Edited by Conny Rijken and Tesseltje de Lange

Towards a Decent Labour Market for Low-Waged Migrant Workers

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An Introduction

Tesseltje de Lange and Conny Rijken

Abstract
This editorial chapter sets the stage for the groundbreaking chapters that comprise this volume. We discuss in some detail the fragmented legal framework of intra-EU mobility and labour market access of third-country nationals coming to the EU. In the discussion of the concept of decent labour and decent labour markets, we identify three dichotomies at the intersection of (the regulation of) labour markets and migration that underlie this volume. This is followed by a discussion of the collected chapters, each of which describes and problematises aspects of the road and obstacles towards a decent labour market for low-waged migrant workers. The chapter concludes with a multilayered framework and some unconventional thoughts on how to achieve such a decent labour market.

Keywords: labour migration, low-waged migrants, decent labour market, intra-EU mobility, EU migration law

This book is the final output of a research project – *Protecting labour migrants in the Netherlands: past, present and in the future* that allowed us to collaborate with the selected contributors to this volume.[1] Together, we dive into the position of low-waged migrant workers from within the EU, possibly working under worse labour conditions than nationals, or under the level of their education attainments, as well as third-country

1 The project was financed by Institute Gak, (www.instituutgak.nl) project title: '*Bescherming van arbeidsmigranten in Nederland: toen, nu en in de toekomst'*.

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nationals, especially those in low-paid jobs such as seasonal workers, asylum seekers or those without legal residence. These migrant workers contribute to the labour market, valued for their work but are vulnerable to abuse. The research aim of this project was to contribute to developing theories and strategies to overcome this vulnerability and window for abuse: to work towards a decent labour market for low-waged migrant workers. Understanding the fragmented legal framework and its consequences for migrant workers was a first step to achieve this aim. Together with the contributors to this volume, we looked into opportunities to mitigate the negative consequences.

It cannot be denied that migrant workers are an integral part of EU labour markets. Dynamics of globalisation, individualisation, flexibilisation, and liberalisation are only a few factors that determine the state of labour markets today. After the recent financial crisis, we see a rise in employment rates and shortages in the labour market. Today, we see migration flows of rather diverse groups of migrant workers under a great diversity of legal schemes, ranging from intra-EU mobility of EU nationals, to asylum seekers and international students. Not all migrant workers profit equally from the positive dynamics of economies on the rise. It seems to be a general notion that the divide between the privileged and the unprivileged, the haves and have nots, in the labour market, is widening.[2]

In this editorial chapter, we first discuss terminological ambiguities employed in this field and define the limits of this volume. Next, we discuss in more detail the relevant fragmented legal framework and the concept of a decent labour market as used in our research. We discuss the concept of decent labour and decent labour markets and identify three dichotomies at the intersection of (the regulation of) labour markets and migration that underlie this volume. This is followed by a discussion of the collected chapters, each of which describes and problematises some aspect of a road towards a decent labour market for low-waged migrant workers. In the final section, we draw our conclusions. This edited volume is unique, not only because it studies different legal areas in their interrelatedness but uses

2 On this divide, see, for instance: R. B. Freeman (2007), 'The Challenge of the Growing Globalization of Labour Markets to Economic and Social Policy', in E. Paus (ed.), *Global Capitalism Unbound. Winners and Losers from Offshore Outsourcing*, Palgrave pp. 23-39; also C. Teney, O.P. Lacewell, and P. de Wilde (2014), 'Winners and losers of globalization in Europe: attitudes and ideologies', *European Political Science Review*, 6(4) pp. 575-595; W. Tiemeijer (2017), *Wat is er mis met maatschappelijke scheidslijnen?* WRR.

insights from other disciplines – e.g. economics, anthropology, political sciences – to understand the problem and to look for ways to improve the position of migrant workers.

Terminological ambiguity

A first terminological ambiguity we face, regards the concept of 'migrant workers': migrant workers come under many – legally speaking – different frameworks. We look at overarching legal regimes that are central to this study, which are migration law, the laws on access to the national or EU labour market, and the laws describing the rights of migrant workers. Migration law defines migrant workers according to their status upon arrival, which can be facilitated by laws such as the free movement laws for EU nationals or EU labour migration laws for third country nationals (TCN) or by EU and national laws governing the arrival of TCNs coming to the EU for reasons other than work. Indeed, not all migrant workers arrive as workers: they might arrive and remain legally within the EU as family migrants, as foreign students,[3] or may enter to seek refuge, or have other reasons for entry; if they are working, they too are considered migrant workers. Those migrants that enter legally for reasons of work are labelled as labour migrants. They often receive (restricted) work permits for specific jobs, employers, or geographical areas within a country.

Migrant workers' legal status is not fixed, but may change over time for better or for worse.[4] Migrant workers might arrive without permission to stay and work, labelled as 'undocumented', 'unauthorised', 'irregular' migrant workers.[5] Their irregularity can be caused by loss of a previously held legal

3 T. de Lange (2015), 'Third-Country National Students and Trainees in the EU: Caught between Learning and Work', *IJCLLIR,* 31(4) pp. 453-472.

4 R. Paul (2015), *The political Economy of Border Drawing. Arranging Legality in European Labour Migration Policies*, Berghahn; M. Ruhs and B. Anderson (2010), *Who needs migrant workers? Labour shortages, immigration and public policy*, OUP.

5 Still very relevant is the discussion on undocumented migration by S.H. Legomsky (2009), 'Portraits of the Undocumented Immigrant: A dialogue', *Georgia Law Review*, 44(65). Also see B. Bogusz, R. Cholewinski, A. Cygan, and E. Scyszczak (2004), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, Martinus Nijhoff Publishers; A. Triandafyllidou and D. Vogel (2010),'Irregular Migration in the European Union: Evidence, Facts and Myths', in A. Triandafyllidou (ed.), *Irregular Migration in Europe: Myths and Realities*, Farnham: Ashgate pp. 291-299.

residence status,[6] can be uncovered through measures of intensified control,[7] and can be dissolved through regularisations.[8]

All migrant workers, whatever their status as a *migrant* is, and regardless of the protection or lack thereof offered in migration and labour market access laws, are also *workers.* As workers, they may fall under the scope of labour laws and receive legal protection.[9] But how to determine what kind of worker the migrant qualifies as; as employed, or seconded, or provider of a service, or self-employed? This is another terminological – and legally relevant – ambiguity central to this volume. In the next paragraph, we will elaborate on this legal fragmentation.

A Fragmented Legal Framework for EU Labour Mobility

The ambiguity of the concept of the migrant worker is shaped by, and can only be understood within, the legal and regulatory regime of the EU, by current debates and sensitivities on migration in general, and by the opening of the labour market for EU nationals from relatively newer EU Member States.

Intra-EU migration is based on Title IV on free movement of persons, services, and capital of the Treaty of the Functioning of the European Union (TFEU). The chapters in Title IV define the rights of EU nationals moving into another EU Member State as workers, to establish a business or to provide a service. It is a legal framework with blurry boundaries between the legal categories of movers. The Regulation on Free Movement

6 L. Goldring, C. Bernstein, and J.K. Bernhard (2009), 'Institutionalizing precarious migratory status in Canada', *Citizenship Studies,* 13(3) pp. 239-265; F. Düvell (2011), 'Paths into irregularity: The legal and Political construction of irregular migration', *European Journal of Migration and Law,* 13 pp. 275-295.

7 See, for instance, A. Desmond (2016), 'The development of a Common EU Migration Policy and the Rights of Irregular Migrants: A Progress narrative?', *Human Rights Law Review*, 16(2) pp. 247-272.

8 See, for instance, S. Chauvin, B. Garcés-Mascerenas, and A. Kraler (2013), 'Working for Legality: Employment and Migrant Regularization in Europe', *International Migration*, 51(6).

9 This is at least the case in the Netherlands today and, to our knowledge, in most EU countries, although the legality of a job contract in case of illegal employment of irregular migrants, and thus the protection offered through labour laws, has been contested; see, for instance, A. Bogg (2013), 'The immoral trap: migrant workers and the doctrine of illegality', in B. Ryan (ed.), *Labour migration in hard times: reforming labour market regulation?*, Institute of Employment Rights; E. Dewhurst (2011), 'The Right of Irregular Immigrants to Outstanding Remuneration under the EU Sanctions Directive: Rethinking Domestic Labour Policy in a Globalised World', *EJML*, 13(4) pp, 389-410.

1612/68/EC explicitly mentions in its preamble the 'social advancement' of the worker as one of the aims of free movement of workers. Whereas Regulation 1612/68 allowed for a protection of the national labour market in the EU context, the social advancement was never used as an aim and subsequently abolished in the Regulation 492/2011, tipping the balance of interests involved towards the interests of employers and their need for work force over the migrants' interest in 'social advancement' through working elsewhere in the EU. A similar process occurred when adopting and negotiating the Posted Workers Directive (PWD).[10] Framing posting of workers under the free movement of services and choosing this as the sole legal basis for the PWD, the position of posted workers was dealt with under the freedom to provide services. Regardless of the (limited) protection clauses adopted in the PWD to guarantee minimum rights to posted workers, the PWD diminished their position.[11] In relation to the free movement of services, the Services Directive was adopted in 2006.[12] Because the risk of social dumping[13] was considered too high when the 'country of origin' principle was applied, this was not included in the directive. Other measures to protect service providers were, however, not included. According to Article 14, Member States are prohibited to make the provision of services conditional to nationality or residency requirements of the providers and other conditions, making it nearly or practically impossible for service providers from other Member States to provide services in that Member State. Article 15 explains which conditions can be imposed that are not discriminatory to service providers from other EU Member States. This volume shows how this directive is creatively applied, e.g. through letter box firms, to increase financial profits to the detriment of the position of the (migrant) service provider.[14]

Current political debates on the free movement of workers and services, on the one hand highlight how intra-EU mobility is strongly supported at the EU level and considered 'one of the unfulfilled promises of the EU'.[15] On

10 Directive 96-71-EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ 21/1/1997, L 18/1.

11 See Chapter 3 by Houwerzijl and Schrauwen in this volume.

12 Directive 2006/123/EC of 12 December 2006 on services in the internal market, OJ 17/12/2006, L376/36.

13 Although social dumping has not been defined it is understood as a set of unfair and uncompetitive practices aimed at gaining (monetary) advantages which could have negative consequences for economic processes and workers' social security.

14 See, for instance, Chapter 4 by Cremers and Dekkers in this volume.

15 J. Donaghey and P. Teague (2006), 'The free movement of workers and social Europe: maintaining the European ideal', *Industrial Relations Journal,* 37(6) pp. 652-666.

the other hand, host states are rather ambivalent and may consider the use of free movement of workers and services by nationals from new Member States as a threat rather than a potential benefit. Although, for a long time, these free movement rights led a dormant life, they became actively applied after the last two enlargements of the EU, and especially after the restrictions towards these freedoms were abolished. High unemployment rates in host Member States and perceived use or abuse of the social benefits have now led to a negative image of EU workers.[16] The differences in wages, labour conditions, and opportunities to work throughout the EU are a constant incentive for people living in the EU where wages and conditions are low, to try to improve these in other EU Member States where wages and labour conditions are high. From an employer's perspective, free movement creates opportunities to lower labour costs either by using service providers from other, low-wage EU countries or by moving the business to such countries. This creates a continuous tension on the one hand between the economic benefits of free movement of workers and services, and, on the other hand, upholding labour rights standards.

In legal and political discourse, there is a strong claim that open labour markets should be accompanied by enhanced labour standards or stronger EU social policy.[17] The lack of full competence at the EU level in the field of social policy makes it more difficult (not to say impossible) to adopt and include social safety nets in regards to the free movement of workers and services. This is called the problem of the 'Social deficit' of the EU construction. The competition between economic freedom and fundamental social rights includes the risk of a race to the bottom in terms of labour rights. Moreover, Achtsioglou and Doherty argue that a lack of correspondence of EU declarations on social values, 'without an expansion of the EU's competences within the social field, any social objective will remain simply declaratory'.[18] Recent developments amending the posting of workers directive to guarantee 'equal pay for equal work'

16 Editorial Comments (2014), 'The free movement of persons in the European Union. Salvaging the dream while explaining the nightmare', *Common Market Law Review*, 51 pp. 729-740.

17 J. Donaghey and P. Teague, p. 662. In November 2017, the so-called 'pillar of social rights' was signed, proposing a decent labour market for EU *citizens*, not mentioning resident non-EU nationals though. Available at: https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights/european-pillar-social-rights-20-principles_en.

18 E. Achtsioglou and M. Doherty (2014), 'There must be some way out of here: The Crisis, Labour Rights and Member States in the Eye of the Storm', *European Law Journal*, 20(2) pp. 219-240.

may be perceived as an example of a move in a more social direction.[19] The directive focusses on enforcement of social norms to prevent social dumping. Donaghey and Teague on the other hand conclude that practices of social dumping and wage dumping as a consequence of open labour markets is not widespread nor supported by solid evidence. The threats to national social security as expressed by some ministers in the EU Member States have not been sufficiently supported by quantitative data, they argue.[20] We remark that it cannot be denied that corporations, temporary work agencies, as well as self-employed persons and companies hiring migrant workers have shown great ingenuity in circumventing rules of equal treatment covering migrant workers albeit, often through legitimate legal constructions.

Besides circumventing behaviour and the 'social deficit', a third aspect complicating the application of the free movement of workers and services is the issue of defining work relations. It is not always clear when a person is posted, or working by means of hiring out, or when a person is a worker, (bogus) self-employed person, or service provider. The providing of services, either as (bogus) self-employed person, posted worker, or through transnational temporary work agencies, has been widely used and abused. This has led to a variety of constructions in which minimum wages are not paid, access to social benefits is denied, people are dependent on their employer or agency while they officially work as a self-employed person, and thus do not receive minimum wages nor benefit from collective agreements and protection regimes for workers.[21] For each of these different types of workers a different legal regime exists with different rules on limitations to the freedoms that can, and do, create incentives to frame a labour situation according to the regime with the most opportunities to limit equal treatment and to maximise profits.

19 Available at: http://www.europarl.europa.eu/news/en/press-room/20171016IPR86114/posted-workers-better-protection-and-fair-conditions-for-all. Also see Chapter 3 by Schrauwen and Houwerzijl in this volume.

20 Letter sent in April 2013 by the UK Home Secretary and her Austrian, German, and Dutch counterparts to the President of the Justice and Home Affairs Council regarding the strain on services and national welfare systems posed by the free movement of Union citizens and the response of Czech, Hungarian, Polish, and Slovak ministers, in December 2013, highlighting the beneficial nature of such movement for host Member State economies.

21 J. Cremers, J. Dølvik, and G. Bosch (2007), 'Posting of workers in the single market: attempts to prevent social dumping and regime competition in the EU', *Industrial Relations Journal,* vol. 38(6) pp. 524-541.

Labour Migration to the EU

Apart from intra-EU mobility, people move from third countries to the EU as well. The legal regime on migrant workers from outside the EU – non-EU nationals also called third-country nationals (TCN) – coming to live and work in the European Union Member States, is laid down in title V of the Treaty on the Functioning of the EU (TFEU), on the areas of freedom, security, and justice. This title of the TFEU includes a chapter on border check, asylum, and immigration policies. As far as relevant for this volume, Title V states that the EU shall develop a common policy on visas and other short-stay residence permits. Furthermore, it shall develop a common policy on asylum, subsidiary protection, and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. It shall set the standards concerning the conditions for the reception of applicants for asylum or subsidiary protection. Finally, it shall develop a common immigration policy aimed to ensure, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking of human beings. In this respect, measures shall be adopted regarding the conditions of entry and residence and combating both illegal immigration and unauthorised residence and trafficking of persons. Furthermore, the Member States remain free to set conditions and admission quotas of third-country nationals coming from outside the EU to seek work, if not covered by the specific EU directives.

Based on these TFEU provisions, the EU has concluded several Directives with specific relevance for labour migration. These are the Single Permit Directive 2011/98/EU aiming at efficient entry procedures but not setting any criteria for admission.[22] Both migrants admitted for reasons of work, and working though admitted for other reasons, fall within the scope of this Directive and are entitled to equal treatment with nationals.[23] Only one EU Directive sets standards for migration into lower skilled jobs, this is the

22 Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, *official Journal* L 343.

23 See: A. Beduschi (2015), 'An empty shell? The Protection of Social Rights of Third Country Workers in the EU after the Single Permit Directive', in P. Minderhoud and T. Strik (eds.), *The Single Permit Directive: Central Themes and Problem Issues,* Oisterwijk: WLP.

Seasonal Workers Directive.[24] This Directive sets entry conditions, sanctions for employers who do not abide by the rules, and an equal treatment right for the workers, but grants no right to family reunification, for instance. In contrast, however, there are numerous directives covering sectors with highly skilled labour migration, an area of migration where political agreement is easier to reach.[25] The first was a directive for the admission of scientists, the Scientific Researcher Directive, which was subsequently assimilated into a directive for the admission of foreign students and scientists.[26] Researchers may teach in addition to conducting research as long as research remains the primary task. Next came a directive for highly qualified and highly remunerated migrants, the European Blue Card Directive.[27] This directive, which is currently under review, is only widely used in Germany. Relatively new is the Intra Corporate Transfer (ICT) directive.[28] The ICT directive regulates admission in the event of intra-group transfers of managers, specialists, or interns for a period of more than 90 days. The legal status of migrant workers and their family members transferred under this Directive is very similar to that of seconded workers under the Posting of Workers Directive and is not equal to the position of nationals. Like the Seasonal Workers Directive, it only allows for temporary labour migration.[29] Finally, there is the Employers' Sanctions Directive, which stipulates that EU Member States are obligated to punish employers who hire third-country nationals who have not been granted a lawful right of residence and/or work permit.[30] In addition, and important for our discussion, the Employ-

24 Discussed in this volume by Zoeteweij and Herzfeld Olsson (Chapters 5-6).

25 A.A. Caviedes (2010), *Prying open Fortress Europe. The turn to Sectoral Labour Migration*, Lexington Books.

26 Directive 2016/801/EU of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes, or educational projects and au pairing (recast), *Official Journal* L 132/21.

27 Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, *Official Journal* L 155/17.

28 Directive 2014/66/EU of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, *Official Journal* L 157/1.

29 C. Costello and M. Freedland (2016), 'Seasonal Workers and Intra-corporate Transferees in EU Law: Capital's Handmaidens?' in J. Howe and R. Owens (eds.), *Temporary Labour Migration in the Global Era. The Regulatory Challenges*, Hart Publishing; T. de Lange and S. van Walsum (2014), 'Institutionalizing temporary labour migration in Europe; creating an "in-between" Migration Status', in L.F. Vosko, V. Preston, and R. Latham (eds.), *Liberating Temporariness? Migration, Work, and Citizenship in an Age of Insecurity Liberating Temporariness? Migration, Work, and Citizenship in an Age of Insecurity*, McGill-Queens University Press.

30 Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, *Official Journal* L 168/24.

ers' Sanctions Directive also provides that Member States must provide a certain degree of protection for illegally employed foreign nationals. The European Commission concluded in its review of the Employers' Sanctions Directive that the level of protection offered to illegally employed TCN by the Netherlands, as well as by a number of other Member States, is not yet adequate.[31] Other EU Directives deal with different kinds of migration rather than labour migration, such as family reunification, long-term residence[32] or asylum-seeking, and set standards for labour market access for non-EU nationals as well. But for the right to work of asylum seekers, as discussed by De Lange in this volume (Chapter 7), these other directives remain untouched here. Although Directives include the obligation to provide for a certain level of equality, not all migrant workers are to be treated equal to nationals of the receiving EU Member States.[33]

This legal framework – together with the labour, tax, or social security laws of the country where a job is performed – creates the legal regime applicable, and defines the position of the migrants, both EU nationals and TCN, on the labour market in the receiving Member States.

The Concept of Decent Labour in a Decent Labour market

Given this fragmented legal framework and using the position of the migrant worker to look at it, what challenges can be identified? Labour lawyers, migration scholars, and political theorists have delved into these themes, compartmentalising the topics and/or groups, looking at intra-EU mobility, (temporary) labour migration, labour exploitation, integration, undocumented migrants, or seasonal workers. A sound 'solution' doing justice to all categories of migrant workers and their specifics may not exist, but we depart from the normative stance that, if a better balance can be struck between interests of all labour market actors, a more *decent* labour market can be created.

So how do we define decent work and does decent work imply a decent labour market? Decent work takes place on the individual level and, as such, fits the perspective chosen in this volume, namely the perspective

31 See Chapter 9 by Berntsen and de Lange in this volume.

32 On labour mobility within the EU of long-term residents, see L. Della Torre and T. de Lange (2017), 'The ¨importance of staying put¨: third country nationals' limited intra-EU mobility rights', *Journal of Ethnic and Migration Studies*, DOI: 10.1080/1369183X.2017.1401920.

33 B. Friðriksdóttir (2016), *What happened to Equality. The Construction of the Right to Equal Treatment of TCN in EU Law on Labour Migration*, (PhD Thesis) Radboud University Nijmegen.

of the migrant worker. A decent labour market refers to the way in which the labour market is organised, namely in such a way that it stimulates decent work and diminishes elements that facilitate or allow practices that are detrimental to workers, including migrant workers. We look at the International Labour Organisation (ILO), EU Social Charter, and EU Directives for further guidance. The ILO description of decent work reads:

> Decent work sums up the aspirations of people in their working lives. It involves opportunities for work that are productive and deliver a fair income, security in the workplace and social protection for families, better prospects for personal development and social integration, freedom for people to express their concerns, organise and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men.[34]

Overall, we see neither specific policy aims nor practices that actually implement this broad definition of decent labour, especially not for migrant workers. For instance, long-term perspectives or vocational training for migrant workers are rarely established. Although the Seasonal Workers Directive requires equal treatment with respect to vocational training, few, if any, EU countries facilitate a future career for their seasonal workers other than, maybe, a fast-track visa procedure, once again, for seasonal work.[35] A decent labour market protects migrant workers against exploitation and offers them opportunities according to their abilities.[36] As such, labour market policies must facilitate equal and fair participation of all migrant workers, including those in low-waged jobs. Throughout this volume, situations, regulations, and abuses are identified that undermine a decent labour market.

If we look at the EU legal framework, this directs us to the European Charter of Fundamental Rights. Article 14, for instance, states that *Everyone has the right to education and to have access to vocational and continuing training.* Vocational and continuing training are typically investments employers make in their workers to encourage commitment. State-run or financially backed training provided to temporary low-waged labour

34 Available at: http://www.ilo.org/global/topics/decent-work/lang--en/index.htm.

35 Chapter 8 by Rijken in this volume.

36 A. Sayer (2009), *Contributive Justice and Meaningful Work*, Department of Sociology, Lancaster University, Lancaster; S. Bolton, K. Laaser, and D. Mcguire (2016), 'Quality Work and the Moral Economy of European Employment Policy', *JCMS,* 54(3) pp. 583, 598 DOI: 10.1111/jcms.12304.

migrants (and to citizens performing these jobs as well) could add to building a sustainably decent labour market with workers' career perspectives in both the receiving and sending countries.[37] Article 15 of the Charter on the Freedom to choose an occupation and the right to engage in work starts by saying that '*Everyone* has the right to engage in work and to pursue a freely chosen or accepted occupation' (emphasis added). But this freedom is, in practice, restricted for labour migrants, low-waged or not, in case their admission for reasons of employment is tied to a specific employer. If they chose to work somewhere else, without the required permission, they fall into irregularity. So far, this has not been interpreted to mean that tying a migrant to an employer through a work permit, common in almost all labour migration regimes, is in conflict with the Charter or must be considered as illegal. However, it has been argued by scholars that it increases vulnerabilities to abuse and exploitation.[38] In the final paragraph, article 15 reads 'Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union'. But how decent is the labour market if TCN seasonal workers must be treated equal to citizens, while EU nationals sent across internal borders, through posting, to perform a service, are not? Here, we support the view that a decent labour market in low-waged sectors can only be achieved in a sustainable manner if the 'mission statement' of the ILO that labour is not (merely) a commodity, is taken seriously for all (local, migrant, and posted) workers alike.

Finally, during the 2015 UN General Assembly, four pillars of Decent Work were defined – employment creation, social protection, rights at work, and social dialogue. This is a narrower definition than presented by the ILO. We feel that, at the EU level and at EU Member State and local levels, there is a need to work towards this kind of inclusive decent labour market, where there is dialogue with the (undocumented) migrant workers, countries of origin, as well as employers and local workforce representatives. In this volume, we will show how legal structures, obligations, and practice do or do not contribute to the creation of such a decent labour market.

37 Indeed, we can conclude from Siebers: if this is not actively pursued, the risk is eminent that children of low-waged migrant workers grow up without the (soft) skills to perform on a changing and socially demanding labour market, in this volume, chapter 11.

38 D. Demetriou (2015), '¨Tied Visas¨ and Inadequate Labour Protections: A formula for abuse and exploitation of migrant domestic workers in the United Kingdom', *Anti-Trafficking Review*, 5, pp. 69-88; S. Mullally and C. Murphy (2014), 'Migrant Domestic Workers in the UK: Enacting Exclusions, Exemptions, and Rights', *Human Rights Quarterly,* 36(2) pp. 397-427.

Literature delineates specific pitfalls that stand in our way of working towards a decent labour market for low-waged migrant workers and are discussed in this volume. 'Disconnections' between the economy – the economic need for the migrant workers' labour – and the social substance of society has shaped migrants' inclusion and mainly exclusion.[39] The disconnections have huge political impacts, with Brexit as an obvious example. We see at least two disconnections that add to the creation of a failed decent labour market.

First, we see a disconnection between labour migration mechanisms for third country nationals providing workers to fill labour market shortages, and, on the other hand, the lack of social protection and equal treatment for third country migrant workers. Options to migrate legally with the aim to perform low-wage work are limited. However, Directives such as the Single Permit Directive 2011/98/EC and the Seasonal Workers Directive 2014/36/EU try to strike a balance and, thus, do contribute to a decent labour market to some extent. The margins for discretion in the national implementation however, are wide and leave plenty of room for deviations to a lower standard of 'decency'.[40]

Second, and as explained above, we see the disconnection between EU social rights and the laws of the internal market. In the European internal market with the free movement of workers and services, economic interests prevail. Creatively manipulating boundaries of these freedoms by employers and companies has led to maximised profits from mobility at the cost of labour migrants.[41] Attempts are made to combat practices that undermine a decent labour market and to facilitate practices that add to a decent labour market. The recently proposed changes to the posting of workers directive is an example thereof. Creating a more central position of the migrant worker in which the rights of the migrant worker serve as a corrective

39 S. Bolton, K. Laaser, and D. Mcguire, (2016), 'Quality Work and the Moral Economy of European Employment Policy', *JCMS,* 54(3) pp. 583, 598 DOI: 10.1111/jcms.12304.

40 C. Rijken (2015), 'Legal Approaches to Combating the Exploitation of Third-Country National Seasonal Workers', *The International Journal of Comparative Labour Law and Industrial Relations,* 31(4) pp. 431-452; J. Fudge (2015), 'Migration and Sustainable Development in the EU: A Case Study of the Seasonal Workers Directive', *International Journal of Comparative Labour Law and Industrial Relations*, 31(3) pp. 331-349.

41 R. Muffels and A. Wilthagen (2013),'Flexicurity: A new paradigm for the analysis of Labour markets and policies challenging the trade-off between flexibility and security', *Sociology Compass,* 7(2) pp. 111-122; C. Rijken and E. de Volder (2010), 'The European Union's struggle to realize a human rights-based approach to trafficking in human beings', *Connecticut Journal of International Law*, 25(49) pp. 49-80.

mechanism to the erosion of these rights contributes to a sustainable and decent labour market.

Three Observations on Labour Markets and Migration

Let us conclude this section with three observations on the connection between labour markets and migration that underlie the chapters in this volume.

Our first observation on the theme of labour markets and migration is that the theme is often framed in the context of exploitation, precariousness, and vulnerabilities, and the use or presumed abuse of the law through 'constructions' to engage in less protective or less regulated mechanisms.[42] Practices in which migrant workers do not receive the salary that was promised or are paid below minimum wage, or, even worse, are forced to work, should be strongly rejected, qualified as labour exploitation, and treated as the criminal act of human trafficking.[43] However, there are practices that are less severe and in which migrant workers have entered voluntarily. Then the question must be raised whether the qualification of exploitation, precariousness, and vulnerability does justice to the labour market needs for flexible (and affordable or even cheap) labour on the employers' side, as well as the needs and willingness of labour migrants to work, and even the needs of their country of origin for economic remittances.[44] On the other hand, we see a disregard and denial of labour standards towards labour migrants, especially at the low end of the labour market. These seemingly discordant but interrelated mechanisms of migrant workers aiming to raise their income by accepting lower labour standards abroad and the combating of exploitative practices, against a background of employers trying to increase financial benefits, raise the question if we could maybe find a better mechanism in labour and migration law to balance the interests involved.

Our second observation on the theme of labour markets and migration concerns the flexibilisation of the labour market in general. A wide variation of flexible contracts and labour relations has seen light since the turn of the

42 B. Anderson (2015), 'Precarious Work, Immigration, and Governance', in C.U. Schierup, R. Munck, B. Likic-Brboricand, and A. Neergaard (eds.), *Migration, Precarity, and Global Governance. Challenges and Opportunities for Labour*,, Oxford, Oxford University Press, pp. 68-82.

43 M.S. Houwerzijl and C. Rijken (2013), *Responses to Forced Labour in the EU*, in country report for JRF.

44 M. Ruhs (2013), *The Price of Rights. Regulating International Labour Migration,* Woodstock: Princeton University Press; C. Costello and M. Freedman (eds.) (2014), *Migrants at Work: Immigration and Vulnerability in Labour Law,* Oxford University Press.

century, such as subcontracting, work via recruitment agencies, pay-rolling, 0-hour contracts, 'traineeships', and increased solo-self-employment. As a steady job is becoming an anomaly, especially for migrants arriving newly on a labour market, we see labour migrants in these low-waged 'flexible' positions or postings (not necessarily coined as jobs) with fewer rights then national workers might have had before in the same position.[45] As indicated above, these flexibilisations were and still are often facilitated by (EU) law and are especially at play in the intra-EU mobility as well as the labour market integration of refugees. At the intra-EU level we have seen the development of a more worker-protective framework build up during the past five years,[46] with a strong voice for less flexibility within the EU internal labour market. This, for instance, has contributed to the proposed amendment of the PWD towards 'equal pay for equal work'. Other countries, such as the UK, gear towards the protection of their labour market against intra-EU mobility, denying the dependence of some sectors on workers from other EU countries.[47] The question is raised if we could allow for the flexibility that businesses require of a labour market, in order to compete internationally, while still providing a decent labour market for both migrant *and* domestic workforces (often with a migrant background) alike.

Our third and final observation concerns the existence of a 'shadow economy' created by those living on the margins of the formal labour market or falling outside of the formal labour market. An example of the latter are undocumented migrants. They are not authorised to stay or to work within host societies, nevertheless it is common knowledge that they live and work in our midst. Undocumented migrants perform valuable tasks on our behalf, without receiving societies' acknowledgement.[48] In global cities, the

45 College voor de Rechten van de Mens (2013), *Poolse arbeidsmigranten in mensenrechtenperspectief*, report; C. Costello and M. Freedman (Eds.) (2014), *Migrants at Work: Immigration and Vulnerability in Labour Law,* Oxford University Press; K. Strauss and J. Fudge (2014), *Temporary Work, Agencies and Unfree Labour: Insecurity in the New World of Work,* New York: Routledge; L. Berntsen (2015), *Agency of labour in a flexible pan-European labour market: A qualitative analysis of migrant practices and trade union strategies in the Netherlands,* Groningen University Press.

46 A.A.H. van Hoek (2016), *Re-embedding the transnational employment relationship – can the commission proposal deliver?* in Amsterdam Law School Legal Studies Research Paper No. 2016-69, Centre for the Study of European Contract Law Working Paper No. 2016-16; M. Seeliger and I. Wagner (2016), *Workers United? How Trade Union Organizations at the European Level Form Political Positions on the Freedom of Services*, MPIFG Discussion Paper 16/16.

47 Houwerzijl and Schrauwen actually shed some more than interesting light on how a different legislative and policy turn in the 1990s might actually have prevented the need for a Brexit, in this volume, chapter 3.

48 J. van der Leun (2003), *Looking for Loopholes*, Amsterdam University Press.

undocumented (domestic) workers facilitate the highly skilled workers by allowing them to work outside the home, by providing the necessary home care in their absence.[49] They work in the 'shadow economy', and, as such, they run a higher risk of exploitation, precariousness, and vulnerability, due to the lack of legal authorisation to stay and work. How can we allow for migrants to perform these jobs without running these risks? And how can we provide a decent labour market for those undocumented migrants? Regularisation mechanisms are employed in some EU countries, but a call for legal entry into the EU and the EU labour market for low-wage jobs, is heard over and over again, but without success.[50] Such a (temporary) migrant worker programme would grant access to formal labour markets and rights, even if not (necessarily) fully equal treatment.

So how can we find a proper balance between the benefits of the EU's internal market, business and private household labour market needs, and build on the concept of a free market *as well as* a decent labour market for (undocumented) migrant workers in low-wage jobs? This volume tries to find answers to this question by understanding the dynamics between different actors and the impact of different legal regimes looked at from the perspective of the position of the labour migrant. Furthermore, it presents some directions for solutions.

Content of this Volume

The book constitutes 12 chapters and is divided into three sections. We start with a conceptual introduction of the relation between labour and migration and the rule of law. The two chapters in this section explain how (legal) boundaries are drawn and the function of these boundaries. Section two is about migrant worker access to the labour market from both within the EU, and from outside the EU. As this volume takes the perspective of the migrant as the lens through which we look at labour migration, the third section addresses the imbalances and vulnerabilities in the labour market for migrant workers at the low end of the labour market, even after migrant workers have participated in the labour market for quite some time.

49 S. Sassen (1991), *The Global City*, Princeton University Press.

50 G. Battistella (2017), 'Temporary Labour Migration: A flawed system in need of reform', in S. Carrera, A. Geddes, E. Guild, and M. Stefan (eds.), *Pathways towards legal migration into the EU,* Center for European Policy Studies, Brussels.

As mentioned, an important element in the study of migrant workers' rights in the EU context is defining the relevant legal framework applicable to the migrants' situation. The variety of migration law frameworks can be linked to factors such as the migrant workers' nationality, the job to be performed, or salary to be earned, which may again depend on the legal structure of the work relationship; it can be about race and, even more so, about class structures. Our goal is an in-depth analysis of the conflict areas of migration where law has a role to play. Other arrangements of ordering, such as the economy, politics, and education, are not discussed.

Section 1: Setting the Scene and Drawing the Boundaries

Bert van Roermund immediately twists our mind with defining labour as human beings reproducing themselves, including the process of determining the 'plural self', the 'we', and, as such, drawing a border between those who are included and those who are excluded. In this way, labour and migration are intertwined. This understanding of labour is far more complex than the reproduction of goods and is represented in the ILO definition of decent labour as discussed above. Based on different characteristics of law, he determines the role of law in this conflict between labour and migration. Only when this conflict is disruptive for society, does law address it. By trying to get a fuller understanding of the conflict, he implicitly provides some guidance for lawmaking. In his 'diagnosing exercise', he identifies inequality and unequal treatment of equal cases as a general parameter. Secondly, he stresses the dire need to involve major stakeholders such as international businesses and banks, labour unions and consumer organisations, and nongovernmental organisations dealing with migration and poverty in labour. Thirdly, he reviews structures of authority in order to enhance legal certainty for migrant workers. With the fourth parameter, Roermund gives further guidance to perform the tasks with a strong emphasis on the relationship between morality and lawmaking and the importance of fundamental rights, which prevent reducing humans to workers.

Regine Paul, in her contribution, challenges the notion of borders as territorial demarcation lines. By 'critically unpacking the normative underbelly of regulatory distinctions of migrant workers in European migration governance', she shows that border drawing is a multilayered process that reaches beyond merely physical border drawing. The outcome of this process is a dubious categorisation of different groups of migrant workers, which she coins as a 'selective meaning-making processes' in which the state plays a crucial role by using its power to create 'legal' and 'illegal' categories of

migrants. For her analysis, she builds on Bourdieu's reflections on classification and symbolic power. This border-drawing framework is illustrated with a comparative study conducted in Britain, France, and Germany, which demonstrates the reasoning and institutional logic behind the distinction between high-skilled and low-skilled labour migration.

Section 2: Access to the Labour Market for EU Citizens and Third-country Nationals

The chapter by *Mijke Houwerzijl and Annette Schrauwen*, by focusing on the position of mobile workers in particular in low-wage sectors, sketches and juxtaposes the respective historical evolution of the narratives on posted and 'migrant' EU workers, while displaying their differing legal impacts on workers' rights. They assess the extent to which the pending proposal for 'targeted revision' (a possible new chapter in the 'saga' on posting of workers of the Posted Workers Directive) improves the position of the posted worker. Their overall conclusion of this assessment is a cautiously positive one, especially when combined with the already adopted posted workers enforcement directive. They furthermore acknowledge that the problem of enforcement is not restricted to posted workers alone, but also contributes to illegal practices for workers and service providers (e.g. as bogus self-employed service providers). According to the authors, the limited legal basis of the PWD is one of the reasons that social rights are excluded, which further hampers the position of posted workers.

Jan Cremers and Ronald Dekker rightly point out how the use of the blurred boundaries between legal categories might bring short-term profits to employers, but may not necessarily contribute to the concept of a decent labour market; even worse, these blurred boundaries create opportunities for abuse of migrant workers. This so-called 'arbitraging' jeopardises the intra-EU mobility framework altogether. Based on the work of a long-term cooperation project of labour inspectors and research in the EU and the Netherlands, they identify the role of HR advisors and intermediaries stimulating corporations to abuse the loopholes created by the fragmented legal framework.

Margarite Zoeterweij centralises the legal framework for third-country national seasonal workers, which should have been implemented by all Member States of the EU by 30 September 2016, in her chapter. She critically assesses the extent to which this directive makes equal seasonal workers' positions with national workers'. The chapter concludes with the thesis that the seasonal workers' directive reinforces the inferiority of the position of the unskilled workers on the labour market. This conclusion is based on

the absence of family reunification rights, social rights, and the fact that seasonal workers are bound to their employer for residence rights according to the directive. Her findings are underpinned with the examples of Spain and Italy, which show a lack of implementation in practice.

Petra Herzfeld Olsson addresses the situation and the regulatory regime for migrant berry pickers in Sweden. They mainly come from Thailand to pick wild blueberries and lingonberries in the remote forests in the north of Sweden. Most of them are employed by Thai temporary-work agencies and posted to Sweden. She shows the interaction between legal regulatory regimes and practice, by focusing on the 2008 reform of the Swedish labour migration regime. Initially, this reform left the abusive practices of Thai berry pickers untouched and, some say, even enhanced these practices. Only after introducing pre-arrival reliability checks of employers and recruitment agencies, combined with targeted interventions by trade unions and municipalities, were these practices addressed. Step by step, the trade union movement and the Migration Agency have strengthened their engagement in this sector with very positive results. However, practices then anticipated these interventions by recruiting EU nationals, mainly as posted workers or (bogus) self-employed persons, to have the berries picked. Olsson puts the finger on the sore spot by raising the issue of long working hours consented to by the berry pickers as a survival strategy for this sector.

Tesseltje de Lange discusses asylum seekers' access to the labour market: What are their rights? And what hurdles do they face in order to enter the labour market? Based on recent research conducted in the Netherlands, De Lange considers how EU law sets the stage for the rights of asylum seekers who are awaiting the outcome of the evaluation of their asylum claim and, more specifically, how this EU law is implemented in the Netherlands. By focussing on (temporary) participation in the labour market and creating opportunities for unpaid employment to facilitate integration, the Dutch approach possibly adds to increased vulnerability instead of financial independence, for which EU law aims.

Section 3: Imbalances and Vulnerabilities

Conny Rijken, in her chapter, argues that the term 'exploitation' is easily used in those cases in which labour rights are infringed. Labour exploitation has not been defined nor is it clear when bad labour conditions turn into situations of labour exploitation, both nationally and internationally. The discussion in this chapter takes into account the international and European context as well as recent discussions on modern slavery and human

trafficking. She analyses the European Court for Human Rights (ECtHR) case Chowdury v. Greece ruled in March 2017 to unpack the concepts of exploitation, forced labour, and human trafficking.

Lisa Berntsen and Tesseltje de Lange base their chapter on a file study conducted in the Netherlands of cases in which the employer was fined for illegal employment. In their chapter, they show how the Dutch Labour Inspection, although assigned with the task to perform the obligations laid down in the Employer Sanctions Directive, did not perceive itself as involved in migration policy. Yet, employer sanctions under EU law fall under migration policy and not labour policy. These blurred, fragmented, or even opposing legal frameworks and on-the-ground practices, do not contribute to creating a decent labour market. As such, the Employer sanctions directive not only aims at labour market regulation and migration control but also aims to improve the protection of labour migrants as well.

Lucia Della Torre also focusses on undocumented migrant workers, but in the context of Switzerland. In her chapter, she discusses the regularisation (or partial regularisation) of these workers in the canton of Geneva. The Swiss stand towards undocumented migrants has, for quite some time, mirrored the European one of – at best – isolation and indifference. Yet, it is precisely from Switzerland that a new attempt to promote the regularisation of Sans-Papiers has very recently arisen. Coming from a Cantonal government, this operation resembles the creative practices of social inclusion already experimented with in some communities. Unlike the latter, however, this Swiss operation received the endorsement of the Federal Government, thus presenting itself as an example of 'Swiss pragmatism', which could become an interesting model for other European countries.

Hans Siebers's chapter demonstrates how even nationals with a migrant background face migration-related challenges as they lack the soft skills needed to perform on an equal footage as locals in the labour market. Ethno-migrant inequality in the labour market is a persistent problem in many countries. In the Netherlands especially, people with a first- or second-generation 'non-Western' migration background find themselves in subordinated positions in the labour market. The aim of this chapter is to outline a framework of explanation. Inspired by Bourdieu, Siebers distinguishes various forms of capital – human, social, cultural – that may give access to economic capital, like getting a well-paid or satisfying job. However, based on empirical studies, he identifies and discusses indirect discrimination when non-job-related capitals such as social and cultural capital play a role in harming the chances for people with a 'non-Western' migration background to access economic capital.

Johan Graafland has researched the impact of collective agreements on female management and job opportunities of employees from disadvantaged groups (including migrants or their descendants) in 4053 enterprises in Europe. He finds that collective agreements stimulate the female presence in board and executive positions and the inflow of employees from disadvantaged groups (e.g. migrant workers, people with disabilities, long-term unemployed). Moreover, female management further enforces job opportunities for disadvantaged workers. Countries with high coverage of collective agreements, therefore, directly as well as indirectly, through female management, foster integration of employees from disadvantaged groups into the labour market. The results imply that dismantling extensions of collective agreements on the labour market increases gender inequality and inequality between advantaged and disadvantaged groups of employees.

Some Conclusions, a Policy Agenda, and Ideas for Future Research

With this broad pallet of topics, concerns, imbalances, and a great variety of actors at regional, national, and European levels, it is quite a challenge to draw conclusions. But it would be a missed opportunity not to pull some strings together, based on the significant observations made in the contributions to this volume. The improvement of the position of the migrant worker, the central focus of this volume, can take place at supranational, national, and sectoral levels. Each of these levels has its own legal and regulatory frames, specific actors and opportunities to achieve such improvement.

