan (working in a fast food restaurant), one from China (working in a Chinese restaurant), one from Egypt (working in a fast food restaurant), one from Indonesia (working as a painter), and one from Pakistan (working in a restaurant).

56 This involved four construction workers (three from India, one from the Philippines), a migrant from Burkina Faso (working at a market stall), a migrant from Ethiopia (who was cleaning), a migrant from Ghana (doing chores at a church), and a migrant from Guinea (meatpacking).

57 Dutch Council of State 3 June 2015, ECLI:NL:RVS:2015:1723.

has a non-Dutch nationality. The majority of these non-Dutch employers have a non-EU nationality. In 17 per cent, the employer has dual nationality (including Dutch), and, in 17 per cent, the employer has Dutch nationality and was born in a non-EU country. The case files reveal that more than half of Turkish, Moroccan, and Egyptian migrants are employed in the ethnic economy.^{58, 59} Combining this data, it appears that small migrant entrepreneurs are frequently subject to inspections, and, if they have indeed violated the WAV, are frequently fined.⁶⁰

Targeting ethnic entrepreneurs might seem logical given the Inspectorate's policy of concentrating its resources where the chance of discovering violations is greatest, but it does result in employer sanctions regulating small ethnic markets (and not the *labour* market as a whole). The high fines can put smaller-sized business owners in a financially precarious position. They may not have the money to pay the fine, either pushing them into bankruptcy or forcing them to take out a loan. Case law shows that employers are offered an opportunity to pay the fine in instalments and, in case of financial incapacity, the fine may be lowered. Until recently, the option of lowering the fine for this reason was only considered if the fine was greater than € 6000 – still a lot of money for a private person or a small business.⁶¹

The number of cases detected by the labour inspectorate involving the illegal employment of EU nationals and TCNs with or without a residence permit is steadily decreasing: In 2014, 1567 illegally employed migrants were detected; in 2015, 863; and, in 2016, 675 migrants were detected. Part of the decrease can be ascribed to the fact that labour market restrictions for Bulgarian and Romanian nationals were lifted as of 1 January 2014. The

58 15 of the 21 Moroccans identified in the fine reports 2014 were employed by a Moroccan employer (Moroccan nationality or born in Morocco); 20 of the 29 Turkish migrants were employed by a Turkish employer; and 14 of the 22 Egyptian migrants worked for Egyptians.

59 On the ethnic economy in the Netherlands, see R. Kloosterman, J. van der Leun, and J. Rath (1999), 'Mixed em-beddedness:(in) formal economic activities and immigrant businesses in the Netherlands', *IJURR* 23(2).

60 While the labour inspectorate does not currently have any specific policy targeting migrant entrepreneurs or businesses in the ethnic economy, it did in 2007 and 2008. A specific programme was set up to inspect retailers of non-Western produce, and sanctions were issued in 20 per cent of the inspected workplaces. See labour inspectorate (2008), *Projectverslag Inspectie naleving WAV en WML in de sector Detailhandel voor niet Westerse producten*, The Hague. The Inspectorate SZW reports their inspections online < <https://www.inspectieresultatenszw.nl/> > accessed 15 October 2017. Although a systematic analysis of the more recent inspection data was not performed, the names of the inspected employers suggest these are often migrant entrepreneurs, for instance, in the hospitality sector.

61 Dutch Council of State 16 August 2017, ECLI:NL:RVS:2017:2174.

information shared by the labour inspectorate does not, however, reveal whether the illegal employment of illegally staying TCNs is also decreasing.

5 **Employer Sanctions as an Instrument of Migration Control?**

The imposition of employer sanctions in the Netherlands appears to be focussed primarily on labour market regulation rather than on migration control. The migration status of a migrant who is working illegally (meaning without a valid work permit) in the Netherlands is irrelevant for imposing a sanction. Since June 2016, however, sanctions are increased in the event that the illegal employment involves a migrant without a residence permit. As this is the first time an explicit link has been made between illegal residence and employer sanctions, it could be considered a move towards using sanctions as an instrument of migration control.

Theoretically, formal separation is observed between the Dutch labour inspectorate and police or migration enforcement during workplace inspections. In practice, it is not so clear whether this is truly the case, especially when migrant workers are involved; police officers often accompany labour inspectors on workplace visits.⁶² If a migrant is unable to identify him or herself during a workplace inspection and the police are not already there, labour inspectors notify them of the situation. Specifically, the department of Identification and Trafficking in Human Beings of the Aliens Police is alerted, for identification purposes and to take the migrant into custody if he or she is found to be staying in the country illegally. If that is the case, the same department of the Aliens Police contacts the INS (Immigration and Naturalisation Service) to arrange for deportation.

