De handhaving van het verbod op illegale tewerkstelling: De verhouding tussen strafrechtelijke en bestuursrechtelijke handhaving in de Werkgeverssanctierichtlijn, Nederland en Duitsland

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Summary

This summary gives an overview of the main findings of this dissertation. First these findings will be briefly presented to give an outline of the topics of this dissertation. After that, the content of the chapters that form the basis for the main findings will be discussed. Finally the main findings will be discussed in more detail.

This dissertation deals with the enforcement against employers who employ third-country nationals who do not have the right to reside in the EU. This dissertation shows that the ideas about the relationship between criminal and administrative sanctions underlying the enforcement in Directive 2009/52/EC (the Employer Sanctions Directive), in the Netherlands and in Germany differ from one another. The conclusions of this dissertation consist of four main points. The first point is the question whether or not there was a legal basis for prescribing criminal sanctions in the Employer Sanctions Directive. Connected to the first point is the second point: the decision to opt for criminal sanctions in the Directive, given the enforcement practice in the Netherlands and Germany. The third point is the role of capacity and priority for the enforcement of illegal employment as a condition for successful enforcement in the Netherlands and Germany and the consequences for European legislation. The fourth point is the relationship between criminal and administrative sanctions in the academic discourse in the Netherlands, based on lessons that can be learned from the crimmigration literature.1406

These main findings, that will be discussed more elaborately at the end of this summary, are based on the chapters of this dissertation. The first chapter consists of the research question and the design of the dissertation and also discusses the methodology and terminology used in this dissertation. The second chapter describes the content, legal basis, realization and policy background of the Employer Sanctions Directive. The third chapter deals with the criminal and administrative enforcement of illegal employment in the Netherlands, followed by chapter four containing the conclusions on the enforcement of illegal employment by Dutch municipalities. Chapter five describes the enforcement of illegal employment in Germany. The next chapter, chapter six, analyses the crimmigration literature and the question whether employer sanctions can be seen as a part of crimmigration. Chapter seven contains the main findings and conclusion of this dissertation.

Chapter two describes the legal basis, realization and policy background of the Employer Sanctions Directive. This Directive contains minimum common

1406 The crimmigration literature analyses the ongoing convergence between criminal law and migration law, mostly in the United States.
standards and a general prohibition of employment of third-country nationals without legal residence in the EU. Besides certain preventive measures, the Directive compels Member States to enforce this prohibition with administrative, financial and, under certain severe circumstances, criminal sanctions. Furthermore, the Directive grants certain social rights to the illegally employed third-country nationals. The Member States also have to make sure effective and adequate sanctions are being implemented.

According to article 1 of the Directive, the main aim of the Directive is to ‘fight illegal immigration’, by reducing the possibility of obtaining work without legal residence. The Directive is part of the comprehensive European migration policy. This policy mainly consists of instrument to control the access of migrants to the EU. A few other instrument, like this Directive, aim to close the non-official routes to the EU. The Directive bears a great resemblance to a proposed Directive from 1976 (redrafted in 1978, but never adopted). At the time there was no legal basis for instruments concerning migration. The proposed Directive was part of the social policy of the EC, the aim of which was to improve the social circumstances of employers and the prevention of labour exploitation. Under the current Directive the improvement of social circumstances is merely an instrument to discourage employers, by making illegal employment more expensive. Certain academics and stakeholder are of the opinion that the current Directive should also, partly, have been based on the social legal basis in the EC Treaty. The effects of the social rights incorporated in the Directive have never been researched, while these effects on the level of Member States can be extensive. Besides the social rights for employees the Directive also contains measures and sanctions. An important aspect of the Directive in this dissertation is the introduction of criminal sanctions for private employers. Private employers should be liable to criminal sanctions if the infringement of the general prohibition is committed intentionally and the employment: is continuous or repeated, concerns a significant number of employees without permits, is accompanied by particularly exploitative working conditions, is carried while the employer knows the employee is a victim of human trafficking or concerns a minor. Based on case law by the ECJ criminal sanctions under the former First Pillar are only allowed if criminal sanctions are an essential measure in order to ensure full effectiveness of the Community legislation. According to the Commission criminal sanctions are necessary since ‘administrative sanctions alone are likely not to be enough to deter certain unscrupulous employers’. However the need for criminal sanctions does not show from the preliminary research that has been commissioned by the Com-

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1407 Carrera & Guild 2007, Dewhurst 2011 and the labour organization ETUC.
1408 ECJ, 13 september 2005, C-176/03, under 48.
mission. The Commission states that research by GHK shows the effectiveness of criminal sanctions in the Member States. Analysis of the report and research material of GHK contradicts these findings. It turned out that the Commission found the criminal sanctions so important that they let GHK rewrite their findings in order to support the need for criminal sanctions. The conclusion therefore must be that the need for criminal sanctions is not proven by the Commission. Therefore the legal basis for criminal sanctions is questionable.