At the supranational level, the level beyond state level, it must be acknowledged that flexibilisation of labour, labour mobility (within the EU), and labour migration (to the EU) is a reality and so is circumventing behaviour. This circumventing behaviour is facilitated by the fragmented legal framework, lack of enforcement, and the corporate focus to maximise profits, often to the detriment of the position of (migrant) workers, coined by Marx as the commodification of labour. In the EU, these dynamics are further enhanced by the free movement of workers and services, as well as the blurred boundaries between the two. Increased mobility of workers and service providers from middle- and Eastern European countries have multiple effects; it leads to abusive practices by intermediaries and companies of workers and service providers, to a diminishing of wages of migrant workers (profitable for businesses, but disadvantageous for workers and service providers from the host country), to labour displacement and social dumping,

but also to an improvement of the competitive position of companies and industries in the host countries. Ideally, the combination of labour-market openness and labour standards should be in harmony, and if labour standards are not guaranteed there should be a corrective mechanism that fits within the acquis communautaire. Future EU policies on labour mobility and on labour migration from TCN should build on this. The future will tell whether the Posted Workers Enforcement Directive (PWED) and the adaptation of the PWD are examples thereof. So far, restrictions to the free movement, e.g. for protecting minimum wages for migrant workers and service providers, have not been accepted by the CJEU. However, and in line with the concept of the rule of reason in relation to the free movement of goods, in future research, it is worth exploring the application of this concept in the area of free movement of workers and service providers to protect migrant workers.

At the national level, states are the main actors. First, and if not regulated by EU law, they are to determine under what conditions third-country nationals are allowed to work on their territory. Especially in the area of low-waged migrant workers, EU law only addresses the legal position of seasonal workers in the SWD and, albeit hardly effective, the employment of illegally employed migrants without legal residence under the Employer Sanction Directive. This brings us to the second role of states, namely as the addressees of EU law who are responsible for the correct implementation of EU law. As will be shown in this volume, the more sensitive the topic, the more difficult it is to achieve agreement amongst the EU Member States, and the more there is left to the discretion of individual Member States to implement in practice EU legal provisions. Consequently, protection and guarantees of migrant workers need to be realised at the state level rather than the EU level, creating considerable differences between EU Member States. A third role of the state is the enforcement of the regulatory regime, regardless of whether it originates from the EU or the state level. Looked at from the position of the migrant worker, this requires profound knowledge of social security, tax laws, labour law, as well as migration law, indicating that this is a complex task. Furthermore, it requires cooperation with other EU countries, which is not an easy task either. Fourth, and linked to the first task, states have a role to play when the outcome of their migration policies hamper the position of migrants, including illegally employed and possibly undocumented migrant workers, but who perform an important role for the economy and perform work that nationals are often not willing to do. By looking at the Swiss example on regularisation, discussed by Della Torre in this volume, we find inspiration for renewed regularisation schemes that could

be applied in other countries as well. Such regularisation based on both economic performance and humanitarian reasons could fill a policy gap in western EU countries like the Netherlands.

At the sectoral level, directly related to the position of the migrant worker, the legal regulatory framework is only of limited value. Of course, what is unacceptable from a normative perspective should be prohibited or, in Van Roermunds' words, 'what is socially disruptive, should be determined by the law' and consequently excluded, forbidden and prosecuted. However, before the law 'steps in', it is other actors such as trade unions, intermediaries, corporations, and HR officers that can improve the position of the migrant worker. Their role should not be underestimated. They are crucial for migrant workers to realise their rights, and, at the same time, they are the ones who deny migrant workers their rights.

To conclude and in order to improve the position of migrant workers, actions need to be taken at all three levels. Actions should be equally creative and provocative as some of the circumventing strategies employed by corporations, intermediaries, and others. But we also have to think ahead. In a globalised world, we should have the courage to explore global opportunities. If a sector (e.g. agriculture) can only survive in an EU Member State by jeopardising our legal framework and its underlying value of equality, the question if such an industry should not be moved to other places, may be legitimised. Another controversial avenue would be to address the root causes of EU mobility, namely large differences in wages and labour conditions between EU Member States. The effect of large numbers of Middle and Eastern European workers leaving their country to work in Western Europe is also a detriment to increasing wages and labour conditions in these countries of origin. Levelling wages and labour conditions at EU level could mean considering lowering wages for some sectors in high-income countries in parallel with increasing incomes in those countries in which incomes are low. If we take decent work seriously, we should not be afraid to consider unconventional measures to support it.

Bibliography

Achtsioglou, E. and M. Doherty (2014), 'There must be some way out of here: The Crisis, Labour Rights and Member States in the Eye of the Storm', *European Law Journal,* 20(2) pp. 219-240.

Anderson, B. (2015), 'Precarious Work, Immigration, and Governance', in C.U. Schierup, R. Munck, B. Likic-Brboricand, and A. Neergaard (eds.), *Migration,*

Precarity, and Global Governance. Challenges and Opportunities for Labour, Oxford: Oxford University Press, pp. 68-82.

Anderson, B., et al. (2006), *Fair Enough? Central and east European low wage migrants in low wage employment in the UK*, report for Joseph Rowntree Foundation.

Battistella, G. (2017), 'Temporary Labour Migration: A flawed system in need of reform', in S. Carrera, A. Geddes, E. Guild, and M. Stefan (eds.), *Pathways towards legal migration into the EU*, Center for European Policy Studies, Brussels.

Beduschi, A. (2015), 'An empty shell? The Protection of Social Rights of Third Country Workers in the EU after the Single Permit Directive', in P. Minderhoud and T. Strik (eds.), *The Single Permit Directive: Central Themes and Problem Issues*, Oisterwijk: Wolf Legal Publisher.

Berntsen, L. (2015), *Agency of labour in a flexible pan-European labour market: A qualitative analysis of migrant practices and trade union strategies in the Netherlands,* Groningen University Press.

Bogg, A. (2013), 'The immoral trap: migrant workers and the doctrine of illegality', in B. Ryan (ed.), *Labour migration in hard times: reforming labour market regulation*?, Institute of Employment Rights.

Bogusz, B.; R. Cholewinski; A. Cygan; and E. Scyszczak (2004), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives,* Martinus Nijhoff Publishers.

Bolton, S.; K. Laaser; and D. Mcguire (2016), 'Quality Work and the Moral Economy of European Employment Policy', *JCMS,* 54(3). pp. 583, 598 DOI: 10.1111/jcms.12304.

Caviedes, A.A. (2010), *Prying open Fortress Europe. The turn to Sectoral Labour Migration,* Lexington Books.

Chauvin, S.; B. Garcés-Mascerenas; and A. Kraler (2013), 'Working for Legality: Employment and Migrant Regularization in Europe', *International Migration* 51(6), pp. 118-131. DOI: 10.1111/imig.12109.

College voor de Rechten van de Mens (2013), *Poolse arbeidsmigranten in mensenrechtenperspectief*, report.

Costello, C. and M. Freedland (Eds.) (2014), *Migrants at Work: Immigration and Vulnerability in Labour Law,* Oxford University Press.

Costello, C. and M. Freedland (2016), 'Seasonal Workers and Intra-corporate Transferees in EU Law: Capital's Handmaidens?' in J. Howe and R. Owens (eds.), *Temporary Labour Migration in the Global Era. The Regulatory Challenges*, Hart Publishing.

Cremers, J.; J. Dølvik; and G. Bosch (2007), 'Posting of workers in the single market: attempts to prevent social dumping and regime competition in the EU', *Industrial Relations Journal,* 38(6) pp. 524-541.

Della Torre, L. and T. de Lange (2017), 'The 'importance of staying put': third country nationals' limited intra-EU mobility rights', *Journal of Ethnic and Migration Studies*, pp. 1-17. DOI: 10.1080/1369183X.2017.1401920.

Demetriou, D. (2015), '"Tied Visas" and Inadequate Labour Protections: A formula for abuse and exploitation of migrant domestic workers in the United Kingdom', *Anti-Trafficking Review*, 5 pp. 69-88.

Desmond, A. (2016), 'The development of a Common EU Migration Policy and the Rights of Irregular Migrants: A Progress narrative?' *Human Rights Law Review*, 16(2) pp. 247-272.

Dewhurst, E. (2011), 'The Right of Irregular Immigrants to Outstanding Remuneration under the EU Sanctions Directive: Rethinking Domestic Labour Policy in a Globalised World', *European Journal of Migration and Law*, 13(4) pp. 389-410.

Donaghey, J. and P. Teague (2006), 'The free movement of workers and social Europe: maintaining the European ideal', *Industrial Relations Journal*, 37(6) pp. 652-666.

Düvell, F. (2011), 'Paths into irregularity: The legal and Political construction of irregular migration, *European Journal of Migration and Law,* 13 pp. 275-295.

Editorial Comments (2014), 'The free movement of persons in the European Union. Salvaging the dream while explaining the nightmare', *Common Market Law Review*, 51 pp. 729-740.

Freeman, R.B. (2007), 'The Challenge of the Growing Globalization of Labour Markets to Economic and Social Policy', in E. Paus (ed.), *Global Capitalism Unbound. Winners and Losers from Offshore Outsourcing*, Palgrave pp. 23-39. Available at: https://link.springer.com/book/10.1057/9780230608849.

Friðriksdóttir, B. (2016), *What happened to Equality. The Construction of the Right to Equal Treatment of TCN in EU Law on Labour Migration*, (PhD Thesis) Radboud University Nijmegen.

Fudge, J. (2015), 'Migration and Sustainable Development in the EU: A Case Study of the Seasonal Workers Directive', *International Journal of Comparative Labour Law and Industrial Relations*, 31(3) pp. 331-349.

Goldring, L.; C. Berinstein; and J.K. Bernhard (2009), 'Institutionalizing precarious migratory status in Canada', *Citizenship Studies,* 13(3) pp. 239-265.

Hoek, A.A.H. van (2016), 'Re-embedding the transnational employment relationship – can the commission proposal deliver?', *Amsterdam Law School Legal Studies Research Paper* No. 2016-69, Centre for the Study of European Contract Law Working Paper No. 2016-16.

Houwerzijl, M.S. and C. Rijken (2013), *Responses to Forced Labour in the EU,* country report for Joseph Rowntree Foundation.

Kremer, M.; M. Bovens; E. Schrijvers & R. Went (red.) (2014), *Hoe ongelijk is Nederland? Een verkenning van de ontwikkeling en gevolgen van economische ongelijkheid,* WRR-Verkenning 28.

Lange, T. de and S. van Walsum (2014), 'Institutionalizing temporary labour migration in Europe; creating an "in-between" Migration Status' in L.F. Vosko, V. Preston, and R. Latham (eds.), *Liberating Temporariness? Migration, Work, and*

Citizenship in an Age of Insecurity Liberating Temporariness? Migration, Work, and Citizenship in an Age of Insecurity, McGill-Queens University Press.

Lange, T, de (2015), 'Third-Country National Students and Trainees in the EU: Caught between Learning and Work'*, International Journal of Comparative Labour Law and Industrial Relations,* 31(4) pp. 453-472.

Leun, J. van der (2003), *Looking for Loopholes*, Amsterdam University Press.

Muffels, R.J.A., and A.C.J.M. Wilthagen (2013), 'Flexicurity: A new paradigm for the analysis of labour markets and policies challenging the trade-off between flexibility and security'*, Sociology Compass*, 7(2) pp. 111-122.

Mullally, S. and C. Murphy (2014), 'Migrant Domestic Workers in the UK: Enacting Exclusions, Exemptions, and Rights', *Human Rights Quarterly,* 36(2) pp. 397-427.

Paul, R. (2015), *The political Economy of Border Drawing. Arranging Legality in European Labour Migration Policies*, Berghahn.

Rijken, C. (ed.) (2011), *Combating Trafficking in Human Beings for Labour Exploitation*, Wolf Legal Publisher.

Rijken, C. (2015), 'Legal Approaches to Combating the Exploitation of Third-Country National Seasonal Workers', *The International Journal of Comparative Labour Law and Industrial Relations,* 31(4) pp. 431-452.

Rijken, C. and E.J.A. de Volder (2010), 'The European Union's struggle to realize a human rights-based approach to trafficking in human beings', *Connecticut Journal of International Law*, 25(49) pp. 49-80.

Ruhs, M. and B. Anderson (2010), *Who needs migrant workers? Labour shortages, immigration and public policy*, Oxford University Press.

Ruhs, M. (2013), *The Price of Rights. Regulating International Labour Migration,* Woodstock: Princeton University Press.

Sassen, S. (1991), *The Global City.* Princeton University Press.

Seeliger, M. and I. Wagner (2016), *Workers United? How Trade Union Organizations at the European Level Form Political Positions on the Freedom of Services*, MPIFG Discussion Paper 16/16.

Strauss, K. and J. Fudge (2014), *Temporary Work, Agencies and Unfree Labour: Insecurity in the New World of Work.* New York: Routledge.

Sayer, A. (2009), 'Contributive Justice and Meaningful Work' *Res Publica*, 15(1) pp.1-16.

Teney, C.; O.P. Lacewell; and P. de Wilde (2014), 'Winners and losers of globalization in Europe: attitudes and ideologies', *European Political Science Review,* 6(4) pp. 575-595.

Tiemeijer, W. (2017), *Wat is er mis met maatschappelijke scheidslijnen?* Wetenschappelijke Raad voor het Regeringsbeleid.

Triandafyllidou, A. and D. Vogel (2010), 'Irregular Migration in the European Union: Evidence, Facts and Myths' in A. Triandafyllidou (ed.), *Irregular Migration in Europe: Myths and Realities*, Farnham: Ashgate, pp. 291-299.

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Section 1

Setting the Scene: Imbalances on the Labour Market

1 The Challenge of Migration

Politics as Labour and Labour as Politics

Bert van Roermund

Abstract
Van Roermund coins the fundamental concepts in this book to be 'labour' and 'migration'. Plus 'law', of course. However, the latter is not at par with the former two. Law will enter the argument as the normative viewpoint from which the basic conceptual discourse on migration and labour will be analysed. In other words, first and foremost, he explores the conceptual geography of these complex phenomena directly. Section 1 presents their fundamental differences; section 2, their relationship based on these differences; and, against this backdrop, section 3 spells out the implications in the form of a few general parameters for lawmaking. As the angle of this paper is a philosophical one, primarily, it will not come as a surprise that these implications will be accounted for in terms of legal principles rather than rules, doctrines, or policies.

Keywords: conceptual discourse, reproduction of human existence

1 Migration and Labour: Different Perspectives of Political Ordering

It goes without saying that 'labour' is more than a job; it is more than even a market full of jobs that are in demand and on offer. By the same token, it is more than everything we call 'employment' – being employed or providing employment. In essence, labour is the variety of ways in which human beings as a species reproduce themselves in multifarious exchanges with

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their environment.[1] A woman giving birth is said to be 'in labour' because she is doing exactly this, reproducing human existence from a body that, towards the end of pregnancy, has gradually become as much her (intimate) environment as herself. Only against this conceptual backdrop we can understand why, in daily life, the production of 'value', usually in the form of goods and services, emerges as the hallmark of labour.

It is important to appreciate the inherently multifarious character of these exchanges. In contemporary western society, we tend to lend prominence of place to industrial production, driven by the intertwinement of labour force and capital. A little reflection, however, suffices to show that industrial production is only a contingent default for what labour is about. Take art, for example. Arguably, making art is an essential aspect of reproducing human existence. But it resists, to a large extent, industrial production, and it is much more geared to craftsmanship than to entrepreneurship. Or, again, consider crop and livestock farming – without doubt, a classical area of labour. These practices, as one witnesses on a daily basis, soon appear to work against human health (hence, human existence) if they are governed, from beginning to end, by the laws of industrial production. This is why effects of pesticides and transmission of animal diseases on humans are called 'adverse'.

What is at the root of labour, much more than industrial production, is that it requires coordinated division and distribution. Even artists, say professional musicians and painters, are dependent on the contributions of others towards what is, in the end, their performance. They rarely make their own instruments, their canvasses, or their basic colours. They need theatres and galleries, as much as the galleries and the theatres need their talents. Note that artists are among those who are most tempted to work on an individual basis. But if division of labour is already inevitable in the case of small-scale art production, how much more necessary is it in situations where the 'job' to be done requires large amounts of skills, or time, or money? Still, coordination in labour practices does not necessarily bring in dedicated coordinators. Rather, what is necessary is a process of reciprocal

1 I summarise early Marx here: 'Denn erstens erscheint dem Menschen die Arbeit, die *Lebenstätigkeit*, das *produktive Leben* selbst nur als ein *Mittel* zur Befriedigung eines Bedürfnisses, des Bedürfnisses der Erhaltung der physischen Existenz. Das produktive Leben ist aber das Gattungsleben. Es ist das Leben erzeugende Leben. In der Art der Lebenstätigkeit liegt der ganze Charakter einer species, ihr Gattungscharakter, un die freie bewusste Tätigkeit ist der Gattungscharakter des Menschen.' 'Zur Kritik der Nationalökonomie – ókonomisch-philosophische Manuskripte' [1844] in K. Marx, *Werke – Schriften*, Bd. I, hrsg. v. H.-J. Lieber and P. Furth, (1971) *Darmstadt*, Wissenschaftliche Buchgesellschaft, p. 567.

'tuning' by the participants themselves. It is the job that dictates, in the final analysis, what is to be done, who should do what, when and where it should be done, etc. Of course, in complex situations, one calls on coordinators to make authoritative decisions. But still, the quality of their decisions, hence their authority, can be measured against the demands of the job that is to be done. In principle, whose proposals, efforts, and achievements will count as 'contributions' is often decided *ex post*, depending on whether or not it appears to fit, in hindsight, into the coordination scheme at hand. Sometimes, a seemingly 'useless' activity, like counting insects on ten square metres of land for five years, suddenly appears of crucial importance for the development of innovative produce.

Such a coordination scheme, in turn, is a function of what the job is about; which, in the end, is about reproducing *human* existence. Thus, what lends a sense of direction to these reproduction processes are values, in the sense of more or less shared preferences in societies. These values are the variables that determine what is regarded, for instance, as a *flourishing* human existence. They are also decisive in what we call 'skills', as well as in the hierarchy we make of 'low' and 'high' skills. Last but not least, they are at the bottom of individual self-respect. This is a variable independent of the said hierarchy, since, under certain conditions, lower skills may be valued as very high, and vice versa. To mention just one case in point, if a coordination scheme is merely driven by the values of cost-efficiency and opts for division of labour by infinite parsing of tasks at the cost of individual job satisfaction, it becomes highly probable that the scheme will run idle and be abandoned. This happened, for instance, in Japan in the 1990s, when so-called 'lean production' at conveyor belts fell victim to shortage of workers who successfully looked for more satisfying employment opportunities.

I will return to the implications of all this in Section 2. Here, I would like to emphasise that, from the viewpoint of labour and division of labour, the constraints of social ordering are dictated by coordination. In the simplest of words, the more people are prepared to join and do the job, the better, provided that their actions can be coordinated. Or, again, in a specific sense, division of labour is *inclusive*, even if it is divisive. Predicates like 'foreigner', 'migrant', or 'child', for instance, do not register for those who are primarily interested in labour and coordination of labour. Their sole concern is the job that is to be done; and to get it done, they ignore any boundaries external to the job, including political boundaries, be they territorial, functional, or ideological. This is why large-scale projects, like seasonal harvesting or the Olympic Games, attract large crowds of people from all over the place.

It is why, for instance, IOC or FIFA are called 'moving sovereignties'; they are in the habit of partially taking over the legal order in the place they happen to land in, demanding special tax regimes, extra infrastructure, exceptions on social security, etc., and getting away with it. But it is also why, as I saw in Rwanda, a project of labour, like building a house together, may start a complex process of reconciliation between women who lost their husbands in the 1994 genocide, and women whose husbands were imprisoned as guilty of the same slaughtering. So the inclusive nature of labour is ambiguous. It brings people together, sometimes to their benefit and sometimes to their detriment.

A very different perspective on sociopolitical ordering is opened if we now ask what migration is about. The question is itself a misfire. The term 'migration' can only be used by those who pretend to transcend political ordering and speak from a politically neutral vantage point. People 'migrate' in all sorts of ways. They are on the move to drive their business, to do research, to get education, to satisfy their curiosity by seeing remote places, to find a job, or indeed also to escape from violence and hardship. By presenting all these kinds of behaviour under the heading of 'migration', we extract the political sting out of the problem. Migration becomes a problem of political ordering only under the guise of *im*-migration and *e*-migration, i.e., if we acknowledge that it is about leaving or entering a polity. From a political angle, a polity is a bounded whole, and its boundaries are set (not once and for all, but again and again) by self-inclusion.

In this respect, the concept of a polity is crucially different from that of a society. Or, if one does not like this kind of 'essentialist' terminology, one may revert to its linguistic equivalent: political discourse is crucially different from social discourse. Different societies are separated, but also connected by gradual transitions in languages, cuisines, customs, religions, and their ilk. Polities are separated by lines; and, as we know, lines have length, no width. In everyday communication, we think about these lines, boundaries, or borders in terms of bars and barriers. But these are just one kind of epiphenomena ('marks') of what is meant. Not only national states, but *all* polities include a 'we' by various strategies of representation. This first-person plural 'we' is always determined from the inside, thus including some and excluding others. Only by presupposing this bounded whole is it possible to use typically political discourse and refer to such important issues as 'the *general* interest', 'the gross *domestic* product', 'the *common* wealth', 'the *national* security', or '*third*-country Nationals'. Obviously, these boundaries are construed, and they are not construed from nothing. They are often built on rather arbitrary data, such as the presence of a mountain range

or a river, differences in physiognomy ('ethnicity'), etc. But a polity cannot afford not to construe them, or pretend that they are just fictitious, hence nonexistent. Every politician and every citizen of a polity has to participate in this terminology of 'the bounded whole' if they want to claim relevance and credibility for their words and actions in the society they seek to order.

There is no point in denying that the boundaries of a polity are and should be flexible, porous, and malleable rather than rigid, impenetrable and petrified. A polity can only survive if it remains relatively open to pressure experienced as 'coming from the outside'. Preserving its resilience, it should be able to respond to changes in, for instance, the global economy, standards in technology, or regional climate. But then again, such responses will always be geared towards the preservation of the polity over time, thus cast in the mould of how the polity sees itself from the inside, in particular with regard to the sustainability of its boundaries.

The problem of emigration and immigration can only arise against the backdrop of this 'logic', i.e., of what is ineradicably political about politics. Obviously, neither emigration nor immigration will register as problems as long as the agents ('migrants') can be categorised in terms imposed on them by this logic of the political. They register as either 'regular' or 'irregular' migrants. Or, if this political logic has managed to determine the legal order (to some degree), they will be counted as either 'legal' or 'illegal' migrants. Here, those on the inside decide about those on the outside, a maxim that makes principled issues of migration vanish into thin air.

The problem of migration emerges as a principled problem only if it is regarded as a problem of massive trespassing on boundaries drawn from the inside. In the case of emigration, the legitimacy of these boundaries is challenged by insiders; in the case of immigration, by outsiders. It is tempting to think of such challenges as so many checks on the resilience of the polity's boundaries, to see if and how they should be redrawn. On a small scale, they probably are. But large-scale immigration and emigration mean much more. These challenges become particularly edgy if and when they leave no space for alternative boundary setting. In these cases, the message conveyed to the polity by both emigration and immigration is a radical one: boundary setting is not at issue. In other words, the polity in question, as it sees itself, may as well not exist as far as the challengers are concerned. This message is understandable from their point of view. They want to avoid, at all costs, being trapped in yet another round of discourse in which the boundaries are redrawn, at the end of the day, by those who are already inside. The same message, however, is also rather frightening for the insiders, as it confronts them with the contingencies of their political

order. These contingencies are deeply felt when the political metaphor of the line having no width, of the doorstep neatly separating inside and outside, appears to be false in social reality. Immigrants landing at the shores of a country may be pictured as being 'at the doorstep' of the polity, but, in point of fact, the doorstep already appears to be part of the inside of the house; a position that may be reclaimed by the residents, as they may construct new thresholds for entrance over and over again, leaving newcomers in an inferior position for years to come. But doing so only contributes to proving the point at issue: They have reason to fear that their boundaries, at the end of the day, may as well not count in the eyes of others, even if, for themselves, they are the very definition of an ordered society.

This fear is not really different if we turn to the polity that faces emigration rather than immigration. Potential emigrants seeing no future in their own country may be treated (i.e., threatened, in many cases) as being 'inside' by the authorities of their polity. In point of fact, however, even the fences at their borders appear to be, literally, an area of transition for those who are determined to leave. In conclusion, we may say that massive emigration and (probably even more) immigration, violate, indeed jeopardise, the inherently exclusive logic of the political. Note, however, that the predicates 'inclusive' and 'exclusive' in this context do not imply any normative, let alone moral connotations. They just capture the general lines of two ways of ordering society.

2 The Interplay between These Perspectives

How, then, do these two perspectives or 'logics' of ordering society – the inherently inclusive character of ordering governed by labour division and the inherently exclusive character of ordering dictated by the polity – relate? At first sight, on the account above, they seem to be incompatible. If this would be the end of the argument, there would be only one solution remaining to usher this conceptual analysis into everyday practice: We would have to argue for a hierarchy, lending priority of one over the other. In this vein, many would defend that the political should take priority over the economic logic that comes with the division of labour. For them, politics is the overarching practice ordering all social practices, from relaxing to religion and everything in between. But others would certainly argue that this claim about the role of politics is outdated, and that global division of labour should take priority so that we can all profit from the wealth it will bring. On closer inspection, however, the picture becomes much richer. So

let us ask if it is possible to intertwine both perspectives and explore the implications for the principles of lawmaking.[2]

We start at the end of labour. The commitment to values is the point where labour and division of labour take on a genuinely political dimension. What is at stake in this commitment is the kind of societal structure that will count as 'order' – hence also what will count as disorder, or inferior order, or superior order. Note, however, that the values reflecting how a society sees itself flourishing, are far from mere wishes or blueprints. Values determining this order present the conditions under which the reproduction of human existence, intertwined with a specific environment (i.e., labour), is seen to become and remain sustainable – in a first-person plural perspective, i.e., from the vantage of a 'we'. What values express are not these abstract pictures of possible social worlds, as is sometimes thought. In promoting values, one cannot picture any society as the 'ideal' one. Values are very much underpinned by facts from which 'we' cannot cut loose. Indeed, more often than not, our values are better called 'interests' – what we seek to achieve in between (inter-esse) the life we desire and the facts with which we have to reckon. In this sense, interests are realistic, and so are, in principle, the demands to be met in divisions of labour. As a polity, we cannot seriously claim that we have an interest in becoming the world's leader in producing hydroelectrical energy if our country does not have powerful water currents. In brief, values are more or less shared preferences in a polity, but since this polity and its members are always, already *situated* at a specific time and place, these preferences matter, to themselves as to others, to the extent that they are promoted to, and register as, interests.

This should not, however, count against the conclusion that division of labour is value-driven, and that, from the agent's own perspective, this valuing cannot be separated from articulating the collective identity that comes with the first-person plural, i.e., the 'we' we are committed to, but under conditions of greater sustainability. This 'we' decides what the task at hand amounts to, how it should be pursued, what should count as a contribution, and who is therefore invited to join the venture. In other words, the political perspective of self-inclusion cannot be kept at bay if we try to look at social orderings from the economical vantage point of labour.

If we depart from the other end of our analysis, migration under its politically relevant guises of emigration and immigration, we may discover

2 The argument below profits greatly and gratefully from discussions with C. Raucea, who defended her PhD thesis, (18 December 2017) *Citizenship Inverted: From Rights to Status?* at Tilburg University.

that we are pursuing a path taking us into the division of labour rather than the reconfirmation of boundaries. To cut things a bit short, I take the liberty to focus on immigration rather than emigration, leaving it to the reader to draw the parallel. Let us return to the point where the frightening character of massive, nonregulated immigration was explained. I submitted that the threat consists of the members of a polity being inevitably confronted with the contingencies of the body politic they happen to live in. Immigrants appearing at their borders in considerable numbers without visa applications, invitations or registrations, i.e., people ignoring the legal requirements for entrance, signal to be indifferent to the constitutive act of the residents' polity, i.e., the act of self-inclusion. In this sense, the message of immigrants is that their 'host' polity might as well not exist at all. It is without entitlement, precisely because its boundaries have been set without any opportunity for them to raise their voices. This does not mean, of course, that, as outsiders, they contest the insiders' right to live in *some* polity. But if massive immigration is frightening, what are the reasons for that exactly?

One reason often given is that it collapses the polity into problems of distributive justice. To give people their due of the common wealth, i.e., to divide the profits as well as the burdens of social goods like education, health care, infrastructure, etc. equally, one should be able to count the number of those involved in the distributive scheme of the polity, and the number should be finite. If, by hypothesis, social goods are scarce, hence in limited supply, it is logically impossible to distribute them if the denominator of the division is infinite. It is in virtue of this finitude that self-inclusion is part and parcel of political action. This is a pretty strong argument, and its persuasive force is greatly enhanced by the rhetoric of the cake at a birthday party. To divide the cake in accordance with the exigencies of distributive justice, i.e., to give all guests an equal part of the cake, one should start by counting the guests (and stop counting at some point). But it is precisely this metaphor that allows us to probe the weak spot of the argument. Prior to counting the guests and dividing the cake equally, there should be a cake to divide in the first place. This cake is not brought about by sheer command. It has to be produced by coordinated and sustained action of a plurality of agents. Indeed it requires … labour, hence division of labour. This explains why, in western societies, immigration is welcomed to some extent, on the condition that it enhances the common wealth of the polity, e.g., by bringing in a qualified workforce, or a workforce of unskilled labour, or (in particular) a *cheap* workforce.

Of course, at first sight, this takes us back to what was said about this perspective a moment ago. This does not reach beyond the political vantage

point of self-inclusion. If a polity opens its borders solely for what it deems profitable, it just demonstrates with greater clarity what self-inclusion is about and how it comes around. However, the argument of the cake having to be produced before it can be divided is stronger than the metaphor suggests. It does not easily collapse into the political logic of self-inclusion and exclusion. What is to be produced is not just a cake, it is the very identity of the 'we' that grapples for self-inclusion. It is not a matter of 'us' baking a cake, i.e., something pre-determined outside of us, but of 'us' reproducing, i.e., reinventing ourselves. There is no other way to 'reproduce human existence' than by reproducing society; and there is no other way to reproduce society than by reproducing a plural self, a 'we'. Precisely this process of jointly carving out a plural self is itself a matter of labour, hence division of labour. Thus, at the heart of the political order, we discover its *opposite* form of social ordering, namely labour. And, as we saw, from the viewpoint of labour, there is no *a priori* reason for exclusion. We can never be certain beforehand about who on the outside will matter to those on the inside. In other words, none of those excluded in actual practice can be excluded in principle. As a first-person plural, we can neither cut loose from self-inclusion nor achieve it completely. Without 'negotiating' such identity (in all meanings of the word 'negotiate'), the process of *self*-inclusion would become inconceivable. Indeed, *ex hypothesi* (see above), any political action would then be undercut from the beginning, as all political action starts out from discursive references to this identity in the sense of a plural 'self'. At the same time, however, these references never reach what they target. Our plural identity escapes us in the moment we think of defining it. These references remain efforts to grasp what can never be grasped completely and what therefore remains contestable, namely a definitive 'we'.

Nevertheless, there are a few strongholds that may enhance the success rate of this negotiation process. We mentioned one already: in search of identity, it seems wise to aim at flexibility rather than rigidity, as conditions in a group's environment are in the habit of changing in unpredictable ways. There is, however, another side to this coin, namely reliability. To make references to a plural self *reliable*, the ascriptions of its properties should be reliable. These can only be trusted to be reliable if they are tested against criteria that are not controlled by the same agents that make the ascriptions. To a considerable extent, political identity is based on recognition from 'outsiders'. As in the case of the individual person, not just self-awareness but reliable self-awareness is the key to sustainable social orderings. This does not imply any form of collectivisation in the sense of subjecting individuals to the group, but there is no point in denying that 'identity' – in both the

singular and the plural mode of the self – comes with 'targeted unity'. Split polities are as pathological as split personalities if their parts are radically antagonistic (as is the case in unconstitutional secession and civil war), and cannot see themselves as parts of a larger (bounded) whole.

Pathology aside, let us stay focussed on the point where I said that the process of self-identification in a polity has to do with (division of) labour. I should explain what this has to do with (im-)migration. Remember what was said about labour at the very beginning of this paper: In the final analysis, labour is about reproducing human existence in interchange with one's environment. On this account, the process of articulating a plural self may indeed be characterised as 'labour'. This is most evident in the case of revolutions, that more often than not come with a promise of the birth of 'a new human being'. Typically, what initiatives of revolt need, is the contributions of 'the many' or 'the multitude', as an infinite reservoir, not only of forces but also of ideas. Under these circumstances, participation is maximally open towards both agents and action. As the polity itself is at issue, there is no pre-given decision with regard to what counts as a contribution and who counts as a partisan. The process is under-coordinated, which is one of the reason why, soon after a revolution has proclaimed its success, it tends to 'devour its own children'. It is not different in less dramatic cases, in which a society gradually transforms into what it sees as a new era for itself, demanding the articulation of a new, more reliable and sustainable 'we'. In what sense does this reveal the logic of labour emerging at the heart of political logic? In what sense does it emerge through massive immigration, in particular? Take, for instance, how a polity P that thinks of itself as 'western', 'modern', 'democratic', 'liberal', 'welfare directed', etc., prepares for human-induced climate change, or for genetic engineering. Note, first and foremost, that we ascribe such preparations to 'society' rather than 'the polity'. This simple change of words already suggests that we are trying to capture a level of social life that is not yet affected by the inside-outside gambit of political action; political action comes with the claim to order social life, and thus precedes it, conceptually. Note also that, in the case of climate change, the phenomenon of 'climate refugees' coming P's way as potential immigrants, hugely enhances P's awareness of the challenge it has to face, hence the need for a reliable plural identity. It is this very influx, as well as P's response to it, that I propose to regard as 'labour'. Look, secondly, at the manifold of pursuits converging and diverging around such alleged phenomena; the narratives told, the technologies presented, the policies announced, moral debates arising, stock markets moving, etc. All of these dynamics transgress the basic fault line of P's self-inclusion, though not

without returning to it at the end of the day, reiterating P's identity in a new key. For P, there is little point in denying, for instance, that a large amount of these narratives, announcements, and movements, are conveyed to it by what immigration from China to P (and similar polities) has achieved on a global scale: the business China acquired, the resources they bought, the infrastructure they erected. P facing China as the new economic and military world leader is what I call 'labour' in the sense proposed consistently from the beginning of this paper. It is part and parcel of the process of reproducing human, hence societal, existence. This 'job-to-be-done' is a political exercise that, at its heart, exceeds the logic of political ordering in order to re-order, re-re-define, and re-produce it. Assess, thirdly, how inclusive and under-coordinated this process of labour and labour division is. Reports on South Korean experiments with cloning, or disastrous flooding in Myanmar, do not register as *faits divers* from remote places, but as challenges to a western society like P is exposed to. They matter because they propose a division of labour to which P cannot afford *not* to respond, in the short or the long run. Here, once more, migration matters. It registers not only as 'im-migration' from the viewpoint of established polities like P, as we saw in the first section. It also registers, within P, as e-migration from other polities. It matters to P in the first-person plural. To express this more perspicuously, I propose to add this 'P' (for a specific polity) in superscript to the first-person plural pronoun.

We may say then, that migration matters to us^{P}, not only as *our*^{p} political problem (what about our^{P} borders?), but also as *their* political problem spilling over into ours^{P} (what about their borders?). Their and our^{P} interests meet, i.e., we^{P} are involved in their interests, neither out of curiosity nor out of moral concern, but because of 'the job' that needs to be done. This is not to say that there is a *common* problem, as their political perspective may well be radically different from ours^{P}. But we^{P} cannot be blind to this perspective, insofar as emigration, for the polity left behind, often means, e.g., brain drain, capital flight, demographic ageing, diminishing labour force, exploitation, impoverishment, etc. In this sense, the seemingly neutral term 'migration' often refers to practices proposing a global or regional division of labour that is far from indifferent to any polity left or entered. It is not at all sure beforehand where, eventually, the costs or the benefits of a certain division will fall. P would not be entirely wrong if it would come to see its dealings with problems of immigration as delayed payments for its colonial invasions of the not too distant past. In sum, we may say that the challenge of massive immigration and the response it evokes do not just cause problems for labour and the labour market, they *are* themselves forms of labour.

3 Implications for Lawmaking

We have to take stock by asking what the intertwinement of labour and migration means for lawmaking. I started out by explaining the basically different perspectives of social ordering in which the concepts of labour and migration are usually perceived. The economic perspective of reproducing human existence is home to the concept of labour requiring a division that is as inclusive as can be, given the (re-)production 'job' that needs to be done. The political perspective of establishing a bounded polity that is sustainable (hence, flexible and resilient) over time immediately makes migration dovetailing into immigration and emigration, depending on the vantage point of the polity where migration registers. Upon further reflection, however, both of these perspectives come to include the other, so that they become intertwined without merging. The joint enterprise of reproducing *human* existence requires a form of joint valuing that inevitably poses the question of identity, thus introducing the political logic of self-inclusion, hence exclusion. Then again, articulating this political logic in the form of productive action necessarily comes under the guise of division of labour, which is inclusive in principle as long as coordination is warranted.

Already at this level, there are conclusions to be drawn for policy-making in general, regardless of the role attributed to law. If the argument above is basically sound, it is probably not wise to expect that the dedicated representatives of the economy and the dedicated representatives of the polity will agree on shared arrangements. In all probability, they will talk at cross-purposes, as they will cling to the primary perspective they represent, despite the crossovers between the two perspectives. As representatives, they will be unable to represent the intertwinement from their respective vantage points. They can act and speak either as economists or as politicians, but not as both, without forsaking their roles as representatives. This is why there is scope for a third perspective, namely law.

Although it is an unwarranted generalisation, I presume that many a trained legal mind would now be tempted to hold that it is the task of law to strike 'a balance' between these two perspectives. Indeed, for all practical purposes, this is precisely what ought to be done. In doing so, however, the drift of my argument should not be taken as a plea for a conceptual synthesis of the two perspectives. On the contrary, my aim is to show that they are conceptually irreconcilable. They are and remain as alien to each other as my left leg to my right leg. Perhaps this metaphor is a felicitous one; we need both legs to walk, alternating their functions of lending support and

moving forward. This is, in my view, how, from a legal point of view, one should go about the two perspectives, striking a balance by negotiating their ineradicable difference.

A critical reader will ask what it means to strike a balance if the metaphor neither captures a conceptual synthesis nor complies with its own narrative by revealing what – in imagining a balance – is the correlate of 'gravity'? My answer is that law *does* present such a correlate, at least in western culture. It is possible to say what it is (all) about in the end, generalising a number of legal orders and trying to grasp their 'telos'. Law is geared towards ending and/or preempting conflict that is potentially disruptive to social order, by means of authoritative decision making. This thumbnail definition accommodates a number of features that are characteristic of law. Let me mention just three of these:

- Law is primarily interested in ending or preventing conflict in society, rather than 'solving' the underlying problem; although it is obvious that solving the underlying problem is a solid way to end or prevent conflict.
- Law does not aim to prevent or end all conflicts in society, only those that are considered socially disruptive. Obviously, what is disruptive of social order depends very much on which society is at stake and how it has evolved (is evolving) over time.
- Law is dependent on authority – a notion too complex to detail here any further. Suffice it to say that without recognising and shaping structures of authority, decisions taken in the name of the law are null and void.

From these features, one may infer some implications for lawmaking with regard to the intricate relationship between labour and migration. It is crucial to determine, first and foremost, the problems of this relationship in terms of conflicts that are potentially disruptive to the societies involved. Not all the problems it raises usher in conflicts – as I mentioned already, for instance, an established welfare society welcoming an unskilled labour force, in spite of the problems of immigration. Some of these problems are to be addressed by policies other than lawmaking and/or by policies other than by state agents (e.g., entrepreneurs redefining their long-term corporate interests or labour unions reinventing themselves). Moreover, not all conflicts are socially disruptive (some conflicts further cohesion and resilience), not all conflicts disrupt the same societies, and different societies may be affected in ways that may turn out to be the root causes of conflicts between them. Let me try to formulate a few 'tasks' that should take priority in this 'labour on labour' and let me link them to the parameters or values of legal validity that Gustav Radbruch proposed in his canonical

work.[3] The first task at hand is an in-depth analysis of the conflict areas of migration where law has a role to play, as distinct from areas that should be left to other arrangements of ordering, such as the economy, politics, education, etc. The general parameter in this diagnosing exercise from a juridical point of view is *inequality*. In principle, unequal treatment of equal cases is the root cause of social conflict. Defining an overlapping consensus between political ideologies will be crucial in determining what case is equal to what other case(s), and what treatment will count as 'equal' in all cases. The second task, with regard to policy design, is to involve major stakeholders in labour who are *not* primarily driven by the logic of the political, for example, international businesses and banks, labour unions and consumer organisations, nongovernmental organisations dealing with migration, refugeeship, and poverty. Their responsibility is to lend 'voice' to migrants as the primary stakeholders, which obviously entails letting them speak for themselves wherever this seems possible. Without such involvement, policy-making will not be 'expedient'. The third task is to review structures of authority that could ground legal decision-making, so as to enhance legal certainty for migrant workers. Here, EU authorities could take the lead in the pursuit to enhance international, indeed supranational authority with regard to labour and migration. It should aim, for instance, at a more robust integration of the ILO in the current WTO environment, in spite of the lack of enthusiasm at the WTO end of the rope (the latest update on their relationship at the WTO site is from ten years ago).[4] This does not necessarily mean that such structures have to precede legal decisions. There is a two-way street here, in the sense that legal decisions establish structures of authority as much as they make use of them. This is especially the case if and when such decisions impose not only an end to a conflict, but lead on to solving the underlying problem(s) in a sustainable way. Of course, by calling these three projects 'tasks', I do not imply that they are yet to be performed; the better part of both the literature and the policy-making on labour and migration falls squarely within these lines.

But is it possible to enhance the sense of direction that should guide these efforts? Here, I can only point to a few general parameters (and I will not hide my inability behind the confines of this paper). First and foremost, we should be aware of the fact that law is a political artefact. It is, itself, made (i.e., posited in the encompassing sense of enacted, executed, and applied) by

3 Cf. his *Rechtsphilosophie*, 4. Aufl., hrsg. v. E. Wolf and H.-P. Schneider, Stuttgart, Koehler Verlag, 1950.

4 Available at: https://www.wto.org/english/news_e/news07_e/ilo_feb07_e.htm.

political action. It therefore cannot evade the logic of the political explained above. But then, though made by politics, it is not reducible to politics once it is made. It also undercuts politics, preventing self-inclusion from becoming relentless. In some polities, there may be largely shared moral reasons in the background of this undercutting. Since law should also be able to create social order when and where moral reasons go in radically different directions, one should not underestimate the political reasons in favour of exercising *political self-restraint*. Equal treatment, for instance of labour force, is a case in point here. Going rigorously by the logic of the political, i.e., of the polity including itself as a bounded whole, it would be perfectly acceptable to enhance the common wealth by what is usually called 'social dumping'. Large groups of legal as well as illegal immigrants are particularly vulnerable to the various practices that come under this name. To counter these practices, one may use moral arguments that point to pervasive notions such as human dignity or moral rights. But it is often more convincing to appeal to the danger of a rigorous pursuit becoming a rigid pursuit, at the cost of harm to the very polity venturing such pursuit. The Viking and Laval cases before the European Court of Justice, for instance, banned unequal treatment because it jeopardises the internal market of the European Union rather than its moral virtuousness. Similarly, on a global scale, there is increasing evidence that a WTO labour rights clause is to be advanced for the sake of greater productivity, hence trade capacity, in low-wage countries, hence for the sake of 'good' ('smooth') trade worldwide, rather than for the sake of allegedly 'universal' moral rights.