Our case file research shows that the degree of police involvement during or after workplace inspections cannot always easily be determined. In 29 per cent of the fine reports filed in 2014, there is no information available indicating whether police were present and involved during the workplace inspection, whether they were called in afterwards, or whether the migrant was later handed over to the police. In 57 per cent of cases involving migrants found to be working in Rotterdam, there is no information at all on police involvement available in the files. In Amsterdam and The Hague, this is the case in, respectively, 31 and 22 per cent of cases. Sometimes, migrant

62 PICUM (2015), *Employers' sanctions: impacts on undocumented migrant workers' rights in four EU countries* (Position paper).

workers are merely sent on their way by labour inspectors. This is what happens to those who are found to be working illegally, but nonetheless have legal residence. However, the same treatment is sometimes given to illegally staying TCNs if, for instance, the (aliens) police is not able to come to pick up the migrant right away. Of course, illegally staying TCNs have also been known to try to outrun labour inspectors as soon as they have been spotted in the workplace. In our case file research, we encountered 19 incidences of this strategy being used by possibly illegally staying TCNs to avoid being identified as workers by labour inspectors.⁶³ It is also possible that an employer may have already successfully prevented TCNs from finding employment prior to a labour inspection meant to ferret out illegally employed and illegally staying migrants, but the extent to which employer diligence contributes to stemming the flow of irregular migration into the EU is unknown. Moreover, when TCNs are detained, this does not inevitably mean they will also be forced to leave the EU.⁶⁴ Since the case files on deportation have not been linked up with the case files on illegal employment of illegally staying TCNs, it is not possible to assess the direct impact of employer sanctions as a migration control instrument. There are, however, indications that the deterrent effect of sanctions limits job opportunities for illegally staying TCNs.⁶⁵

Employers are expected to check a TCN's status to see if they are allowed to work. Illegally staying migrants are unlikely to be able to show any documentation at all, or might present someone else's documents. This is why employers are obliged to check the documents presented thoroughly. The person presenting the document could be a so-called lookalike – the employer should check, for instance, whether the worker actually resembles the photograph on the document and whether the signature is legible and

63 A. Bloch et al. (2015), 'Employer sanctions: The impact of workplace raids and fines on undocumented migrants and ethnic enclave', *CSP*, 35(1), provides some other examples of the strategies illegally residing migrant workers employ to avoid detection in the UK, for instance, by choosing safer working environments (building sites rather than restaurants, because of worker mobility) or safer working hours (working at night).

64 In general, about 30 per cent of the migrants held in detention in 2016 were not deported. This percentage decreased in 2016 for the first time since 2012. In 2015, about 40 per cent of the migrants held in detention were not deported. Ministry of Security and Justice (2017), *Rapportage Vreemdelingenketen – periode januari-december 2016*, p. 40.

65 L. Berntsen, T. de Lange and C. Rijken (2018), *De sociaal-economische en rechtspositie van ongedocumenteerde migranten in Nederland* (AUP forthcoming); J. van der Leun and R. Kloosterman (2006), 'Going underground: Immigration policy changes and shifts in modes of provision of undocumented immigrants in the Netherlands', *Tijdschrift voor Economische en Sociale Geografie* 97(1).

comparable. An employer must furthermore endeavour to ascertain whether the document is valid and genuine, not expired, and that there are no typos or missing information. When in doubt, the employer is advised to contact the police. Also, it is suggested that employers use a magnifying glass or a UV lamp to check documents, and to read up on or take a course in the practice of checking documents. Small entrepreneurs are not likely to invest in the materials or know-how for checking documents. The number of falsified documents and lookalike cases encountered by labour inspectors appears to be negligible: in nine cases in 2014, there was some suspicion that documents had been falsified; in ten cases, it was suspected that a migrant had been working after presenting 'lookalike' documentation. The limited number of cases perhaps suggests that employer sanctions have been effective at reducing the illegal employment of illegally staying TCNs, or it may merely indicate that illegal employment has gone even further underground – where employers do not even bother to ask migrants for documentation, and/or illegally staying TCNs are not detected.