The GHK report showed that inspections are one of the most important elements for successful enforcement, since almost every single Member States has enough instruments but lacks inspections. The Commission added a 10% inspection norm in the final version of the draft Directive. This norm was immediately disposed by the Member States, who tried to tone down every single article in the Directive containing obligations for the Member States.

As shown in chapter three, the enforcement of illegal employment in The Netherlands (AEA) was reorganized in 1995. Until 2005 the enforcement took place using criminal prosecution, based on the AEA or article 197b of the criminal code. During the first years of the AEA the administrative fine became more and more important as an enforcement instrument in the Netherlands. In 2005 administrative fines were introduced to enforce the AEA. Only after the third infringement in two years’ time would the employer still be subject to criminal charges. According to the Dutch government administrative sanctions are necessary to intensify the enforcement. The criminal sanctions were replaced by administrative fines because of the discontent with the efficiency and the amount of the criminal fines.

As a result of the success of the administrative fine the Netherlands introduced the so called strafbeschikking. This legal instrument gives the public prosecutor the authority to directly impose criminal sanctions to suspects, bypassing an independent court. The suspects (or rather the offender) should appeal within two weeks in order to have his or her case reviewed by an independent court. This development is important for the comparison with Germany as we will see later on.

The Directive was implemented in a formal way: article 197b of the criminal code makes criminal prosecution theoretically possible; however the actual enforcement is still done via administrative fines. The Netherlands does however comply with the conditions that, according to the preliminary research by the Commission, are decisive for a high level of enforcement: capacity and priority for the enforcement. In 2013 the enforcement of a third infringement in two years was also transferred to administrative sanctions. The enforcement had to be stricter and tougher to emphasize the moral disapproval of these sorts of infringements.
Because of the rise of administrative fines and the introduction of the *strafbeschikking* the difference between criminal and administrative sanctions is becoming less and less clear. Traditionally the criminal sanctions were used as a last resort, the *ultimum remedium*, for infringements that were morally disapproved. The moral disapproval is no longer just connected to criminal sanctions. The only way to show moral disapproval is by introducing higher fines and tougher sanctions. In the Netherlands this is easier to achieve by introducing administrative fines than by toughening the criminal sanctions. This is connected to the fact that the premise that underlies the *ultimum remedium*, namely the fact that criminal sanctions are more severe than administrative sanctions, is no longer valid. Criminal sanctions are no longer viewed by the government as being the toughest sanction available.

Chapter four describes the outcomes of a research into the enforcement by municipalities in the Netherlands. Included in this research was the actual application of sanctions on a municipality level. Municipalities have several different options to temporarily or permanently close businesses where illegal employment takes place or to withdraw licenses to conduct a business in the case of illegal employment. These sanctions are prescribed by article seven of the Directive. The chapter shows that the enforcement varies greatly from one municipality to another. This depends on the size of the municipality and the dominant sector. The municipality only has the competence to close a business or to withdraw a license in certain sectors. The actual application of sanction also varies, however the presence of prostitution is a main indicator. No matter the size of the municipality, illegal employment in the prostitution sector will lead to a sanction from the municipality. In the smaller municipalities this is mainly due to the attention that the police has for these sectors. The larger municipalities have their own departments dealing with the enforcement. In 2013 a general, national competence to close businesses was introduced because of discontent with the criminal options that were never used. The enforcement by municipalities was not taken into regard when introducing the general competence. Just as with the general criminal sanctions the government was not content with the severity of the measures and decided to create a competence for the Minister of Social Affairs. Based on the general competence the enforcement is no longer limited to certain sectors.

Chapter five describes the enforcement of illegal employment in Germany. Just like in the Netherlands the enforcement has been reorganized in the past decade. In Germany the decentralized enforcement was centralized. Germany uses a system of sanctions similar to the system of the Directive: administrative fines for simple infringements and criminal sanctions for more severe infringements. Legal entities cannot be subject to criminal sanctions in Germany, so legal entities can only be held responsible via administrative sanctions. Different
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from the Netherlands and the Directive is that in Germany the employee can also be liable to incur administrative and criminal sanctions. Also worth noting is the fact that the administrative fines in Germany, after an appeal, invoke a normal criminal procedure, just like the strafbeschikking in the Netherlands. The administrative fines explicitly do not belong to the criminal law, whereas the strafbeschikking is part of the criminal law. These highly comparable instruments are placed in different fields of law in the Netherlands and Germany, based on national principles.