Going on to a second parameter, for the very same reasons, *democracy* appears to be a *relatively* successful format of lawmaking. In a polity consisting of changing majorities and minorities, it holds on to the principle that any majority may follow its preferences, on condition that it abstains from the use of violence in leaving to any minority, the institutionally warranted chance to become a majority. It is only consistent (though not logically compelling) that the same polity would apply this very principle in the relationships with other polities as well. Prior to all metrics of voting and electing by which one may articulate 'majority rule', this principle anchors the idea of 'self-government by the people' in institutional reality. It harbours an understanding of the people's 'self', i.e., their identity, in terms of majorities and minorities constantly in flux, with only one permanent point of reference: their commitment to majority rule. By the same token, it shows that the 'identity' of a plural self does not necessarily take us into the conceptual realm of monolithic polities, totalitarian states, central authority, and their ilk. On the contrary, it opens up to political strategies

for large groups of relatively powerless people to gain power by getting organised. Thus, we may say that democracy is a powerful format to arrange political self-restraint in lawmaking, but it is not the panacea of lawmaking under all circumstances. Under conditions of so-called 'transitional justice', i.e., in the transition from a polity torn apart by oppression or civil war to a polity under the rule of law, democracy is in transit, too. Preempting major conflict in such a society, e.g., by enforcing lucid (rather than strict) anti-corruption policies, may well require temporary authoritarian rule, on the very same grounds that would 'normally' foster democracy. Rwanda seems a case in point here.

As a third parameter, I suggest that, as a matter of principle, lawmaking should be regarded as *transboundary*, by all three powers involved in it: legislative, governmental, and judicial. I prefer the predicate 'transboundary' over, for instance, 'supranational', for various reasons. The most salient one is that I propose to steer away from the idea that one should first establish cooperation and, indeed, institutionalisation of dedicated legal bodies on a level beyond the national state before one can embark on lawmaking. Important as such cooperation may be in its own right (cf. the transposition of EU directives, the reinforcement of the role of the ILO), the driving force of labour lawmaking should be elsewhere. A 'transboundary' vantage point should be the hallmark of both national and supranational legal agents who opt for law as political self-restraint. This applies to legislators implementing supranational rules and standards, to governments enforcing them by international cooperation, to judges exercising discretion after due comparative research informed by legal principles rather than domestic black letter rules. With regard to the latter, 'judicial dialoguing' – as it is sometimes called – should take place not only between the judges of supranational polities like the EU, but also between judges in sending and receiving migrants, difficult as these dialogues may be.

A fourth parameter regards the attribution of fundamental rights to migrants, often used by a polity to differentiate not only between legal and illegal immigrants, but also between different subcategories on both sides of this divide. I would like to point to the *interconnectedness* of fundamental rights. You cannot have one without the other. It is common policy, for instance, to distinguish free movement rights of workers from rights to family life, rights to health care and education, and political voting rights. The latter, again, are often subdivided into voting rights on various institutional levels of the polity, e.g., municipal, national, federal, and their ilk. One should see these differentiations as varied efforts to negotiate the boundaries of the polity. As I argue above, such efforts are part and parcel of the way

polities exist, and there is no point in dubbing them 'right' or 'wrong' as such, let alone in arguing that they should be abandoned in the name of morality. What morality may demand is that they should be made under provisions of self-restraint; a demand that backs up, by principle, what is often enough already demanded by prudence. It is precisely the exercise of political self-restraint that will make legal authorities recognise that access to education and health services come in the wake of the right to family life, which sooner rather than later turns out to be a sequel to a permission to enter, which, in turn, only illustrates that fundamental rights root in *human* rights, and one cannot reduce humans to workers. After all, labour, indeed, is about reproducing *human* existence.

Bibliography

Marx, K. (1971), *Werke – Schriften*, Bd. I, hrsg. v. H.-J. Lieber, and P. Furth, Darmstadt, Wissenschaftliche Buchgesellschaft.

Raucea, C. (18 December 2017), *Citizenship Inverted: From Rights to Status?* (PhD thesis) Tilburg University.

Wolf, E. and H.P. Schneider (1950), *Rechtsphilosophie,* Stuttgart, Koehler Verlag.

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2 How 'Low-Skilled' Migrant Workers Are Made

Border-Drawing in Migration Policy

Regine Paul

Abstract
When discussing labour migration governance in Europe, many observers – including academics – rather intuitively take for granted regulatory distinctions. This includes schisms such as EU free movers vs. workers from outside the EU, or high-skilled vs. low-skilled migrant workers, and also a relative acceptance of the different rights regimes that apply across categories of migrant worker. This chapter challenges physically biased notions of borders, often featured in migration policy research, as territorial demarcation lines that lose their effectiveness when migrants cross them without authorisation. Instead, migration governance is conceptualised as a border-drawing activity by which migrants are classified and thus constructed as 'legal' or 'illegal' in highly selective and structurally embedded processes of 'meaning-making'. Paul forges a conceptual hub for critically unpacking the normative underbelly of regulatory distinctions of migrant workers in European migration governance, and for discussing how such deeply political distinctions fashion (exploitable) positions for low-waged migrant workers.

Keywords: labour migration, governance, migrant categories, border-drawing, symbolic power, cultural political economy

1 Introduction

When discussing labour migration governance in Europe, many observers – including academics – rather intuitively take regulatory distinctions for

Rijken, Conny and Tesseltje de Lange (eds): *Towards a Decent Labour Market for Low Waged Migrant Workers.* Amsterdam: Amsterdam University Press, 2018
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granted. Opposing categories usually include EU free movers vs. workers from outside the EU and high-skilled vs. low-skilled migrant workers. These schisms belittle, however, a) the creative activity of constructing these categories through regulation, b) their interaction with complexly stratified labour market relationships for both EU and non-EU workers, including wage biases based on the patchy recognition of non-domestic qualifications on European labour markets, and c) the ways in which formal and informal labour markets are themselves shaped by regulatory distinctions in migration law. This chapter conceptualises labour migration regulation as a powerful categorisation activity. It does so by interrogating the normative underbelly of migrant classifications as 'low-skilled' or 'low-waged' migrant workers in contrast to high-skilled categories, as well as in the context of the EU's free movement regime for EU citizens (who are not considered as migrant workers here, but as free movers). Such a critically minded unpacking of regulatory categories in migration policies towards so-called third-country nationals contributes, I hope, to an analytical framework for reflecting on the structural and discursive conditions by which low-skilled migrant workers' often vulnerable labour market positions – plentifully detailed in other contributions of this volume – are facilitated in the first place. It offers a way to acknowledge labour migration regulation as a complexly structured activity of statehood wielding far-reaching classificatory effects for migrant workers themselves. At the same time, such conceptualisation overcomes the physical concepts of borders that feature in much political sciences and migration policy research.

To do so, I propose to analyse migration policy as border-drawing.[1] With border-drawing, I mean the state's capacity to impose classifications – that is: categories of thought about how, and according to which criteria of distinction, to best categorise the social world – through immigration legislation. Based on a problematisation of the physical bias in border concepts, featured in the 'control gap' literature in migration research, Section 2 delineates a Bourdieusian reading of statutory classification activities. Rather than losing their effectiveness when migrants cross them without authorisation, borders are conceptualised as concerning the state's privileged symbolic power to construe and construct various 'legal' and 'illegal' categories of migrants, and to associate differentiated sets of rights to such classifications. Section 3 embeds the border-drawing concept in a cultural political economy

1 This draws on a larger research project whose findings have been published in a monograph: R. Paul (2015), *The Political Economy of Border-Drawing: Arranging Legality in European Labour Migration Policies,* Berghahn Books.

framework to highlight the selectivity of meaning-making processes underscoring migrant classifications – their normative underbelly – as well as the structuration of such meaning-making by existing institutions. Section 4 illustrates analytical uses of the border-drawing perspective through empirical examples from my past research, paying special attention to the volume's interest in low-skilled migrant labour markets. Section 5 concludes and discusses implications of the border-drawing concept for the analysis of 'low-skilled' and low-waged labour markets for migrant workers.

2 Migration Policy Research and a Physical Bias in Mainstream Border Concepts

Twenty-five years after Stephen Castles and Mark J. Miller first announced the 'age of migration'[2], research on the *regulation* of international migration has become a loyal analytical companion to migratory phenomena. Many social sciences accounts have since diagnosed a rather limited ability of statutory regulations to control migratory flows. From a Weberian reading, states rely on borders to delimit a) the territory they legitimately rule, and b) the individuals who acquire rights and access to public goods (including jobs and welfare) on this specific territory, and who are bound by the state's rules. The 'invention of the passport' has been crucial in statutory attempts to differentiate who is included and excluded from the *Staatsvolk*, fueling the 'state monopolisation of the legitimate means of movement' since the late eighteenth century in Europe.[3] In line with Weberian thinking on the prerequisites of state sovereignty, most migration policy scholars start from the premise that governments 'want to be able to choose which people to admit, how many, for what purpose, and for how long. They do not want these decisions to be made by employers, other governments, or would-be migrants'.[4]

The diagnosis of a 'global migration crisis'[5] rests on the assumption that migration challenges the states' monopoly to control movements into their demarcated territories. Examples include the 'unintended consequences'

2 S. Castles and M.J. Miller (1993), *The Age of Migration: International Population Movements in the Modern World,* Palgrave MacMillan.

3 J. Torpey (2000). *The Invention of the Passport. Surveillance, Citizenship and the State,* Cambridge University Press, p. 4.

4 M. Weiner (1995), *The Global Migration Crisis: Challenge to States and to Human Rights,* HarperCollinsCollege, p. 12.

5 Weiner, n. 4.

of Western European guest-worker programmes in the 20th century, where workers settled rather than returned to their countries of origin after their labour force was no longer needed[6] (i.e. an alleged failure to enforce return); the prominence of mass regularisations of irregular workers (often in low-skilled labour markets) in Southern Europe[7]; the limited success of deportations of irregular residents[8]; or the policy and allocation dilemmas the EU is facing after the large-scale entries of asylum seekers during the so-called refugee crisis.[9] Observations of limited control have provoked manifold scholarly efforts to explain the 'gap'[10] between restrictive policy goals and rather liberal policy outcomes. They include rational choice political economy claims[11], neo-institutionalist arguments[12], and ideas from organisational theory.[13]

Rather than explaining an alleged control gap further, my premise is that such a focus risks missing some of the highly consequential effects of (potentially 'gappy' or not fully enforced) migrant regulation, notably for migrant workers and their employers. Of course, this is where we enter the terrain of critical legal scholarship, which has duly examined the effects of variable, complex, and often contradictory admission criteria as well as migrants' treatment in law depending on their legal status.[14] By assuming

6 W.A. Cornelius and T. Tsuda (2004), 'Controlling Immigration: The Limits of Government Intervention,' in W.A. Cornelius and J.F. Hollifield (eds.), *Controlling immigration: a global perspective*, Stanford University Press; S. Castles (1986), 'The Guest-Worker in Western Europe – An Obituary', *International Migration Review*, 20.

7 E. Reyneri (1998), 'The Mass Legalization of Migrants in Italy: Permanent or Temporary Emergence from the Underground Economy?' *South European Society and Politics,* 3; S. Sunderhaus (2007), 'Regularization Programs for Undocumented Migrants*, Migration Letters,* 4.

8 A. Ellermann (2009), *States against Migrants. Deportation in Germany and the United States,* Cambridge University Press.

9 S. Carrera et al. (2015), *The EU's Response to the Refugee Crisis: Taking Stock and Setting Policy Priorities,* CEPS Essay.

10 W.A. Cornelius, P.L. Martin, and J.F. Hollifield (eds.) (2004), *Controlling Immigration: A Global Perspective,* 2nd ed., Stanford University Press.

11 G.P. Freeman (1995), 'Modes of Immigration Politics in Liberal Democratic-States', *International Migration Review* 29 p. 881; G.P. Freeman and A.E. Kessler (2008), 'Political Economy and Migration Policy', *Journal of Ethnic and Migration Studies,* 34.

12 J.F. Hollifield (2004), 'The Emerging Migration State', *International Migration Review*, 38 p. 885; C. Joppke (1998), 'Why Liberal States Accept Unwanted Immigration', *World Politics* 50.

13 C. Boswell and A. Geddes, (2011) *Migration and Mobility in the European Union* (Palgrave Macmillan); C. Boswell (2007), 'Migration Control in Europe after 9/11: Explaining the Absence of Securitization', *Journal of Common Market Studies,* 45.

14 See, for instance, T. de Lange (2015), 'Third-Country National Students and Trainees in the EU: Caught between Learning and Work', *International Journal of Comparative Labour Law and Industrial Relations,* 31; also see T. De Lange and C. Rijken in the introduction to this edition.

that states have reached the point where attempts to control physical borders have become untenable, many political science approaches to migration policy tend to conceptualise borders as taken-for-granted, merely *physical*, demarcation lines that lose their functionality when someone crosses them without prior authorisation. Such an understanding tends to underestimate the powerful and consequential role of regulation in defining 'legal' and 'illegal' statuses, as well as many in-between categories of semi-legality, and in carving out a highly differentiated rights regime on the basis of such classification. As we will see later, classification crucially hinges upon migrant skill levels as a proxy criterion for distinction. Skill level thereby comes to co-determine the sets of rights available to incoming and resident migrant workers (and their families).

3 Conceptualising Migration Policies as Selective Border-drawing

To expose the normative underbelly and structural consequences of migrant admission regulation, I propose a Bourdeusian reading. This treats borders as complex regimes of highly differential rights and statuses for migrants, produced and reproduced through symbolic classifications that are themselves structurally embedded in existing institutions. Rather than taking borders for granted as physical demarcation lines, a border-drawing perspective highlights the analytical need to explore their mutual construction and structuration in highly selective classification processes.

Migration Policies as Bourdieusian Classifications

Pierre Bourdieu's reflections on classification and symbolic power[15] help us carve out a basic concept of regulation efforts in the migration domain as *border-drawing*. Bourdieu sees classifications as social mechanisms by which positions and relations between individuals and groups are constructed and reproduced in the social world. He considers classifications as products of 'symbolic struggles' over the legitimate 'vision and division' of the social world. This means that the 'space of relations', later called 'social space', is not completely structurally determined, but is constantly constructed and

15 P. Bourdieu (1989), 'Social Space and Symbolic Power', *Sociological Theory*, 7 p. 14; P. Bourdieu (1991), *Language and symbolic power,* Polity Press; P. Bourdieu (1998), *Practical Reason,* Polity Press.

reconstructed in powerful 'symbolic' struggles over classification. While some properties of individuals, such as age, gender, race, and educational attainment, are perceived as ontologically real by Bourdieu and can have structuring effects on the agents' position in the social space, the specific way in which they structure these positions is not predetermined. Rather, a person's status and position in the social space depends, to a great deal, on the ascription of meaning to (some of) their individual properties in classificatory struggles, and in the recognition of these meanings as valid visions of difference. Policies, in this reading, are preliminary codifications of meaning, temporary winner stories in the struggle over legitimate classification. Whether my educational attainment, my professional skills, my age, my biological gender, or my nationality are advantageous for (or indeed detrimental to) my entry and residence in country X, is a matter of the value ascribed to these credentials in the countries' labour admission policies.

A second chief claim in Bourdieu's work considers the privileged role of the state in classificatory struggles. This is closely related to the condition of recognition that Bourdieu associates with 'winning' a classificatory struggle. His concept of symbolic power acknowledges that the state wields much classificatory authority: while anyone can say and mean anything semiotically speaking, not anyone can impose any vision of the world on a whole society sociologically speaking.[16] Asymmetric power relations and unequal access to symbolic capital in the *éspace sociale* found a particularly powerful role for the state in classificatory processes: 'In the symbolic struggle for the production of common sense or, more precisely, for the monopoly over legitimate naming, agents put into action the symbolic capital that they have acquired in previous struggles, and which may be juridically guaranteed'.[17] States' relative authority to impose semantic visions and divisions of the world onto others, and to have such prescriptions 'recognised, that is misrecognised as arbitrary'[18], relies on the 'monopoly over legitimate symbolic violence' and the power to pass collectively binding legislation. In Bourdieu's words: 'One of the major powers of the state is to produce and impose categories of thought that we spontaneously apply to all things in the social world – including the state itself.' It is therefore 'in the realm of symbolic production that the grip of the state is felt most powerfully'.[19]

16 P. Bourdieu, *Language and symbolic power,* n. 15 p. 74.
17 P. Bourdieu, 'Social Space and Symbolic Power', n. 15 p. 21.
18 P. Bourdieu, *Language and symbolic power,* n. 15 p. 170.
19 P. Bourdieu, *Practical Reason,* n. 15 p. 35 and 38.

In addition, when legislation engages in 'naming' and 'labeling', say through creating a legal category for nominally 'low-skilled migrant workers' and by its regulatory distinction from the category 'high-skilled migrant workers', this usually does not remain a merely semantic exercise. Rather, regulation typically attaches highly differentiated and structurally consequential sets of rights and obligations to semantic classifications. By linking the symbolically produced category of a 'low-skilled migrant worker', for example, to distinct sets of rights, such as access to the labour market, public welfare, public services, family reunion rights, or franchise, the state regulation powerfully shapes the socioeconomic and political position of the affected person in the 'host' country. Bridget Anderson has nicely summarised the status-producing effects of borders in this context:

'International borders are commonly presented as filters, sorting out the desirable from the undesirable, the genuine from the bogus, the legal from the illegal. [...] However, [...] borders are not simply territorial, but they reach into the heart of political space. [...] Laws and practices of citizenship [...] may be more usefully analysed as *producing* rather than reflecting status, as creating specific types of social, political and economic relations'.[20]

Eventually then, the ability to classify and define 'legal workers' in official legislation – and to exclude all others from the scope of these definitions and the rights or duties attached to them – must be conceived as one of the most triumphant instances of the state's symbolic power in action. This, of course, is in dire contrast to the perception of powerless liberal states conveyed in the control gap literature.

Normativity and Institutions in Border-drawing

Two further specifications of the border-drawing concept are useful for empirical research, the first concerning the inescapability of meaning-making and the second concerning its structural embeddedness. The first claim relies on the insight that there can be no classification without a criterion for distinction, simple as it may be. The classification of migrants into different status categories – for example, using a legal distinction between high-skilled and low-skilled migrant workers – is not determined by any natural laws. Migrant categories come into being through a set of politically inaugurated principles that define the grounds on which a migrant *should be* classified as legal or illegal, as what type of legal and with access to

20 B. Anderson (2013), *Us and Them? The Dangerous Politics of Immigration Controls,* Oxford University Press, p. 2.

what kinds of rights, or with what type of sanctions in the case of 'illegality'. Legal migrant workers, for example, are typically selected and classified according to their skill level, but criteria for their distinction could also include, *inter alia*, their age, nationality, family status, language proficiency, or previous links to the country of destination.[21] Anyone not matching the predefined skills profiles is consequently deemed either to remain outside the country or to occupy a notionally 'illegal' position without access to many fundamental rights. At the same time, any existing categories for admission can, of course, also be used strategically by prospective migrant workers, for example by entering through seemingly less stringent routes.

Classifications inevitably entail political choices about the norms that should guide regulatory divisions and access to rights in the 'host' country. As Chavez has suitably pointed out, 'illegality' is 'a status resulting from political decisions made by governmental representatives, who could just as well have decided to allow migrants to enter'.[22] The specific combination of classification principles in the regulation of migrant admissions thus entails a highly *selective* normative vision of the world that cannot be taken for granted in scholarly policy analysis but instead requires critical reconstructing.

So how are specific credentials chosen to matter as markers of distinction in migrant classifications then? My second specification draws on the supposition that existing institutions structure, though never fully determine, the room of possible meaning-making in border-drawing. The normative underbelly of migrant classifications is not radically contingent but interacts with preexisting institutionalised sets of meaning and material structures of capitalist labour markets. This view borrows from the works of Bob Jessop and Ngai-Ling Sum[23] on cultural political economy, which I review more fully elsewhere.[24]

21 R. Paul (2012), 'Limits of the Competition State: The Cultural Political Economy of European Labour Migration Policies', *Critical Policy Studies*, 6; R. Paul, *The Political Economy of Border-Drawing: Arranging Legality in European Labour Migration Policies,* n. 1.

22 L.R. Chavez (2007), 'The Condition of Illegality', *International Migration*, 45 p. 192.

23 B. Jessop and N. Sum (2010), 'Cultural Political Economy: Logics of Discovery, Epistemic Fallacies, the Complexity of Emergence, and the Potential of the Cultural Turn', *New Political Economy*, 15; B. Jessop (2009), 'Cultural Political Economy and Critical Policy Studies', *Critical Policy Studies*, 3; N. Sum and B. Jessop (2013), *Towards a Cultural Political Economy. Putting Culture in Its Place in Political Economy,* Edward Elgar Publishing; N. Sum (2009), 'The Production of Hegemonic Policy Discourses: "competitiveness" as a Knowledge Brand and Its (Re-)Contextualizations', *Critical Policy Studies*, 3.

24 R. Paul, *Limits of the Competition State: The Cultural Political Economy of European Labour Migration Policies,* n. 21; R. Paul, *The Political Economy of Border-Drawing: Arranging Legality in European Labour Migration Policies,* n. 1, Chapter 1.

At its most basic, cultural political economy (CPE) starts from an analytical distinction of two modes of complexity reduction, which actors, organisations, and social systems use to go on in an otherwise incomprehensibly and unmanageably complex world.[25] One is 'meaning-making' or 'semiosis', the other one is 'structuration'. Semiosis concerns discursive strategies of accentuating some selected aspects of the social world, while ignoring or silencing others, or combining and recombining sets of meanings. A selective stressing of the negative welfare effects of low-skilled migration that ignores its economic utility, in our case, would be a typical semiotic complexity reduction mechanism. Structuration concerns the 'extra-semiotic' or 'material' aspects of complexity reduction that can be found in institutionalisations of specific forms of social relations, such as relatively stable organisations or transaction models. Material structuration could concern, for example, the labour shortages and demographic decline on domestic labour markets – a macroeconomic factor that might then affect the extent to which the import of migrant labour is seen as a legitimate answer to so-called skill gaps.

A CPE approach joins both modes of complexity reduction in one analysis to acknowledge both (a) the *productive* potential of meaning-making processes (which we have captured with the Bourdieusian language of 'symbolic production' above) and (b) the impact of *structural preconditions* on the possibility for certain discourses to gain substantial influence beyond semantics. In a nutshell, this suggests that the institutional landscape delimits the range of possible (or 'compossible' in Sum and Jessop's words[26]) social formations from which new meanings can be selected and vested in policies. Such understanding is also relevant for policy analysts in the interpretivist camp more generally. Henk Wagenaar[27], for example, highlights the power of often implicit 'presuppositional concepts' to offer patterns of meaning in distinct social or cultural contexts and thus silently shape our understandings of what a particular policy is – and indeed should be – about.

Overall then, border-drawing in migration regulation never acts in a vacuum and cannot create just any meaning. Rather, the moment of selectivity that is so crucial in classification processes is historically and socially embedded; it interacts with existing institutions and their normative foundations. At the same time, the view on structural embeddedness – and this is a clear departure from assuming institutional path dependencies – should not

25 Summary in B. Jessop, *Cultural Political Economy and Critical Policy Studies*, n. 23.

26 N. Sum and B. Jessop, n. 23 pp. 235-236.

27 H. Wagenaar (2011), *Meaning in Action: Interpretation and Dialogue in Policy Analysis,* M.E. Sharpe, p. 18.

lead to an underestimation of the powerful construction of 'facticity' through policy-making.[28] Facticity means that new taken-for-granted assumptions are brought into being through statutory classifications of migrant workers in regulations, which can create new statuses and opportunities or amend previous ones. CPE employs the term 'sedimentation' to capture the moment in which selective interpretations of the social world make it into the higher realm of 'facticity' to 'give them the form of objective fact of life'.[29]

Once created, migrant classifications such as the notion of a low-skilled vs. a high-skilled migrant worker tends to 'become hard realities, facts that constrain us, not merely norms that guide our autonomous judgment'.[30] Low-skilled migrant workers will feel their inability to bring their spouses to live with them (such as is the case with migrants coming to work in the EU under the scope of the Seasonal Workers Directive discussed by Zoeteweij in this volume), a direct function of the rights attached to their classification as 'low-skilled' migrant workers, as a very hard reality indeed. It is precisely such construction mechanisms by which the inevitably selective claims to meaning that underpin regulatory choices – e.g., 'we do not need lower-skilled workers' or 'high-skilled workers boost economic growth' – can acquire the status of tacit knowledge beyond contestation.

Eventually, border-drawing and respective migrant classifications are not just shaped by the socioeconomic formation in which they emerge, i.e. in contemporary capitalism. They simultaneously reconstitute this setting through the very process of producing or rearranging policy meanings and can hence come to shape future classificatory struggles. In other words: it might prove hard to retreat from the claim that 'we do not need lower-skilled migrant workers', once it has sedimented through legislation and related labour market positions with societal discourses having reached the stage of seemingly factual knowledge. While many contributions to this volume critically clarify such a claim through careful empirical analysis on real labour markets and in real work places, this chapter's conceptual contribution lies in detailing how such classifications come about in the first place: in powerful statutory acts of border-drawing in which statuses are allocated in highly selective and yet institutionally embedded ways.

28 F. Fischer (2003), 'Beyond Empiricism: Policy Analysis as Deliberative Practice', in M.A. Hajer and H. Wagenaar (eds.), *Deliberative policy analysis: understanding governance in the network society.* Cambridge University Press.

29 B. Jessop, *Cultural Political Economy and Critical Policy Studies,* n. 23 p. 340.

30 N. MacCormick (2007), *Institutions of Law: An Essay in Legal Theory,* Oxford University Press p. 33.

4 Analysing the Regulation of Low-skilled Migrant Workers as Border-drawing

How can a border-drawing lens, with its focus on selective meaning-making processes that are both structured by existing institutions and productive of new sets of meaning, facilitate critical analyses of the regulation of low-skilled migrant workers and their jobs? To illustrate the empirical application of the border-drawing framework, I rehearse key findings from a larger study I conducted from 2009-2012, comparing labour migration regulation in Britain, France, and Germany.[31] This serves to demonstrate the reasoning and institutional logic behind a common regulatory distinction between high-skilled and low-skilled labour migration. It also indicates how the context of EU free movement structures entry options and statuses for those non-EU migrants classified as low-skilled workers.

The Relevant Other Category: Classifying High-skilled Migrant Work as Innovation-boosting

The first key finding concerns the structural and discursive conditions under which contemporary labour admission regimes for non-EU workers in European Member States classify lower-skilled migrant jobs as economically undesirable, by way of comparison with the nominally highly desired, high-skilled migrant workers. Labels and specificities of respective permits may vary, but the three countries I studied broadly structure the regulatory terrain by skill level as guiding criterion for distinction: 1) high-skilled professional routes, including post-study job search and intra-company exchanges; 2) shortage routes for skilled workers, and 3) lower-skilled routes that are sometimes inactive (Britain). Legislation in all three countries privileges high-skilled workers with more secure residence statuses (even including access to immediate permanent residency in Germany), easier and more comprehensive labour market access, but also encompassing family reunion rights. In contrast, migrants working in lower-skilled jobs are tied to their employers, at least initially, and they can usually only stay

31 R. Paul, *The Political Economy of Border-Drawing: Arranging Legality in European Labour Migration Policies,* n. 1; further findings in R. Paul, *Limits of the Competition State: The Cultural Political Economy of European Labour Migration Policies,* n. 21; R. Paul (2013), 'Strategic Contextualisation: Free Movement, Labour Migration Policies and the Governance of Foreign Workers in Europe', *Policy Studies*, 32; R. Paul (2016), 'Negotiating Varieties of Capitalism? Crisis and Change in Contemporary British and German Labour Migration Policies', *Journal of Ethnic and Migration Studies*, 42.

for the duration of the work contract. Any change of employers requires consent by the employment and migration authorities; a requirement that is certainly most pronounced in the British sponsorship certificate system. Additional labour market protection mechanisms in the guise of shortage lists, resident labour market checks, and bilateral recruitment agreements or country-specific quotas, further add to the impression of a tightly regulated domain.

This finding concurs with several studies[32] evidencing that the rediscovery of migrant workers as 'potentially useful human resources' in the 1990s – after decades of official recruitment bans – came with highly selective admission regimes: 'migrants are welcome as long as they promise to contribute to the prerogatives of a business-friendly national economic growth strategy.'[33] Clearly, arguments of economic utility are not being accepted as sufficient for legitimising legal entry for migrants of *lower* skill levels. Unlike in the so-called guest-worker period after the Second World War, when countries such as France and Germany recruited mainly lower-skilled or unskilled workforce to build up flourishing postwar economies, active recruitment since the 1990s has been mainly focussed on high-skilled workers.[34]

A border-drawing perspective helps exploring the seeming desirability of high-skilled workers as a selective accentuation of innovation goals in the context of the so-called 'knowledge-based economy'. For example, the European Commission, in a 2005 green paper, highlighted 'the need to review immigration policies for the longer term, particularly in the light of the implications that an economic migration strategy would have on competitiveness and, therefore, on the fulfilment of the Lisbon objectives.'[35] The normative underbelly of any migrant classification by skill level is shaped by the selective assumption that national economies compete desperately for high-skilled workers in a globalised 'knowledge-based economy', and that state policies ought to facilitate economic competitiveness and growth strategies by attracting high-skilled foreigners. As a British policymaker

32 cf. S. Castles (2006), 'Guestworkers in Europe: A Resurrection?', *International Migration Review*, 40; M. Ruhs (2013), *The Price of Rights. Regulating International Labour Migration,* Princeton University Press; M. Ruhs and B. Anderson (2010), *Who Needs Migrant Workers? Labour Shortages, Immigration, and Public Policy,* Oxford University Press.

33 G. Menz (2009), *The Political Economy of Managed Migration: Nonstate Actors, Europeanization, and the Politics of Designing Migration Policies*, Oxford University Press p. 31.

34 S. Castles, n. 7; A. Ellermann (2014), 'Do Policy Legacies Matter? Past and Present Guest Worker Recruitment in Germany', *Journal of Ethnic and Migration Studies*, 41.

35 Commission of the European Communities, *Green Paper on an EU Approach to Managing Economic Migration*, Brussels, p. 3.

highlighted in an interview, employers take the view that 'if someone in this field comes up then we hire them, not because we need a job, but because if we don't hire them General Electric will, and these people are like gold dust'. The hegemony of the belief in innovation-induced growth and competitiveness in contemporary capitalist economies and states thus gets imprinted on migrant admission schemes.[36]

As set out in the introduction to this collection, the categorisation of a person as a 'low-skilled' migrant gives them little chance of entering the EU legally as a worker, and has direct effects on their labour market position if they enter via other schemes (e.g. students, family members, asylum seekers), or come as undocumented workers. While economic utility considerations do not feature prominently in the three countries' generic regulation for low-skilled worker admissions[37], the reality of informal cheap migrant labour suggests high economic utility of these workers in practice. Some have suggested this to be a 'malign neglect'[38] within migrant admission regimes, arguing that the illegalisation of migrant workers through restrictive policy-making serves hidden policy objectives of practically increasing the utility of cheap labour.[39] Indeed, the classification of someone as a 'low-skilled' migrant worker with less legal entry options than their higher-skilled counter parts, and less rights attached to the status, is itself shown to contribute to the 'fashioning of precarious workers'.[40] Scholars have, of course, also

36 P.G. Cerny (2006), 'Restructuring the State in a Globalizing World: Capital Accumulation, Tangled Hierarchies and the Search for a New Spatio-Temporal Fix', *Review of International Political Economy*, 13; P.G. Cerny (2010), 'The Competition State Today: From "Raison d'État" to "Raison Du Monde"', *Policy Studies*, 31; B. Jessop's notion of a 'Schumpeterian workfare post-national regime' depicts the role of the 'capitalist state' as one of securing the key conditions under which valorisation of capital and the reproduction of labour are possible. See B. Jessop (2002), *The Future of the Capitalist State*, Polity.

37 Of course, regulations like the EU's Seasonal Workers Directive create entry channels where the utility of low-skilled labour is officially acknowledged but these are regulated in highly confined manners and usually come with temporary residence and fewer rights than higher-skilled entry schemes; E. Carmel and R. Paul (2013), 'Complex Stratification: Understanding European Union Governance of Migrant Rights', *Regions and Cohesion,* 3.

38 M. Samers (2010), 'Strange Castle Walls and Courtyards: The Political Economy of Undocumented Migration and Undeclared Employment', in G. Menz and A. Caviedes (eds.), *Labour migration in Europe,* Palgrave MacMillan.

39 cf. A. Morice (1996), 'Précarisation de L'économie et Clandestinité: Une Politique Délibérée', *Plein Droit*, 31; A. Morice and S. Potot (2010), 'De l'Ouvrier Immigré au Travailleur sans Papiers. Les Étrangers dans la Modernisation du Salariat', in A. Morice and S. Potot (eds.), *Travailleurs étrangers entre émancipation et servitude*, Édition Karthala.

40 B. Anderson (2010), 'Migration, Immigration Controls and the Fashioning of Precarious Workers', *Work, Employment & Society*, 24.

traced ways in which 'illegal' or semi-legal positions can be negotiated in practice, mainly through proving economic utility and moral decency[41], but potentially also by mobilising around notions of labour exploitation.[42]

Structurally Embedding Low-skilled Labour Demands as a Matter of EU Free Movement

What of low-skilled migrant jobs in the dominant imaginary of the knowledge economy? It is certainly widely acknowledged that lower-skilled workers are economically useful by filling important shortages in host labour markets[43], even if they are not usually framed as 'desired' in policy discourse and meet much less benevolent admission schemes than their higher-skilled counterparts. For example, British food businesses are known to rely on a constant supply of flexible migrant workers willing to work for 'the lowest possible wages and [in] poor working conditions' in the attempt to keep food prices low, all while often facing much uncertain seasonal supply chains and consumer demands.[44]

Yet, unlike in the global competition for high-skilled 'gold dust' workers, policymakers assume that lower-skilled labour is in abundant supply in domestic and European labour markets and therefore does not need to be imported from third countries: 'they [European workers] do amply fill the gaps that would otherwise need to be filled by a greater number of residents and by non-European workers' in the view of a British policymaker in 2011, talking before Brexit. The structural conditions that facilitate the 'compossibility' of such a rationale are shaped by the EU's free movement regime. Where Europeans are concerned, individuals who would have counted as 'foreign workers' from a traditional, nation-state perspective, and could

41 S. Chauvin and B. Garcés-Mascareñas (2014), 'Becoming Less Illegal: Deservingness Frames and Undocumented Migrant Incorporation', *Sociology Compass*, 8; S. Chauvin, B. Garcés-Mascareñas, and A. Kraler (2013), 'Working for Legality: Employment and Migrant Regularization in Europe', *International Migration*, 51.

42 P. Barron, A. Bory, S. Chauvin, N. Jounin, and L. Tourette (2016), 'State Categories and Labour Protest: Migrant Workers and the Fight for Legal Status in France', *Work, Employment and Society*, 30.

43 cf. B. Anderson, n. 40; B. Anderson, n. 20; R. Paul, *Limits of the Competition State: The Cultural Political Economy of European Labour Migration Policies,* n. 21; M. Ruhs and B. Anderson (2010), 'Semi-Compliance and Illegality in Migrant Labour Markets: An Analysis of Migrants, Employers and the State in the UK', *Population, Space and Place*, 16.

44 A. Geddes and S. Scott (2010), 'UK Food Businesses' Reliance on Low-Wage Migrant Labour: A Case of Choice or Constraint?' in M. Ruhs and B. Anderson (eds.), *Who needs migrant workers? Labour shortages, immigration, and public policy*, Oxford University Press.

have been selected, rejected, or expelled on the terms and conditions set out in national regulations, can no longer be treated as aliens in national legislation.[45]

A border-drawing analysis indicates that the EU free movement regime serves as a selective structural point of reference that helps to justify restrictive admission policies for low-skilled labour from outside the EU. The selectivity of this legal condition becomes obvious when we highlight that the availability of EU workers is no criterion for exclusion from admission of third-country nationals who are high-skilled migrant workers, domestic graduates, or intra-corporate transferees.[46] The legal implications of an EU-wide labour market in which national regulators cannot discriminate other EU nationals, has provisionally constrained the applicability of the usual labour and welfare protection strategies for third-country nationals. It is important to note that some of them had enjoyed easier, or even privileged, access before, for example through guest-worker agreements (e.g. Turks in Germany) or postcolonial links (*Maghrebins* in France, New Commonwealth citizens in Britain). Therefore, some observers discuss EU free movement as a replacement of historical migration patterns with ethnicised stratification effects.[47]

Yet, recent developments around Brexit clearly indicate that to treat non-EU migrants as legally secondary to EU free movers is highly contested and unstable over time. Unexpectedly high mobility, and its perceived adverse effects, were at the centre of a recent policy U-turn from liberal recruitment under New Labour to limiting net migration overall from 2010 onwards, under Conservative-led administrations in the United Kingdom.[48] The government's inability to restrict free movement directed regulatory

45 More detailed review of the mobility regime in E. Carmel and R. Paul (2013), 'Migration, Mobility and Rights Regulation in the EU', *Policy Studies*, 32; cf. D. Kostakopoulou (2007), 'European Union Citizenship: Writing the Future', *European Law Journal*, 13; and M.S. Houwerzijl and A. Schrauwen in this volume.

46 I speak of 'strategic contextualization' to explain the selective use of EU free movement in policies directed at non-EU migrant workers: R. Paul (2013), 'Strategic Contextualisation: Free Movement, Labour Migration Policies and the Governance of Foreign Workers in Europe', *Policy Studies*, 32.

47 cf. P. Hansen (2000), '"European Citizenship", or Where Neo-Liberalism Meets Ethno-Culturalism', *European Societies*, 2; P. Hansen and S. B. Hager (2010), *The Politics of European Citizenship: Deepening Contradictions in Social Rights and Migration Policy,* Berghahn; L. McDowell (2009), 'Old and New European Economic Migrants: Whiteness and Managed Migration Policies', *Journal of Ethnic and Migration Studies*, 35.

48 R. Paul, *Negotiating Varieties of Capitalism?,* n. 31.

repercussions mostly to non-EU foreign workers.[49] Interestingly, most legal changes to admission routes kept the basic classification by skill levels intact and curtailed routes by simply recalibrating skill requirements within the points-based system. For example, while New Labour had defined 'skilled' workers in tier 2 as those with school-leaving certificates and included 192 occupations on the shortage list in 2008, David Cameron's administration raised the skill requirements to professional diploma level in 2011 (121 occupations) and to graduate level in 2013 (89 occupations).[50] As a result, options for 'low-skilled' workers to enter Britain through the shortage route diminished without any migrants lowering their qualification level. More recently, of course, EU free movement itself became a major battlefield in the Brexit vote[51] and delegitimised the previously hegemonic – at least under New Labour – construal and construction of EU mobile workers as useful, flexible labour supply, on low-skilled British job markets.

5 Conclusion

This chapter took issue with the taking for granted of legal distinctions of migrants in dominant political science research with their foci on the 'gap' between (tough) migrant regulation and its (lax) enforcement. Instead, I outlined border-drawing as a framework for (1) critically interrogating the ways in which regulation classifies migrants into various categories of 'legal' and 'illegal', usually with highly differential sets of rights, and (2) exploring the normative underbelly and strategically selective institutional embedding of such distinctions.

The border-drawing lens alerts the analyst that the contemporary positive framing of high-skilled workers as economically desirable should not be easily taken for granted, even if it seems to be normalised in several contemporary studies and consultancy reports.[52] Rather, such positive meanings – and, by

49 R. Ford, W. Jennings, and W. Somerville (2015), 'Public Opinion, Responsiveness and Constraint: Britain's Three Immigration Policy Regimes', *Journal of Ethnic and Migration Studies,* 41.

50 Migration Advisory Committee (2013), *Immigration and the British Labour Market: The Role of the Migration Advisory Committee*.

51 J. Portes (2016), 'Immigration, Free Movement and the EU Referendum', *National Institute Economic Review*, 236; D. Wincott (2017), 'Brexit dilemmas: New opportunities and tough choices in unsettled times', *The British Journal of Politics and International Relations*, 19.

52 L. Cerna (2013), 'Understanding the Diversity of EU Migration Policy in Practice: The Implementation of the Blue Card Initiative', *Policy Studies*, 34; OECD (2011), 'Global Governance and the Regulation of Migration Flows', *Development Centre Studies* (Organisation for Economic

implication, the often negative framing of low-skilled migrant workers and the rather restrictive regulation of their entry in EU Member States – are selectively inscribed in regulation with the political intention of structuring the social world around selective norms of 'economic desirability'. Classifications emerge at specific moments in time and in specific places and are structurally embedded in hegemonic ideas about capitalism. Both the diminishing legal acceptance of low-skilled migrant workers as economically utile, from the so-called guest-worker period towards the contemporary 'knowledge-based economy', and the role of the EU free movement regime in structuring responses to still economically extant low-skilled labour demands, highlight the power of such selective structuration. By classifying 'low-skilled' migrant workers as abundantly available on EU labour markets, regulation also disadvantages the position of non-EU migrant worker residents, some of who have long-standing links to the 'host' country, and may thus wield ethnicised stratification effects. However, as Brexit has shown, such political structuration may also backlash when voters are unwilling to accept EU free movers' rights to fill low-wage job gaps and define the feared 'other' on socio-political or cultural – rather than economic – grounds.[53] At the same time, restrictive regulation contributes to the 'fashioning' of exploitable labour market positions for migrant workers in low-skilled jobs and might also lend these disadvantaged legal positions to strategies of victimization (as discussed in some of this volume's contributions).

Overall, classifying migrant workers as economically less desired, and granting them fewer legal entry options and fewer rights, in a structural environment where they are economically still utile (and potentially more so with a less secure legal status), implies wide-ranging and non-straightforward political ordering effects. It is by exposing these effects that the border-drawing perspective can contribute more intriguing accounts of regulation than a conventional focus on explaining unauthorised border crossing or visa overstaying. To analyse the position of low-skilled and/or low-waged migrant workers in European labour markets critically, I suggest, we require careful unpacking of (a) legal categories as constructs, (b) the markers of classification which distinguish on category from one another (as well as

Co-operation and Development 2011); M. Ruhs, n. 32; P. Zaletel (2006), 'Competing for the Highly Skilled Migrants: Implications for the EU Common Approach on Temporary Economic Migration', *European Law Journal*, 12.

53 My fieldwork unearthed plenty of puzzling and amusing anecdotes in which citizens of the UK with Jamaican and other New Commonwealth heritage wondered why the British government decided to bring in Eastern Europeans who 'don't even play cricket!'. Cf. R. Paul, *The political economy of border-drawing,* n. 1, Chapter 6.

from different classification regimes across time and space), (c) the structural conditions in which markers of distinction are selected and come to operate, and (d) the variable eligibility conditions and rights attached to different categories of migrant. Just like in Scott's famous account of state governance through cadastral maps, city plans, and scientific foresting, categories of migrants are thus understood as 'abridged maps' of the social world that 'enable much of the reality they depict to be remade'[54] through state regulation.