Employers' obliviousness to the fact that a migrant was staying illegally has been a key element in much of the case law. At first, the labour inspectorate was adamant in holding fully responsible any employer who did not use a UV lamp, or who failed to contact the police in cases where the labour inspectorate itself (with the help of the police) discovered that a document was a fake and that the person using it was not allowed to work in the Netherlands. This meant that, even if there was no reason to doubt that a document was genuine, for instance a passport issued by another EU country – and that, consequently, the migrant presenting it was permitted to work – the employer would be fined. In our case file research, we found that around 20 per cent of illegally staying TCNs encountered by the Inspectorate had a residence permit from another EU Member State that was no longer valid.⁶⁶ Italy, Belgium, and Spain were the main 'transit' countries. The Council of State found that an employer who had followed all suggestions – diligently checked the documents presented, had well-trained staff that observed effective internal procedures – could not be held liable for the illegal employment of a migrant using a forged document that was not recognisable as such.⁶⁷ This is, however, an administrative burden

66 In almost half the cases examined during our case file research, we were unable to extract information from the fine reports on migration routes, previous residence permits, or previous whereabouts.

67 The policy guidelines on employer sanctions, however, suggest mitigation of the sanction by 50% rather than not holding the employer liable at all. Decree of the Minister of Social Affairs

that larger companies may be able to bear, but smaller businesses and private individuals generally cannot. Similar in consequence to the broad definition given to the term ‘employer’, these administrative obligations may result in a tendency not to hire migrants at all – those staying legally and illegally alike.⁶⁸

Employer sanctions probably have only limited effect as an instrument of migration control, although their deterrent effect may limit employment opportunities for illegally staying TCNs. Shifting the burden of migration control duties to private actors, and the resulting administrative burden for employers, may have a spillover effect; to avoid all risk, even legally staying migrants might end up being less frequently recruited. Further research will be needed on this, however.

6 Protection of Illegally Staying TCNs’ Workers’ Rights

As shown in Section 2 of this chapter, there are specific provisions in the ESD regarding the protection of migrant workers’ rights: the availability and accessibility of complaint mechanisms, and the recuperation of outstanding wages.⁶⁹ While article 23 of the WAV has, since 1995, provided for the possible recuperation of six months back pay in the event of illegal employment, no additional provisions have been implemented to ensure the actual recuperation of outstanding wages.⁷⁰ To fulfil the ESD requirement of making the recuperation of outstanding wages accessible to illegally staying TCNs, the Netherlands provides funding to the NGO Fairwork, which informs migrants of their workers’ rights and assists them in wage recuperation procedures.⁷¹ However, there is, to our knowledge, only one case in which a formerly illegally staying TCN successfully sued for six months back pay.⁷²

and Employment on the adoption of the Beleidsregel boeteoplegging WAV 2017, *Stcrt.* 2017, 37085, explanatory memorandum, p. 11.

68 For migrant entrepreneurs who are active in the ethnic economy, not hiring employees from their ethnic community may be problematic, see R. Kloosterman, J. van der Leun, and J. Rath (1999), ‘Mixed embeddedness: (in)formal economic activities and immigrant businesses in the Netherlands’, *IJURR* 23(2).

69 Art. 6 and 13 ESD.

70 T. de Lange (2011), ‘De verborgen schat van artikel 23 WAV’ *Jaarnaal Vreemdelingenrecht* 1(4).

71 A. Sommarribas, R. Petry, and B. Nienaber (2017), *Illegal employment of third-country nationals in the European Union*, EMN Synthesis Report.

72 There may have been others, but those disputes would probably have been settled out of court, and therefore would not have contributed to the case law. The migrant in this case was assisted in his wage claim by the Dutch NGO Fairwork.

Migration lawyers may be unaware of their clients' labour rights, just as labour law practitioners may not be aware of this legal instrument hidden away in a migration law, thereby limiting irregular migrants' options for legal redress.⁷³

In 80 per cent of the 2014 fine reports involving the illegal employment of migrants without residence papers, there was no information included on remuneration or the hours worked by the migrant. When that information was included, it often appeared that the level of remuneration was below the Dutch minimum wage. Moreover, in almost 40 per cent of cases, the Inspectorate, besides checking for violations of the WAV, also checked for violations of the Dutch Minimum Wage Act (WML). This nonetheless resulted in a WML fine report being filed only in three cases,⁷⁴ possibly indicating that illegally staying TCNs can hope to receive little support from the labour inspectorate in claiming their workers' rights. The Inspectorate indicated, however, that the department of Investigations of the labour inspectorate receives around 200 reports of labour exploitation each year. Whether a particular case had been flagged as an incidence of potential labour exploitation was, however, not linked to or recorded in the fine reports we studied. Underpayment, nonpayment, undertheatable payments in general, and excessive working hours, can all be indicators of labour exploitation.