The amount of the administrative fine in Germany depends on the circumstances of the specific case. There is almost no information available on the average amount of the fines. The average amount of the fines for undeclared work (of which illegal employment is a part) was €2,142 in 2005 and €1,499 in 2006. In these two years around 1,600 persons were sentenced to serve a term in prison, averaging around eight months. Again these sanctions were imposed for all sorts of undeclared work. The enforcement in Germany used to be characterized by decentralization and fragmentation on the one hand (because of the federal character of the German state) and cooperation and the use of central databases on the other hand. With the establishment of the Finanzkontrolle Schwarzarbeit (FKS) in 2004 the local labour inspections and the customs division that worked on illegal employment were combined in a federal organization. This has reduced the problems of decentralization and fragmentation. Junkert en Kreienbrink conclude that Germany has a broad range of instruments for combating illegal employment.\(^\text{1410}\) This is due to a combination of facts in which the criminal sanctions play only a small role. The Directive did not add much to the existing enforcement of illegal employment in Germany. Just like in the Netherlands the accomplished reorganization, and the link with priority and capacity for the enforcement, seem to be more important for the current level of enforcement than the Directive.

Chapter six deals with the crimmigration literature. Crimmigration, a combination of criminal law and migration law, is a theory describing the convergence between criminal and migration law. Criminal infringements get more and more migration consequences and at the same time infringements of migration law get more and more criminal consequences. This process started in the United States with the introduction of criminal employer sanction in 1986 and rapidly developed after the attacks of 11\(^\text{th}\). Not only migrants themselves, but also their facilitators (like employers) can be subject to this development. The main point of the literature describing crimmigration is the loss of rights for migrants and the ‘ad hoc instrumentalization’.\(^\text{1411}\) Sklansky describes this as a way of thinking about the law and legal institutions of the

\(^{1410}\) Junkert & Kreienbrink 2008, p. 76.
\(^{1411}\) Sklansky 2012.
government which is only aimed at imposing the most vigorous sanctions available on migrants. In each specific case the government uses the sanctions that are most convenient. Legal categories and protection of migrants’ rights are only relevant as to make sure they don’t interfere with the enforcement. When introducing the crimmigration literature to the European debate it is important to let go of the connection with criminal law. This connection is important in the US debate given matters of competence between the federal civil migration law and criminal law enforcement on state level. This connection however, is too narrow to be of use in the European debate. Important aspects of European enforcement, like administrative enforcement in the Netherlands, fall beyond the scope of the crimmigration literature if this literature is restricted to the merger between migration law and criminal law, while at the same the process that Sklansky describes is actually going on in Europe as well. Tougher enforcement, combined with fewer rights for the involved individuals in the Netherlands is coupled with the abolishment of criminal law, instead of the introduction of criminal law. The defendants’ rights in a criminal procedure are seen in the Netherlands as a nuisance for the state, interfering with tough enforcement.

The Employer Sanctions Directive has a double hybrid character. One the one hand the employers are the ally of the government, checking documents to prevent illegal employment. On the other hand they face tough sanctions when infringing the prohibition of illegal employment. The same goes for the illegally staying migrants themselves. The aim of the Directive is to prevent their presence on EU soil. On the other hand they are given social rights, acknowledging the fact that often these migrants are victims of harsh or even abusive working conditions. This hybrid character makes it hard to clearly acknowledge the Employer Sanctions Directive as a part of crimmigration, mainly due to the fact that the migrants’ rights are actually improved instead of worsened.

The findings in these chapters form the basis for the main conclusion of this dissertation which has been briefly discussed at the beginning of this summary. The main conclusion consists of four, related, points: the legal basis for criminal sanctions in the Directive, the decision to include criminal sanctions in the Directive, the role of capacity and priority concerning the enforcement of illegal employment and the academic consequences of the relationship between administrative and criminal sanctions and the crimmigration literature.