Bibliography

Anderson, B. (2010), 'Migration, Immigration Controls and the Fashioning of Precarious Workers', *Work, Employment & Society*, 24 pp. 300-318.

Anderson, B. (2013) *Us and Them? The Dangerous Politics of Immigration Controls,* Oxford: Oxford University Press.

Barron, P.; A. Bory; S. Chauvin; N. Jounin; and L. Tourette, L. (2016), 'State Categories and Labour Protest: Migrant Workers and the Fight for Legal Status in France', *Work, Employment and Society*, 30 pp. 631-648.

Boswell, C. (2007), 'Migration Control in Europe after 9/11: Explaining the Absence of Securitization', *Journal of Common Market Studies*, 45 pp. 589-610.

Boswell, C. and A. Geddes (2011), *Migration and Mobility in the European Union,* London: Palgrave Macmillan.

Bourdieu, P. (1989), 'Social Space and Symbolic Power', *Sociological Theory*, 7 pp. 14-25.

Bourdieu, P. (1991), *Language and symbolic power*, Cambridge: Polity Press.

Bourdieu, P. (1998), *Practical Reason,* Cambridge: Polity Press.

Carmel, E. and R. Paul (2013), 'Complex Stratification: Understanding European Union Governance of Migrant Rights', *Regions and Cohesion*, 3 pp. 56-85.

Carmel, E. and R. Paul (2013), 'Migration, Mobility and Rights Regulation in the EU', *Policy Studies*, 32 pp. 238-253.

Carrera S. et al. (2015), *The EU's Response to the Refugee Crisis: Taking Stock and Setting Policy Priorities,* CEPS Essay, 20, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2715460.

Castles, S. (1986), 'The Guest-Worker in Western Europe – An Obituary', *International Migration Review*, 20 pp. 761-778.

54 J. Scott (1998), *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed,* Yale University Press, p. 3.

Castles, S. (2006), 'Guestworkers in Europe: A Resurrection?', *International Migration Review*, 40 pp. 741-766.

Castles, S. and M.J. Miller (1993), *The Age of Migration: International Population Movements in the Modern World,* London: Palgrave MacMillan.

Cerna, L. (2013), 'Understanding the Diversity of EU Migration Policy in Practice: The Implementation of the Blue Card Initiative', *Policy Studies*, 34 pp. 180-200.

Cerny, P.G. (2006), 'Restructuring the State in a Globalizing World: Capital Accumulation, Tangled Hierarchies and the Search for a New Spatio-Temporal Fix', *Review of International Political Economy*, 13 pp. 679-800.

Cerny, P.G. (2010), 'The Competition State Today: From "Raison d'État" to "Raison Du Monde"', *Policy Studies*, 31 pp. 5-21.

Chauvin, S. and B. Garcés-Mascareñas (2014), 'Becoming Less Illegal: Deservingness Frames and Undocumented Migrant Incorporation', *Sociology Compass*, 8 pp. 422-432.

Chauvin, S.; B. Garcés-Mascareñas; and A. Kraler (2013), 'Working for Legality: Employment and Migrant Regularization in Europe', *International Migration*, 51 pp. 118-131.

Chavez, L.R. (2007), 'The Condition of Illegality', *International Migration*, 45 pp. 192-196.

Commission of the European Communities, *Green Paper on an EU Approach to Managing Economic Migration*, Brussels.

Cornelius, W.A. and T. Tsuda (2004), 'Controlling Immigration: The Limits of Government Intervention' in W.A. Cornelius and J.F. Hollifield (eds.), *Controlling immigration: a global perspective,* Stanford: Stanford University Press, pp. 2-48.

Cornelius, W.A.; P.L. Martin; and J.F. Hollifield (eds.) (2004), *Controlling Immigration: A Global Perspective,* 2nd ed., Stanford: Stanford University Press.

Ellermann, A. (2009), *States against Migrants. Deportation in Germany and the United States,* Cambridge: Cambridge University Press.

Ellermann, A. (2014), 'Do Policy Legacies Matter? Past and Present Guest Worker Recruitment in Germany', *Journal of Ethnic and Migration Studies*, 41 pp. 1235-1253.

Fischer, F. (2003), 'Beyond Empiricism: Policy Analysis as Deliberative Practice', in M.A. Hajer and H. Wagenaar (eds.), *Deliberative policy analysis: understanding governance in the network society,* Cambridge: Cambridge University Press, pp. 209-227.

Ford, R.; W. Jennings; and W. Somerville (2015), 'Public Opinion, Responsiveness and Constraint: Britain's Three Immigration Policy Regimes', *Journal of Ethnic and Migration Studies*, 41 pp. 1391-1411.

Freeman, G.P. (1995), 'Modes of Immigration Politics in Liberal Democratic-States', *International Migration Review,* 29 pp. 881-913.

Freeman, G.P. and A.E. Kessler (2008), 'Political Economy and Migration Policy', *Journal of Ethnic and Migration Studies*, 34 pp. 655-678.

Geddes, A. and S. Scott (2010), 'UK Food Businesses' Reliance on Low-Wage Migrant Labour: A Case of Choice or Constraint?' in M. Ruhs and B. Anderson (eds.), *Who needs migrant workers? Labour shortages, immigration, and public policy*, Oxford: Oxford University Press, pp. 193-218.

Hansen, P. (2000), '"European Citizenship", or Where Neo-Liberalism Meets Ethno-Culturalism', *European Societies*, 2 pp. 139-166.

Hansen, P. and S.B. Hager (2010), *The Politics of European Citizenship: Deepening Contradictions in Social Rights and Migration Policy,* New York/Oxford: Berghahn.

Hollifield, J.F. (2004), 'The Emerging Migration State', *International Migration Review*, 38 pp. 885-912.

Jessop, B. (2002), *The Future of the Capitalist State,* Cambridge: Polity Press.

Jessop, B. (2009), 'Cultural Political Economy and Critical Policy Studies', *Critical Policy Studies*, 3 pp. 336-356.

Jessop, B. and N. Sum (2010), 'Cultural Political Economy: Logics of Discovery, Epistemic Fallacies, the Complexity of Emergence, and the Potential of the Cultural Turn', *New Political Economy*, 15 pp. 445-451.

Joppke, C. (1998), 'Why Liberal States Accept Unwanted Immigration', *World Politics*, 50 pp. 266-293.

Kostakopoulou, D. (2007), 'European Union Citizenship: Writing the Future', *European Law Journal*, 13 pp. 623-646.

Lange, de T. (2015), 'Third-Country National Students and Trainees in the EU: Caught between Learning and Work', *International Journal of Comparative Labour Law and Industrial Relations,* 31 pp. 453-472.

MacCormick, N. (2007), *Institutions of Law: An Essay in Legal Theory*, Oxford: Oxford University Press.

McDowell, L. (2009), 'Old and New European Economic Migrants: Whiteness and Managed Migration Policies', *Journal of Ethnic and Migration Studies*, 35 pp. 19-36.

Menz, G. (2009), *The Political Economy of Managed Migration: Nonstate Actors, Europeanization, and the Politics of Designing Migration Policies*, Oxford: Oxford University Press.

Migration Advisory Committee (2013), *Immigration and the British Labour Market: The Role of the Migration Advisory Committee*, p. 33.

Morice, A. (1996), 'Précarisation de l'Economie et Clandestinité: Une Politique Délibérée', *Plein Droit,* 31 p. 10.

Morice, A. and S. Potot (2010), 'De l'Ouvrier Immigré au Travailleur sans Papiers. Les Étrangers dans la Modernisation du Salariat', in A. Morice and S. Potot, S. (eds.), *Travailleurs étrangers entre émancipation et servitude,* Paris: Édition Karthala, pp. 5-21.

OECD (2011), 'Global Governance and the Regulation of Migration Flows', *Development Centre Studies,* Organisation for Economic Co-operation and Development.

Paul, R. (2012), 'Limits of the Competition State: The Cultural Political Economy of European Labour Migration Policies', *Critical Policy Studies*, 6 pp. 379-401.

Paul, R. (2013), 'Strategic Contextualisation: Free Movement, Labour Migration Policies and the Governance of Foreign Workers in Europe', *Policy Studies*, 32 pp. 122-141.

Paul, R. (2015), *The Political Economy of Border-Drawing: Arranging Legality in European Labour Migration Policies,* New York/Oxford: Berghahn Books.

Paul, R. (2016), 'Negotiating Varieties of Capitalism? Crisis and Change in Contemporary British and German Labour Migration Policies', *Journal of Ethnic and Migration Studies*, 42 pp. 1631-1650.

Portes, J. (2016), 'Immigration, Free Movement and the EU Referendum', *National Institute Economic Review*, 236 pp. 14-22.

Reyneri, E. (1998), 'The Mass Legalization of Migrants in Italy: Permanent or Temporary Emergence from the Underground Economy?', *South European Society and Politics*, 3 pp. 83-104.

Ruhs, M. (2013), *The Price of Rights. Regulating International Labour Migration,* Princeton: Princeton University Press.

Ruhs, M. and B. Anderson (2010), *Who Needs Migrant Workers? Labour Shortages, Immigration, and Public Policy,* Oxford: Oxford University Press.

Ruhs, M. and B. Anderson (2010), 'Semi-Compliance and Illegality in Migrant Labour Markets: An Analysis of Migrants, Employers and the State in the UK', *Population, Space and Place*, 16 pp. 195-211.

Samers, M. (2010), 'Strange Castle Walls and Courtyards: The Political Economy of Undocumented Migration and Undeclared Employment', in G. Menz and A. Caviedes (eds.), *Labour migration in Europe,* London: Palgrave MacMillan, pp. 209-231.

Scott, J. (1998), *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed,* New Haven: Yale University Press.

Sum, N. (2009), 'The Production of Hegemonic Policy Discourses: "competitiveness" as a Knowledge Brand and Its (Re-)Contextualizations', *Critical Policy Studies*, 3 pp. 184-203.

Sum, N. and B. Jessop (2013), *Towards a Cultural Political Economy. Putting Culture in Its Place in Political Economy,* Cheltenham: Edward Elgar Publishing.

Sunderhaus, S. (2007), 'Regularization Programs for Undocumented Migrants', *Migration Letters*, 4 pp. 65-76.

Torpey, J. (2000), *The Invention of the Passport. Surveillance, Citizenship and the State,* Cambridge: Cambridge University Press.

Wagenaar, H. (2011), *Meaning in Action: Interpretation and Dialogue in Policy Analysis,* Armonk, N.Y.: M.E. Sharpe.

Weiner, M. (1995), *The Global Migration Crisis: Challenge to States and to Human Rights,* Harper Collins College.

Wincott, D. (2017), 'Brexit dilemmas: New opportunities and tough choices in unsettled times', *The British Journal of Politics and International Relations*, 19 pp. 680-695.

Zaletel, P. (2006), 'Competing for the Highly Skilled Migrants: Implications for the EU Common Approach on Temporary Economic Migration', *European Law Journal*, 12 pp. 613-635.

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Section 2

Access to the Labour Market for EU Citizens and Third-country Nationals

3 From Competing to Aligned Narratives on Posted and Other Mobile Workers within the EU?

Mijke Houwerzijl and Annette Schrauwen

Abstract

The Treaty provisions on the free movement of workers provide rights to workers to move to, and accept work in other Member States, and to be treated as equal to 'national workers'. The enabling aspects of these provisions offer people a feeling of what it means to be an EU worker and allows them to determine freely how they are going to make a living. Clearly, the narrative of free movement of workers prevents that the focus is on the needs of the employer alone. In contrast, the posting of workers falls under the heading of EU free movement of services, and puts workers in a position of commodities or 'tools' with which service providers may provide their services in another Member State. It induces a narrative that puts the focus first and foremost on the economic interests of the employers, in their positions as temporary cross-border service providers. Focusing on the position of mobile workers in particular in low-wage sectors, this chapter sketches and juxtaposes the respective historical evolution of the narratives on posted and 'migrant' EU workers, while displaying their differing legal impact on workers' rights. This is accompanied by a look into the most recent developments in the posting of workers saga. What we assess is whether the pending proposal for 'targeted revision' of the Posted Workers Directive (PWD) substantially diminishes the differences between the two narratives. Does it broaden its perspective to the needs of workers next to those of employers? How would that relate to the framing that posted workers do not enter the labour market of the host state?

Keywords: posted workers directive, narratives posted and 'migrant' EU workers, revision PWD

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1 Introduction

In the historic narrative of EU free movement of workers, free movement rights were initially conceived in terms of the efficient exchange of the production factor labour, soon followed by a conception in terms of individual freedom that allowed workers to improve their living and working conditions and to improve their social advancement. The Treaty provisions on the free movement of workers provide rights to workers to move to, and accept work in another Member State and to be treated as equal to 'national workers'. The enabling aspects of these provisions form a species of social imagination that allows people to determine how they are going to live their lives. The narrative of free movement of workers prevents that the focus is on the needs of the employer alone.

In contrast, the posting of workers falls under the heading of EU free movement of services, and puts workers in a position of commodities or 'tools' with which service providers may provide their services in another Member State. The posting mechanism involves workers being temporarily employed in a 'host' Member State other than that where they normally work, while being taxed in and contributing to the social security system of the 'sending' Member State. Since the posting of workers takes place in the framework of the provision of services and not in the employee's capacity as a worker in his or her own right, it induces a narrative that puts the focus first and foremost on the needs of employers, in their position as temporary cross-border service provider.

Below, we will give an account of the historical evolution of the two contrasting narratives. The initial decision of the Court of Justice of the EU (hereafter CJEU or Court) in March 1990 in the case *Rush Portuguesa*,[1] that posted workers were covered by the services provisions in the TFEU instead of the provisions on free movement of workers, was crucial. The main question that will be addressed throughout this chapter is whether the pending proposal for 'targeted revision' of the Posted Workers Directive (hereafter PWD) substantially diminishes the differences between the two narratives. Does it broaden its perspective to the needs of workers next to those of employers? How would that relate to the framing that posted workers do not enter the labour market of the host state?

The structure of this chapter is as follows: It starts by introducing several concepts stemming from discourse analysis that it loosely employs for the comparison of the respective narratives under free movement of workers

1 Case C-113/89, Rush Portuguesa Ld[a] v Office national d'immigration [1990] ECR I-1417.

and services as constructed by the CJEU. It will then sketch the (evolving) position of the 'mobile' worker under both narratives and identify which elements currently included in the narrative on posted workers are modified by the proposal for revision. Afterwards, it will turn to the revision process of the PWD in order to assess possibilities to 'upgrade' the narrative on posted workers. The chapter ends with some concluding remarks.

2 Framing, Narratives, and their Limitations

In *Worlds between Words*, Mark van Ostaijen shows the significance of discourses to understand institutional action and policy-making.[2] His study reveals that the outcome of a discursive struggle determines whether mobility or migration is seen as 'problem', 'solution', 'a return from the past', or as 'hope for the future'.[3] Hence, it determines the starting point for institutional (in)action. This chapter borrows from his study the idea that the discursive perspective allows an insight into '*how* actors create consistency and credibility to articulate legitimate claims'.[4] For example, the Court can be seen as an important actor in legitimising the current EU legal framework in which posted workers are situated, starting with its landmark ruling in *Rush Portuguesa*. Though the concepts 'frame' and 'framework' suggest a static concept by which subjects and issues are addressed, framing is more of a political process. The present chapter borrows the approach to framing as 'how specific language and concepts are used (*naming*), how involved groups are defined (*classifying*) and how a causal story with prescriptive solutions is constructed (*narrating*)', from Van Ostaijen.[5] The authors of this chapter propose that discursive framing also influences legal categorisations and the legal framework. For instance, the statement of the Court that posted workers 'do not enter the labour market' of the host state influences the relative weight accorded to the protection of their rights in the development of further legal framework.

However, before looking at the respective narratives, one *caveat* must be made. It would go beyond the scope of this chapter to provide a thorough and balanced analysis of the 'full picture' of issues attached to cross-border

2 M.M.A.C van Ostaijen (2017), '*Worlds between Words: the politics of intra-European movement discourses,*' Erasmus University Rotterdam, retrieved from http://hdl.handle.net/1765/99986.

3 Idem, p.188.

4 Ibidem.

5 Idem, p. 113.

(posted) labour mobility within the EU. Instead, the narratives reconstructed in this chapter are underpinned by a selection of remarkable judgments and other legal 'highlights', such as specific considerations or provisions of a Regulation or Directive, only.[6] The selection made was inspired by the focus of this book on the challenges to create a decent labour market for low-waged work, involving mobile posted or migrant workers. In the EU, such challenges relate mainly to the movement of labour from 'low-wage' countries to 'high-wage' countries, in sectors such as agriculture, construction, road transport, and care, where companies are under high competitive pressure to 'search for ever cheaper labour'. In our view, a decent labour market in such sectors can only be achieved in a sustainable manner if the 'mission statement' of the ILO, that labour is not (merely) a commodity, is taken seriously for all (local, migrant, and posted) workers involved.

This limited approach helps to focus on the major elements in the narrative and makes a comparison possible. However, we acknowledge that it overemphasizes the position of low-waged mobile workers 'vis-à-vis' other mobile workers within the EU. Nevertheless, the political discourse in the last decade justifies such a selective approach. The (perceived threat of) social dumping, 'welfare tourism', and examples of abusive exploitation associated with cross-border labour mobility within the EU have provided a source of political tension. Currently, there is a fierce and ongoing debate about the costs and benefits of free labour mobility across the EU. In the United Kingdom, this debate played a crucial role in the victory for the advocates of 'taking back control over national borders'. In many other host countries, politicians blame 'Europe' for the undercutting of local workers and/or easy access to social welfare benefits. The scapegoating of Polish workers by the Dutch right wing *PVV* opening a hotline in the Netherlands in 2012 was a radical example of it.[7] Therefore, it is submitted that it is also in the interest of frontier workers with standard contracts, of high-wage international football players, of highly skilled professionals who work 'all over the globe' and all other mobile workers with relatively 'secure' and decent working conditions, to strive for a 'stronger framework

6 This means that the following issues will not be dealt with: the different types of posted workers, the position of international truck drivers, the exact scope of remuneration (such as the inclusion or exclusion of allowances, reimbursements for travel costs in the definition), the applicability of all or only general applicable collective agreements, the link between the PWD and Private International Law (PIL), as well as the link with regulations concerning the coordination of social security systems.

7 This provoked a European Parliament resolution of 15 March 2012 on discriminatory Internet sites and government reactions (2012/2554(RSP).

for posting in the EU, contributing to a fairer and deeper Single Market',[8] and to make 'the free movement of people to be based on rules that are clear, fair for everybody and enforced on the ground'.[9] Analysing and juxtaposing the narratives on free movement of workers and posting of workers from that angle brings out (or refreshes our collective memory of) interesting differences that could serve as an impetus for further steps to enhance the current legal framework.

3 'Free movement of workers': An Almost Fully Consistent Narrative of Enabling Personal Development and Social Advancement for Workers

In one of the earlier cases on the free movement of workers and Article 45 TFEU [then 48 EEC], *Commission* v *France*, the Court interpreted the provision as entailing 'the abolition of any discrimination based on nationality, *whatever be its nature or extent*, between workers of the Member States as regards employment, remuneration and other conditions of work and employment.'[10] What makes this judgment remarkable is that the Court added that the effect of nondiscrimination is not only enhancing the free choice to work in another EU country and being treated equally as national workers. It also has the effect of 'guaranteeing to the State's own nationals that they shall not suffer the unfavourable consequences which could result from the offer to, or acceptance by, nationals of other Member States, of conditions of employment or remuneration less advantageous than those obtained under national law, since such acceptance is prohibited.'[11]

One could see this as framing the free movement of workers in functions of both the individual freedom to decide to take up employment in another Member State, and of a level playing field where remuneration and employment conditions cannot be used as means to displace local workers (often referred to as 'social dumping'). The individual freedom to take up employment anywhere in the EU on the condition of equal treatment, is

8 European Commission (2016), *Revision of the Posting of Workers Directive-frequently asked questions*, Strasbourg. Available at: http://europa.eu/rapid/press-release_MEMO-16-467_en.htm.

9 EU Observer (20 July 2016), 'Eastern EU states lose battle on workers' pay', Brussels. Available at: https://euobserver.com/economic/134433.

10 Case 167-73, *Commission* v *France* (French merchant seamen), [1974] ECR 359, para. 44. Italics added by the authors.

11 Ibidem, para. 45. See also C. Barnard (2014) 'Free movement of natural persons', in: C. Barnard and S. Peers (eds.), *European Union Law*, OUP p. 359.

mentioned very often by the Court in subsequent cases on free movement of workers,[12] whereas the guarantee that nationals of host States shall not suffer the negative consequences of free movement of workers is not.[13] Still, it is interesting to note that the Court has also stressed this 'dual rationale' of the nondiscrimination principle in relation to other subjects.[14]

The Court's narrative partly equals that of Regulation (EEC)1612/68 on free movement of workers, now replaced by Regulation (EU) 492/2011. The preamble of the Regulation explicitly mentions 'social advancement' of the worker as one of the aims of free movement of workers. Furthermore, the Regulation has as its principal aim in the words of the Court, to ensure that 'in each Member State workers from the other Member States receive treatment which is not discriminatory by comparison with that of national workers by providing for the systematic application of the rule of national treatment as far as all conditions of employment and work are concerned.'[15] By granting entitlement to EU nationals to access the labour markets of the other Member States, these provisions are meant to be the main source (the 'cornerstone') of EU labour movement to another Member State. Pursuant to Article 7(4) of the Regulation, EU nationals who move as workers to another Member State are entitled to equal treatment with national workers as regards remuneration, dismissal, and other labour conditions in law laid down in collective or individual agreement, or any other collective regulation; and, should they become unemployed, reinstatement or reemployment, access to training in vocational schools and retraining centres, and the same social and tax advantages, whether or not attached to the contract of employment,[16] the extension of which to workers from other Member States seems 'suitable to facilitate their mobility within the

12 For a recent example, see Case C-566/15, *Konrad Erzberger,* ECLI:EU:2017:562, para. 33.

13 However, A-G Lenz explicitly relied on para. 45 of the French merchant seamen judgment in his opinion in the case 237/83 *Prodest*, [1984] ECR 3153, para 4. See in more detail, M.S. Houwerzijl (2005), *De Detacheringrichtlijn'*(PhD thesis), Deventer: Kluwer, pp. 64-66; and M. Houwerzijl (2014), 'Regime shopping across (blurring) boundaries' in S. Evju (ed.), *Regulating Transnational Labour in Europe: The quandaries of multilevel governance*. Oslo: Skriftserie nr. 196.

14 See Case 43/75, *Defrenne II* [1976] ECR 455, paras. 10-15, on equal treatment of men and women. A link was made to Art. 117 (now Art. 151 TFEU) on 'common action to ensure social progress and seek the constant improvement of living and working conditions'. See also the remark of A-G Dutheillet de Lamothe in *Defrenne I* (Case 80/70 [1971] ECR 445) about Art. 119 (now 141 TFEU) 'creating an obstacle to any attempt at "social dumping" by means of the use of female labour less well paid than male labour'.

15 Case 110/79, *Una Coonen* v. *Insurance officer*, [1980] ECR 1445, para. 6.

16 Regulation 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, OJ English special edition 1968 II-475; Case 32-75, *Anita Cristine* v *Société nationale de chemins de fer français*, [1975] ECR 1085, para. 13.

Community'.[17] The preamble of the Regulation presents free movement of workers as 'a fundamental right for workers and their families', which, in the Court's view, is a 'general affirmation of the right of *all* workers to pursue the activity of their choice' within the Union, and could be 'an effective means of improving their living conditions'.[18]

On the other hand, the Court's statement that local workers *shall not suffer* the unfavourable consequences of unequal treatment of incoming workers, deviates somewhat from Regulation 1612/68. The latter provided for possible measures in cases in which Member States would undergo or foresee disturbances of their labour market, which may seriously threaten the standard of living or the level of employment in a region or industry. In such a case, Member States could stop the information on vacancies (the machinery for vacancy clearance), but they were not allowed to limit access to employment. However, this provision, recognising that local workers in a certain industry or region might need some protection from free movement in specific cases, was never used and subsequently abolished in Regulation 492/2011.[19]

The Court's discourse on equal treatment as (always) protecting local workers from unfair competition became more seriously contested by the discourse used towards free movement of workers in the context of the Greek accession (and in the context of subsequent accessions with countries poorer than the existing Member States). The Accession Treaty included transitional provisions on free movement of workers allowing all Member States, including Greece, to impose work permits for a seven-year period.[20] A joint declaration was added to the Accession Treaty that said that '[T]he enlargement of the Community could give rise to certain difficulties for the social situation in one or more Member States as regards the application of the provisions relating to the free movement of workers.' In fact, the nine Member States feared that Greek workers would try to escape the high unemployment level in Greece, leading to an influx of 'cheap' Greek labour.[21]

The Court, in this respect 'overruled' by the Accession Treaty, had to acknowledge the fear of the Member States that a right to equal treatment in

17 Case 65/81, *Franzesco and Letizia Reina* v. *Landeskreditbank Baden-Württemberg* [1982] ECR 33, para. 12.

18 Case 53/81, *Levin* v. *Staatssecretaris van Justitie* [1982] ECR 1035, para. 14 and 15.

19 Art. 20 of Regulation 1612/68.

20 Act concerning the conditions of Accession of the Hellenic Republic and the adjustments to the Treaties, OJ EU of 19.11.1979, L291/17, articles 45-48.

21 Available at: https://www.cvce.eu/content/publication/1999/1/1/61a2a7a5-39a9-4b06-91f8-69ae77b41515/publishable_en.pdf.

itself would not be enough to make sure local workers will not suffer unfavourable consequences from free movement. However, when it had to answer a preliminary question concerning these transitional provisions, it declared that the provision 'is to prevent disturbance of the labour market both in Greece and in the other Member States as a result of immediate and substantial movements of workers following accession'[22] and that, as such, it must be interpreted restrictively. Hence, it stuck to the narrative that equal treatment will, in principle, protect local workers from unfair competition, except in post-accession periods. Outside the context of accession, the Court has explicitly dismissed the argument that an increasing number of unemployed local workers in a specific sector would allow a Member State to prevent or hinder access of EU citizens and their family members to work in that sector.[23]

To sum up: the Court's narrative on free movement of workers is quite positive. It is beneficial for moving workers, who can improve their living conditions or obtain social advancement. Except for post-accession periods, it is not assessed as negative for the local workers, who are protected against unfair competition on remuneration or working conditions and social benefits via the principle of equal treatment.

We may wonder whether the choice for Brexit challenges this (last part of the) narrative. While on the one hand upholding firmly the stance that 'freedom of movement is non-negotiable as long as one is Member of the EU or if Britain wants access to the single market',[24] the European Commission states that it has also 'learnt from Britain's vote to leave the EU that many Europeans fear globalisation and want the EU to provide more social protection in the internal market'.[25] As one of the outcomes of this 'learning process', the Commission, in March 2016, launched a proposal to achieve a 'stronger framework for posting in the EU, contributing to a fairer and deeper Single Market'.[26] However, there are no formal plans to reform the

22 Case 77/82, *Anastasia Peskeloglou* [1983] ECR 1086, para. 12.

23 Case 131/85, *Emir Gül* v. *Regierungspräsident Düsseldorf*, [1986] ECR 1583, para. 6 and 17; Case 9/88, *Lopes da Veiga*, [1989] ECR 2989, para 10. A similar restrictive approach is visible in the judgments on *Vicoplus* (joined cases C-307-309/09 [2011, ECR I-453), *Essent* (C-91/13, ECLI:EU:C:2014:2206), and *Martin Meat* (C-586/13, ECLI:EU:C:2015:405). See for an explanation in particular A-G Bot, Opinion in *Essent*, paras. 102-110, 114, ECLI:EU:C:2014:312. See on Vicoplus, Houwerzijl (2014), n. 14, pp. 118-124.

24 See Donald Tusk (5 July 2016), *'Freedom of movement is non-negotiable if Britain wants access to single market'*, The Independent. Available at: http://www.independent.co.uk/news/uk/politics/donald-tusk-says-access-to-the-single-market-means-britain-must-accept-eu-four-freedoms-a7120191.html.

25 EU Observer (20 July 2016), n. 10. Available at: https://euobserver.com/economic/134433.

26 European Commission (2016) n. 9. Available at: http://europa.eu/rapid/press-release_MEMO-16-467_en.htm.

current 'acquis' on free movement of workers, even though the 2016 'new settlement' deal struck between the Council and the UK to 'prevent' Brexit included a safeguard mechanism acknowledging Member States' competence to limit 'flow of workers' and their access to social benefits in a host state.[27] Apparently, lessons from Brexit do not (yet) include further questions on the narrative of free movement of workers. It is true that Directive 2014/54[28] was adopted with an aim to ensure better information about free movement rights and responsibilities, and to combat circumvention of those rules. Although a topical reminder that the right of freedom of movement for workers requires ensuring equality of treatment *in fact* and in law,[29] it does not substantially change the positive narrative that nondiscrimination renders free movement beneficial for the moving worker and prevents, in principle, negative consequences for the local workers.

In order to understand why creating decent labour conditions for posted workers is one of the objectives in the Commission's strategy to create a deeper and fairer internal market, whereas reforming free movement of workers is not,[30] we now turn to the narrative on that form of cross-border labour mobility within the EU.

4 'Posting of workers': A Switch of Narrative towards a Focus on Service Provision

This section illustrates how posted workers were eventually caught in the narrative on free provision of services. As early judgments of the Court of Justice in the cases *Manpower* and *Van der Vecht*[31]show, employee posting was already a phenomenon in the late 1960s and early 1970s. In the cases of *Webb* and *Seco*, the Court acknowledged that service providers could provide manpower or bring (non-national or non-EU) workers to do the job, and that Member States could apply their legislation or collective labour agreements

27 European Council Conclusions (19 February 2016), EUCO 1/16, Annex I section D and Annex VI.

28 Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers, *OJEU* of 30.4.2014, L 128/8. See also Section 6 below.

29 Recital 6 Regulation 492/2011.

30 Available at: https://ec.europa.eu/commission/priorities/internal-market_en.

31 Case 19/67, *Van der Vecht* [1967] ECR 345 and Case 35/70, *Manpower* [1970] ECR 1251. At stake was the practice of hiring (temporary agency) workers from a country with a 'cheaper' social security scheme, with the sole purpose of posting them to a Member State with a more expensive social security regime, which was, at that time, labeled abusive and 'social dumping'.

relating to minimum wages to workers within their territory, no matter in which Member State the employer is established.[32] However, the disputes in Webb and Seco were about difference in treatment of the employers as service providers, and the Court did not rule on the applicability of the Treaty provisions of either free movement of workers or free movement of services on the employees.

Nevertheless, one can find in the *obiter dictum* in *Webb* that the employees may 'in certain circumstances be covered by the provisions of the free movement of workers', but that it does not prevent 'undertakings of that nature which employ such workers from being undertakings engaged in the provision of services'. This consideration seems to reflect the original narrative on posting of workers, laid down in secondary legislation of the 1960s on the ambit of the freedom to provide services, wherein the following standard sentence, referring to the free movement of workers, used to be included in the Preamble: 'Whereas the position of paid employees accompanying a person providing services or acting on his behalf will be governed by the provisions laid down in pursuance of Articles 48 and 49 of the Treaty (now Articles 45 and 46 TFEU)'.[33]

In those days, as a main rule, it was stipulated that *all* workers, whether permanently or temporarily moving to another Member State, fell under the free movement of workers. Hence, all forms of workers' mobility of EU nationals were lumped together under the free movement of workers.[34] Nonetheless, it was also acknowledged from the very beginning that the law on the free provision of services may interfere with the law on the free movement of workers.[35] To make sure that a cross-border posted worker would not be denied the right to reside temporarily (not exceeding a year) in the host Member State, a special provision was laid down in Article 6(3) of Directive 68/360/EEC, based on the free movement of workers. Undeniably, in this original approach, the status of the employing company – as cross-border service provider – was separated from the status of the posted worker.

32 Case 279/80, *Criminal proceedings against Alfred John Webb* [1981] ECR 3305; Joined case 62 and 63/81, *SECO* v *EVI,* [1982] ECR 223, para 14.

33 Cited from old Council Directive 64/429/EEC (now repealed). For an overview of the other (old) Directives that contain this sentence, see Houwerzijl (2005/2014), n. 14, respectively p. 35, p. 102.

34 Evidenced by the texts and scope of old Regulations 1612/68, Regulation 1408/71, and old Directive 68/360. See Houwerzijl (2005/2014), n. 14, respectively pp. 31-32, pp. 102-103.

35 See D. Vignes (1961), 'Le droit d'établissement et les services dans la C.E.E.' *Annuaire Français de Droit International*, 7 pp. 674-675; U. Everling (1963), *Das Niederlassungsrecht im Gemeinsamen Markt,* Verlag Franz Vahlen Berlin 1963 pp. 72-73.

In its landmark judgment *Rush Portuguesa*, the Court abandoned the original narrative. It ruled that the situation of employees travelling with their employer to another Member State in order to carry out works on a temporary basis would fall under the scope of free movement of services. The Court's decision postdates the accession of Portugal. Rush Portuguesa, a Portuguese undertaking, had won a contract in France and wanted to carry out the work with its Portuguese workers. Under the transitional provisions of the Accession Treaty with Portugal, the provisions of free movement of workers did not apply to the Portuguese staff. The French authorities notified Rush Portuguesa of a decision to pay a fine for employing foreign workers in breach of the provisions of the French Labour Code. In proceedings for annulment of the decision of the French authorities, the undertaking argued that it was not the provisions of free movement of workers, but those of free movement of services that applied, and therefore its workers could not be hindered or prohibited from working in France. In answer to the preliminary questions of the referring judge, the CJEU decided not to apply the provisions of free movement of workers to posted workers, with the key argument that they did not enter the labour market of the host Member State.

Cleary, the context of the post-accession transition provisions played a major role in that decision.[36] Under the transitional regime, the only way to bring the posted workers under the scope of EU law was to relocate them to the field of free movement of services. However, this had two consequences for the further narrative of posted workers. First, the argument that posted workers do not enter the labour market of the host state had to be made to show why, from a substantive point of view, it was justified to exclude them from the transitional provisions on the free movement of workers. Secondly, the free movement rights of posted workers had to be reformulated as deriving from that of the service provider: imposing conditions of obtaining a work permit for posted workers 'on the person (*i.e. the employer in the sending state*) providing services in another Member State discriminates *against that person* in relation to his competitors established in the host country […], and moreover affects *his ability to provide the service*.'[37] The Court added in an *obiter dictum* that Member States may extend their mandatory labour law and collective labour agreements to posted workers, apparently to comfort

36 Indeed, the Court indicates that the transitional provisions in the Act of Accession are justified by a risk that the employment market of the host state might be disrupted when Portuguese workers and their family members seek access to the employment market of other Member States. In Case 9/88, *Lopes da Veiga* v. *Staatssecretaris van Justitie*, n. 24, predating *Rush Portuguesa*, the Court was more blunt. See para. 10.

37 *Rush Portuguesa*, para. 12. Italics added by the authors.

France and possibly other host states that admission under free movement of services will not lead to a massive influx of workers under the guise of service provision, nor create social dumping.[38] However, this consideration does not imply that posted workers have a *right* to equal treatment, only that Member States *may* extend domestic labour law provisions to them.[39]

The decision in *Rush Portuguesa* set the tone for framing the further case law on posted workers.[40] In *Vander Elst*,[41] a Belgian employer carried out works in France with his Moroccan employees, and disputed the obligation to pay fees for work permits to the French authorities with the argument that the Moroccan workers had already been issued with work permits in Belgium. The Court agreed and ruled that the obligation restricted the freedom to provide services. In its ruling, the Court implicitly sharpened the distinction between the narrative on free movement of workers and that on posted workers with three arguments. The *first argument* responds to the ratio of the French system of work permits, notably the regulation of access to the labour market of non-EU workers. The Court states that workers 'do not in any way seek access to the labour market' of the host state.[42] This rationale behind the 'status aparte' of posted workers is underpinned by the notions that they only work 'temporarily' or 'for a limited period' in the host state. The *second argument* is that EU law 'does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry relating to minimum wages' to posted workers.[43] Apparently, only the coverage by the minimum wage level in the host state is enough to protect posted workers and fair competition. The *third argument* is connected to the second, and relies on the 'underlying' applicability of the labour law of the country where the posted worker normally carries out his work: the application of that law 'in any event excludes any substantial risk of workers being exploited, or, of competition between undertakings being distorted.'[44]

38 See L. Gormley (1992), 'Freedom of Establishment and Freedom to Provide Services: Workers and Services Distinguished,' *European Law Review*, 17(1) p. 63 and p. 66.

39 See also S. Evju (2010), 'Revisiting the Posted Workers Directive: Conflict of Laws and Laws in Contrast', *CYELS,* 12 p. 151 and p. 164.

40 Ibidem. See also, C. Barnard (2009), 'Internal market v. labour market: a brief history', in M. de Vos (ed.), *European Union Internal Market and Labour law: Friends or Foes,* Intersentia.

41 Case C-43/93, *Vander Elst* v. *Office des Migrations Internationales*, [1994] ECR I-3818.

42 Idem, para. 21.

43 Idem, para. 23.

44 Idem, para. 25. In VanderElst, the Court refers to the applicable law of the country of establishment of employer, but from a private international law perspective (currently in the Rome I Regulation 593/2008), which is not elaborated upon in this Chapter, it depends on the

As is well-known, it was the landmark judgment in the case *Rush Portuguesa* that paved the way for the legal base of the PWD.[45] In the first half of the 1990s, in the context of the social dimension of the Delors' project 'Europe 1992', the proposal for a Directive on the Posting of Workers was launched.[46] In order to promote a true single market, a framework of rules for posted workers would have to be created to avoid unfair competition. The proposal led to a six-year period of fierce debates in European Parliament and Council.[47] The debates focussed in particular on the extent to which host Member States must be allowed, or should be required, to apply their mandatory wage provisions and other working conditions to workers posted to their territory. Another issue concerned the legal basis of the Directive, which was found in the Treaty provisions establishing the freedom to provide services.[48] From a political point of view, the undoubted merit of this legal basis is that it facilitated a qualified majority vote. Without this, the PWD proposal would probably have stranded.[49] Still, from a legal point of view, the worrying implication of the choice of (only) this legal base is that it suggests that the PWD is purely intended to facilitate the cross-border provision of services. That it also serves to protect employees and to create a level playing field (and no unfair competition) is by no means evident from its legal base.

individual situation of the posted worker whether the law of 'the (common) country of origin' applies or the law of another country. The main connecting factor is supposed to be 'the habitual country of work'. See A. van Hoek and M. Houwerzijl (2016), 'Where do EU mobile workers belong, according to Rome I and the (E)PWD', in H. Verschueren (ed.), *Residence, employment and social rights of mobile persons: on how EU law defines where they belong*, Intersentia; see also A. van Hoek (2018), 'Re-Embedding the Transnational Employment Relationship: A Tale about the Limitations of (EU) Law?', *Common Market Law Review* 55, no. 2, 449-87. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2886430.

45 See R. Zahn (2017), 'Revision of the Posted Workers Directive: a Europeanisation Perspective', *Cambridge Yearbook of European Legal Studies 2017* 5, p. 5. See also M.S. Houwerzijl (2014), n. 14. While Evju traces a much longer and more complex background to the Directive, he considers the decision in Rush Portuguesa a 'booster' for the PWD in S. Evju (2010), n. 40, p. 154.

46 The first documents on what would become the PWD referred to the Community Charter for social fundamental rights of workers, see COM (89)568. See, for an extensive historical account, M. S. Houwerzijl (2005), n. 14, p. 85. Also see J. Cremers, J. E. Dølvik, and G. Bosch, (2007-6) 'Posting of workers in the single market: attempts to prevent social dumping and regime competition in the EU', *Industrial Relations Journal,* pp. 524-541 and S. Evju (2010), n. 40, p. 160.

47 See, for instance, OJ 15, C 166/123.6.95, no. 4-464/204 and no. 4-464/206.

48 Articles 57 (2) and 66 EC [now 53(1) and 62 TFEU].

49 See, about the political circumstances of the early 1990s (in which the British Conservative Government tried to veto almost everything that had to do with social policy) that influenced the political fate of the posting directive, M. Biagi (1998), 'The "Posted Workers' EU Directive"', in R. Blanpain (ed.), *The Bulletin of Comparative Labour Relations in the European Union*, p. 175.

To sum up, it may be noted that the framing of the status of posted workers by both the Court and the legislature was probably highly influenced by the political and legal 'momentum'. The services provisions in the Treaty conveniently allowed the Court to bring posted workers from new Member States under the scope of EU law in a situation in which free movement of workers was subjected to transitional provisions. The services provisions also conveniently allowed the legislature a qualified majority voting, necessary to adopt the PWD. However, the result seems far from satisfactory with regard to the protection of both posted and local workers: (Re)Framing posted workers under the free movement of services deprived posted workers with EU citizenship of their self-standing right to free movement in their capacities as workers. The services narrative contains no reference to improvement of living conditions nor to social advancement of posted workers. Protection only goes as far as 'core host labour standards' and exclusion of exploitation. Neither does this narrative pay much attention to possible displacement of local workers, as it puts the emphasis on fair competition between undertakings/service providers and consequently on equality of treatment between undertakings, omitting any reference to equality of treatment between posted and local workers.

5 Interpretation of the PWD: Strengthening the Narrative Based on Service Provision

As stated in its recital 5, the PWD means to reconcile the exercise of companies' fundamental freedom to provide cross-border services under Article 56 TFEU, on the one hand, with the need to ensure a climate of fair competition and respect for the rights of workers, on the other. However, in *Rüffert,*[50] the Court seems to have created a priority between the three goals, emphasising that the objective of the Directive is 'in particular to bring about the freedom to provide services'.[51] Although fitting well with the legal basis of the PWD,[52] this emphasis of its exclusive falling within the scope of free movement of services, clearly deviates from how the European

50 Case C-346/06, *Rüffert* [2008] ECR I-1989, para 36.

51 Evju (2010), n. 40, pp. 169-170.

52 See also S. Reynolds (2016), 'Explaining the constitutional drivers behind a perceived judicial preference for free movement over fundamental rights', *CMLRev.* 3 p. 643.

Commission originally presented the proposal for the PWD as part of the development of a social dimension of the internal market.[53]

In order to achieve its aims, the PWD coordinates Member States' legislation in a way that it provides a core of mandatory rules on minimum protection with which employers who post workers to the Member State, in which the service is to be provided, must comply in the host country. This is laid down in Article 3 of the PWD. Article 3(1) states that Member States are to ensure that undertakings falling within the scope of the PWD guarantee workers posted to their territory, the terms and conditions of employment laid down by mandatory law, including collective agreements that have been declared universally applicable insofar as they concern the construction sector referred to in the Annex of the PWD. These 'host state standards' concern the duration of the work; rest periods and holidays; minimum rates of pay; health, safety, and hygiene at work; the conditions of hiring out workers; protective measures for pregnant women, for women who recently gave birth, for young people and children; and equality of treatment between men and women. Hence, Article 3(1) PWD determines the nature of the labour standards that must be applied in the host state, but not the substance of these standards.