According to lobby organisations such as PICUM (Platform for International Cooperation on Undocumented Migrants) and FRA (Fundamental Rights Agency), there should in practice be a clear '(fire)wall' established between the mechanisms for accessing labour protection (through the labour inspectorate or through trade unions) and the migration law enforcement authorities, such as the (aliens) police. Requiring labour inspectors to report illegally staying TCNs to the migration/aliens police may infringe on migrants' access to their fundamental and workers' rights.⁷⁵ As indicated in the previous section, the distinction between the competences of labour

73 M. Freedland and C. Costello (2014), 'Migrant Work and the Division of Labour' in C. Costello and M. Freedland (eds.), *Migrants at Work: Immigration and Vulnerability in Labour Law*, OUP.

74 Since 2016, the labour inspectorate's enforcement focus has increasingly concentrated on fighting underpayment (enforcement of the Dutch minimum wage and holiday allowance act, WML), while also checking for violations of the WAV (as well as the Working Times Act, ATW, and the Intermediaries Act, WAADI). This has resulted in fewer cases being concluded in 2016, although in more fine reports involving the WML Act. Inspectorate SZW (labour inspectorate) (2016), *Annual report*, p. 8.

75 PICUM (2015), *Employers' sanctions: impacts on undocumented migrant workers' rights in four EU countries*, Position paper; I. de Sancho Alonso (2007), 'Access to labour rights for undocumented workers', CEPS Policy Brief, p. 140.

inspectors and police officers during a workplace inspection may be lost on illegally staying TCNs, which infringes their access to effective remedy for the recovery of outstanding wages. The Netherlands is, however, not a case in point on this matter. The focus of state interventions in other EU Member States, but also in Australia and the United States, has been on sanctions and the enforcement of immigration law at the expense of the enforcement of employment law remedies for illegally staying migrant workers.⁷⁶ In so-called 'sanctuary cities' in the US, local authorities attempt to counter this tendency by limiting their engagement with immigration enforcement.⁷⁷ Several studies have shown that stricter state controls have had limited beneficial effect on employment practices, but instead tend to drive informal job opportunities further underground, where working conditions for irregular migrants are worse.⁷⁸

7 Conclusion

Although the Dutch government's stance with regard to illegal employment might seem tough, the execution of employer sanctions would, in fact, appear to prioritise labour market regulation and, to a lesser extent, migration control. This is echoed in the labour inspectorate's priorities; the case files from 2014 do not indicate that much attention is paid to the actual employment conditions of illegally staying TCN workers.⁷⁹ Nevertheless, a recent policy change that favours differentiated employer sanctions depending

76 Laurie Berg illustrates this development through her analysis of temporary migrant labour cases in Australia: L. Berg (2016), *Migrant rights at work: Law's precariousness at the intersection of immigration and labour*, Routledge.

77 Immigration Policy Center and L. Tramonte (2011), *Debunking the myth of "sanctuary cities": Community policing policies protect American communities*, Special report; S. Chauvin and B. Garcés-Mascareñas (2012), 'Beyond Informal Citizenship: The New Moral Economy of Migrant Illegality', *IPS* 6.

78 A. Bloch et al. (2015), 'Employer sanctions: The impact of workplace raids and fines on undocumented migrants and ethnic enclave', *CSP* 35(1); J. van der Leun and R. Kloosterman (2006), 'Going underground: Immigration policy changes and shifts in modes of provision of undocumented immigrants in the Netherlands', *Tijdschrift voor Economische en Sociale Geografie* 97(1).

79 We do need to mention, however, that the Dutch labour inspectorate changed its enforcement approach in 2016, gravitating towards a more integral focus on all labour laws. This entails, in practice, that, when a migrant is found to be working without a (valid) work permit, the inspectors also check whether the working conditions are in line with Dutch minimum wage standards. This calls for an update of the case file research on workplace inspections that took place after the policy change to assess its impact on irregular migrant workers' rights.

on the residence status of the migrant worker(s), however, indicates fresh interest in controlling migration with employer sanctions.

Whereas the Dutch labour inspectorate has traditionally played the role of labour market regulator, in effect protecting the national labour market from illegal employment, its resort to the instrument of employer sanctions has expanded its scope to encompass migration control as well. By imposing employer sanctions, however, the duty to enforce migration policy has shifted to employers and private individuals. Besides enforcement, the labour inspectorate plays a dual role in the sense that it is also responsible for protecting all workers in the Netherlands, regardless of their legal status, against exploitative working conditions. According to EU and Dutch law, irregular migrant workers are entitled to back pay, and to the same minimum wage and working standards as workers with legal status and permission to work. Member States should make sure that irregular migrants have access to adequate complaint mechanisms and are thus able to claim outstanding wages. In the Netherlands, although this has, to a certain extent, been made available to and attainable for irregular migrants via migrant support organisations, trade unions, and/or legal advisors, there is certainly room for improvement.

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