1. As already described in this summary neither the preliminary research nor the impact assessment provide arguments for the necessity of criminal sanctions to combat illegal employment. The comparison between the Netherlands and Germany, as carried out in this dissertation, is also unable to provide evidence of the necessity of criminal sanctions. In these Member States the crim-

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1412 Mitsilegas 2012, p. 97.
inal sanctions are not decisive for the high level of enforcement. Since criminal sanctions under the former First Pillar are only allowed if these sanctions are necessary, the Commission has a certain duty to justify why the adoption of criminal sanctions is necessary. Because of the lack of justification it’s questionable if there actually was a legal basis for adopting criminal sanctions.\textsuperscript{1413} Of course it is possible that I’ve overlooked an important reason for adopting criminal sanctions. However, as long as the Commission doesn’t argue the need for criminal sanctions, the legal basis is questionable. The most likely reason for the lack of justification would be that this justification is not available. Especially given the fact that the preliminary research in first instance showed that there was no need to adopt criminal sanctions.

2. The findings in this dissertation give reason to critically review the choice to adopt criminal sanctions in the Directive. These findings have a broader relevance than just illegal employment. The ideas of the Commission on the role and effectiveness of criminal law are not shared by the examined Member States. This causes problems since the Commission connects a material goal (effective enforcement of illegal employment) to a specific instrument (criminal sanctions). In the Netherlands this connection is not necessarily present. Therefore the Netherlands has to choose between either the correct implementation of the material goal or implementation of the prescribed instrument. Concerning the Directive the Netherlands choose to opt for implantation of the material goal. The specific instrument has only been formally implemented; the criminal sanctions are almost never used.

The comparison between the Netherlands and Germany also shows that the juridical classification of instruments can vary between Member States. The German administrative fine show great resemblance with the Dutch \textit{strafbeschikking} and would thus be considered as an instrument of criminal law in the Netherlands. This could lead to the situation that if two Member States deploy the same instruments (the German administrative fine and the Dutch \textit{strafbeschikking}), one Member State has to change their instruments (since it is not considered criminal law), while the other Member State can continue to use the same instrument (since it is considered criminal law). This makes the outcome of adopting criminal law in a Directive unpredictable. Also the fact that the Employer Sanctions Directive accounts for the German doctrine that legal entities cannot be held criminally responsible is interesting when compared to the Dutch practice. A big majority of illegal employment fines in the Netherlands are handed out to legal entities. So, on the one hand criminal sanctions are, according to the Commission, necessary to deter employers while on the other hand legal entities don’t have to be sanctioned with criminal penalties, meaning that criminal sanctions would hardly be used in the Netherlands. This underlines

\textsuperscript{1413} This is also the reason that two Member States did not vote in favor of this Directive.
the finding that the effects of prescribing criminal law are highly dependent on the national legislation. Therefore the Commission should have prescribed effective, proportionate and dissuasive sanctions, like it traditionally does in Directives (and also in article 5 of the Employer Sanctions Directive).

3. The comparison showed that criminal sanctions are not decisive for the level of enforcement. Capacity and priority are more important factors. The legal classification of the instrument used is less important that the actual deployment of any sanctions. At the very last moment the Commission added a 10% inspection norm to the proposal for the Directive, meaning that each Member State should inspect 10% of all businesses each year. The Member States immediately discarded this obligation during the negotiations. It’s hard to understand why the Commission clung to the criminal sanctions but didn’t really try to get the inspection norm into the Directive (it of course remains the question whether 10% would have been proportionate or effective, since the effects of this norm have not been researched). However, article 14 of the Directive still contains a different sort of norm. Member States are obliged to ensure that effective and adequate inspections are being carried out. Based on the findings in the preliminary research and this dissertation this article could be the key to success for this Directive. Therefore the Commission should ask the Member States for an elaborate report on the inspections carried out and should take action if these inspections are not effective and adequate. The Commission should focus on the actual inspections and enforcement, and not on the legal classification of the instruments that are being used.

4. The chapter on crimmigration shows that the changed relationship and fading differences between administrative and criminal law often results in decreasing legal protection for the people concerned. According to both the crimmigration literature and the adoption of criminal sanctions in the Directive the conclusion of this dissertation is that the fading difference between administrative and criminal sanctions are not acknowledged. Therefore it’s important that the academic discussion does not just focus on one single instrument, but looks at developments of the whole body of sanctions. Based on the work of Sklansky the basic rights and legal protection should be the main focus. The state shows a tendency to opt for the toughest sanctions, disregarding legal classification and only regarding legal protection as a nuisance. The academic discussion should not focus on the exact differences between criminal and administrative law, but on the central question: what should be the minimum amount of legal protection when the state uses punitive sanctions against persons?