However, this material scope of the PWD got a strict interpretation by the CJEU in the triptych *Laval*, *Commission* v. *Luxemburg,* and *Rüffert* cases.[54] According to Article 3(10) first indent of the PWD, the host Member States may add public policy provisions on other subjects than those explicitly listed in art. 3(1) PWD. This was part of the delicate political compromise needed to get the PWD adopted. In *Commission v Luxembourg*, the Court has chosen a restrictive interpretation of this provision, by cutting back the margin of appreciation Member States have in defining what is to be understood under public policy. The CJEU has pointed out that the concept of public policy, firstly, comes into play where a genuine and sufficiently serious threat affects one of the fundamental interests of society and, secondly, since it is a justification for a derogation from a fundamental principle of the Treaty, that it must be narrowly construed.

In *Laval*, the main focus of the Court's judgment was whether the collective action, in the form of a blockade taken by trade unions in this case, was compatible with the EU rules on the freedom to provide services. The CJEU ruled that the 'right to take collective action for the protection of the

53 See references in n. 46.

54 Case C-341/05, *Laval* [2007] ECR I-11767; Case C-319/06, *Commission* v. *Luxemburg* [2008] ECR I-4323; Case C-346/06, *Rüffert* [2008] ECR I-1989.

workers of the host state against possible social dumping may constitute an overriding reason of public interest', which could justify an infringement of free movement of services. However, in this case, it did not, since the prevailing Swedish collectively bargained labour standards were deemed to be not 'sufficiently precise and accessible' for the foreign service provider to know its obligations in advance. Hence, the Court did not accept the method of implementation of the PWD in Sweden, where the applicable rates of (minimum) pay were negotiated on a case by case basis through the social partners, without being supplemented by legislation providing for universal applicability. Furthermore, the Court pointed out that the PWD does not allow the host Member State to make the provision of services in its territory conditional on the observance of terms and conditions of employment that go beyond the mandatory rules for minimum protection, as laid down in Art. 3(1) PWD. It is this consideration that the phrase often used in literature, the 'floor' of minimum labour conditions in the host state has (also) become 'a ceiling' stems from.[55] Clearly, the Court considers the PWD to be about protection of workers only in a secondary sense, noting that the minimum protection in force, in the host state, enables the posted workers 'to enjoy better terms and conditions of employment in the host member state'.[56] This phrase is a far cry from the 'improvement of life conditions and social advancement' in the narrative on free movement of workers.

The judgments of the Court fueled intense scholarly and public debate.[57] Moreover, the European Commission had changed its initial approach to the PWD as well,[58] as became clear in the debate on the then draft Services Directive.[59] The controversies surrounding the Services Directive, back then commonly referred to in the popular press as the 'Bolkestein Directive',[60] together with the EU's enlargement with Middle and Eastern European countries, have played an important role in drawing attention to the limited impact of the social dimension of the PWD.[61] Instead, the narrative that

55 S. Evju (2010), n. 40, p. 177.

56 *Laval* para. 76 and 77.

57 The 'Laval-quartet' gave rise to numerous conferences among scholars and policymakers and led to a 'tsunami' of (working) papers and articles in Academic journals. See also many ETUC press releases and reports on the aftermath of this case law.

58 J. Cremers, J. E. Dølvik, and G. Bosch, (2007), n. 47, pp. 538-539.

59 See, for instance, 14.02.2006 Commissioner Charlie McCreevy's Statement on the Services Directive at the European Parliament Plenary session of February 2006; SPEECH/06/84.

60 Bolkestein was the name of the responsible Commissioner at the time. In France, however, the draft Services Directive was nicknamed Frankenstein Directive in the popular press.

61 See, for an acknowledgement of the 'integration fatigue' and '(single) market fatigue' in the old Member States in western Europe due to e.g. the enlargements, M. Monti (May 2010), *A new*

posting of workers was in particular to bring about the freedom to provide services was reinforced.

At the same time, the language remained such that posted workers were deemed (1) to not enter the labour market of the host state, (2) to not compete with local workers because of the application of a set of core host labour standards, and, (3) to be protected against exploitation by the labour rules applicable to their employment contract with their employer in the 'sending' state.

6 Acknowledgement that Protection against Exploitation is Largely 'a fairy tale'

The bursts in this predominant narrative on the PWD started with its third limb, which was contested and eventually declared fictitious around 2011. By that time, studies had convincingly shown that there is, in practice, a huge lack of control, monitoring, and cooperation among Member States, and that enforcement of minimum terms and conditions of employment is poor, e.g. on wages, working time, and costs of housing and transport.[62] Anecdotal evidence from media has been confirmed and elaborated upon by academic and policy research. Studies of Wagner and Berntsen based on interviews with e.g. foreign workers situated at the building sites of the European Central Bank in Germany and the 'Eemshaven' in the Netherlands, as well as in workplaces in the meat sector and the supermarket distribution centres, clearly show exploitative practices in combination with the fact that cross-border mobile workers concerned, most often, do not even know their legal status.[63]

strategy for the single market, at the service of Europe's economy and society, Retrieved from: http//:ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf.

62 See A.A.H. van Hoek and M.S. Houwerzijl (2011), *Comparative Study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union*, Report to the European Commission; J. Cremers (2011), 'In search of cheap labour in Europe', *CLR studies* 6; J. Cremers (2011), *In Search of Cheap Labour in Europe: Working and living conditions of posted workers*, Brussels: CLR/EFBWW/International Books.

63 L.E. Berntsen (2015), *Agency of labour in a flexible pan-European labour market: A qualitative study of migrant practices and trade union strategies in the Netherlands Groningen* (PhD Thesis) Groningen: University of Groningen, SOM research school; and I. Wagner (2015), *Posted Work and Deterritorialization in the European Union: A study of the German Construction and Meat Industry*, (PhD Thesis) Groningen: University of Groningen, SOM research school. See also A. van Hoek (2017), n. 45 and literature cited there.

It is interesting to note that these findings about the 'real' situation of low-waged mobile workers within the EU, indicate that the effective application and enforcement of workers' rights under the narrative on free movement of workers, is also far from guaranteed. Especially in the area of provision of manpower, the problem of combating illegal activities is encountered. These forms of abuse are not specific to posting. The illegal intermediaries may be established both in the country of recruitment (leading to posting) or in the county of work (leading to free movement of workers). Several reported cases of abuse concerned migrant workers or (bogus) self-employed.[64] These cases involve social dumping in its purest form – with no respect for either the protective system of the 'sending' country or that of the host country. In the field of free movement of workers, the EU legislator adopted Directive 2014/54 to enhance effective enforcement.[65] To remedy the monitoring and enforcement lacunae under the posting of workers narrative, a proposal for the 'Posting of Workers *Enforcement* Directive' (PWED) was launched in 2012 and – after initial fierce resistance of 'sending countries' – adopted on 15 May 2014.[66] Its name acknowledges that the PWD did not guarantee in practice any protection against abusive and exploitative practices.[67]

The PWED can be seen as only a minor shift in the narrative on posted workers. It did not change anything to the second dimension of the narrative: posted workers are still only guaranteed a core of substantive minimum rights in the host state.[68] Regarding the first dimension, Article 4 of the PWED provides some 'ammunition' to attack the presumption that posted workers do not have access to the labour market of the host state. The provision lists elements that can be used by labour inspectorates and other stakeholders to check whether a posting is genuine in that respect, and

64 See Van Hoek and Houwerzijl, n. 63, pp. 50-60. More recently, the European Agency on Fundamental Rights (FRA) (2015) called for 'zero tolerance for severe forms of labour exploitation' in its report on *Severe Labour Exploitation: Workers Moving within or into the European Union, States' Obligations and Victims' Rights*, Brussels.

65 See also above, n. 30.

66 COM (2012) 131, emphasis added by the authors. The proposal was adopted as Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') *OJ* L159/11 of 28.5.2014.

67 However, the 'tools' provided for combating abuse in the PWED do not seem to be very powerful.

68 Although the Court seems to have broadened the interpretation of the concept of 'minimum rates of pay' in Art. 3(1) PWD in its Judgment on Case 396/13 (*Sähköalojen ammattiliitto* ECLI:EU:C:2015:86) and with the Judgment in C-115/14 (*Regiopost* ECLI:EU:C:2015:760) the judgment in *Rüffert* was (de facto) 'softened'.

whether the employer of the posted worker is really established in the 'sending' country, instead of being a so-called letterbox company or empty shelf, purely established to enable posting of workers from a country with low wages, taxes, and social security contributions.[69] At the same time, the 'status aparte' of posted workers versus workers using the free movement of workers regime, was emphasized by recital two of the PWED, which states: 'It is necessary for the purpose of the posting of workers to distinguish this freedom from the free movement of workers'.[70]

7 The Targeted Revision Proposal: Towards a New Narrative on the Balance of Rights in the PWD?

Contestation of the narrative on posted workers did not stop with the adoption of the PWED. In March 2016, the Commission launched a proposal for a targeted revision of the PWD.[71] According to the explanatory memorandum, the main aims for the revision are ensuring the smooth functioning of the single market and stopping 'unfair competition' on wage costs and working conditions, reflected in the mantra 'same pay for the same work in the same place'. This mantra clearly contests the second dimension of the narrative on posted workers as not competing with local workers due to the application of minimum protection provisions of the host state. How can this be explained?

According to Martin Ruhs, migrant rights cannot 'be comprehensively analysed and debated without a discussion of the role and interests of the state in granting, as well as restricting, migrant rights.'[72] The validity of this statement becomes particularly clear in the process which set the targeted revision process in motion. In a letter of Ministers from seven countries

69 See extensively on this phenomenon and how to combat it: M. Houwerzijl, E. Traversa, and F. Henneaux (December 2016), *A hunters game: How policy can change to spot and sink letterbox-type practices*, Brussels, commissioned by the ETUC.

70 This recital reads in full: 'The freedom to provide services includes the right of undertakings to provide services in another Member State, to which they may post their own workers temporarily in order to provide those services there. *It is necessary for the purpose of the posting of workers to distinguish this freedom from the free movement of workers*, which gives every citizen the right to move freely to another Member State to work and reside there for that purpose and protects them against discrimination as regards employment, remuneration and other conditions of work and employment in comparison to nationals of that Member State' (emphasis added).

71 COM (2016) 128 final of 8 March 2016.

72 Martin Ruhs (2013), *The Price of Rights: Regulating International Labour Migration*, Princeton University Press, ebook, p. 23.

from Northwest Europe, a revision of the PWD was pleaded according to the principle of 'equal pay for equal work in the same place'.[73] In their letter to the Commission, the host states make clear that they are worried about unfair competition: '[…] currently employers of posted workers may enjoy an unfair advantage vis-à-vis employers in the host country'.[74] However, they not only focus on equality of treatment between undertakings, but consider the position of the workers as well: 'In our view, fair competition is important to both cross-border workers and cross-border employers, as well as regular workers and employers in the host Member States.'[75] They seem to suggest, similar to the narrative on free movement of workers, that equal treatment protects local workers (and companies alike) from unfair competition on remuneration or working conditions. Also, they signal that, in some cases, services provided by posted workers have transformed into services of semipermanent nature with a real and lasting presence on the domestic labour market. Thereby, these countries at least partially, and implicitly, contest the first dimension of the narrative that posted workers do not enter the labour market of the host state.

However, others still stick firmly to the said two dimensions of the narrative. In a letter of Ministers from nine countries, mainly from Middle and Eastern Europe, it was argued that it is too early to revise the PWD since the implementation period of the PWED was only finished in June 2016. These Ministers want to wait and see what the impact of the PWED will be. Furthermore, they argue that 'the alignment of wages across Member States should come as a consequence of further economic development and not from the Union's legislative action.'[76] This is a nice way of saying that they feel their undertakings should be able to compete on wages until the difference in wage costs has decreased. Hence, the sending states stick mainly to (their reading of) the services narrative by expressing the concern 'that the principle of equal pay for equal work in the same place may be incompatible with the single market, as pay rate differences constitute one legitimate element of competitive advantage for service providers'.[77] The proposal itself was also attacked: fourteen parliamentary chambers

73 Available at: https://www.rijksoverheid.nl/documenten/brieven/2015/06/19/brief-aan-eurocommissaris-thyssen-over-de-detacheringsrichtlijn.

74 Idem, p. 1.

75 Idem, p. 2.

76 Communication from the Commission on the proposal for a Directive amending the Posting of Workers Directive, with regard to the principle of subsidiarity, in accordance with Protocol No2, COM(2016)505 final of 20.7.2016, at 4.2.1.

77 Idem, under 3.1.

from eleven Member States have drawn the yellow card, most of them, apparently, because they feel the proposed amendments go against the idea of an internal market and competitiveness.[78] However, the Commission has decided to maintain the proposal as it is.

The proposal for targeted revision of the PWD distances itself from the narrative as developed thus far in several ways. First of all, the minimum wage guarantee is deemed no longer enough to protect a level playing field, and it is replaced by a guarantee of equal remuneration, so all elements of remuneration that are mandatory apply to both local and posted workers.[79] These elements include thirteenth month allowances, travel expenses, or compensation for work during public holidays or night work. Secondly, the proposal contains the provision that whenever the anticipated or effective period of posting exceeds 24 months, posted workers will be protected by *at least the compulsory labour law rules of the host state*.[80] However, the proposal of the French president Macron in June 2017 to halve the legal limit to twelve months,[81] has been endorsed in the Council meeting of 23 October 2017.[82] Remarkably, such an introduction of a temporal limit to posting clearly abandons the current rationale behind the PWD that all posted workers would only work 'temporarily' or 'for a limited period' in the host state. Hence, this is an implicit recognition that, after a certain defined period of time, posted workers *do enter the labour market* of the host state.[83]

One might conclude that important elements of the narrative on posted workers, as belonging in the category of free movement of services, are

78 Thomas Weber (14 May 2016), 'Third time's a charm? National Parliaments form bloc against posted workers directive,' *Leiden Law Blog*, available at http://leidenlawblog.nl/articles/third-times-a-charm-national-parliaments-form-bloc-against-posted-workers-directive.

79 COM (2016) 128 final, art. 1(2) of the proposed Directive, amending art. 3 of the PWD. The explicit exclusion of supplementary occupational retirement pension schemes remains.

80 Idem, art. 1(1) of the proposed Directive, adding art. 2a to the PWD.

81 See e.g. http://www.euractiv.com/section/economy-jobs/news/macrons-proposals-wreak-havoc-on-posted-worker-negotiations/ and https://www.euractiv.com/section/economy-jobs/news/france-seeks-last-minute-support-for-posted-workers-bill/.

82 With a possibility for a six-month extension in exceptional cases. Proceedings of EPSCO Council meeting, Interinstitutional File: 2016/0070 (COD), Brussels 24 October 2017.

83 More explicitly, the proposed recital 8, p. 4, reads: 'Posting is of a temporary nature and the posted worker usually returns to the country of origin after the completion of the work for which he has been posted. However, in view of the long duration of certain postings, and *in acknowledgment of the link between the labour market of the host country and the workers posted for such long periods*, it is necessary to provide that, in case of posting lasting for periods longer than twelve months, host countries should ensure that undertakings posting workers to their territory guarantee an additional set of terms and conditions that are mandatorily applicable to workers in the Member State where the work is carried out' (emphasis added by the authors).

gradually erased from that narrative. Nevertheless, the initial decision of the Court in *Rush Portuguesa* that posted workers fall (only) within the scope of the services provisions still stands. In the explanatory memorandum accompanying the proposal for a targeted revision, the Commission argues that, because this is a *revision*, the legal basis must be identical to that of the PWD, hence the free movement of services provisions 53(1) and 62 TFEU. It is questionable whether the fact that this is a revision, is in itself conclusive for the exclusive use of the free movement of services provisions as legal basis.[84] According to an opinion of the Committee on legal affairs of the European Parliament in June 2017, adding a legal basis is possible.[85] In an examination of the measures that Article 46 TFEU allows the Union to adopt, on the free movement of workers and on facilitating the functioning of a common labour market, the Committee concludes that these do not correspond with the aim and content of the proposal. In order for this article to be applicable as legal basis, a wholly different piece of legislation would have to be envisaged. However, the Committee has opined that Article 153 TFEU, providing the EU with (shared) competences in the field of social rights should be added as legal basis, if the European Parliament wants to reinforce emphasis on the social protection of posted workers. In its adopted report, the Committee on Employment and Social Affairs of the European Parliament has indeed proposed to do so.[86] Unfortunately, the – at the time of finalising this Chapter – recent compromise reached in the so-called trilogues,[87] does not include the broadening of the legal basis of the PWD.[88] Therefore, we can expect the

84 See: C-271/94 (*Edicom* [1996] ECR I-1689) or 242/87 (*Erasmus* [1989] ECR 1425), and, in general, R.H. Van Ooik (1999), *De keuze der rechtsgrondslag voor besluiten van de Europese Unie* (PhD Thesis), Kluwer pp. 101-102. Still, DG Employment, Social Affairs, and Inclusion leads the process of revision, not DG Internal Market.

85 Available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-604.710+02+DOC+PDF+V0//EN&language=EN.

86 See adopted report with amendments, Rapporteurs: Elisabeth Morin-Chartier, Agnes Jongerius, A8-0319/2017, Brussels 19 October 2017. Available at: http://www.europarl.europa.eu/committees/en/empl/draft-reports.html?ufolderComCode=EMPL&ufolderLegId=8&ufolderId=05991&linkedDocument=true&urefProcYear=&urefProcNum=&urefProcCode=.

87 Interinstitutional negotiations between the European Parliament, the Council, and the Commission. See for an overview of the issues that were on the table EU Observer (25 October 2017), 'EU posted workers face hurdles', Brussels, https://euobserver.com/social/139625.

88 See Joint Statement on the Posting of Workers Directive and Fact sheet – Towards fair labour mobility: Revision of EU posting of workers rules (1 March 2018). Available at: http://ec.europa.eu/social/main.jsp?langId=en&catId=471&newsId=9062&furtherNews=yes . At the time of writing this Chapter the legislative text was not yet published at the European Commission's website. The provisional agreement still needed to be confirmed by EU member states' permanent

Court to keep interpreting a revised PWD first and foremost in the light of free movement of services.[89]

8 To Conclude: What about the Workers?

The (political compromises on the) proposed revision of the PWD would clearly bring the narrative on posted workers more in line with the Court's narrative on free movement of workers. Indeed, it acknowledges that equal treatment between workers prevents unfair competition, which is an important step in the right direction. However, there is no reference made in the adjusted narrative on posting of workers that acknowledges potential beneficial aspects of this form of free movement for moving posted workers in their own right, notably to improve their living conditions or to obtain social advancement. It is indeed questionable whether this would be achievable without amending the legal basis of the PWD with a provision based on the free movement of workers, which would imply an acknowledgement that (at least many low-waged) posted workers do enter the labour market of the host state.[90]

Interestingly, recent empirical research has indicated that posted workers themselves do (sometimes) feel that moving as a posted worker allows them 'to improve their position and the future of their children in terms of socio-economic status, education and care,' even if they have to accept unequal remuneration, compared to local workers of the host state, or if they have to comply with poor working or housing conditions.[91] This stance, sometimes boldly phrased as 'the point of view of the posted worker from post-communist states', has also been defended from a

representatives (COREPER) and adopted in the European Parliament's Employment and Social Affairs Committee. Meanwhile, the revised directive has been officially approved by Parliament and Council on 28 June 2018 (see: PE 18 2018 REV 1).

89 Nevertheless, in recent case law the Court has paid a bit more attention to the social protection of workers of service providers, see Case C-115/14, *Regiopost GmbH & Co. KG* v. *Stadt Landau in der Pfalz,* ECLI:EU:C:2015:760 and Case C-396/13, *Sähköalojen ammattiliitto ry* v *Elektrobudowa Spolka Akcyjna* ECLI:EU:C:2015:86.

90 See Section 7 above for the negative opinion of the Committee on legal affairs of the European Parliament on adding a legal base based on Article 46 TFEU.

91 M. van Ostaijen, U. Reeger, and K. Zelano (2017), 'The commodification of mobile workers in Europe – a comparative perspective on capital and labour in Austria, the Netherlands and Sweden', *Comparative Migration Studies* 5(6) p. 17. See also Berntsen, n. 64, above. On the other hand, there is also ample research that indicates dissatisfaction of the workers involved with abusive and exploitative working conditions.

normative point of view. In particular, while acknowledging that social dumping and 'a race to the bottom' may occur in situations of posting, Kukovec and Leczykiewicz argue that these disadvantages, which (in their view) mainly go against the interests of the wealthier 'central' Member States and their workers, are outweighed by the interests of the workers from the new, 'peripheral' Member States to use their one and only comparative advantage – the possibility to compete on the basis of lower labour costs.[92]

Remarkable in this respect, is the statement of Leczykiewicz that '*employment opportunities* on the Swedish and Finnish market in no way 'belong' to Swedish and Finnish workers.'[93] In relation to the posting of workers narrative, her argument sits uneasily with the legal fiction that posted workers do not have access to the labour market of the host state and (therefore?) cannot be deemed job seekers (and hence not migrant workers in the meaning of Art. 45 TFEU). In the opinion of Leczykiewicz, the Finnish and Swedish workers would no longer be legitimised to defend their system against underbidding by outsiders. Such a radical form of 'transnational solidarity' by allowing workers to compete on wage levels – and hence give them a right to 'self-exploitation' – runs counter to goals and underpinnings of labour law, enshrined in the free movement of workers narrative.[94] Acceptance of such self-commodification might, in the long run, not be sustainable, once the worker from the 'new' Member State stays for a longer period in the host Member State, and actually becomes more embedded in this state (by starting a family life, hiring or buying a house, having an accident, needing medical help, etc.). Moreover, as noted by Bernaciak, although in the short-term, posted workers may profit from dumping strategies, in the long run, dumping practices not only lead to the erosion of employment protection systems in the host states, but might also hinder the gradual improvement of wages and working conditions in the poorer sending countries.[95]

92 See D. Leczykiewicz (2015), 'Conceptualizing conflict between the economic and social in EU law after Viking and Laval', in M. Freedland and J. Prassl (eds.), *EU law in the Member States: Viking, Laval and beyond, Oxford*, Hart Publishing; and D. Kukoveck (2014), 'Hierarchies as law', *Columbia Journal of International Law,* 21 p. 142. See also A. Somek (2011),'The social question in a transnational context', *LSE 'Europe in question' Discussion Paper* 39, p. 31.

93 See D. Leczykiewicz (2015), n. 92 p. 21 under footnote 48, emphasis added by the authors.

94 And also in the EU Charter of fundamental rights (chapter on solidary).

95 See Magdalena Bernaciak (2012), 'Social Dumping? Political catchphrase or threat to labour standards' , WP 2012/06, p. 26.

The main point to stress, from the perspective we have chosen in this chapter, is that the posting of workers narrative is not about workers competing on wage levels, but about service providers competing (unfairly) on wage levels and employment conditions of their employees. In our view, the most legally coherent and socially sustainable way to 'upgrade' the narrative on posted 'low-waged' workers, would be to acknowledge posted EU workers as self-standing beneficiaries of free movement of workers rights, who deserve to be protected by the prohibition of discrimination based on nationality as much as any person who falls under the scope of EU law.[96] As a second best, a revised PWD, based on 'equal pay for equal work at the same location', may be assessed as an important step in the right direction, in particular in combination with other improvements such as a defined time limit of twelve months.[97] If effectively applied and enforced, this may lead to a loss of interest in 'posting as a cheap business model' because that would not be so lucrative anymore. Ideally, such a development would go hand in hand with hiring cross-border workers directly in the host state, based on the 'superior narrative' of the free movement of workers, and/or with bringing more jobs to the worker instead of workers to the jobs, both in (what are currently known as) 'host states' and 'sending states'.

Bibliography

Barnard, C. (2009), 'Internal market v. labour market: a brief history', in M. de Vos (ed.), *European Union Internal Market and Labour law: Friends or Foes?,* Antwerp: Intersentia, pp. 19-43.

Barnard, C. (2014), 'Free movement of natural persons and citizenship', in C. Barnard and S. Peers (eds.), *European Union Law*, Oxford: Oxford University Press: 2017 pp. 369-408.

96 We acknowledge that this would bring back to the stage the initial problem, which was solved by the ruling in *VanderElst* regarding third-country nationals legally residing and working in an EU Member State. These workers are not covered by the freedom to move as a worker enshrined in Art. 45 TFEU, but have, under the current narrative on posting of workers, a *de facto* right to movement derived from their EU-based employer, albeit a 'passive' one. They can, however, move as a worker once they obtain long-term resident status. For the interaction between Art. 45 TFEU and PIL, see e.g. Houwerzijl (2014), n. 14, pp. 109-111.

97 Combined with other 'most beneficial ingredients' from a social point of view in the provisional agreement between the Council, Parliament and Commission of March 2018, such as that travel, board and accommodation costs should be paid by the employer and not deducted from workers' salaries, and that the accommodation conditions for posted workers should be decent, and in line with national rules.

Bernaciak, M. (2012), 'Social Dumping? Political catchphrase or threat to labour standards,' ETUI *Working Paper* 2012/06.

Berntsen, L.E. (2015), *Agency of labour in a flexible pan-European labour market: A qualitative study of migrant practices and trade union strategies in the Netherlands Groningen* (PhD Thesis) Groningen: University of Groningen, SOM research school.

Biagi, M. (1998), 'The "Posted Workers' EU Directive"', in R. Blanpain (ed.), *The Bulletin of Comparative Labour Relations in the European Union*, pp. 173-180.

Cremers, J. (2011), *In Search of Cheap Labour in Europe: Working and living conditions of posted workers*, Brussels: CLR/EFBWW/International Books.

Cremers, J.; J.E. Dølvik; and G. Bosch (2007), 'Posting of workers in the single market: attempts to prevent social dumping and regime competition in the EU', *Industrial Relations Journal* 6, pp. 524-541.

EU Observer (20 July 2016), *Eastern EU states lose battle on workers' pay*, Brussels.

European Commission (2016), *Revision of the Posting of Workers Directive-frequently asked questions,* Strasbourg.

Everling, U. (1963), *Das Niederlassungsrecht im Gemeinsamen Markt,* Berlin: Verlag Franz Vahlen.

Evju, S. (2010), 'Revisiting the Posted Workers Directive: Conflict of Laws and Laws in Contrast', *Cambridge Yearbook of European Legal Studies,* 12 pp. 151-182.

Gormley, L. (1992), 'Freedom of Establishment and Freedom to Provide Services: Workers and Services Distinguished', *European Law Review*, 17(1) pp. 63-67.

Hoek, A. van (2018), 'Re-Embedding the Transnational Employment Relationship: A Tale about the Limitations of (EU) Law?', *Common Market Law Review* 55, no. 2, 449-87.

Hoek, A.A.H. van and Houwerzijl, M.S. (2011), *Comparative Study on the legal aspects of the posting of workers in the framework of the provision of services in the European Union*, Report to the European Commission.

Hoek, A.A.H. van and Houwerzijl, M.S. (2016), 'Where do EU mobile workers belong, according to Rome I and the (E)PWD', in H. Verschueren (ed.), *Residence, employment and social rights of mobile persons: on how EU law defines where they belong*, Antwerp: Intersentia, pp. 215-253.

Houwerzijl, M.S. (2005), *De Detacheringrichtlijn* (PhD thesis) Tilburg: Tilburg University, Deventer: Kluwer.

Houwerzijl, M.S. (2014), 'Regime shopping across (blurring) boundaries', in S. Evju (ed.), *Regulating Transnational Labour in Europe: The quandaries of multilevel governance,* Oslo: Skriftserie nr. 196.

Houwerzijl, M.S.; E. Traversa; and F. Henneaux (December 2016), *A hunters game: How policy can change to spot and sink letterbox-type practices*, Brussels: commissioned by the ETUC.

Kukoveck, D. (2014), 'Hierarchies as law', *Columbia Journal of International Law*, 21 pp. 131-193.

Leczykiewicz, D. (2015), 'Conceptualizing conflict between the economic and social in EU law after Viking and Laval', in M. Freedland and J. Prassl (eds.), *EU law in the Member States: Viking, Laval and beyond,* Oxford: Hart Publishing.

Monti, M. (May 2010), *A new strategy for the single market, at the service of Europe's economy and society.* Retrieved from: http//:ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf.

Ooik, R.H. van (1999), *De keuze der rechtsgrondslag voor besluiten van de Europese Unie* (PhD Thesis Universiteit Utrecht), Deventer: Kluwer.

Ostaijen, M.M.A.C. van (2017), *Worlds between Words: the politics of intra-European movement discourses*, Erasmus University Rotterdam, retrieved from http://hdl.handle.net/1765/99986.

Ostaijen, M.M.A.C. van; U. Reeger; and K. Zelano (2017), 'The commodification of mobile workers in Europe – a comparative perspective on capital and labour in Austria, the Netherlands and Sweden', *Comparative Migration Studies,* 5(6) pp. 1-22.

Reynolds, S. (2016), 'Explaining the constitutional drivers behind a perceived judicial preference for free movement over fundamental rights' *Common Market Law Review* 3 pp. 643-677.

Ruhs, M. (2013), *The Price of Rights: Regulating International Labour Migration*, Princeton University Press.

Somek, A. (2011), 'The social question in a transnational context', *London School of Economics 'Europe in question' Discussion Paper*, No. 39.

Tusk, D. (5 July 2016), 'Freedom of movement is non-negotiable if Britain wants access to single market', *The Independent*.

Vignes, D. (1961), 'Le droit d'établissement et les services dans la C.E.E.' *Annuaire Français de Droit International*, 7 pp. 674-675.

Wagner, I. (2015), *Posted Work and Deterritorialization in the European Union: A study of the German Construction and Meat Industry*, (PhD Thesis) Groningen: University of Groningen, SOM research school.

Weber, T. (14 May 2016), 'Third time's a charm? National Parliaments form bloc against posted workers directive', *Leiden Law Blog*, available at http://leidenlawblog.nl/articles/third-times-a-charm-national-parliaments-form-bloc-against-posted-workers-d.

Zahn, R. (2017), 'Revision of the Posted Workers Directive: a Europeanisation Perspective', *Cambridge Yearbook of European Legal Studies* 5, pp. 5-24.

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4 Labour Arbitrage on European Labour Markets

Free Movement and the Role of Intermediaries

Jan Cremers and Ronald Dekker

Abstract
This chapter focusses on the proliferation of human resource management practices: What makes HRM decide to adopt certain practices? The recruitment processes are analysed against the background of the EU regulatory framework with regard to the use of migrant labour. Specific for the EU context are three forms of regulation, related to the free movement of workers, the freedom to provide services, and the freedom of establishment. Furthermore, we take into account the economic context (of relative or absolute labour shortages on local/sectoral labour markets). In this contribution, we recognise that intermediaries have (partially) built their business models on labour arbitrage (a notion that will be explored in the next sections), among other things through strategically choosing the countries where they register their businesses. The main features in this process of efficiency seeking, are temporary employment agencies with an international focus, and consultancy firms that advise businesses on tax or regulatory arbitrage.

Keywords: human resource management, EU mobility regulation, intermediaries, human resource management

Introduction

Free movement of workers belongs to the core principles of the European Union, although the intra-European mobility of labour migrants has come under pressure in recent years. Cross-border mobility and recruitment of

Rijken, Conny and Tesseltje de Lange (eds): *Towards a Decent Labour Market for Low Waged Migrant Workers.* Amsterdam: Amsterdam University Press, 2018
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workers from abroad are often motivated by employers with arguments of labour shortages, but also with reasons of costs and employment protection, which tend to be lower for migrant workers. The cost differences mainly stem from differences in the regulatory regime in the fields of corporate law, labour law, and social security law. In our research, we found evidence that many firms adopt recruitment practices, and start using migrant labour, based on these reasons.

Theoretically, this chapter focusses on the proliferation of human resource management practices: What makes HRM decide to adopt certain practices? The recruitment processes are analysed against the background of the EU regulatory framework with regard to the use of migrant labour. Specific for the EU context are three forms of regulation, related to the free movement of workers, the freedom to provide services, and the freedom of establishment. Furthermore, this chapter takes into account the economic context (of relative or absolute labour shortages on local/sectoral labour markets). In this contribution, we recognise that intermediaries have (partially) built their business models on labour arbitrage (a notion that will be explored in the next sections), among other things through strategically choosing the country where they register their businesses. The main features in this process of efficiency-seeking, are temporary employment agencies with an international focus and consultancy firms that advise businesses on tax or regulatory arbitrage.

The current situation creates an ideal environment for fraudulent (or at least questionable) cross-border business activities. The overlapping or vaguely defined legal categories encourage arbitrage practices. Even if these practices are not illegal, we depart from the normative stance that these practices deprive workers from the wider principles that fit in a policy of rights-based migration and labour mobility. The practices described in this chapter deviate from this normative stance, and, by doing so, endanger the genuine free movement of workers in Europe.

This Chapter is structured as follows. We start with the mapping of the EU regulatory frame, relevant for the practice of free movement and arbitrage. The next section discusses cost-saving models and mechanisms and their impact on the Dutch labour market. The following section looks at the role of management and the influence of intermediaries on the decisions to 'arbitrage'. The final part contains our conclusions and recommendations.

The EU Regulatory Frame

The 1957 Rome Treaty establishing the European Economic Community contained several provisions connected to the notion of labour mobility: citizens should gain from free movement. The Treaty ensured free movement of workers.[1] This freedom meant, in particular, that workers who were nationals of one Member State had the right to go to another Member State to seek employment and to work there. The Treaty underpinned and guaranteed the residence, labour, and equal treatment rights of these mobile workers. The creation of the EU internal market, accompanied by the dismantling of internal frontiers, placed the mobility of workers and the freedom to provide services with mobile workers even more in the centre of the socioeconomic approach of the EU institutions.[2] This led to a regulatory frame that serves as a building block for the workers' mobility. Three policy areas can be distinguished with an impact on the promoted mobility:

a policies in the field of the freedom of establishment;
b policies related to the freedom to provide services;
c social policies, notably in the field of labour and contract law, pay and working conditions, and social security.[3]

The promotion of this mobility remains high on the agenda, even though the European Commission, in its analysis of the functioning of the internal market, has reported several times that the expectations of the mid 1980s about mobility in Europe have not been realised.

The establishment of a company or subsidiary in the EU is covered by the freedom of establishment, as enshrined in Article 49 of the Treaty on

1 Treaty Establishing the European Community, Rome, 1957, Articles 48 to 51.

2 J. Cremers (2012), 'Free movement of workers and rights that can be derived', *FMW: Online Journal on free movement of workers within the European Union*, 4 pp. 26-32.

3 The coordination of the national social security became one of the first pillars of the European Community legislation in this area (Council of the European Economic Community, Regulation [EEC] No. 3 of 25 September 1958, OJ No. 30, 16.12.1958. Brussels). The coordination rules are based on the principle that persons moving within the EU are subject to the social security scheme of only one Member State. The starting point in the field of working conditions and labour law was that mobile workers would fall under the application of the so-called *lex loci laboris* principle. This meant that the regulations of the country where the work was carried out would apply. The so-called posting of workers became an exception to this principle, motivated by the fact that workers that provided services (under the subordination of their posting company in the home country) would only temporarily stay in another Member State.

the Functioning of the European Union (TFEU).[4] In general, setting up a company in a foreign constituency is facilitated by that provision. Companies benefit from the internal market principles that guarantee both the right of establishment and the freedom to provide services, cf. Articles 54 and 62 TFEU. Corporate entities are creatures of national law and the rules for setting up companies vary significantly among Member States.[5] Some Member States apply the so-called real seat theory; i.e. the law governing a company is determined by the place where the central administration and substantial activities of that company are located. This requires companies having their operational headquarters within a given Member State to be established under the laws of that state. Other Member States follow the incorporation theory, which favours party autonomy in the choice of corporate law. Hence, under such law, companies may have their 'real seat' in a Member State different from the state of incorporation, which also implies that they may have a mere artificial entity in the incorporation country.[6] Companies can thus install a considerable part of their legal frameworks in another country without pursuing any real activities there. Based on the freedom of establishment and the free provision of services, these national entities are free to move around and get market access in other Member States. Conflicting or contradictory legal provisions in labour law and company law can be used by companies, which create artificial arrangements for the purpose of evading statutory and other obligations in the country of activity.

The freedom to provide services gained much support in the course of the development of the European Union. As the relationship was underscored between the working conditions of workers involved in temporary cross-border activities and the free provision of services, problems emerged. In successive cases, the Court of Justice of the European Union (CJEU) judged that it is not up to EU Member States to define unilaterally the notion of public policy or to impose all mandatory provisions of pay and working

4 European Union (2010). Consolidated Treaties. Treaty on European Union – Treaty on the Functioning of the European Union – Charter of Fundamental Rights of the European Union, Luxembourg.

5 National laws also determine the way business registers are organised and the legal value of entries. The EU Council of Ministers has so far refused to work towards a central business register. A less far-reaching alternative is developed in Directive 2012/17/EU, which establishes a system of interconnection of business registers. It is currently being implemented and will be operational by the end of 2017.

6 J. Cremers (2018), *Letterbox companies and regime shopping in Europe*. Policy Brief ETUI, Brussels, forthcoming.

conditions on suppliers of services established in another country.[7] According to this interpretation, EU Member States have no unilateral right to decide on the mandatory rules applicable within their territory, even if these mandatory rules would guarantee better provisions for the workers concerned. Measures that are likely to limit the freedom of establishment or the freedom to provide services are not per se incompatible with EU law, but have to be justified by overriding reasons of public interest and cannot be discriminatory against foreign EU service providers or companies. Restrictions must be appropriate to attain the objective pursued, and cannot go beyond what is necessary. The overriding reasons of public interests, considered by the court, are mostly limited to the prevention of abusive tax practices, for instance in case of 'wholly artificial arrangements intended to escape the domestic tax normally payable'.[8] On the other hand, the CJEU has ruled that host states may not refuse recognition of the legal capacity of a company incorporated under the law of another Member State, even if that company does not pursue any economic activity in the latter state.[9] This initiated a process of regulatory arbitrage in the EU.[10] In this context, we define regulatory arbitrage as a practice whereby firms explore (and benefit from) loopholes and conflicts in regulatory systems in order to bypass or avoid unfavourable regulation.

7 Judgments related to the free provision of services (Rüffert C-346/06 in 2008, Commission v. Luxembourg C-319/06 in 2008) created a situation whereby foreign service providers do not have to comply with imperative provisions of national law that have to be respected by domestic service providers. The Luxembourg case, for instance, centred around mandatory provisions applicable to all workers on the country's territory, irrespective of their nationality, including those temporarily posted. Luxembourg required a written (labour) contract for all employees, whether they were national or foreign citizens. The Court ruled that these national mandatory regulations beyond the list of minimum provisions 'may be regarded as a restriction on the free provision of services', and are not 'crucial for the protection of the political, social and economic order'. It can be argued that this contradicts the legislative intention of the PWD, which states explicitly (Article 3.10) that the Directive's application 'shall not preclude' Member States applying 'to national undertakings and to the undertakings of other States, on a basis of equality of treatment […] terms and conditions of employment [on issues other than minimum standards] in the case of public policy provisions'. See: J. Cremers (2013), 'Free provision of services and cross-border labour recruitment', *Policy Studies*, 34(2) pp. 201-220.

8 European Court Reports 2008, I-02875ECLI:EU:C:2008:239

9 E. Wymeersch (2003), *The transfer of the company's seat in European Company Law*, Financial Law Institute. Gent University.

10 M. Gelter (1 April 2010), 'Tilting the Balance between Capital and Labour? The Effects of Regulatory Arbitrage in European Corporate Law on Employees', *Fordham International Law Journal*, 33, Fordham Law Legal Studies Research Paper No. 1595067; ECGI – Law Working Paper No. 157/2010.

The free movement principles in the European Union affect the respect for the well-balanced regulatory framework for social policy, including social security and labour standards that exist in EU Member States. This regulatory framework was and is characterised by a mixture of labour legislation and collective bargaining, partly resulting from national litigation and case law. Soon after the introduction of the internal market, collisions emerged between the economic reasoning in the EU and the social policy covering labour standards and equal treatment of workers. The emphasis on the primacy of economic freedoms, vigorously promoted by EU institutions, negatively affected the application of national social security rules and working conditions of workers. The recruitment of a foreign workforce brought with it the risks of undermining or evading existing social standards with the aim to gain a competitive advantage, while the relocation of production and the competition waged in the sphere of taxation and social security created new tensions between regions. The freedom of establishment created an industry of incubators able to deliver ready-made companies whose sole purpose was to circumvent national regulations, labour standards, and social security obligations.[11] Efficiency-seeking, so far mainly used in the fiscal area, also became mainstream in the social field.

Cost-saving Models and Mechanisms

In an analysis of the work of the labour inspectorate related to the respect for and compliance with the applicable Dutch regulations of pay and working conditions in cross-border recruitment practices, several mechanisms that have come into vogue in recent decennia could be traced.[12] Although the sample in this study was based on files and cases in which there was already a suspicion of breaches, and the outcome is thus not representative of the overall development, the research gave important proxy evidence of the tendencies on the Dutch labour market. Moreover, the analysed files testify to more than simple loopholes and inconsistencies in legislation. The report reveals that these loopholes, combined with a lack of coherence in the overall policy, and the absence of collaboration between the different

11 For an overview of relevant sources, see: K. Kall and N. Lillie (2017), *Protection of Posted Workers in the European Union: Findings and Policy Recommendations based on existing research*. University of Jyväskylä.

12 J. Cremers (2017), *Drie jaar ervaring met intensievere cao-naleving: Een analyse van de nalevingsdossiers n.a.v. het Sociaal Akkoord 2013*. Tilburg: Tilburg Law School.

policy areas, lead to 'creative' forms of labour recruitment and hiring of workers, very often to the detriment of the recruited workers.

These methods have been the subject of several studies referred to by different names, ranging from 'regulatory competition' to 'regime-shopping', 'social engineering', or 'social dumping'.[13] One of the main characteristics is that several of the methods are not necessarily unlawful; they twist the law and are found in the margins of the applicable regulatory frame. Other methods profit from loopholes and contradictions in that frame. Some methods are lawful, although they are morally blameworthy, other methods are against the law, but because of the complexity of the legislative framework and the absence of straightforward redress mechanisms, difficult to tackle. Some methods can be traced by the enforcement and compliance authorities, but effective and dissuasive sanctions (especially in a transnational context) are nonexistent. Most of the methods are planned, well-organised, and set up with business consultants who will explain to you that everything is perfectly legal. The methods consist of well-established and well-designed business models that have been thought of with all the legal details; this leads to competition based on wage costs, and to distortion of competition with genuine companies who actually comply with the legal and conventional frame.

The compliance evaluation distinguishes cost-saving models in four areas: savings on direct wage costs, saving on indirect wage costs and employers' contributions, savings on social security contributions, and fiscal savings (income tax, turnover tax, corporate income tax). The analysis of the inspection reports describes the existence of five different, partly intertwined, circumvention mechanisms that serve in the search for cheap labour:

a fraudulent contracting/pay-rolling;
b chains of subcontracting;
c the use of foreign legal entities;
d the provisions of services with posted workers;
e regime-shopping in the field of social security and taxation.

One of the common denominators of all analysed mechanisms is the use of outsourced labour on projects and workplaces. This takes the form of a subcontracted workforce, hired and leased workers, external recruitment, agency work, and posting of workers (and self-employed persons). Pretended contracting, based on the provision of services, can blur the labour

13 M. Bernaciak (2015), *Market Expansion and Social Dumping in Europe*. Brussels: ETUI/Routledge.

relationship of the involved workers. The externalisation often takes the form of the recruitment of a foreign workforce through establishments abroad (in many cases initiated by Dutch user firms or headquarters). The introduction of a foreign legal entity in a subcontracting chain complicates the control and enforcement. It can lead to delays and even to defeat. Investigation of facts and verification of data in a foreign constituency depends on transnational cooperation and mutual assistance.

The Impact on the Labour Market

The question is how does this development affects the labour market? In general, agreement among researchers exists that, in the years before the crisis (the period 1999-2008), no evidence can be found of large-scale substitution or direct displacement of residents after the arrival of foreign labour, staying for the long term.[14] The increased arrival of labour migrants from Central and East European countries, by contrast, had a positive effect on domestic employment.[15] Ultimately, the influx of labour migrants had a (slight) downward effect on the average wage level and caused substitution to a limited degree of the workforce already present. This effect was limited to the lowest wage levels and completely absent in the higher levels. For the lowest-wage earners, a high share of labour migrants in a sector and region entailed a negative downward pressure on their wages. But, in overall terms, the supply of foreign workers supplemented the inland supply.

However, some evidence can be found that this changed after the onset of the financial and economic crisis.[16] In the period 2009-2015, labour migration from Western European countries decreased, whilst migration from Eastern Europe did not change. In the agricultural, the manufacturing, the construction, the retail, and the transport sectors, the total employment of Dutch workers decreased with dozens of percentages, combined with an increase of foreign labour. In these sectors, the search for cheap labour was combined with an ongoing process of flexibilisation of labour relations. The jobs were most often shifted from direct labour to temporary and flexible contracts. The cost reduction was achieved through the recruitment of

14 SEO (2011), *De economische impact van arbeidsmigratie: verdringingseffecten 1999-2008*, Amsterdam.

15 D. Dustmann (2008), *The Labour Market Impact of Immigration, Centre for Research and Analysis of Migration*, University College London.

16 SEO (2014), *Grensoverschrijdend aanbod van personeel*, Amsterdam.

labour migrants who accept lower wages and high flexibility. This type of substitution mainly took place in labour-intensive jobs with standardised work, with a calculation and a competition based on price, not on quality, and in situations in which language skills are neither essential, nor important. The recruitment of labour migrants, as several sources indicate, thus further facilitates the externalisation and flexibilisation of the labour market.[17] Since fixed-term contracts have a short duration and they terminate at no cost, they provide firms with scope for wage adjustment.

How does this relate to the current situation with repeated notifications of labour shortages? Analysis of labour market shortages in the Netherlands focus mainly on *absolute* shortages (no labour supply available). The *relative* shortage in terms of the labour (or employment) volume of jobs that are difficult to fulfil given the offered conditions (pay, working conditions, OSH) cannot be found in employment statistics and prognosis. According to an EU survey (published in 2016) 40% of the interviewed employers were confronted with recruitment problems. Around half of the cases belonged in the category of real qualification shortages, and one third of the cases were related to a remuneration that was too low. Unattractive working conditions, combined with atypical working time, poor career perspectives, and a lack of training facilities, explain why it is often difficult to find the right person, especially if no permanent job is in sight. There are clear indications that this relative type of labour shortage has been encountered in recent years with the recruitment of labour migrants. Longitudinal analysis reveals that a large majority of labour migrants from CEE countries in the Netherlands keep working in temporary jobs and contracts, which are low-paid and in precarious occupations, despite several years of service.[18] Local Dutch surveys among employers engaging foreign labour, provide further evidence. In local communities with a high registration of CEE workers, this survey investigated the motives for employers to recruit foreign workers (mainly through agencies).[19] Employers praised the labour migrants for their work ethic, commitment, and flexibility. Migrants are willing to accept arduous work, irregular working times, and long working days. Labour migrants carry out seasonal work and cater to peaks in agriculture, horticulture, and manufacturing. The motives of employers are induced by a combination of

17 D. Raess and B. Burgoon (2015), Flexible Work and Immigration in Europe. *British Journal of Industrial Relations*. SEO (2014), *Grensoverschrijdend aanbod van personeel*, Amsterdam.

18 A. Strockmeijer (2017), ´´Mobiliteit binnen de perken,´ *Tijdschrift voor Arbeidsvraagstukken*, 33(2), Amsterdam: Boom.

19 J. Cremers and A. Strockmeijer (2017), *De inzet van arbeidsmigranten in Zeewolde*, Tilburg Law School.

frictions and relative shortages on the labour market: the search for cheap labour, hard work, flexibility, and an offer that Dutch workers will not accept. The involved employers are well aware of the fact that their offer is not attractive. Without labour migrants, the wheel stops turning.

Cross-border Hiring and Sourcing

A substantial part of labour migration is driven by the behaviour of employers, who actively search for workers from abroad in order to deal with labour shortages at home, but also to cut back on wages and other labour costs. 'The central feature of demand-driven systems is that "the initiative for the migration comes from the employer"'.[20] In the local surveys, mentioned beyond, both reasons for wanting to hire migrant workers are mentioned regularly. A straightforward analysis of the different factors underlying the decision to hire migrant workers include a mix of institutional factors, economic circumstances, and the match (or lack thereof) between employers' demands and employee skills and requirements.[21] In this paragraph, we include the possibility that these decisions are also influenced by a process that can neutrally be described as management learning, but could also be characterised as copycat behaviour by employers. We assume that HR practices are copied from other organisations and also actively propagated by consultants and labour market intermediaries.

Intermediaries on the labour market make active use of loopholes and gaps in the legislation that among other things:

> pave the way for companies and intermediaries who can easily and at low cost be established as a legal entity in a foreign country, can quickly disappear across the border, go bankrupt and re-set up again from the beginning. This has also led to an industry of business consultants who can explain how perfectly legitimate such practices are. It is therefore imperative to strengthen the legal framework and to eliminate the gaps and imperfections in the legislation in a coherent and integral manner. This requires a thorough analysis in line with internal market regulation,

20 C. Finotelli and H. Kolb (2017), '"The Good, the Bad and the Ugly" Reconsidered: A Comparison of German, Canadian and Spanish Labour Migration Policies', *Journal of Comparative Policy Analysis: Research and Practice,* 19(1) pp. 72-86.

21 See, for an overview: M. Ruhs and B. Anderson (eds.) (2010), *Who Needs Migrant Workers?* Oxford: Oxford University Press.

> not only in the interests of the employees concerned but also in the interests of bona fide companies and consumers.[22]

What is the rationale behind the practices that we have examined in the previous sections? Different views exist about the proliferation and adoption of management practices on the continuum between fully rational and decidedly emotional behaviour.[23] Managers can be hypothesised to make decisions on adopting new HR management practices with a combination of the views below: this is a multidimensional approach to this type of decision-making. Alternatively, managers could choose between the different views below, based on the context for the decision: this is a contingent approach to this type of decision-making. Empirical research with concern to the role that these different views play in adopting management practices indeed suggests that the choice is influenced by the context and by a combination of different views.[24]

- rational view: adopt, because these practices work or promise to do so;
- psychodynamic view: adopt, because it 'feels good' to adopt, preventing the anxiety associated with doing nothing;
- dramaturgical view (rhetoric): adopt, because somebody (gurus, consultants) tells you that it is a good idea to adopt;
- political view: adopt, because the powerful (Anglo-Saxon business community, multinational firms, business schools) tell you that it is a good practice to adopt;
- cultural view: adopt, because the practices fit the cultural characteristics of your organisation (e.g. Hofstede dimensions);
- institutional view: adopt for symbolic reasons (seeking peer and shareholder legitimacy).

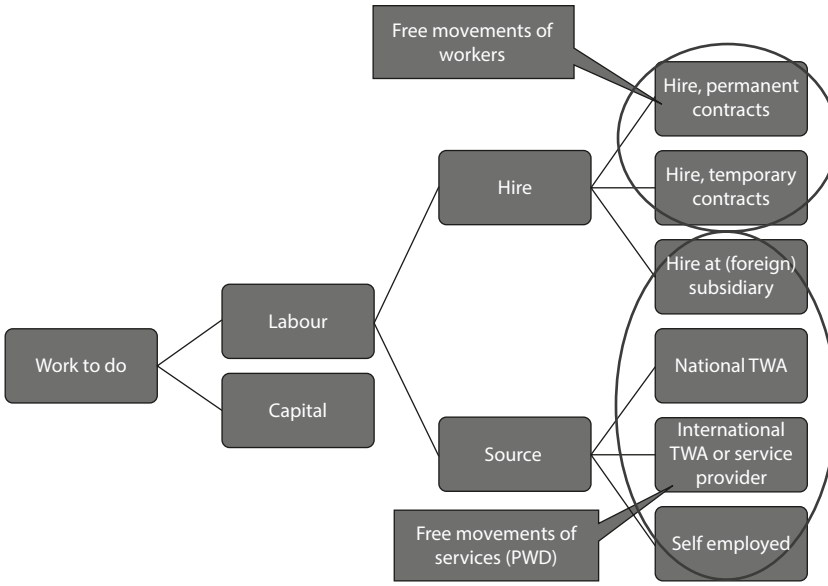
When we apply these different views on the specific topic of HRM practices and the possibilities for using migrant labour, the decision problem for organisations can be visualised by the stylized decision tree in Figure 1 below.

22 J. Cremers (2016), 'Economic freedoms and labour standards in the European Union', *Transfer: European Review of Labour and Research,* 22(2) pp. 149-162.

23 A. Sturdy (2004), 'The adoption of management ideas and practices theoretical perspectives and possibilities,' *Management Learning*, 35(2) pp. 155-179.

24 E. Daniel, A. Myers, and K. Dixon (2012), 'Adoption rationales of new management practices', *Journal of Business Research,* 65(3) pp. 371-380.A.I. Rautiainen (2009), 'The interrelations of decision-making rationales around BSC adoptions in Finnish municipalities', *International Journal of Productivity and Performance Management,* 58(8) pp. 787-802.

Figure 1 Simple model of HR (labour demand) decision-making



The model of labour demand decision-making illustrates that there are ample opportunities for organisations to articulate part of their supply in terms of specific demand for migrant labour, either through direct hires (possibly at subsidiaries abroad) or through different forms of sourcing (e.g. through temporary work agencies, hereafter TWA). The model shows that agencies and other intermediaries have an incentive to 'influence' the decision-making of organisations in this respect, namely in order to increase their 'part of the pie' of labour demand. The different stages in the process during which HR business consultants can influence decisions are easy to identify. It identifies the many degrees of freedom that organisations have to translate 'work to do' into 'labour demand' and also the many degrees of freedom to locate that labour demand in foreign jurisdictions.

Similar to this approach, and very critical with respect to hiring migrant workers, Gordon (2017) states that:

> employers' recruitment of would-be migrants from other countries, unlike their use of undocumented workers already in the United States, creates a transnational network of labour intermediaries – the 'human supply chain' – whose operation undermines the rule of law in the workplace, benefitting U.S. companies by reducing labour costs while creating

> distributional harms for U.S. workers, and placing temporary migrant workers in situations of severe subordination. It identifies the human supply chain as a key structure of the global economy, a close analogue to the more familiar product supply chains through which U.S. companies manufacture products abroad.[25]

With this simple decision framework, it is possible to hypothesise a role for either business consultants or labour market intermediaries to give advice at different stages of the decision process. We will assume that these intermediaries act in their own interest and that organisations are likely to listen to the advice given to them for reasons of both a rational view (lower costs) and other factors, which involve managerial anxiety, political and peer pressures that are a combination of the other possible views on adopting (new) managerial practices.

The Role of Intermediaries in Practice

Both TWAs and business consultancy firms that provide HR management advice are examples of so-called Advanced Business Services (ABS) at the labour market. It is argued 'that ABS, as a complex, hold considerable power, which they exercise in a large measure by operating legal, accounting and financial vehicles designed partly to escape the control of governmental or intergovernmental organisations through the use of offshore jurisdictions'.[26] It seems fair to assume that the intermediaries and consultants focus on the cost benefits of regulatory (labour) arbitrage and are less inclined to 'sell' decent labour market arrangements. Berntsen has described these practices for TWAs:

> Firms employing foreign workers in host countries strategically situate themselves in particular regulatory regimes or industries. In the Netherlands, for example, the benefits applicable to posted workers in the construction sector are more extensive than in the metal sector, allowing for cost savings when firms post workers under the conditions for the metal industry. TWAs can choose between situating themselves in the host country and employing the foreign workers under TWA contracts, or

25 J. Gordon (2017), 'Regulating the Human Supply Chain', *Iowa Law Review*, 102(2).
26 D. Wojcik (2012), 'Where governance fails: Advanced business services and the offshore world', *Progress in Human Geography*, 37(3) pp. 330-347.

> posting the TWA workers from the home country, or even a third country in which social security contributions are lower. With the first option, employment conditions have to be regulated in line with the host-country framework; in the second and third option, there will be a combination of host- and sending-country regulations.[27]

Furthermore, it is documented in the management literature that big consultancy firms play an important role in the propagation of HRM practices. In general, it is argued that business consultants 'create and disseminate ideas' about management innovation and have 'persuasive power' in doing so.[28] More specifically, McKinsey & Co. played an important role in spreading the influential concept of the 'war for talent' in the HR field.[29] Other researchers have found 'that texts from management consultants and mainly American business school academics have diffused extensively into the important setting of English healthcare organisations.'[30] Offshoring, in particular, could also be regarded as a mere 'management fad'. Even a large consultancy firm argued that business should and would be weighing pros and cons of offshoring more carefully.[31]

The process described above started with big consultancy firms advising multinational corporations that already had offshore subsidiaries, mainly for 'tax arbitrage' purposes. The aforementioned ABS organisations have thereby 'taught' businesses to evade government regulation in general. A SOMO report concludes 'There is obviously a web of consultancy firms, sometimes related in ownership but rather a network of business management tax advisory firms that specialise in creating and managing letterboxes [...]'.[32]

27 L.E. Berntsen (2015), ´Agency of labour in a flexible pan-European labour market: A qualitative study of migrant practices and trade union strategies in the Netherlands,´ *Jyväskylä studies in education, psychology and social research*, 0075-4625 p. 526.

28 E. Abrahamson (1991), 'Managerial fads and fashions: The diffusion and rejection of innovations', *Academy of management review*, 16(3) pp. 586-612. A. Alharbi and A. Mamman (2015), 'Why Human Resource Management Innovations have many Versions not in Theory but in Practice', *International Journal of Academic Research in Business and Social Sciences*, 5(11) pp. 214-229.

29 J. O'Mahoney and A. Sturdy (2016), ´Power and the diffusion of management ideas: The case of McKinsey & Co., *Management Learning*, 47(3) pp. 247-265.

30 E. Ferlie (2016), 'The political economy of management knowledge: management texts in English healthcare organisations', *Public Administration,* 94(1) pp. 185-203.

31 Deloitte Consulting (April 2005), *Calling A Change in the Outsourcing Market: The Realities for the World's Largest Organizations*.

32 McGauran (2016), *The impact of letterbox-type practices on labour rights and public revenue*, Brussels: SOMO/ETUC. The report identifies different employment relationships used for social dumping, all of which involve artificial arrangements with no material activities in the country of registration, established with the sole purpose to recruit workers for working abroad.

The use is no longer restricted to large multinational corporations, but has evolved into a 'general purpose technology' management innovation, also available to small- and medium-sized companies (SMEs) without a preexisting international presence. SMEs in Europe are advised to relocate their administrative seat to another jurisdiction (Cyprus, Lichtenstein), for the sole reason that it will give them a competitive advantage in reducing their wage bill.

Our field work and analyses of the work of the labour inspectorate reveal that organisations have several options for hiring migrant labour. The setting up of a foreign subsidiary, or cooperating with an existing one that is nothing more than an empty shell, provides the opportunity to evade labour standards, social security, and taxation regulations. These subsidiaries are called 'mailbox' or 'letterbox' companies or, in legal terms: 'artificial arrangements'.[33] The regulatory framework related to the phenomenon of artificial arrangements is stretched over various national and EU policy areas, with noncoherent, contradictory, or even conflicting rules in company, labour, and contract law; internal market regulations; tax rulings; and social security legislation. As a result, many loopholes for labour arbitrage can be identified. Furthermore, the fragmented nature of both regulation and its enforcement makes it difficult to monitor and combat abusive practices.[34]

In the labour and social security policy areas, this notion was first signalled in the 1990s in the international transport sector. It was based on

33 Most definitions of letterbox companies refer to tax evasion by a business that establishes its domicile in a tax-friendly country with just an address, while conducting its commercial activities in other countries. The European Commission states that 'letterbox subsidiaries' are artificial arrangements established in countries solely to qualify for a softer tax regime and cut their bill. European Commission (2013), *MEMO, Questions and Answers on the Parent Subsidiary Directive*. Linkage with the free provision of services led to a definition beyond taxation. The EC refers in a Communication on smart regulation to legislative loopholes; 'letterbox companies are companies which have been set up with the purpose of benefitting from legislative loopholes while not themselves providing any service to clients'. European Commission (2013), *Smart regulation – Responding to the needs of small and medium-sized enterprises*.

34 'For trade unions and (understaffed) enforcement authorities it is difficult to trace and combat the situations; the fluidity in the cross-border context with firms often disappearing across borders or going bankrupt, complicate their efforts to enforce (and execute) local labour standards. And in the relatively few cases where trade unions and host state institutions do succeed in reaching the workers, they experience enormous practical difficulties in establishing exactly which conditions (should) apply to a specific individual employment relationship, because the rules are so complicated in cross-border situations.' M. Houwerzijl (2016), 'Letterbox strategies to suppress wages & labour standards: About the deliberate use of rules on determining applicable labour law and company law 'in search of cheap labour', in *A hunters game: how policy can change to spot and sink letterbox-type practices*. Brussels: ETUC.

dubious practices and problems caused by letterbox companies, which only had addresses in the country of establishment and all activities offshored to a different jurisdiction, often combined with 'bogus self-employment' among drivers and circumvention of statutory pay and working time standards.[35] The phenomenon became associated with a 'cheap labour business model': letterbox companies that operate in a cross-border context and pick and choose the social security and labour standards regime that is the least regulated and the most profitable. Ownership and employer liabilities are obscured or blurred by using proxy owners or strawmen. These entities take advantage of limited inspection competences and a lack of transnational enforcement mechanisms to deprive workers of their wages and contributions. In practice, the cross-border recruitment, through artificial arrangements, prevents states from reinforcing employment and labour standards.

The divergence of conflict rules, the legal complexity, and loopholes hamper effective application of the law and therefore favour unreliable actors. This situation undermines legal certainty about the law governing the operations of companies, and may work both to the detriment of bona fide cross-border establishment and provision of services, and to the detriment of effective monitoring and enforcement of the rules. In all this uncertainty and complexity, one thing is certain: the current situation creates an ideal environment for mala fide cross-border business activities.

Concluding Part and Outlook

In this chapter, we have documented recent studies that shed light on the impact of artificial recruitment arrangements on compliance with and respect for labour standards and social security obligations. Due to the primacy of freedom of establishment, and with the deregulation of company law dominating the EU internal market, there is a serious tension in the enforcement of labour standards, social security, and tax laws. The introduction of free movement in the European Union created an attractive open market for businesses, whilst the respect for the well-balanced national social regulatory framework became subordinated to the promotion of competition and mobility.

35 J. Cremers (2011), *In search of cheap labour in Europe: working and living conditions of posted workers*, Brussels: i-books/CLR-Studies.

By the late 1980s, the first indications of the practice of bypassing the applicable rules through the use of foreign labour-only subcontractors led to questions related to the role of cross-border labour recruitment. A matrix of complex, semilegal, or outright unlawful employment arrangements emerged, involving foreign corporate entities with questionable substance in the country of establishment. Through these channels, the basic principle of *lex loci laboris* eroded. The consequences in cross-border situations included regime-shopping, social dumping, and the threat of the unequal treatment of workers. For undertakings, it meant a distortion of competition and a race to the bottom, as the level playing field was vanishing. The free provision of services, combined with the deregulation of company law and the freedom of establishment, created a situation whereby service providers from abroad could circumvent mandatory rules that are imperative provisions of national law, and which have to be respected by domestic service providers. The primacy given to competition and deregulation created a climate in favour of labour arbitrage.

This puts the advocates of free movement inside the EU in a dilemma: the poor regulation of the recruitment of foreign labour creates tensions in the local market. Abuses build a breeding ground for strong anti-Europe sentiments (e.g. Brexit). Cross-border recruitment is channelled through constructs established in other constituencies. The possibility for host countries to verify the legality of the construct is very limited. Circumvention practices related to artificial legal entities, acting in the frame of the freedom of establishment, can only come to an end through policies that lie partly outside the social domain, such as national and European re-regulation of company law.

Employers have a strong and legitimate interest in the recruitment of foreign labour, as do agencies and other intermediaries. It would be logical for the management side to take a strong stand in favour of a coherent and consistent labour mobility regulation, based on decent workers' rights and equal treatment, and developed in the framework of national and EU social dialogue. Free movement of workers might only stay upright in the EU if grounded on the principle of equal treatment in the territory where the work is performed.

Bibliography

Abrahamson, E. (1991), 'Managerial fads and fashions: The diffusion and rejection of innovations', *Academy of management review*, 16(3) pp. 586-612.

Alharbi, A. and A. Mamman (2015), 'Why Human Resource Management Innovations have many Versions not in Theory but in Practice', *International Journal of Academic Research in Business and Social Sciences*, 5(11) pp. 214-229.

Bernaciak, M. (2015), *Market Expansion and Social Dumping in Europe,* Brussels: ETUI/Routledge.

Berntsen, L.E. (2015), 'Agency of labour in a flexible pan-European labour market: A qualitative study of migrant practices and trade union strategies in the Netherlands', *Jyväskylä studies in education, psychology and social research 526*, academic dissertation, Jyväskylä: University of Jyväskylä, 172 p.

Cremers, J. (2011), *In search of cheap labour in Europe: working and living conditions of posted workers*, Brussels: i-books/CLR-Studies.

Cremers, J. (2012), 'Free movement of workers and rights that can be derived', *FMW: Online Journal on free movement of workers within the European Unio*n, 4 pp. 26-32.

Cremers, J. (2013), 'Free provision of services and cross-border labour recruitment', *Policy Studies*, 34(2) pp. 201-220.

Cremers, J. (2016), 'Economic freedoms and labour standards in the European Union', *Transfer: European Review of Labour and Research*, 22(2) pp. 149-162.

Cremers, J. (2017), *Drie jaar ervaring met intensievere cao-naleving: Een analyse van de nalevingsdossiers n.a.v. het Sociaal Akkoord 2013*. Tilburg: Tilburg Law School.

Cremers, J. (2018), *Letterbox companies and regime shopping in Europe*. Policy Brief ETUI, Brussels (forthcoming).

Cremers, J. and A. Strockmeijer (2017), *De inzet van arbeidsmigranten in Zeewolde,* Tilburg Law School.

Daniel, E.; A. Myers; and K. Dixon (2012), 'Adoption rationales of new management practices', *Journal of Business Research,* 65(3) pp. 371-380.

Deloitte Consulting (April 2005), *Calling A Change in the Outsourcing Market: The Realities for the World's Largest Organizations*.

Dustmann, D. (2008), *The Labour Market Impact of Immigration, Centre for Research and Analysis of Migration*, University College London.

Ferlie, E. (2016), 'The political economy of management knowledge: management texts in English healthcare organisations', *Public Administration,* 94(1) pp. 185-203.

Finotelli, C. and H. Kolb (2017), '"The Good, the Bad and the Ugly" Reconsidered: A Comparison of German, Canadian and Spanish Labour Migration Policies', *Journal of Comparative Policy Analysis: Research and Practice,* 19(1) pp. 72-86.

Gelter, M. (1 April 2010), 'Tilting the Balance between Capital and Labour? The Effects of Regulatory Arbitrage in European Corporate Law on Employees', *Fordham International Law Journal*, 33 pp. 790-875.

Gordon, J. (2017), 'Regulating the Human Supply Chain', *Iowa Law Review*, 102(2) pp. 445-504.

Kall, K. and N. Lillie (2017), *Protection of Posted Workers in the European Union: Findings and Policy Recommendations based on existing research*. University of Jyväskylä.

McGauran K. (2016), *The impact of letterbox-type practices on labour rights and public revenue*, Brussels: SOMO/ETUC.

O'Mahoney, J. and A. Sturdy (2016), 'Power and the diffusion of management ideas: The case of McKinsey & Co', *Management Learning*, 47(3) pp. 247-265.

Raess, D. and B. Burgoon (2015), ´Flexible Work and Immigration in Europe,´ *British Journal of Industrial Relations*.

Rautiainen, A.I. (2009), 'The interrelations of decision-making rationales around BSC adoptions in Finnish municipalities', *International Journal of Productivity and Performance Management,* 58(8) pp. 787-802.

Ruhs, M. and B. Anderson, eds. (2010), *Who Needs Migrant Workers?* Oxford: Oxford University Press.

SEO (2011), *De economische impact van arbeidsmigratie: verdringingseffecten 1999-2008*, Amsterdam: SEO Economisch Onderzoek

SEO (2014), *Grensoverschrijdend aanbod van personeel*, Amsterdam: SEO Economisch Onderzoek.

Strockmeijer, A. (2017), 'Mobiliteit binnen de perken', *Tijdschrift voor Arbeidsvraagstukken*, 33(2) Amsterdam: Boom, pp. 384-400.

Sturdy, A. (2004), 'The adoption of management ideas and practices theoretical perspectives and possibilities', *Management Learning*, 35(2) pp. 155-179.

Wojcik, D. (2012), 'Where governance fails: Advanced business services and the offshore world', *Progress in Human Geography*, 37(3) pp.330-347.

Wymeersch, E. (2003), 'The transfer of the company's seat in European Company Law', *Financial Law Institute,* Gent University.

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5 The Seasonal Workers Directive

Another Vicious Circle?

Margarite Helena Zoeteweij

Abstract
This contribution analyses the regime of the Seasonal Workers Directive (SWD) in order to determine whether it grants adequate safeguards to seasonal workers. Zoeteweij defends the argument, however, that the Directive itself and the (state of) implementation by the EU Member States only confirms the legal subordination of unskilled or low-skilled labour migrants on the European labour market, and that the observed reluctance on the side of the Member States with regard to the transposition of the Directive serves to underpin this argument. The focus of the contribution is on the progress in the implementation of the Directive; special attention is given to the implementation in Italy and Spain. Finally, the contribution concludes by taking stock of the changes in the legal position of seasonal workers, and by formulating a prognosis of what can be expected of the Directive.

Keywords: seasonal workers directive, implementation, subordination low-skilled workers, seasonal workers rights

1 Introduction

The Seasonal Workers Directive, providing minimum standards on the conditions of entry and stay of third-country nationals (TCN) for the purpose of employment as seasonal workers, should have been implemented by the Member States bound by it until September 2016.[1] Implementation of the

1 Directive 2014/36/EU of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, OJ2014 L94/375.

Rijken, Conny and Tesseltje de Lange (eds): *Towards a Decent Labour Market for Low Waged Migrant Workers.* Amsterdam: Amsterdam University Press, 2018
DOI: 10.5117/9789462987555_ZOET

Directive's standards is to ensure decent working and living conditions for seasonal workers by setting out fair and transparent rules for admission and stay, and by defining the rights of seasonal workers in order to ensure decent working conditions.[2] This contribution analyses the regime as per the Directive in order to determine whether it indeed grants adequate safeguards to seasonal workers. This contribution defends the argument, however, that the Directive itself and the (state of) implementation by the EU Member States only confirms the legal subordination of unskilled or low-skilled labour migrants on the European labour market, and that the observed reluctance on the side of the Member States with regard to the transposition of the Directive serves to underpin this argument.

The argument in this contribution is built up as follows. It will briefly discuss the historical background of the Directive, which is followed by an analysis of some of the rights that are provided for – or rights that are lacking – in the Directive. The focus of the contribution subsequently shifts to the progress in the implementation of the Directive; special attention is given to the implementation in Italy and Spain as the agricultural sector in these two Member States depends to a large extent on seasonal workers. Finally, the contribution concludes by taking stock of the changes in the legal position of seasonal workers, and by formulating a prognosis of what can be expected of the Directive now that the deadline for its implementation has expired.

2 Background

The aim of the EU's migration policy is to ensure the efficient management of migration flows and the fair treatment of TCNs legally residing in the Member States.[3] The first proposal for a Directive on the conditions of entry and stay of TCNs for the purpose of paid employment and self-employed economic activities was presented by the Commission in 2001.[4] This proposed Directive would have established a general regime treating all labour migrants equally.[5] However, due to a lack of support for the proposal in the

2 Seasonal Workers Directive, Preamble, under 7.

3 Article 79 of the Treaty on the Functioning of the European Union, TFEU.

4 European Commission, Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities, COM (2001) 386 final.

5 C. Costello (2016), 'EU migration and asylum law: A labour law perspective', in A. Bogg, C. Costello, and A.C.L. Davies (Eds.), *Research Handbook on EU Labour Law*, Edward Elgar Publishing, p. 312.

Council, the Commission withdrew the proposal in 2005. Consequently, the Commission decided it would approach the issue of TCN workforce sector by sector, proposing Directives that would introduce different regimes for each and every category of TCN workers in the EU.

It was not until 2010, after Directives on the entry and stay (and employment) of students, trainees, volunteers, researchers, and highly qualified workers had been adopted with unanimity in the Council, and after the adoption of legislative measures with regard to migration was made easier due to the Lisbon Treaty of 2009, that the Commission proposed the introduction of legislation harmonising Member States' legislation on unskilled migration.[6] Even then, the proposal was the subject of long and difficult negotiations in the Council of Ministers and the European Parliament, as its discussion took place during a period of economic crisis in some of the Member States, and an increased scepticism to migration in almost all.[7] The adoption of the Directive in 2014 in itself may therefore already be regarded as an accomplishment.[8]

Be that as it may, it is through the substance and effective implementation of the Directive that its effect on the improvement of the working and living conditions for seasonal workers[9] should be assessed. Therefore, the following paragraphs will critically analyse the potential improvement brought about by the Directive with regard to the situation of seasonal workers on the labour markets of the Member States of the EU.

3 Rights and Temporariness: Which Way Does the Scale Tip?

The Directive, in its version as adopted in February 2014, regulates a number of issues related to the entry and stay of unskilled or low-skilled TCN migrant workers to carry out an activity dependent on the passing of the seasons.

6 G. Menz (2015), 'Framing the matter differently: the political dynamics of European Union labour migration policymaking', *Cambridge Review of International Affairs*, 28(4) p. 558.

7 R. Cholewinski (2015), 'Migration for Employment', in Plender (Ed.), *Issues in International Migration Law*, Brill, p. 67; also L. Hayes, T. Novitz, and P.H. Olsson (2013), 'Migrant workers and collective bargaining: institutional isomorphism and legitimacy in a resocialised Europe', in N. Countouris and M. Freedland (Eds.), *Resocialising Europe in a Time of Crisis*, CUP, p. 461; also M. Jesse (2016), *The Civic Citizens of Europe: The Legal Potential for Immigrant Integration in the EU, Belgium, Germany and the United Kingdom*, Brill, p. 165.

8 C. Costello and M. Freedland (2016), 'Seasonal Workers and Intra-corporate Transferees in EU law', in J. Howe and R. Owens (Eds.), *Temporary Labour Migration in the Global era – The Regulatory Challenges*, Edward Elgar Publishing, p. 54.

9 Preamble to the Seasonal Workers Directive, under 7.

In a nutshell, the Directive seeks to cater to the Member States' fluctuating but persistent demand for low-skilled migrant labour force, without giving the labour migrants falling within its scope the prospective of integration and long-term residence in the host Member State. The solution to this equation is thus sought in the promotion of temporary and circular migration. The Directive can therefore be regarded as the schoolbook example of migration law that transforms people into economic inputs who depart when their labour is no longer necessary.[10] This is understandable and even laudable from an economic point of view. Some even argue that it is also in the interest of (potential) unskilled labour migrants that the catalogue of rights granted to them stays at a minimum as an increase in their rights could come at the price of a more restrictive admission policy of the hosting countries. Advocates of this view put forward that, as long as certain basic rights are granted, a number of specific rights of migrant workers can be temporarily restricted in order to give more unskilled workers the chance to migrate legally to higher-income countries.[11] It is apparently in this spirit that the Seasonal Workers Directive was drafted. As is often the case with legislation that serves economic purposes, it takes less heed of the possible negative effects of the legislation on the persons involved, effects that, in the case of the Directive, are reinforced by the uncertainty of temporary employment and short-term residence.[12] Compared to the original 2010 draft proposal for the Directive, the text of the Directive that resulted from the intervention of the Parliament and international actors such as the ILO[13] does provide the seasonal worker with a more comprehensive catalogue of rights. However, are the substance and the weight of these rights enough to guarantee labour migrants decent work,[14] in line with the aims of the Directive as listed in its preamble? That question is the starting point of the following analysis of the Directive. In order to be able to focus on the rights regime in as much detail as possible, this contribution will focus on

10 C. Cauvergne and S. Marsden (2014), 'The Ideology of Temporary Labour Migration in the Post-Global Era', *Citizenship studies*, 18(2) p. 232.

11 M. Ruhs (2013), *The Price of Rights: Regulating International Labour Migration*, Princeton University Press, pp. 190-191.

12 J. Howe and R. Owens, *Temporary Labour Migration in the Global Era*, p. 23.

13 ILO technical comments on the Proposal for a EU Directive on seasonal employment of migrant workers. Avaliable at: http://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---ilo-brussels/documents/genericdocument/wcms_168539.pdf.

14 During the UN General Assembly in 2015, decent work and the four pillars of the ILO's Decent Work Agenda – promoting jobs and enterprise, guaranteeing rights at work, extending social protection, and promoting social dialogue (with gender as a crosscutting theme) – became integral elements of the new 2030 Agenda for Sustainable Development.

the substantial provisions in the directive rather than those on admission, procedure, and authorisation. Therefore, the following aspects are addressed: equal treatment, family rights, dependency on employer, and enforceability.

Equal Treatment

The Directive's central provision determining the rights of the seasonal worker as migrant and as employee can be found in Article 23. This article provides that, in principle, the seasonal worker is entitled to equal treatment with nationals of the host Member State. The European Parliament's introduction of this provision at a later stage in the legislative procedure, and the extension of the scope of this article to cover terms of employment and the right to strike, can indeed be regarded as an accomplishment.[15] The article allows Member States to make exceptions from the principle of equal treatment. Exceptions may be made with regard to social security benefits,[16] such as sickness benefits, maternity benefits, benefits in respect of accidents at work, unemployment benefits, and family benefits.[17] It is, however, questionable whether Member States implementing laws creating unequal treatment with regard to social security is in line with EU and international law in this regard. The ECtHR has repeatedly ruled that difference of treatment with regard to social security, based exclusively on the ground of nationality, is only possible if justified by very weighty reasons.[18] Relevant ILO Conventions further limit Member States' discretion, even though these Conventions are presently only binding on a very small number of them.[19] The content of the right to equal treatment under the Seasonal Workers Directive therefore certainly does not guarantee that their treatment will be equivalent to the treatment of nationals – or, for that matter, to the treatment of other, more 'economically valuable'.[20] TCN

15 A. Lazarowicz (28 March 2014), *A success story for the EU and seasonal workers' rights without reinventing the wheel*, EPC Policy Brief, p. 3.

16 Seasonal Workers Directive, Article 23(1)(d).

17 The complete list of social security benefits with regard to which Member States may make an exception to the principle of equal treatment can be found in Article 3 of Regulation 883/2004 on the coordination of social security systems.

18 ECtHR, Gaygusuz v. Austria, Application no. 17371/90, para. 42; also ECtHR, Andrejeva v. Latvia, Application no. 55707/00, para. 87.

19 ILO Convention No. 118 on Equality of Treatment (Social Security).

20 Though, legally speaking, it is not possible to establish the value of a person and compare it to the value of another person, economically speaking, the value of a person as a production factor can be determined by looking at the supply and demand for this particular person as a production factor. As the EU aggregate of the demand for third-country national seasonal

labour migrants that fall under the regime of the Single Permit Directiv[21] or the Blue Card Directive.[22]

Family Rights

When taking a closer look at the legal regime established by the Seasonal Workers Directive, and especially when comparing this regime with other EU acts regulating labour migration into the EU, the lack of the right to family reunification stands out immediately.[23] This aspect of the Seasonal Workers Directive especially bears resemblance to guest worker programmes, implemented throughout Europe in the 1960s and 1970s, which left a bitter aftertaste for all parties involved. Not only did the families involved suffer from prolonged periods in which their family life was disrupted, but the States hosting the guest workers were also faced with the unanticipated effect of an increased irregular (or at least undesired) migration.[24] With the adoption of the Seasonal Workers Directive, the EU may have entered into the same vicious circle. Considering that the aim of the Directive is to foster a circular movement of labour force, it does not offer the prospect of integration and settlement in the host Member State to the labour migrant– even though the Directive allows Member States to implement schemes that foresee a more stable residence for third-country nationals that fall within the scope of the Directive.[25] It does not come as a surprise that the Directive does not provide for family reunification. Furthermore, as seasonal workers are excluded from the scope of the Long Term Residents

workers is much lower than the global supply for seasonal workers, the value of the seasonal worker is considerably lower than the economic value of a highly skilled blue card holder.

21 K. Groenendijk (2014), 'Which Way Forward with Migration and Employment in the EU?', in S. Carrera, E. Guild, and K. Eisele (eds.), *Rethinking the Attractiveness of EU Labour Immigration Policies, Comparative perspectives on the EU, the US, Canada and beyond*, CEPS, pp. 95 and 96. Where he compares the content of the right to equal treatment under the Seasonal Workers Directive to that as provided by Article 12 of Directive 2011/98/EU on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State ('Single Permit Directive').

22 Council Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ 2002, L155/17.

23 Preamble of the Seasonal Workers Directive, under 46.

24 Though opinions may vary with regard to whether family members joining the guest worker migrated irregularly or regularly, it is a fact that their presence alongside the guest worker was not intended; see, for the Dutch example, Bonjour (2009), *Grens en Gezin*, Aksant, pp. 51 ff.

25 See Article 14(1) of the Seasonal Workers Directive; also see under paragraph IV 'implementation' the example of the implementation of the Directive in Italy.

Directive,[26] they do not have another legal venue to obtain this right as long as their stay in the EU is regulated by the Seasonal Workers Directive.[27] At the same time, however, the Directive provides that Member States may allow seasonal workers to stay and work on their territories for periods of up to nine months per calendar year, and, if the implementing national legislation so provides, subsequent return for periods up to nine months per calendar year for the purpose of seasonal work.[28] Thus, third-country nationals whose economic situation in their country of usual residence is dire enough to apply for seasonal work in countries far away, and who want to stay and work for as long as possible in order to earn back the money invested in finding employment and travelling to the EU before being able to make remittances,[29] are thus forced into illegality, or into illegally bringing their families along.[30]

The Protection Gap and Dependency on the Employer

Apart from the substantive rights regime of the Directive, there are other aspects that corroborate the disadvantageous position of the seasonal worker on the EU labour market. As the obligation to facilitate reentry of a

26 Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, Article 3(2)(e).

27 Article 14(1) of the Seasonal Workers Directive enables Member States to issue a residence permit under national or Union law for purposes other than seasonal work.

28 Article 16 of the Seasonal Workers Directive.

29 This is especially the case for those migrants that have to travel long distances to the host Member State; they usually incur higher initiation costs than those coming from neighbouring countries, and for migrants that have made other costs related to the application for a work and residence permit, and therefore also take longer to generate a net financial gain that is high enough to make the whole exercise worthwhile. Ruhs, *The potential of temporary migration programmes in future international migration policy*, A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration (GCIM.org), p. 13. Also, International migration and development, Report of the UN Secretary General (2013, (A/71/296)), op cit., para. 113. Since the EU's Seasonal Workers Directive makes the third-country national applicant to a large extent dependent on the employer, this increases the danger of employers being tempted to sell visas and work permits, as is known to have been a widespread problem under a number of temporary migration programmes before. There is no reason why this would be different under the current scheme as devised by the Directive.

30 Wessendorf describes the impact of the Swiss seasonal workers legislation on the Italian seasonal workers population in Switzerland in the 1960s and 1970s as 'difficult and often traumatic', as she documents the fact that 15000 Italian children were illegally brought along by their seasonal workers parents in the 1970s. S. Wessendorf, ´State-imposed Translocalism and the Dream of Returning: Italian Migrants in Switzerland´, in L. Baldassar and D. Gabaccia (eds.), *Intimacy and Italian Migration: Gender and Domestic Lives in a Mobile World*, p. 159.

seasonal worker only applies to Member States that have already admitted this person as seasonal worker before, the seasonal worker's freedom to choose seasonal employment in other parts of the EU labour market is curtailed.[31] In the current version of the Directive, in case a seasonal worker employed in one Member State would like to take up seasonal employment in another Member State, the worker will have to start the whole application procedure from scratch, without being able to rely on the facilitated reentry. In line with the principle of mutual recognition characterising the EU legal order, the Directive could have provided for the establishment of a database of seasonal workers that have already entered, stayed, and left one of the Member States of the European Union, entitling them to facilitated entry in another Member States on the same conditions that would have applied if they would have requested reentry in the Member State that had previously hosted them. As it is now, the principle of mutual recognition and, as a result, the EU market perspective is missing in the Seasonal Workers Directive.

During their stay in a Member State, seasonal workers' freedom to move between employers is limited.[32] Additionally, considering the length (or, rather, the shortness) of the stay of the seasonal worker in the host Member State, and the fact that proof of accommodation is one of the requirements for admission as a seasonal worker for stays exceeding 90 days,[33] the seasonal worker will most likely be dependent on the employer for accommodation too. Though Article 20 of the Directive provides for minimum standards with regard to accommodation arranged by the employer, terms used in this Article such as 'excessive rent' and 'equivalent document' leave the Member States and the employers broad discretion.

The dependency of the seasonal worker on the employer also has its consequences for the enforceability of the Directive's standards, which is also one of the concerns voiced in the European Parliament. Dependence results in a low incentive on the side of the worker to complain in case of the employer's noncompliance with the standards of the Directive, let alone to file a lawsuit against the employer.[34] For it is only natural that employees who are dependent on their employers for residence as well

31 Seasonal Workers Directive, Article 16.

32 Article 15(6) of the Seasonal Workers Directive allows Member States to refuse an extension of the stay for the purpose of seasonal work when the vacancy in question could be filled by nationals ofthe Member State concerned or by other Union citizens, or by third-country nationals lawfully residing in the Member State.

33 Article 6(1)(c) of the Seasonal Workers Directive.

34 J. Fudge and P.H. Olsson (2014), 'The EU Seasonal Workers Directive: When Immigration Controls Meet Labour Rights', *European Journal of Migration and Law,* 16 p. 465.

as work permits will think twice before ventilating any discontent with the working conditions, as this could lead to (the employer threatening with) a severing of the employment relationship.[35] For this reason, the Directive obliges Member States to establish mechanisms that enable seasonal workers to lodge complaints through relevant third parties that have a legitimate interest in ensuring compliance with the Directive, such as Unions; these third parties should be authorised to act on behalf of or in support of seasonal workers.[36] It is therefore up to the worker to lodge a complaint, after which the third party can come into action. However, the fact that seasonal workers are usually recruited from countries with less protective labour standards already leads the assumption that they will be prepared, or even willing, to work under conditions that are below the legal standards in the host country. This so-called 'dual frame of reference' of migrant workers describes situations in which the conditions in the host country are evaluated on the basis of the conditions and legal framework existing in the home country of the migrant worker. The conditions in the home country often being perceived as (far) worse than those in the host country, the migrant workers are sometimes relatively satisfied with the conditions they find in the host country, even if these are below the legal standards.[37] Generalising, one could therefore say that (temporary) seasonal workers are less likely to raise issues about wages and other conditions relating to their employment,[38] and that the effective protection of seasonal workers under the Directive depends mostly on Member State monitoring, assessment, and inspections.[39] In light of the surplus of seasonal workers in relation to the aggregated EU demand, a surplus that will continue to exist despite unequal treatment or even exploitation of seasonal workers, the costs that the effective implementation of such protection measures bring along with them make it highly improbable that Member States will be in a hurry to comply with these particular provisions of the Directive. This would not be a first, as the Member States' lack of gusto for an effective implementation of Union legislation protecting vulnerable migrants seems

35 C. Rijken (2015), 'Legal Approaches to Combating the Exploitation of Third-Country National Seasonal Workers', *The International Journal of Comparative Labour Law and Industrial Relations,* 31 no. 4, p. 449.

36 Seasonal Workers Directive, Article 25.

37 See, for instance, R. Waldinger, and M. Lichter, *How the Other Half Works: Immigration and the Social Organisation of Labor,* University of California Press, p. 40.

38 J. Howe and R. Owens, 'Temporary Labour Migration in the Global Era', in J. Howe and R. Owens (Eds.), *Temporary Labour Migration in the Global era: The Regulatory Challenges*, p. 9.

39 These issues are regulated in Article 24 of the Seasonal Workers Directive.

to be a recurrent, and worrying, pattern.[40] The following section reviews the progress that Member States have made with regard to the implementation of the Directive.

4 Implementation by Member States

As mentioned above, the deadline for the implementation of the Seasonal Workers Directive expired in September 2016. Without implementation in national legislation, the Directive will remain a paper tiger as it does not provide the seasonal worker with directly enforceable rights. Many of the rights and norms need to be given shape and teeth by implementation in national legislation. For this reason, no definitive conclusions can yet be drawn with regard to the implications of the Seasonal Workers Directive in practice.[41] What is more, assessment of an effective transposition of the Directive depends, as it always does in similar situations, on Member States' reporting and outsourced studies the implementation of which requires more time than just one year.[42] So far, the European Commission's European Migration Network (EMN) reported that only five Member State have introduced amendments to the national law on the entry and stay of TCN migrant workers to ensure alignment with the provisions of the Seasonal Workers Directive. These Member States are Cyprus, Czech Republic, Estonia, Italy, and Luxembourg.[43] The same report noticed that Spain and France have retained legislation that was already deemed by these Member States to be in line with the Directive. With regard to three other Member States, the report noticed that advanced plans to implement the Directive were in place, but that, as yet, the legislation in these Member States was not aligned with the Directive. We can therefore conclude that implementation of the Directive in the remaining fifteen Member States that are bound by it[44] is not even underway yet or at a preliminary stage.

40 UN Human Rights Council, 23rd session, 24 April 2013, Agenda item 3, *Report of the Special Rapporteur on the human rights of migrants, Francois Crepeau,* Regional study: management of the external borders of the European Union and its impact on the human rights of migrants, p. 18.

41 The research leading to this contribution was carried out in the summer of 2017.

42 See also E. Collett (March 2015), 'The Development of EU policy on immigration and asylum – rethinking coordination and leadership', *Migration Policy Institute Policy Brief Series*, 8 p. 8.

43 European Migration Network (2016), *Annual Report on Migration and Asylum,* pp. 38-39.

44 Denmark, Ireland, and the UK are not bound by the Directive, according to its Preamble under 54 and 55.

Though studies of Member States' compliance with EU law show that, on the whole, the statistics on transposition of Directives by Member States have improved over the last decades, there are still considerable differences between the compliance rates pertaining to the legislation in the various EU policy areas,[45] with noncompliance ranging from no implementation or late implementation of a directive to incorrect implementation of a directive. The Commission proudly claims that, with regard to so-called 'Single Market Directives', noncompliance has fallen from almost 7% in 1997 to below 1% at present in most of the Member States.[46] A possible explanation given by the Commission for this high compliance rate is a strong political commitment in the Member States, as observed by the Commission. Considering the contentious character of legislation regulating the entry and stay of TCNs, the persisting lack of timely implementation of Directives related to migration demonstrated again by the fifteen Member States that do not yet have (communicated) plans to implement the Seasonal Workers Directive should not come as a surprise.[47] Even for those Member States that have reported an alignment of their national law with the Seasonal Workers Directive, it remains questionable whether this particular section of the national law is complied with in practice. In the following, two case studies illustrate how ostensible implementation does not have to equal compliance with the standards of the Directive. As data with regard to the transposition of the Directive are only available with regard to a small number of Member States, the choice for the discussion of implementing measures is very limited. Italy and Spain are selected as case studies because they are two of the few Member States that have reported alignment of the national law with the Directive, and because exploitation of migrant workers in the agricultural sector is reported to be notorious in these countries.[48]

45 R. Thomson, R. Torenvlied, and J. Arregui (2007), 'The Paradox of Compliance: Infringements and Delays in transposing European Union Directives', *British Journal of Political Science*, 37(4) p. 706. This article explains the differences in compliance with Directives across the EU and across policies, and found that Member States are less likely to comply with Directives they disagree with, or that do not fit their national policies. Falkner et al. have implemented a more general study with regard to the implementation of EU Directives, see G. Falkner et al. (2005), *Complying with Europe: EU Harmonisation and Soft Law in the Member States*, Cambridge University Press.

46 Available at: www.ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/transposition/index_en.html.

47 S. Peers et al. (Eds.), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition*, Volume 2: EU Immigration Law, p. 24.

48 See, for example, A. Corrado, C. de Castro, and D. Perrotta (2017), *Cheap food, cheap labour, high profits: agriculture and mobility in the Mediterranean, in Migration and Agriculture. Mobility and change in the Mediterranean area*, Routledge; F.S. Caruso and S. Corrado (2015), *Migrazioni*

Case Studies of Implementation

Italy

To start with Italy, the Italian legislator adopted a new Decree just a month after the expiration of the deadline for implementation of the Seasonal Workers Directive, transposing the Directive into national law. Decree n. 203 of 29 October 2016[49] entered into force on 24 November 2016 and was clarified by a circular letter issued by the Ministry of Labour and Immigration in December 2016. According to the Decree and the circular letter, seasonal workers in the agricultural and tourism sectors can benefit from its provisions, which enable the seasonal worker, among other things, to switch from a seasonal workers permit to a regular employment resident permit, and foresees the issuance of permits that allow the seasonal workers to return to Italy for seasonal work in consecutive years, without requiring the seasonal worker to return to the same employer.[50] It also prohibits the automatic deduction of the costs for accommodation, if provided by the employer, from the wages of the seasonal worker, and even provides for a cap on costs for the accommodation of the seasonal worker.[51] The Decree therefore seems to provide for standards that are above the relevant minimum requirements in the Directive. Unfortunately, however, enforcement of similar protective measures has previously failed dramatically in Italy. Instances of (institutionalised) labour exploitation are often known to the authorities, but these authorities either lack the will or the power to intervene.[52] It is not seen as a priority for the policy or public institutions, and the adoption of more protective measures alone, without stepping up enforcement, will not improve the position of the migrant workers in Italy.[53]

e lavoro agricolo: un confronto tra Italia e Spagna in tempi di crisi, in Colucci and Gallo, Tempo di cambiare, Rapporto sulle migrazioni interne in Italia, pp. 55-74; and Amnesty International (2012), *Exploited labour Migrant workers in Italy's agricultural sector.*

49 Decreto Legislativo 29 October 2016, n. 203; Attuazione della direttiva 2014/36/UE sulle condizioni di ingresso e di soggiorno dei cittadini di Paesi terzi per motivi di impiego in qualita' di lavoratori stagionali, Gazzetta Ufficiale n.262, 9 November 2016.

50 Art. 1(11) of the Decree.

51 Art. 1(3) of the Decree.

52 European Union Agency for Fundamental Rights, Severe labour exploitation: workers moving within or into the European Union – States' obligations and victims' rights, p. 54.

53 Amnesty International, *Exploited labour Migrant workers in Italy's agricultural sector,* pp. 32 and 33.

Spain

With regard to the transposition of the Directive, as mentioned above, Spain reported that national legislation in place was deemed to be in line with the Directive's standards. Issues of compliance could be raised, not only with regard to the adoption of adequate national legislation implementing the Seasonal Workers Directive, and with regard to the enforcement of such measures, but also with regard to more favourable provisions of bilateral or multilateral agreements to be adopted by or already in place between one or more member States and one or more third countries. Such agreements are, according to Article 4 of the Directive, not affected by the provisions of the Directive. When taking a closer look at the relevant Spanish national legislation, it seems that it provides for favourable labour migration arrangements that could benefit from Article 4 of the Directive. These arrangements for the recruitment and employment of seasonal workers from Morocco in Spain date back more than just a few years.[54] Only one aspect of this legislation will be mentioned here: the Spanish-Moroccan arrangements. These arrangements are known to have allowed for guest worker programmes that featured as one of the recruitment conditions the sex of the guest worker (in this case female), or parenthood of minor children: Women applying for participation in the programme were required to produce documents indicating the ages of their children.[55] The compatibility of such arrangements for the recruitment and employment of seasonal workers with the Directive and with EU law on gender equality[56] is therefore questionable.

Article 4 (2) of the Directive provides that, despite the Directive being applicable without prejudice to more favourable provisions of Union law or unilateral or bilateral treaties between the EU and/or its Member States on the one side, and a third country on the other side,[57] Member States still have the right to adopt or retain more favourable provisions for third-country nationals to whom it applies in respect of Articles 18, 19, 20, 23, and 25. The Article, read against the background of this one Spanish example, serves to

54 Z. Ibáñez, M. Acebillo, and M. León (2015), *Voluntary, involuntary and programmed circular migration in Spain: the case of Moroccan workers in the berry-producing region of Huelva (Spain)*, Institut de Govern i Polítiques Públiques, Universitat Autonoma de Barcelona, p. 16.

55 S. Mannon, P. Petrzelka, C.M. Glass, and C. Radel, 'Keeping Them in Their Place: Migrant Women Workers in Spain's Straw-berry Industry', *International Journal of Sociology of Agriculture and Food*, 19(1) p. 98.

56 Articles 2 and 3(3) of the TEU; Articles 8 and 10 of TFEU; Articles 21 and 23 of the Charter of Fundamental Rights of the European Union; Gender Equality Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, 2006 OJ L204/23.

57 Article 4(1) of the Seasonal Workers Directive.

show that, in order to assess the compatibility of Member States' legislation transposing the Directive into national law with the Directive and other relevant EU law, analysing implementation of legislation alone will not suffice. Next to that, all bilateral and multilateral arrangements covering the entry, stay, and employment of third-country nationals for the purpose of seasonal employment in an EU Member State should be scrutinised on a rolling basis – a herculean task indeed, especially considering the Member States' perceived lack of interest in this particular piece of legislation. Yet, it is the only way in which the EU can show that it takes the protection of vulnerable temporary labour migrants on the EU labour market seriously, lest it wants the Seasonal Workers Directive to share the same fate as the Employers Sanctions Directive, discussed by Berntsen and De Lange in this volume.

5 Analysis and Conclusions

This relatively short analysis of several aspects of the EU's Seasonal Workers Directive allows for preliminar[58] conclusions to be drawn with regard to the potential of the Directive to ameliorate the position of TCN seasonal workers on the labour market of the EU Member States bound by the Directive.

Equal Treatment, but Not Quite

The Seasonal Workers Directive, as one of the EU's legislative measures regulating labour migration into the EU Member States, provides minimum standards with regard to the entry, stay, and employment of TCNs for the purpose of seasonal employment in the EU. That it is intended to be mostly a migration management tool is clear from the narrow legal basis of the Directive in Article 79(2) of the TFEU – whereas considering the impact of the Directive and the other labour migration directives on the labour market alone, broadening this legal basis by including the EU's social policy would not only have increased the legitimacy of the Directive, but would have also guaranteed the involvement of social partners as provided by Article 154 TFEU.[59] Such an involvement could have resulted in a regime that provides

58 Preliminary, as concrete results of the adoption, implementation, and application of the Directive are not yet available.

59 Costello, 'EU migration and asylum law: A labour law perspective', in Bogg, Costello, and Davies (Eds.), *Research Handbook on EU Labour Law*, p. 313.

for a better and more effective protection for labour migrants than the minimum standards of measures like the Seasonal Workers Directive. By choosing instead to base the Directive solely on EU competences with regard to the regulation of migration of TCNs further undermines the EU's social and migration management policies, and contributes to the stigmatisation of the seasonal worker as a potential irregular whose situation needs regulation instead of a migrant worker who is entitled to decent work. As things stand now, despite the introduction of Article 23 to the Directive, it is clear that the rights and obligations pertaining to the status of seasonal worker under the Seasonal Workers Directive create a legal regime that is not on a par with that related to EU citizen workers, or indeed to other TCN workers on the EU labour market.[60] This inequality does not only negatively affect TCN seasonal workers, but will also have a negative effect on the local labour force in the long run.[61]

This inequality, created by the cardinal wish of the legislator to benefit from temporary workers without giving too many benefits in return, and thus by obstructing the integration of seasonal workers and compelling seasonal workers to leave when their work is done, make the Directive prone to attract criticism and legal scrutiny. Taking into account that, according to Article 15(3) of the Charter of Fundamental Rights of the EU, 'Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union', and that, furthermore, Article 21 of the same Charter prohibits 'Any discrimination based on any ground' within the scope of application of the Treaties, the Directive in its current form might not have survived the scrutiny of the Court of Justice, if an action for annulment would have been brought before it. In the present situation, the Court can only be called on to assess the validity or interpretation of the Directive through a Member State court's request for a preliminary ruling. This could be the case when, based

60 C. Costello and M. Freedland, *Migrants at work: Immigration and Vulnerability in Labour Law*. The same authors come to a somewhat more nuanced conclusion in their contribution entitled *Seasonal Workers and Intra-corporate transferees in EU Law*, in which they compare the regime of the Seasonal Workers Directive to that of the Intra-corporate Transferee Directive; see J. Howe, R. Owens, et al. (Eds.), (fn. 9), p. 63.

61 A. Goldman, 'Assessing Employment Policies from an Organic Perspective: the Needed Transition from Job Security and Job Welfare to Personal Security and Welfare', in R. Blanpain and M. Weiss (Eds.), *Changing Industrial Relations & Modernisation of Labour Law, Liber Amicorum in Honour of Professor Marco Biagi*, p. 168. Where Goldman finds that migrant workers' enforceable minimum working conditions and rights in the host country protect not only the migrants but also prevent a race to the bottom for domestic workers who are competing for the same work opportunities.

on Member States' implementation measures of the Directive, questions are raised regarding the validity or interpretation of the Directive.

As regards the transposition of the Directive, however, this contribution also shows that most of the Member States have yet to report their (proposed) implementation measures, or their preexisting national legislation that (supposedly) complies with the Directive. This leads to the conclusion that implementing legislation is not in place in most of the Member States bound by the Directive, despite the fact that the deadline for implementation already expired in September 2016. Adopting national legislation regulating the entry, stay, and working conditions of unskilled or low-skilled labour migrants does not seem to be a priority for the national legislator.

Implementation and Enforcement: Law that Remains in the Books

The implementation and enforcement of the Directive leads to a number of issues.[62] First of all, Directives are typically not directly effective and their enforcement depends on (correct) transposition into national law.[63] The previous paragraphs have shown that correct implementation of the Seasonal Workers Directives is presently problematic. Second, in case of incorrect or incomplete implementation by the Member States, the provisions of these Directives are enforceable only in the vertical relation of the individual TCN against the state, and not against another individual such as the employer. Even against the state, the TCN's case is weak, as the directives' provisions are often unclear and leave substantial leeway to the Member States as already mentioned before. In such cases, knowledgeable judges or active legal counsellors could improve the position of the seasonal workers by filing a request for a preliminary ruling. Finally, even correct transposition of the Directive, which will also entail the State ensuring that effective mechanisms through which seasonal workers may lodge complaints against their employers are put in place,[64] does not solve the problem of the precariousness and dependency of the situation that a circular migrant with no particularly coveted set of skills is in with regard to the effective enforcement of his or her rights.[65]

62 A. Kocharov (2011), 'Regulation that Defies Gravity: Policy, Economics and Law of Legal Immigration in Europe', *European Journal of Legal Studies,* 4(2) p. 33.

63 E. Thomann and F. Sager (2017), 'Toward a better understanding of implementation performance in the EU multilevel system', *Journal of European Public Policy,* 24(9).

64 Article 25 of the Seasonal Workers Directive.

65 C. Costello (2016), 'EU migration and asylum law: A labour law perspective', in A. Bogg, C. Costello, and A.C.L. Davies (Eds.), *Research Handbook on EU Labour Law*, Edward Elgar Publishing, pp. 325 and 332.

For the time being, therefore, one can only conclude that it is highly improbable that the adoption of the Directive in 2014 has contributed to a substantive improvement of the position of the TCN seasonal workers in the EU Member States. Once more, or perhaps now more than ever, seasonal workers depend on the vigilance and activism of unions, legal counsellors, and the judiciary to enjoy the protection they need, the decent work they are entitled to,[66] and the rights they deserve as persons on equal footing with their EU and TCN peers.

Bibliography

Amnesty International (2012), *Exploited labour Migrant workers in Italy's agricultural sector.*

Ibáñez, Z.; M. Acebillo; and M. León (2015), *Voluntary, involuntary and programmed circular migration in Spain: the case of Moroccan workers in the berry-producing region of Huelva* (*Spain*), Institut de Govern i Polítiques Públiques, Universitat Autonoma de Barcelona, http://igop.uab.cat/wp-content/uploads/2016/07/UK-National-Report-Spain-Mobile-identities.pdf.

Caruso, F.S. and S. Corrado (2015), *Migrazioni e lavoro agricolo: un confronto tra Italia e Spagna in tempi di crisi, in Colucci and Gallo, Tempo di cambiare.* Rapporto sulle migrazioni interne in Italia, pp. 55-74.

Cauvergne, C. and S. Marsden (2014), 'The Ideology of Temporary Labour Migration in the Post-Global Era', *Citizenship studies*, 18(2) pp. 232-242.

Cholewinski, R. (2015), ´Migration for Employment´, in R. Plender, (Ed.), *Issues in International Migration Law*, Leiden/Boston, Brill, pp. 27-80.

Collett, E. (March 2015), 'The Development of EU policy on immigration and asylum – rethinking coordination and leadership', *Migration Policy Institute Policy Brief Series*, 8.

Costello, C. (2016), 'EU migration and asylum law: A labour law perspective', in A. Bogg; C. Costello, and A.C.L. Davies (Eds.), *Research Handbook on EU Labour Law,* Cheltenham, Edward Elgar Publishing, pp. 299-334.

Costello, C. and M. Freedland (2016), 'Seasonal Workers and Intra-corporate Transferees in EU law', in J. Howe and R. Owens (Eds.), *Temporary Labour Migration in the Global era – The Regulatory Challenges*, Cheltenham, Edward Elgar Publishing, pp. 43-63.

66 The right to decent work, and the obligations to ensure decent working conditions, are recognised by the EU in the preamble of the Seasonal Workers Directive under 7, and by other relevant international organisations such as the ILO; see, e.g., Promoting Decent Work for Migrant Workers, ILO, February 2015.

Corrado, A.; C. De Castro, and D. Perrotta (2017), *Cheap food, cheap labour, high profits: agriculture and mobility in the Mediterranean, in Migration and Agriculture. Mobility and change in the Mediterranean area*, London, Routledge.

Council Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ 2002, L155/17.

Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, OJ 2004, L16/44.

Decreto Legislativo 29 October 2016, n. 203; Attuazione della direttiva 2014/36/UE sulle condizioni di ingresso e di soggiorno dei cittadini di Paesi terzi per motivi di impiego in qualita' di lavoratori stagionali, Gazzetta Ufficiale n.262, 9 November 2016.

Directive 2014/36/EU of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, OJ2014 L94/375.

ECtHR, Andrejeva v. Latvia, Application no. 55707/00, para. 87.

ECtHR, Gaygusuz v. Austria, Application no. 17371/90, para. 42.

European Commission (2001), Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities, COM 386 final.

European Migration Network (2016), *Annual Report on Migration and Asylum,* pp. 38-39.

European Union Agency for Fundamental Rights, Severe labour exploitation: workers moving within or into the European Union – States' obligations and victims' rights, Publications Office of the European Union, 2015.

Falkner, G. et al. (2005), *Complying with Europe: EU Harmonisation and Soft Law in the Member States*, Cambridge, Cambridge University Press.

Fudge, J. and P.H. Olsson (2014), 'The EU Seasonal Workers Directive: When Immigration Controls Meet Labour Rights', *European Journal of Migration and Law,* 16, pp. 465-466.

Goldman, A. (2003), 'Assessing Employment Policies from an Organic Perspective: the Needed Transition from Job Security and Job Welfare to Personal Security and Welfare', in R. Blanpain and M. Weiss (Eds.), *Changing Industrial Relations & Modernisation of Labour Law, Liber Amicorum in Honour of Professor Marco Biagi*, The Hague/New York, Wolters Kluwer, pp. 161-172.

Groenendijk, K. (2014), 'Which Way Forward with Migration and Employment in the EU?' in S. Carrera, E. Guild, and K. Eisele, *Rethinking the Attractiveness of EU Labour Immigration Policies, Comparative perspectives on the EU, the US, Canada and beyond*, Centre for European Policy Studies, pp. 95 and 96.

Hayes, L.; T. Novitz; and P.H. Olsson (2013), 'Migrant workers and collective bargaining: institutional isomorphism and legitimacy in a resocialized Europe', in N.

Countouris and M. Freedland (Eds.), *Resocialising Europe in a Time of Crisis*, Cambridge, Cambridge University Press, pp. 448-465.

Howe, J. and R. Owens (2016), *Temporary Labour Migration in the Global Era*, in Howe and Owens (Eds.), Temporary Labour Migration in the Global Era – The Regulatory Challenges, Oxford/London, Hart Publishing, pp. 3-40.

ILO technical comments on the Proposal for a EU Directive on seasonal employment of migrant workers. Avaliable at: http://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---ilo-brussels/documents/genericdocument/wcms_168539.pdf.

International migration and development, Report of the UN Secretary General (2013, (A/71/296), op cit., para. 113.

Jesse, M. (2016), *The Civic Citizens of Europe: The Legal Potential for Immigrant Integration in the EU, Belgium, Germany and the United Kingdom*, Leiden, Brill.

Kocharov, A. (2011), ′Regulation that Defies Gravity: Policy, Economics and Law of Legal Immigration in Europe′, *European Journal of Legal Studies,* 4(2) pp. 9-43.

Lazarowicz, A. (28 March 2014), *A success story for the EU and seasonal workers' rights without reinventing the wheel*, EPC Policy Brief.

Mannon, S.; P. Petrzelka; C.M. Glass; and C. Radel (2012), 'Keeping Them in Their Place: Migrant Women Workers in Spain's Strawberry Industry', *International Journal of Sociology of Agriculture and Food*, 19(1) pp. 83-101.

Menz, G. (2015), 'Framing the matter differently: the political dynamics of European Union labour migration policymaking', *Cambridge Review of International Affairs*, 28(4), pp. 554-570.

Peers, S. et al. (Eds.) (2012), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition*, Volume 2: EU Immigration Law, Leiden/Boston, Martinus Nijhoff.

Ruhs, M. (2013), *The Price of Rights: Regulating International Labour Migration*, New Jersey, Princeton University Press.

Rijken, C. (2015), 'Legal Approaches to Combating the Exploitation of Third-Country National Seasonal Workers', *The International Journal of Comparative Labour Law and Industrial Relations,* 31(4) pp. 431-451.

Ruhs, M. (2006), *The potential of temporary migration programmes in future international migration policy*, A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration (GCIM.org).

Thomann, E. and F. Sager (2017), 'Toward a better understanding of implementation performance in the EU multilevel system', *Journal of European Public Policy,* 24(9) pp.1385-1407.

Thomson, R.; R. Torenvlied; and J. Arregui (2007), ′The Paradox of Compliance: Infringements and Delays in transposing European Union Directives′, *British Journal of Political Science*, 37, pp. 685-709.

Waldinger, R. and M. Lichter (2003), *How the Other Half Works: Immigration and the Social Organisation of Labor*, Berkeley/Los Angeles/London, University of California Press.

Wessendorf, S. (2010), 'State-imposed Translocalism and the Dream of Returning: Italian Migrants in Switzerland', in L. Baldassar and D. Gabaccia (eds.), *Intimacy and Italian Migration: Gender and Domestic Lives in a Mobile World*, New York, Fordham University Press, pp. 152-170.

UN Human Rights Council, 23rd session, 24 April 2013, Agenda item 3, *Report of the Special Rapporteur on the human rights of migrants, Francois Crepeau,* Regional study: management of the external borders of the European Union and its impact on the human rights of migrants.

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6 Towards Protection of Vulnerable Labour Migrants in Sweden

The Case of the Thai Berry Pickers

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Abstract
This chapter illustrates how the scandals that followed the 2008 reform prompted the authorities and the trade union movement to adopt a – fairly successful – coordinated approach to prevent further exploitation of a particularly vulnerable group of migrant workers – seasonal migrant berry pickers from third countries. The result illustrates that, because labour migration gives rise to specific challenges in efforts to enforce domestic labour standards, the stakeholders responsible for the enforcement of these rights must resort to alternative methods, not used for domestic workers. Olsson also shows that well-targeted immigration control measures, in combination with other activities, can play an important role in strengthening the position of migrant workers.

Keywords: seasonal workers, trade unions, targeted immigration control measures, berry pickers

1 Introduction

Seasonal work is not considered to be particularly attractive for domestic workers in Western economies.[1] Nevertheless, production in need of seasonal

1 International Labour Organization (2010), *International Labour Migration. A rights-based approach'*, Geneva p. 85; COM (2010), 379, Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment, pp. 2-3.

Rijken, Conny and Tesseltje de Lange (eds): *Towards a Decent Labour Market for Low Waged Migrant Workers.* Amsterdam: Amsterdam University Press, 2018
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work continues to take place.[2] Often, this is made possible through an influx of workers through seasonal labour migration schemes.[3] A seasonal migrant worker is commonly understood as 'a migrant worker whose work by its character is dependent on seasonal conditions, and is performed only during part of the year'.[4] In Sweden, one quarter of all third-country national[5] labour migrants, admitted to the Swedish labour market, are seasonal workers who come to pick berries.[6] Their work is similar in many respects to the agricultural work carried out by seasonal migrant workers around Europe[7] – it is short-term, physically challenging, and sometimes dangerous and isolated –, but their environment is a bit different.[8] Instead of working at farms and greenhouses, they pick wild berries that grow in the remote forests in the northern parts of Sweden.

The Swedish labour migration regime was reformed in 2008. The new system is described as the most open labour migration regime within the OECD.[9] Through this reform, any employer, irrespective of branch, can recruit workers from third countries. The reform turned people's attention to the berry-picking industry and opened the door for new, sometimes unscrupulous players.[10] A number of scandals came to light, instances in which berry pickers were left with no remuneration and huge debts.[11] There were even suggestions that some of these workers might be victims of trafficking and so-called 'modern slavery'.[12]

2 COM (2010), n 1, pp. 2-3.

3 ILO, n 1, pp. 29, 85.

4 ILO, n 1, p. 29.

5 'Third-country national' in this context means non-Nordic, non-EEA, or non- Swiss citizens.

6 Statistics published by the Swedish Migration Agency for the years 2016 and 2017. Available at: https://www.migrationsverket.se/Om-Migrationsverket/Statistik/Arbetstagare---de-storsta-yrkesgrupperna.html.

7 ILO, n 1, p. 85; J. Hunt (2014), 'Making the CAP Fit: Responding to the Exploitation of Migrant Agricultural Workers in the EU' *The International Journal of Comparative Labour law and Industrial Relations,* 30(2) pp. 132, 135; See also the judgment from the European Court of Human Rights, *Affaire Chowdury et Autres c. Grèce* (requiete 21884/15) 30 March 2017 para. 139, in which a number of strawberry pickers in Greece were victims of forced labour.

8 C. Woolfson, P. Herzfeld Olsson, and C. Thörnqvist (2012), 'Forced Labour and Migrant Berry Pickers in Sweden' *The International Journal of Comparative Labour Law and Industrial Relations*, 28(2) pp. 147, 152.

9 OECD (2011) *Recruiting Immigrant Workers: Sweden* 2011, OECD, p. 32.

10 C. Woolfson et al., n. 8, p. 152.

11 Ibid p. 153; LO (2013) Fusk och utnyttjande – om avregleringen av arbetskraftsinvandringen, Landsorganisationen i Sverige.

12 L. Vogazides and C. Hedberg (2014), '*Människohandel för tvångsarbete och exploatering av arbetskraft i Sverige: Exempel från restaurang och bärbranscherna*', ADSTRINGO, pp. 69-70.

In some jurisdictions, the approach adopted to handling the exploitation of seasonal migrant workers in the agricultural sector has been to shift priorities 'from securing decent working conditions for agricultural workers, given their especial vulnerability, to combatting irregular migration, forced labour, and human trafficking'.[13] The dangers involved in shifting from an 'employment' agenda to an 'immigration control' agenda, in an effort to protect particularly vulnerable labour migrant groups, has been highlighted, because, ultimately, it may turn out to be damaging to the interests of the majority of workers in this category.[14]

In this chapter, I will illustrate how the scandals that followed the 2008 reform prompted the authorities and the trade union movement to adopt a – fairly successful – coordinated approach to prevent further exploitation of this particularly vulnerable group of migrant workers – seasonal migrant berry pickers from third countries. The result illustrates – as has been described elsewhere – that, because labour migration gives rise to specific challenges in efforts to enforce domestic labour standards, the stakeholders responsible for the enforcement of these rights must resort to alternative methods, not used for domestic workers. The chapter also shows that well-targeted immigration control measures, in combination with other activities, can play an important role in strengthening the position of migrant workers.

The chapter is organised as follows. In section two, the Swedish labour migration regime is presented. In section three, the coordinated measures taken to prevent further exploitation of the berry pickers are discussed; first, measures categorised as immigration control will be dealt with, followed by the innovative trade union strategies adopted. In section four, the role of other stakeholders in promoting decent conditions for the berry pickers is touched upon. In section five, some remaining challenges are discussed, and, finally, in section six, the chapter ends with some conclusions.

13 A.C.L. Davies (2014), 'Migrant Workers in Agriculture – A Legal Perspective', in C. Costello and M. Freedland (eds.), *Migrants at Work,* Oxford University Press, p. 79.

14 A.C.L. Davies, n. 13, p. 79; B. Anderson (2010), 'Migration, Immigration Controls and the Fashioning of Precarious Workers, *Work, employment and society*, 24(2) p. 301; J. Fudge (2012), 'Precarious Migrant Status and Precarious Employment – The Paradox of International Rights for Migrant Workers,' *Comparative Labour Law & Policy Journal*, 34 p. 96.

2 The Rules on Immigration for Seasonal Work: The 2008 Reform[15]

Before the 2008 reform, the entry into Sweden of all groups of labour migrants depended mainly on the outcome of labour market tests carried out by the labour market authorities, together with the trade unions.[16] A permit was available specifically for seasonal work.[17] The wild berry-picking industry, to some extent, operated outside that regime. Berry pickers could stay up to three months on tourist visas and pick wild berries without a work permit.[18] One intention behind the 2008 reform was to establish a labour migration system that would apply in the same manner to all labour migrant groups, including seasonal berry pickers. Thus, the specific work permit for seasonal work was eliminated.[19]

To enter Sweden, a third-country national needs a Schengen visa or a national visa.[20] Stays longer than 90 days, as a main rule, require a residence permit.[21] All third-country nationals who work in Sweden must have a work permit. This applies both if the third-country national is employed in Sweden or continues to be employed by a foreign employer and is posted to Sweden.[22]

This labour migration scheme is purely driven by employer demand. No labour market tests are conducted, no skill preferences based in law or quotas apply, and the system is open to all sectors of the labour market.[23]

15 This section of the text is based on a similar section by this author in (2017) 'The shortcomings of equal treatment for labour migrants' in K. Ahlberg and N. Bruun (eds.), *The New Foundations of Labour Law,* Peter Lang, Frankfurt am Main.

16 OECD, n. 9, p. 57.

17 Ibid p. 58.

18 C. Calleman and P. Herzfeld Olsson (2015), 'Inledning' in C. Calleman and P. Herzfeld Olsson (eds.), *Arbetskraft från hela världen – hur blev det med 2008 års reform?* DELMI, 9 pp. 13-14.

19 Legislative Bill 2007/08:147, p. 34.

20 Aliens Act 2005:716 ch 2 sec 3. A number of exceptions apply, for example, for citizens in EEA countries, Aliens Act 2005:716 ch 2 sec 8a. Citizens from the countries mentioned in this list need a visa to enter Sweden. Available at: http://www.government.se/government-policy/migration/list-of-foreign-citizens-who-require-visa-for-entry-into-sweden.

21 Aliens Act 2005:716, ch. 2 sec. 5. Exceptions apply, for example, to citizens in Denmark, Norway, Iceland, and Finland, citizens of EEA countries, and for those with a visa for longer than three months, Aliens Act (2005:716) ch. 2 sec. 8b.

22 Aliens Act 2005:716 ch. 2 sec 7. Exceptions apply for citizens in Denmark, Finland, Iceland, and Norway, as well as EES citizens, Ch. 2 sec. 8c Aliens Act and for specific categories, Aliens Ordinance 2006:97 ch. 5 secs. 1 and 2.

23 However, the employers must respect the principle of European Union preference. In reality, that only means that the vacancy must have been published on the websites of the Swedish

Individual employers decide whether they need to recruit workers from third countries, but it is the migrant worker who applies for the work permit. For a successful application, the migrant worker needs to receive an offer of employment. To ensure that migrant workers do not replace domestic workers, the terms of employment offered must be similar to those enjoyed by domestic workers.[24] The law therefore prescribes that the worker must be offered a wage, insurance, and other terms of employment that are not worse than those laid down in the relevant collective agreements, or provided for by custom in the occupation or industry.[25]

The Migration Agency makes decisions on work and residence permits. The Agency has designed a form – the *Offer of employment* – that must be filled in and accompany the application for a work permit.[26] In the *Offer of employment* form, the parties must declare whether the employer is bound by a collective agreement, and, in that case, identify the trade union party. It must also specify the wage, working time, applicable insurances, kind of employment (indefinite or temporary), and the period of employment. The combined effect of wage and working time is also important to fulfil the last legal requirement for being granted a work permit. Migrant workers must be able to support themselves, meaning that their total income must be higher than the level for social assistance for maintenance (around 1300 euros per month).[27]

Trade unions are given a specific role in the application procedure. The relevant trade union shall be given an opportunity to verify whether the terms laid down in the offer of employment are in accordance with the collective agreements or custom.[28] The trade unions are given this task as they are familiar with the content of the collective agreements.[29] However, they are not obliged to give their opinion, and the Migration Agency is not bound to follow the opinion given. Some trade unions refrain from giving

Public Employment Service and the European Employment Services for at least ten days. If that is done, the employer is free to offer the job to anyone, Legislative Bill 2007/08:147 p. 36 and Legislative Bill 2013/14:227 p. 8. This requirement does not apply to posted workers, however.

24 Legislative Bill 2007/08:147, p. 27.

25 Aliens Act 2005:716, ch. 6 sec. 2.

26 Available at: https://www.migrationsverket.se/download/18.5e83388f141c129ba6312eab/1485556063715/anst_erbj_232011_sv.pdf.

27 Aliens Act 2005:716 ch. 6 sec. 2; MIGR 2015:11 (Case law from the Migration Court).

28 Aliens Ordinance 2006:97, ch. 5 sec. 7a. Available at: http://www.migrationsverket.se/download/18.5e83388f141c129ba6312b76/1485556063117/233011+Fackligt+yttrande.pdf

29 Legislative Bill 2013/14:227 p. 20.

opinions if the employer is not bound by a collective agreement.[30] The argument in such cases is that the trade unions do not have the means to control whether the offered conditions are in fact applied if there is no collective agreement.[31] In those cases, the Migration Agency must independently verify whether the offered terms are sufficient.

All work permits are temporary. They are granted for the duration of the employment offered, but for a maximum of two years. Work permits may be extended an unlimited number of times, however, the total period may only exceed four years, in exceptional cases.[32] For each extension a new offer of employment is required from an employer. After having worked legally in Sweden for a total of four years within a seven-year period, the migrant worker may be granted a permanent residence permit.[33] In 2016, 1784 foreigners were granted a permanent residence on that ground.[34]

The work permit is tied to a specific employer and to a specific type of work (occupation) for the first two years, but thereafter it is tied only to a specific type of work.[35] If migrant workers want to change employer or type of work, they must apply for a new work permit. That can be done from within Sweden as long as the previous residence permit is still valid.

The work permit and/or residence permit may be revoked if the employment has ceased, and until December 2017 should be revoked if the working conditions applied did not fulfil the requirements of the law; this might mean, for example, that the wage is lower than the wage provided for in the relevant collective agreement. This latter rule was criticised as being rigid, leading to unjust results. Hence, in December 2017 a change entered into force making it possible for the employer to correct mistakes a posteriori and avoid a revocation of the work permit.[36] In case the employment has still not begun four months after arrival of the migrant worker, the permit will be revoked. To ensure that migrant workers are not too dependent on the employers, they can stay in Sweden for three or four months to search for a new job if they lose the job to which the work permit is connected.[37]

30 See, for example, statements by the biggest white-collar trade union UNIONEN. Available at: https://www.unionen.se/rad-och-stod/yttrande-arbetstillstand.

31 The blue-collar trade union for hotel and restaurant workers. Available at: https://www.svd.se/hrf-kraver-kollektivavtal-for-att-ge-arbetstillstand

32 Aliens Act 2005:716, ch. 6 sec. 2a.

33 Aliens Act 2005:716, ch. 5 sec. 5.

34 E-mail from the statistical department at the Migration Agency (26 September 2017).

35 Aliens Act 2005:716, ch. 6 sec. 2a.

36 Aliens Act 2005:716, ch. 7 secs. 3 and 7e. Legislative Bill 2016/17:2012.

37 Aliens Act 2005:716 ch. 7 secs. 3 and 7e.

These rules apply in their entirety to the seasonal berry pickers who are the focus of this chapter, as well as to all other labour migrant groups. Normally, the Thai berry pickers only stay two or three months in Sweden, which means that some provisions are less relevant to them. For example, the short stays make it very difficult for the berry pickers to ever fulfil the conditions for a permanent residence permit.

3 A Coordinated Effort to Prevent Abuse in the Berry-picking Sector

3.1 Introduction

After the 2008 labour migration reform was put into force, reports came to light of grave misconduct and abuse of berry pickers.[38] Since 2014, the situation has improved. The change is connected to a fairly coordinated effort to prevent further abuse. Before explaining the measures taken, however, we shall provide a short introduction to the berry-picking industry in order to clarify the mechanisms involved.

3.2 The Berry-picking Sector

In Sweden, the *Right of Public Access* applies.[39] This means that everyone has a right to access the countryside and freely pick the available wild growing berries, such as blueberries, lingonberries, and cloudberries.[40] Swedish people have always picked berries for their household needs, and, to a certain extent, for commercial purposes.[41] During the past four decades, however, the berry-picking scene has changed character and it has developed into an international industry.[42] Blueberries are rich in antioxidants and are now

38 Woolfson et al., n. 8, p. 148; K. Krifors (2017), '*Managing Migrant Workers – moral economies of temporary labour in the Swedish IT and wild berry industrie*s,' Linköping Studies in Arts and Sciences No. 717 Linköping, p. 79.

39 The instrument of government 1974:152, ch. 2 sec. 15.

40 Swedish Environment Protection Agency. Available at: http://www.swedishepa.se/Enjoying-nature/The-Right-of-Public-Access/This-is-allowed/Picking-flowers-berries-mushrooms-etc/.

41 L. Jonsson and R. Uddstål (2002), *En beskrivning av den svenska skogsbärsbranschen*, Sveriges Lantbruksuniversitet, p. 12.

42 On this theme, see: C. Hedberg (2015), 'Thailändska bärplockare – hushållsstrategier på en global arbetsmarknad', in C Calleman and P. Herzfeld Olsson (eds.), *Arbetskraft från hela världen,* DELMI, p. 119; Krifors, n. 38.

used in the pharmaceutical and beauty industries in Asia.[43] Additionally, most of the berries are currently picked by seasonal labour migrants from Thailand.[44]

The Thai berry pickers, for tax-related reasons, are employed by temporary work agencies in Thailand.[45] The berry pickers employed by these agencies are exempted from paying taxes in Sweden;[46] nevertheless, the Swedish berry companies play a crucial role in this system.[47] 'They order' a specific number of berry pickers from the Thai temporary work agencies; a contract is drawn up between the temporary work agency and the Swedish berry picking company,[48] and the Thai berry pickers deliver the berries picked to the Swedish berry company.[49] It is also this Swedish berry-picking company that offers the employment in Sweden in the work permit application process, and that takes care of all the practical arrangements in Sweden, such as transport and accommodation.[50] The Swedish berry-picking companies sell the berries to merchants, wholesalers, or retailers who take the berries to the world market.[51]

3.3 Increased Immigration Control

After the problematic berry-picking season of 2009, the government and the Migration Agency realised that additional measures had to be taken to prevent further abuse of this group of migrant workers. It turned out that the new rules had not been properly implemented in relation to the berry pickers. This is partly explained by the lack of a useful comparator regarding the offered wage, something to which we shall return in the next section. Hence, the Migration Agency took responsibility for the application

43 Hedberg, n. 42, p. 119; M. Wingborg (2016), *'En alltmer osäker bransch – om villkoren för utländska bärplockare 2016* , Arena Idé, p. 26.

44 M. Wingborg (2016), n. 43, p. 11.

45 Ibid.

46 Act (1991:586) on particular income tax, sec. 6 1a, b; See also Hedberg, n. 43, p. 124; M. Wingborg (2016), n. 43, p. 18.

47 Hedberg, n. 42, pp. 126-127.

48 M. Wingborg (2015), *'Så var säsongen för utländska bärplockare 2015',* Arena idé, p. 8.

49 Hedberg, n. 42, p. 123; M. Wingborg (2016), n. 43, p. 16.

50 Migration Agency Website. Available at: https://www.migrationsverket.se/English/Other-operators-English/Employers/Special-rules-for-certain-occupations-and-citizens-of-certain-countries/Berry-pickers/When-you-are-employing-or-engaging-berry-pickers.html.

51 Hedberg, n. 42, p. 123.

process from the embassies in the countries concerned.[52] However, new scandals took place in 2010, involving unreliable employers and insufficiently informed berry pickers. The latter often did not know what kind of work they would do and were not ready for the hard work expected from them. In 2011, the Swedish Migration Agency therefore introduced targeted controls of the berry pickers' employers or of the Swedish berry companies hiring the berry pickers. Thus, since 2011, before an application for a work permit can be approved, the entity offering the labour migrant employment has to provide the Migration Agency with additional guarantees, such as:

– A guarantee that wages will be paid despite poor availability of berries, or to berry pickers not skilled enough to pick the required amounts. The Migration Agency normally requires a bank guarantee.
– Proof that the berry pickers have been informed about the kind of work they are supposed to do, the working conditions, the *Right of Public Access*, and Swedish road safety rules (they have to drive to the different spots where the berries grow).
– Foreign temporary work agencies must have a representative present in Sweden and register a branch there.[53]

The new controls had some effect, and the 2012 season was fairly calm. However, in 2013, new problems occurred. A number of berry pickers were denied any wages at all and left with debts.[54] Subsequently, employer monitoring was carried out even more thoroughly and, during the 2014 season, four out of sixteen Swedish berry-picking companies were denied the right to bring berry pickers into Sweden through foreign temporary work agencies.[55] Now, the employers/companies hiring berry pickers must show that they are able to organise transport, room, board, and other practical matters in a manner that is customary for the industry. Additionally, all costs that the person employed or hired is liable for, must also be made clear.[56]

52 M. Wingborg (2011), *'Mors lilla Olle – så exploateras asiatiska bärplockare i de svenska skogarna'*, Swedwatch rapport 41, p. 26. Available at: http://www.jureka.net/jureka/read.asp?NewsId=8548

53 M. Wingborg (2011), *'Mors lilla Olle – så exploateras asiatiska bärplockare i de svenska skogarna',* Swedwatch rapport 41, p. 27. Available at: http://www.jureka.net/jureka/read.asp?NewsId=8548).

54 M. Wingborg (2014), *'Villkoren för utländska bärplockare säsongen 2014'*, Arena Idé, pp. 12 and 14.

55 Ibid p. 10.

56 Available at: https://www.migrationsverket.se/English/Other-operators-English/Employers/Special-rules-for-certain-occupations-and-citizens-of-certain-countries/Berry-pickers.html.

The increased checks on employers and companies hiring migrant workers, before work permits are approved, seems to have been effective. During recent seasons, no scandals have been reported. This indicates that immigration control measures targeting the reliability of employers *before* arrival can be an important component of a sustainable labour migration system. However, these measures would have been rather pointless, if not accompanied by trade union efforts. These efforts will be the focus of the next section. First, a short overview of the Swedish labour law model is needed to understand the context in which the trade unions operate.

3.4 Innovative Trade Union Strategies

3.4.1 The Role of Trade Unions and Collective Agreements in the Swedish Labour Market

Collective agreements are the most important sources of norms regulating wages and employment conditions in Swedish law. In 2014, 85 per cent of the labour force in the private sector was covered by collective agreements and 64 per cent were members of a trade union.[57] This is explained by the high level of employer organisation. Organised employers employed 89 per cent of the labour force in 2014.[58] An employer who is a member of an employment organisation is automatically bound by the collective agreements that this organisation has concluded. The terms of the collective agreement have to be applied to all relevant workers employed by the employer, regardless of their trade union membership. However, there is no mechanism for extending the binding force of collective agreements to others in a sector, different than the signatory parties and their members, and thus to give the collective agreement *erga omnes* effect.[59] At the same time, working hours, employment protection and occupational health and safety is also protected by statutory regulation. A crucial feature of the Swedish system, however, is the absence of legislative provisions on minimum wages – a fact that promotes the conclusion of collective agreements.

57 Medlingsinstitutet (2017), *Avtalsrörelsen och lönebildningen 2016, Medlingsinstitutets årsbok,* Medlingsinstitutet, pp. 216 and 222.

58 Ibid.

59 K. Ahlberg and N. Bruun (2005), 'Sweden: Transition through Collective Bargaining' in T. Blanke, R. Blainpain, and E. Rose (eds.), *Collective Bargaining and Wages in Comparative Perspective: Germany, France, the Netherlands, Sweden and the United Kingdom,* Kluwer Law International, p. 122.

Collective autonomy and nonintervention by the state are essential features of the regulation of wages and working conditions in the Swedish labour market.[60] This is also true when it comes to the responsibility for monitoring that the employment conditions laid down in law and collective agreements are applied. This responsibility, with the exception of the monitoring function of the Work Environment Authority, is borne alone by the parties to the collective agreement, the trade union, and the employer organisation or employer. The local trade union's representatives play a crucial role in this process. They often carry out monitoring and take the main responsibility for ensuring that the rights and obligations in a collective agreement are upheld at the work site. If the conditions are not met, the trade union can demand damages in the Labour Court.[61] The Work Environment Authority monitors the application of occupational health and safety provisions, and, if not dealt with in a collective agreement, working time provisions.

3.4.2 Appointing a Responsible Trade Union

In the Swedish system, it is obviously difficult to uphold decent working standards in a sector without the involvement of a trade union. This partly explains the failed enforcement of the 2008 reform in relation to the seasonal berry pickers in the 2009 season. At that point, no trade union had taken on the responsibility to organise berry pickers, or conclude collective agreements applicable to them. The government claimed that bad employment conditions for berry pickers had to be solved mainly by the mechanisms available within the Swedish labour law model.[62] Thus, the trade union movement had to act. In 2009, the Swedish blue-collar trade union confederation LO decided that the Swedish Municipal Workers Trade Union (*Kommunal*) should be allocated responsibility for the berry pickers.[63] They had previously organised seasonal workers working in the agricultural and forest sectors.

3.4.3 Towards a Suitable Collective Agreement

When a responsible trade union was appointed, it was easy to decide which collective agreement should be applied. The collective agreement that

60 Ibid.

61 T. Sigeman and E. Sjödin (2017), *Arbetsrätten- en översikt,* 7th ed., Wolters Kluwer, p. 109.

62 Svar till riksdagsfråga 2011/12:177 Billström Bärplockare och arbetskraftsinvandring; Svar på riksdagsfråga 2011/12:766 till Hillevi Engström.

63 Wingborg (2011), n. 53, p. 28.

Kommunal had with *the Federation of Swedish Forest and Agricultural Employers* was chosen for berry pickers employed directly by Swedish companies, as some were at that time. For those employed by foreign temporary work agencies, the LO collective agreement for temporary work agencies would apply.[64] Through this decision, a minimum wage level was set and the berry pickers were supposed to be guaranteed that level regardless of how many berries they picked. During the 2017 season, their guaranteed minimum wage was around 2100 euros per month before taxes.[65]

The Thai companies are asked to sign the collective agreement for temporary work agencies, and they normally do. However, this collective agreement is developed with other, more regular sectors in mind; it is difficult to make it effective in a sector with so few organised workers. For instance, the right to get access to the work site and check the working conditions normally depends on whether the trade union has any members on the site. Thus, an agreement adapted to the specific circumstances was needed.[66] In 2014, a new, additional collective agreement was drafted to be concluded with foreign companies temporarily active in Sweden. *Kommunal* nowadays only gives opinions on an application for a work permit if the employer, the Thai temporary work agency, has signed this specific collective agreement.[67]

This additional agreement gives *Kommunal* the tools needed to monitor whether the conditions laid down in the main collective agreement are adhered to. It stipulates that the Codetermination Act should apply in full even if *Kommunal* has no members at the work site. According to the Codetermination Act, the trade union has a right to initiate consultations with the employer. The employer is also obliged to keep the trade union informed about developments in the company and any changes that take place.[68] 'The trade union is given a right, through the collective agreement, to inspect working time and the occupational health and safety situation, through visits to the workplace, regardless of whether there are members working there or not. The employers are also obliged to hand over wage lists, picking lists, working time schedules, and other documents demanded by the local trade union. The local trade union, in this case Kommunals regionally based representatives, shall also be given signed employment

64 Woolfson et al., n. 8, p. 170.

65 The figures for 2017 come from an interview with a local Kommunal trade union representative on 7 June 2017.

66 Wingborg (2011), n. 53, p. 7.

67 The collective agreement (Kollektivavtal, Utländska företag, Häng, Fora).

68 Codetermination Act 1976:580, secs. 10, 11, 12, 13, 19.

evidence and employment contracts and monthly compilations of the number of workers and wages paid.[69]

Another important aspect clarified in the specific collective agreement is what wage deductions are permitted. According to the agreement, the employer is responsible for paying costs related to transport from accommodation to the work site, protective clothing, gloves, and hand-based tools that facilitate the picking. Costs for these things must never be deducted from wages. The employer may, however, deduct compensation for food and accommodation of normal standard at cost price.[70]

Through these provisions, it is possible for *Kommunal* to detect inconsistencies with the collective agreement at an early stage and solve problems in Sweden. Hence, the new collective agreement stipulates that, if the parties to the collective agreement cannot solve a dispute themselves, then the dispute shall be referred to a Swedish court: all disputes regarding the interpretation and application of the collective agreement shall be solved by applying Swedish law.[71] This provision is of great importance. It would obviously be much more difficult for the Swedish trade union to uphold the rights laid down in the collective agreement if disputes were to be solved by Thai courts.

3.4.4 Membership Challenges

A challenge many trade unions face in their work to promote fair working conditions for labour migrants is that the latter are often reluctant to become members of a trade union. In the statutes of most trade unions, one prerequisite for representing a worker or promoting their employment rights, is that they are a trade union member. This is also the case for *Kommunal*.[72] The reluctance to become a trade union member can be based on economic reasons – it is expensive to become a trade union member, and, on fears of reprisals and bad experiences from trade union activities back home.[73] Very few of the Thai berry pickers are members of *Kommunal*. To solve the problem of representation, *Kommunal* introduced a new, less expensive membership in 2016 for temporary labour migrants

69 Collective Agreement, n. 68.

70 Ibid.

71 Ibid.

72 Stadgar, Stadgar antagna vid Svenska kommunalarbetareförbundets kongress 2016, § 2 Förbundets ändamål, mom 2 Uppgift.

73 S. Eriksson (2016), *Säsongsarbetaren från tredje land i dag och i framtiden, Examensarbete i civilrätt särskilt arbetsrätt,* Juridiska institutionen Uppsala universitet, p. 33.

with fixed-term employment.[74] The idea was that the local trade union officials should campaign for this membership during the season of 2017.[75] The Thai berry pickers, however, were not interested and none took advantage of this new membership. Thus, the membership challenge remains unresolved.[76]

4 Other Public and Private Stakeholders

Other stakeholders have also played important roles in the effort to establish decent working and living conditions in this sector. The municipalities are responsible for ensuring that the accommodation provided fulfils the legal requirements regarding, for example, health and safety and fire protection. They have the authority to make inspections of the accommodations provided to the migrant workers to this end. When shortcomings are detected, the inspector can choose to issue a pure injunction, combine the injunction with a fine, or issue a ban.[77] In 2016, the municipalities detected a number of shortcomings regarding the berry pickers' accommodation.[78]

Private stakeholders have also been active in promoting decent treatment of the migrant berry pickers. Many companies in the food retail industry have, for example, used a specific *Social Audit*.[79] This code, like certifications, is an instrument of soft law, and enforcement is safeguarded through dialogue. One of the biggest retail companies conducts social inspections to verify that activities fulfil the requirements of the code.[80] Another group of companies use the KRAV certification system, which mainly concerns ecological sustainability but also includes social requirements for the berry-picking sector. This certification is shown on products

74 Statutes adopted 2016. Stadgar antagna vid Svenska kommunalarbetarförbundets kongress 2016, § 4 mom 4 temporary membership.

75 Telephone interview with Jörgen Gustavsson Kommunal on 7 April 2017.

76 E-mail from Jörgen Gustavsson Kommunal, 10 March 2017.

77 See, for example, how the municipalities should organise their work in the report Miljösamverkan i Västerbotten, *Slutrapport Tillfälliga externa boenden* 2014-2015. Available at: http://extra.lansstyrelsen.se/miljosamverkan/SiteCollectionDocuments/Publikationer/2015/2015-tillfalliga-externa-boenden.pdf.

78 Wingborg (2016), n. 43, p. 14.

79 Ibid pp. 3-21.

80 Ibid.

sold in Sweden.[81] Formal enforcement of these instruments, however, is weak.[82]

5 Remaining Challenges

The coordinated activities by the Migration Agency and *Kommunal* have been rather successful. The unscrupulous actors have been driven out of this regulated system but have found other arenas not covered by these rules; some of them deal with free berry pickers.[83]

Many of these free pickers are European nationals using their right to free movement as EU citizens when entering Sweden.[84] They are described as 'free pickers' as they are not officially employed by anyone. They pick their berries as independent actors and sell them directly to the buyers. Currently, it seems that the worst problems with regard to extremely poor living conditions and low income are related to this group. As they are not 'workers' and many do not need a visa or work permit to enter Sweden, it is a challenge for the Swedish authorities and trade unions to improve their situation. This group's situation has been discussed elsewhere by others.[85] The chapters by Schrauwen and Houwerzijl as well as by Cremers and Dekker in this volume also shed light on dilemmas surrounding free movement within the EU.

Some challenges, however, also remain in relation to the Thai berry pickers and the regulated system. The berry pickers normally take loans to pay for their tickets, visas, and other costs related to the journey to Sweden. Those costs correspond to approximately one month's minimum wage. On top of that, they have costs for accommodation and food while working in Sweden. The collective agreement stipulates that the berry pickers will earn the guaranteed wage level if they pick berries up to a certain value. If they pick berries above the minimum requirement, they will earn more

81 M. Wingborg (2015), n. 48, p. 10. More about KRAV available at: http://www.krav.se/english.

82 M. Wingborg (2013), *'Bärbranschen tar krafttag för bättre villkor I blåbärsskogen'*, Swedwatch rapport 60, pp. 7-8.

83 See Section 3.2.

84 Consolidated version of the Treaty of the Functioning of the European Union (2012) OJ C326/56-57, Arts 20-21.

85 M. Wingborg (2016), n. 43, pp. 23 and 32. N. Mesic (2016), 'Paradoxes of European free movement in times of austerity: The role of social movement actors in framing the plight of Roma berry pickers in Sweden' *International Journal of Sociology and Social Policy,* 36(5/6) pp. 289-303; C. Woolfson and N. Mesic (2015), 'Roma pickers in Sweden: Economic crisis and new contingents of austerity' Transfer. *European Review of Labour Research*, 21(1) pp. 37-50.

money. This means that their chances to earn more money depend on the market price of the berries. This price changes from year to year. In recent years, the price has gone down substantially, from two euros to one. The availability of picked berries on the international market has increased due to increased berry-picking activities in the Baltic states, Russia, and Ukraine. The low price has made it more difficult to recruit the Thai berry pickers.[86] Another factor that affects the price is the level of antioxidants, which can change from year to year and from region to region, and is impossible to foresee. As already mentioned, most of the blueberries are sold to the pharmaceutical industry in Asia due to the high amounts of antioxidants.[87] Thus, it is difficult to foresee the price six months ahead, which is normally when the berry pickers apply for the work permits. The allocation of risks involved in this unpredictability is unsatisfactory, and should be fairer in order to ensure that the pickers at least are debt-free when they get home.[88]

Another issue not yet discussed in this chapter is the fact that the berry pickers work very long hours.[89] It is not unusual for a working day to last twelve to fifteen hours. Reports indicate that the berry pickers themselves do not feel exploited, as they would like to earn as much money as possible when they are in Sweden. From their perspective, the travel to Sweden is part of a sustainable household strategy.[90] *Kommunal* also seems to find it challenging to enforce that the working time provisions in the collective agreement are strictly upheld.[91] It is unclear whether the sector would survive a strict application of the working time requirements. On the other hand, it is, of course, quite strange that this particular sector can operate freely outside the legal framework.

A somewhat different challenge is based on other grounds. The open Swedish labour migration system is not uncontroversial. In 2017, the Swedish Minister of Industry and the chairman of LO argued for a reinstatement of the labour market tests in Swedish labour migration law.[92] Their argument is

86 M. Wingborg (2016), n. 43, pp. 15, 25.

87 Ibid p. 26.

88 Hedberg, n. 42, p. 145. M. Wingborg (2016), n. 43, p. 29.

89 Hedberg, n. 42, p. 133; The report on the 2016 season from the local trade union: Kommunal Mellersta Norrland, *Skogsbärsverksamhet 2016 under perioden juni till oktober.*

90 Hedberg, n. 42, pp. 133-134.

91 Kommunal Mellersta Norrland, n. 90.

92 DN DEBATT, Damberg & Thorwaldsson, Vi vill ha nya regler for arbetskraftsinvandring. Available at: http://www.dn.se/debatt/vi-vill-ha-nya-regler-for-arbetskraftsinvandring/.

that we must save easy jobs, like berry picking, for newly arrived refugees.[93] It is still unclear how and whether the labour migration regime will change, but a proposed change in the tax regulations could, if adopted, make it less attractive for the Thai berry pickers to come to Sweden.[94]

6 Conclusions

It is clear that the story about the berry pickers in the Swedish forests confirms research that claims that the exploitation of labour migrants can be explained by the actual regulation of a specific labour market. Fudge and Tham have stressed 'the significance of labour regulation in shaping the quality and conditions of work' in a sector '*and* in creating a sector-specific demand for "low-skilled" migrant labour'.[95] Before 2009, the sector was shaped by a combination of the lack of trade union interest in these workers and favourable tax provisions for employees of foreign temporary work agencies. When new labour migration provisions were adopted, new preconditions evolved, including both new challenges and opportunities. However, step by step, the preconditions for exploitation were removed. The Swedish trade union movement has taken on this sector and adjusted its working methods to its specific circumstances. This, in combination with increased targeted immigration control by the authorities, meaning, in this case, preventive inspection of the employers, has led to a positive result. The last major abuse involving Thai berry pickers was reported in 2013.[96] The coordinated efforts have been successful, but still challenges remain and the system is not uncontroversial. The proposed tax regulation amendment will, and is maybe also intended to, make it less attractive for the Thai berry pickers to come to Sweden. In that case, the berry-picking industry will be left with domestic workers and free pickers. It is not obvious that the Swedish berry-picking industry will survive such a shift.

93 Ibid.

94 Swedish Tax Authorities, Skatteverket, beskattning och betalning av skatt vid tillfälligt arbete i Sverige, Dnr 202 253985 17/13.

95 J. Fudge and J.-C. Tham (2018) 'Dishing Up Migrant Workers for the Canadian Food Services Sector: Labour Law and the Demand for Migrant Workers', *Comparative Labour Law and Policy Journal*, 39 (1) p. 1. See also M. Ruhs and B. Anderson (2008), 'Migrant Workers: Who Needs Them? A Framework for Analysis of Staff Shortages, Immigration and Public Policy' in Ruhs and Anderson (eds.), *Who needs migrant workers?,* Oxford University Press p. 46.

96 M. Wingborg (2016), n. 43, p. 28.

Bibliography

Ahlberg, K. and Bruun, N. (2005), 'Sweden: Transition through Collective Bargaining' in T. Blanke, R. Blainpain, and E. Rose (eds.), *Collective Bargaining and Wages in Comparative Perspective: Germany, France, the Netherlands, Sweden and the United Kingdom,* Kluwer Law International, the Hague pp. 117-144.

Anderson, B. (2010), 'Migration, Immigration Controls and the Fashioning of Precarious Workers', *Work, employment and society,* 24(2) pp. 301-318.

Calleman, C. and Herzfeld Olsson, P. (2015), 'Inledning' in C. Calleman and P. Herzfeld Olsson (eds.), *Arbetskraft från hela världen – hur blev det med 2008 års reform?,* DELMI, Stockholm pp. 2-39.

Davies, A.C.L. (2014), 'Migrant Workers in Agriculture – A Legal Perspective' in C. Costello and M. Freedland (eds.), *Migrants at Work,* Oxford University Press, Oxford pp. 79-97 .

DN DEBATT, Damberg & Thorwaldsson, *Vi vill ha nya regler for arbetskraftsinvandring*. Available at: http://www.dn.se/debatt/vi-vill-ha-nya-regler-for-arbetskraftsinvandring/.

Eriksson, S. (2016), *Säsongsarbetaren från tredje land i dag och i framtiden, Examensarbete i civilrätt särskilt arbetsrätt,* Juridiska institutionen Uppsala universitet.

Fudge, J. (2012), 'Precarious Migrant Status and Precarious Employment – The Paradox of International Rights for Migrant Workers', *Comparative Labour Law & Policy Journal,* 34 pp. 96-132.

Fudge, J. and Tham, J. (2018) 'Dishing Up Migrant Workers for the Canadian Food Services Sector: Labour Law and the Demand for Migrant Workers', *Comparative Labour Law and Policy Journal* 39(1) pp. 1-29.

Hedberg, C. (2015), 'Thailändska bärplockare – hushållsstrategier på en global arbetsmarknad', in C. Calleman and P. Herzfeld Olsson (eds.), *Arbetskraft från hela världen,* DELMI, Stockholm pp. 114-149.

Hunt, J. (2014), 'Making the CAP Fit: Responding to the Exploitation of Migrant Agricultural Workers in the EU', *International Journal of Comparative Labour Law and Industrial Relations,* 30(2) pp. 131-152.

ILO (2010), *International Labour Migration. A rights-based approach,* Geneva.

Jonsson, L. and Uddstål, R. (2002), *En beskrivning av den svenska skogsbärsbranschen*, Sveriges Lantbruksuniversitet/Vindelns Försöksparker Umeå.

Krifors, K. (2017), *Managing Migrant Workers – moral economies of temporary labour in the Swedish IT and wild berry industries*, Linköping Studies in Arts and Sciences No. 717, Linköping.

LO (2013), *Fusk och utnyttjande – om avregleringen av arbetskraftsinvandringen*, Landsorganisationen i Sverige.

Medlingsinstitutet (2017), *Avtalsröreslen och lönebildningen 2016, Medlingsinstitutets årsrapport*, Medlingsinstitutet, Stockholm.

Mesic, N. (2016), 'Paradoxes of European free movement in times of austerity: The role of social movement actors in framing the plight of Roma berry pickers in Sweden', *International Journal of Sociology and Social Policy,* 36(5/6) pp. 289-303.

OECD (2011), *Recruiting Immigrant Workers: Sweden 2011,* OECD Paris.

Ruhs, M. and Anderson, B. (2008), 'Migrant Workers: Who Needs Them? A Framework for Analysis of Staff Shortages, Immigration and Public Policy' in M. Ruhs and B. Anderson (eds.), *Who needs migrant workers?,* Oxford University Press, Oxford pp. 15-52.

Sigeman, T. and Sjödin, E. (2017), *Arbetsrätten – en översikt*, 7th ed., WoltersKluwer Stockholm,

Swedish Tax Authorities (2017), *Skatteverket, beskattning och betalning av skatt vid tillfälligt arbete i Sverige*, Dnr 202 253985 17/13.

Vogazides, L. and Hedberg C. (2014), *Människohandel för tvångsarbete och exploatering av arbetskraft i Sverige: Exempel från restaurang och bärbranscherna*, ADSTRINGO, Council of the Baltic Sea States Task Force against Trafficking in Human Beings, Stockholm.

Wingborg, M. (2011), *Mors lilla Olle – så exploateras asiatiska bärplockare i de svenska skogarna,* Swedwatch rapport 41.

Wingborg, M. (2013), *Bärbranschen tar krafttag för bättre villkor I blåbärsskogen* Swedwatch rapport 60.

Wingborg, M. (2014), *Villkoren för utländska bärplockare säsongen 2014,* Arena Idé Stockholm.

Wingborg, M. (2015), *Så var säsongen för utländska bärplockare 2015*, Arena Idé Stockholm.

Wingborg, M. (2016), *En alltmer osäker bransch – om villkoren för utländska bärplockare 2016,* Arena Idé Stockholm.

Woolfson, C., Herzfeld Olsson, P. and Thörnqvist, C. (2012), 'Forced Labour and Migrant Berry Pickers in Sweden', *The International Journal of Comparative Labour Law and Industrial Relations,* 28(2) pp. 147-176.

Woolfson, C. and Mesic N. (2015), 'Roma pickers in Sweden: Economic crisis and new contingents of austerity', *Transfer. European Review of Labour Research,* 21(1) pp. 37-50.

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7 Asylum Seekers' Limited Right to Work in the Netherlands

Tesseltje de Lange[1]

Abstract
This chapter considers the rights of asylum seekers to work in the EU and the Netherlands. The chapter maps EU and Dutch regulation on labour market access for asylum seekers as it stands and – with regard to the Dutch regulation – what arguments were put forward in its making. Building on the report 'Van azc naar een baan', De Lange argues that the removal of practical impediments to formal employment will limit the attractiveness of the informal labour market, likely to provide less decent work. The chapter concludes that the limited right to work and the obligations of asylum seekers to contribute financially to their reception once income is acquired does not help prepare them for their eventual financial independence.

Keywords: asylum seekers, labour market access, Reception Conditions Directive 2013/33/EU, financial contribution to reception.

1 Introduction

Europe, including the Netherlands, received a large number of asylum seekers in 2015 and early 2016.[2] 74635 requests for asylum were submitted

1 Tesseltje de Lange is assistant professor Administrative and Migration Law at the Law Faculty of the University of Amsterdam and was senior researcher at Tilburg University. This chapter builds on a research report written in 2017 together with Elles Besselsen, Soumaya Rahouti, and Conny Rijken: *Van azc naar een baan. De Nederlandse regelgeving over en praktijk van arbeidsmarktintegratie van vluchtelinge*n, Universiteit van Amsterdam.

2 For the purposes of this study, application of the term 'refugee' is not limited to migrants who have been recognised as such by a state in accordance with the Convention on Refugees. 'Refugees' refers collectively to asylum seekers (migrants who have requested asylum) and

Rijken, Conny and Tesseltje de Lange (eds): *Towards a Decent Labour Market for Low Waged Migrant Workers.* Amsterdam: Amsterdam University Press, 2018
DOI: 10.5117/9789462987555_LANG

in the Netherlands over a two-year period, 54% of requests were granted. In early 2016, more than 44000 people were housed in asylum seekers' reception centres, whereas, in early 2017, the number was down to 25485.[3] The decrease in new asylum seekers is due to the so-called EU-Turkey deal, which effectively sealed the border between Turkey and Greece. A rapid reduction in the processing time for asylum applications ensued, which means that an asylum seeker now has little time to settle in, and possibly to look for work, while awaiting the outcome of the evaluation procedure.

This chapter considers the rights of asylum seekers who are awaiting the outcome of the evaluation of their asylum claim to work in the EU and, more specifically, in the Netherlands. The chapter is based on the report *Van azc naar een baan* (From asylum seekers reception centre into a job) that we presented in spring 2017.[4] The research for this report was conducted over a six-month period starting in September 2016.[5] Although the numbers of asylum applicants have gone down since the EU-Turkey deal, there are at least two reasons to examine the right to work during the asylum procedure in a book discussing decent labour markets and migrant labour. First, Northern Europe could at any time be faced with a renewed influx of asylum seekers. As the economy is on the rise and labour shortages are increasing, asylum seekers may easily find their way into readily available, possibly precarious jobs. The need for workers to fill labour shortages was indeed one of the reasons for Germany's welcoming attitude towards the refugees. The second reason to discuss asylum seekers' access to the labour market is that a legal framework that allows for asylum seekers to work in the formal economy gives them a head start at their successful economic integration in case their application is evaluated positively. Or working will have at least given them a meaningful way to pass their time while awaiting the outcome of the procedure, possibly acquiring skills useful once forced to return. On the other hand, a lack of labour market access is found to delay and possibly obstruct future labour market participation. Examining the

holders of asylum status (migrants who have been granted temporary residence based on an asylum request).

3 COA, *Personen in de opvang uitgesplitst naar leeftijd en land van herkomst*. Available at:https://www.coa.nl/nl/over-coa/cijfers-en-jaarverslagen.

4 T. de Lange, E. Besselsen, S. Rahouti, and C. Rijken (2017), *Van azc naar een baan. De Nederlandse regelgeving over en praktijk van arbeidsmarktintegratie van vluchtelingen*, Universiteit van Amsterdam. Thanks to University of Amsterdam student assistant Andrew Faughan for translating. The research was funded with a research grant from *Instituut Gak*.

5 The research was based on legal analysis of legislation and case law and interviews and focus groups with, amongst others, migrants with a refugee status.

right to work of asylum seekers thus illuminates how host states are caught in a balancing act between interests such as providing jobs for the native workforce and keeping existing welfare arrangements in place on the one hand and, on the other hand, the legal obligations towards the quality of a 'decent' reception of asylum seekers and integration of those who have been offered protection. First, this chapter maps EU and Dutch regulation on labour market access for asylum seekers as it stands and – with regard to Dutch regulations – what arguments were put forward in its making. This section is followed by a discussion of the obligations of asylum seekers to contribute financially to their reception once income is acquired. The final section presents some conclusions and discussion.

2 Right to Work During the Asylum Procedure

Per article 15 of the EU Reception Conditions Directive 2013/33/EU[6], Member States shall ensure that applicants have access to the labour market no later than nine months from the date when the application for international protection was lodged. Member States shall decide the conditions for granting access to the labour market for the applicant, in accordance with their national law. Member states must ensure that applicants have *effective access* to the labour market – access in a purely legal sense without practical access will not suffice. Member States may give priority to Union citizens and legally resident third-country nationals in accordance with their own labour market policies. The Netherlands has chosen not to restrict access based on labour market needs so this restriction is not discussed any further. According to article 15 section 3 of the Receptions Conditions Directive, access to the labour market shall not be withdrawn during appeals procedures in the admission procedure, if the appeal has suspensive effect, until such time as a negative decision on the appeal is notified.

Member states are free to decide how the Directive is to be implemented in national law. This explains why an asylum seeker in Sweden may work immediately upon filing an application, in Germany after three months, in Belgium after four months, and in the Netherlands only after six months.[7]

6 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 lays down standards for the reception of applicants for international protection [2013] OJ L 180.

7 M. den Heijer, J. Rijpma, and T. Spijkerboer (2016), 'Coercion, prohibition, and great expectations: The continuing failure of the Common European Asylum System', *CMLR* 53(3) p. 609; European Commission (2016), *An economic Take on the refugee crisis*, Institutional paper 033 p. 21.

The preamble names two goals why access to the labour market is part of the Reception Conditions Directive: in order to promote *the self-sufficiency* of applicants and to limit wide discrepancies between Member States. To achieve these goals, it is essential to provide clear rules for the applicants' access to the labour market (preamble 23). The standards for the reception of applicants also have to suffice to ensure them a *dignified* standard of living and comparable living conditions in all Member States should be implemented for asylum seekers.

The relevant Dutch legal framework is the Foreign Nationals Employment Act (*Wet arbeid vreemdelingen*, or WAV), which came into force in 1995 and regulates migrants' access to the Dutch labour market. This act is not restricted to labour migration, but also applies to migrants for whom work is not the primary purpose of the stay, as may be the case with asylum seekers and family migrants. The WAV is also aimed at preventing unfair labour competition caused by the illegal hiring of migrants.[8] According to article 2 of the WAV – its key section –, employers not in possession of a work permit for persons from outside the European Economic Area are forbidden from hiring migrants.

The Minister of Social Affairs and Employment has delegated implementation of the WAV to the administration of the Employee Insurance Agency (*Uitvoeringsinstituut Werknemersverzekeringen*, or UWV). The UWV is therefore responsible for implementation of the WAV as well as for issuing work permits for persons from outside the European Economic Area. Before a permit is issued, the so-called priority workforce must be taken into consideration; if anybody already available on the Dutch labour market is able to perform the job, the UWV will not issue a permit, since doing so could potentially cause displacement in the labour market. The UWV also applies the WAV to 'employers' that have not concluded an employment contract.[9] Therefore, it makes no difference whether the 'employer' holds authority over and pays a wage to the individual performing the work – the usual indicators of the existence of an employment contract under Dutch labour law. In terms of the WAV, the fact that the employer has the migrant carry out work is sufficient grounds to assume that the former is, in fact, an employer.[10] The term 'work' is also broadly defined – the prohibition on employment unless a permit is issued also comes into play if a migrant runs a business or does volunteer

8 See, in this volume: L. Berntsen and T. de Lange (2018), 'Employer sanctions: instrument of labour market regulation, migration control and worker protection?'; A. Klap and T. de Lange (2008), 'Marktordening via het werkgeversbegrip van de Wet Arbeid Vreemdelingen', *SMA* p. 390.

9 Art. 1 sub b sub 1 WAV.

10 See L. Berntsen and T. de Lange (2018).

work. Many exceptions apply, such as the unfettered access to the Dutch labour market enjoyed by Union citizens, and the rules that apply specifically to highly skilled migrants, academic scholars, performers, and Asian chefs.[11]

Note must be taken of the fact that, prior to the WAV coming into force in 1995, asylum seekers were not allowed to work, nor was there a specific policy for granting work permits to employ them. However, a work permit could be granted for the employment of an asylum seeker if no priority workforce was available, or if humanitarian reasons so dictated.[12] Whether the work permit would be granted was a balancing act between the interest of the asylum seeker to be employed and the State's interest in protecting the national labour market. At the time, the Dutch ministry of Justice, responsible for deciding on asylum applications, used to object to asylum seekers working because this would result in integration, which may stand in the way of return later on. They also argued that there was the risk of raised expectations [of legal residence] if the asylum seeker were permitted to work. Besides, allowing asylum seekers to work may have a pull-effect on others. After time passed (more like after three years than six months), the balance shifted to the humanitarian reasons pro-labour market access.[13] This individual balancing shifted to a full exclusion of asylum seekers in 1995, a rigid stance that was aborted soon after and would have obviously been precluded under current EU law.[14]

The Dutch regulation of the access to the labour market for asylum seekers can be divided into three stages: the first six months; after six months; and the period thereafter, when the access is again denied.

2.1 Employment During the First Six Months of the Asylum Procedure

During the first six months in an asylum seekers centre, asylum seekers are not permitted to perform paid work, even if their abilities are in demand on the Dutch job market. This is a result of the inflexible categories specified by the Aliens Act and the WAV: a migrant may either file an asylum request or apply for a 'regular' residence permit as a migrant worker or student – but

11 T. de Lange, H. Oosterom, and P. Krop (2016), 'Arbeidsmigratie', in K. Zwaan, *Nederlands Migratierecht*, Boom Juridisch.

12 Chapter B.11.1, section 4.2.1.d of the Aliens Act Implementation Guidelines (Vreemdelingencirculaire 1982), Available at: http://cmr.jur.ru.nl/cmr/.

13 *Parliamentary Documents II*, 1990/1991, 19637, 76, p. 2. Also an editor's note: 'Werkvergunning asielzoekers' (1991) *Migrantenrecht* 2, pp. 39-40.

14 J. Klaver & E. Tromp (2003), *Asielzoekers en werk. Evaluatie van de mogelijkheden van betaald werken in het kader van de Wet arbeid vreemdelingen,* Regioplan, p. 8.

not both. Once an asylum request has been filed, it is no longer possible to file for a regular residence permit (a single permit for work and residence under EU Directive 2011/98) since the asylum seeker will not have been issued a proper visa before arriving in the Netherlands.

This can sometimes prove burdensome. For example, Doctors without Borders sought a workaround when it requested permission for its doctors, who had fled to the Netherlands and applied for asylum, to work. For them to be able to receive a status as a migrant worker (instead of asylum seeker), the Immigration and Naturalization Service (IND) had to waive the visa requirement, which it refused to do, although it could have chosen to do so.[15] However, even if the IND had waived that requirement, access to the job market is the domain of the UWV. Regulations based on the WAV would need to be amended to give the UWV the discretionary power to issue work permits during the first six months of an asylum procedure.[16] While current regulations allow migrant workers and highly skilled migrants to be recruited abroad and come to the Netherlands to work in fields experiencing labour shortages, (promising) asylum seekers already present, awaiting the outcome of their procedures, cannot be hired for those same jobs. If they would have applied for work permits and long-term visas this would have been very time consuming, if successful at all.

So, since 1995, asylum seekers have had to wait six months before they can be employed. There have been repeated calls to allow asylum seekers to work sooner than six months into the procedure. Already in 2000, the Labour Foundation (*Stichting van de Arbeid*) attempted to convince the government to drop its objections to granting asylum seekers broader access to the jobs market[17]:

> Paid labour provides asylum seekers with something to fill their days, provides them with an income, allows them to maintain their skills, and should in theory make them better able to stand on their own two feet once the asylum procedure has drawn to a close, whether in the Netherlands or elsewhere. The current common perception is that a majority of asylum seekers cannot find work.[18]

15 Interview UWV. See also Art. 16 first para., sub a Aliens Act.

16 Art. 8 first para., sub e WAV is currently phrased in the imperative. The optional exception provided in art. 9 WAV should be able to be applied to asylum seekers.

17 Stichting van de Arbeid, Recommendation letter (SA 0007896/HA, 2000).

18 Ibid.

As far as we know, no research has been performed to support the claim that earlier labour market access, as is the practice in some other EU countries, serves to attract an increasing number of asylum applicants.[19] The argument should not, thus, serve to legitimise the decision to refrain from easing the requirements governing access to the jobs market during the asylum procedure.

Even before 1995, the choice not to give asylum seekers access to the labour market was under attack. In WRR's 1989 report 'Allochtonenbeleid' (ethnic minorities policy), it was proposed that asylum seekers be allowed to work as early as two months after submitting an asylum application, subject to certain conditions. The WRR emphasized that it was in everyone's best interest that newcomers integrate as quickly as possible into Dutch society.[20] They should therefore be allowed to work, if necessary, in specially designed work projects. The two-month waiting period would discourage de facto labour migration, allaying fears that the proposal, if implemented, would only serve to encourage asylum applications. The WRR furthermore speculated that the proposal would spare asylum seekers from boredom and allow them to provide for their own income, which would, in turn, decrease government expenses. The government in power at the time did not wish to grant work permits automatically and held to its policy of granting them sparingly. It was argued that[21], if asylum seekers were allowed to integrate *too* well, it would prove difficult to repatriate them later on if an asylum application was ultimately denied.

In 2014, the Dutch Advisory Committee on Migration Affairs published a report 'Lost time' pleading for more opportunities to work during this initial period.[22] In 2015 a joint policy brief 'No time to waste' issued by three prominent institutions[23] amongst them the Dutch Scientific Council for Government Policy (*Wetenschappelijke Raad voor het Regeringsbeleid, WRR*) also called for expedited labour market access. Policy attention has

19 For instance, in Belgium, asylum seekers have labour market access after four months into the application procedure. In 2016, only 3.6% of those eligible for labour market participation actually worked. N. Lambrecht, M. De Vos, and I. Van de Cloot (2016), *Arbeidsmarkt integratie van vluchtelingen: de klok tikt*, Itinera.

20 WRR (1989), *Allochtonen beleid*, report to the government.

21 *Parliamentary Documents II*, 1990/1991, 19637, p. 76.

22 ACVZ (2013), *Verloren Tijd.*

23 WRR, WODC, and SCP (2015), *Geen tijd verliezen: van opvang naar integratie van asielmigranten*, Policy Brief 4.

been targeted at stimulating voluntary work by asylum seekers instead.[24] The waiting time of six months has remained.

2.2 Inclusion after Six Months and Exclusion Again after Six Months of Work

So, only after the first six months of the asylum procedure in the Netherlands have passed, is the asylum seeker is allowed to work – as long as the employer has obtained a work permit from the UWV.[25] The main requirement for a work permit is that the asylum seeker must still be entitled to the facilities provided by the Central Agency for the Reception of Asylum Seekers (Centraal Orgaan opvang Asielzoekers, or COA). The WAV explicitly states that the reason for allowing migrants to work is to improve the quality of their stay during the asylum procedure. The work permit procedure is simplified, no labour market test applies, there is no need to work enough hours to sustain oneself, and, if general sectoral quota are in place, these do not apply in the case of the employment of asylum seekers. The limits are set in subordinate legislation, requiring the job is performed under market-conforming conditions and not for more than 24 weeks.[26] There are no sectoral restrictions, but for jobs as an artist, musician, on a movie set, or as a technician supporting artists or musicians, the maximum duration is fourteen weeks.

The limited duration of the employment is justified by the government for two reasons. First, because of the national welfare arrangements that become available after the passing of time. Working more than 24 weeks out of 39 weeks would lead to an entitlement to unemployment benefits. One condition for receiving unemployment benefits is the availability on the labour market and the use of – at the time – state-led employment services. According to the Dutch government: 'an unemployment benefit claim does not match with the stage in the asylum claim evaluation procedure in which no final decision has been taken on legal residence or return.'[27] The other reason is because, according to the Dutch government, the prospect of

24 T. de Lange (2018), 'Vrijwilligerswerk door vreemdelingen: klem tussen botsende beleidsvelden', in: *Nieuwe wegen voor vluchtelingen in Nederland*, AUP: Amsterdam; zie ook Bakker, L. e.a. (2018). *Vrijwilligerswerk: stimulans voor tijdige participatie en integratie? Monitor- en evaluatieonderzoek vrijwilligerswerk door asielzoekers en statushouders die in de opvang verblijven*, Significant voor het Ministerie van Sociale Zaken en Werkgelegenheid. Barneveld.

25 Art. 8 para. 2 WAV.

26 Art. 2a *Besluit uitvoering* WAV.

27 *Parliamentary Documents II*, 1999/2000, 26800 VI, 53, pp. 2-3.

unrestricted employment would act as a magnet for (bogus) refugees. The Netherlands is the only country in the EU that limits the length of labour market access once access is granted.[28] The Dutch 24-week rule might very well be a violation of article 15 paragraph 3 of the Reception Conditions Directive, which states that access to the labour market, once granted, shall not be withdrawn during (appeals) procedures.[29] Furthermore, the Directive does not allow for asylum procedures to last longer than six months. As of late 2015, only 605 people had been waiting for more than a half year.[30] in the first eleven months of that year, the UWV issued 51 (and denied 33) work permits to asylum seekers whose procedures had passed the six-month mark. Applications, either first-time or extensions, were denied because either or both the COA and IND had failed to state a reason for the length of the procedure, because wages below the legal minimum had been offered, or because the 24-week work limit had already been reached.[31]

2.3 Testing the Waters

At the time of writing, a test case was brought before the Dutch District Court of Haarlem, to determine whether the 24-week rule violates European Union law.[32] From the case file, we can report as follows. It is the case of Ahmad, an Iraqi, who has been waiting for more than six months for a decision on his application for asylum. He is 30 years old, and trained as a welder and construction worker. With the help of his attorney, he has found a position at a firm devoted to helping unemployed construction workers get back to work. The labour contract offered is for twelve months. A request was filed for a work permit valid for twelve months and, failing that, for 24 weeks. The UWV indeed issued a 24-week permit. When it was pointed out that the 24-week permit was in violation of European law, the UWV answered: 'The regulation quite specifically states that an asylum seeker may work no more than 24 weeks.' The 'regulation' referred to by the UWV is, of course, the Dutch regulation; the European Reception Condition Directive was not

28 European Commission (2016), *An economic Take on the refugee crisis* (Institutional paper 033) p. 23.

29 T. de Lange and C. Rijken (12 January 2016), 'Asielzoeker kan eerder aan de slag', *Opinie Volkskrant*, Amsterdam.

30 More recent data on the number of months it takes to process applications is not readily available to the public.

31 Correspondence with the UWV, 1 November 2016.

32 A hearing was scheduled at the end of November 2017, so, unfortunately, the results of the procedure could not be reported here.

mentioned by the UWV. The attorney filed an objection on behalf of both Ahmad and his employer.

In its ruling on the objection, and in direct response to the complaint that European law had been violated, the UWV acknowledged the EU Reception Conditions Directive, stating that adequate access to the job market had been provided, but that it nonetheless lacked the discretionary power to deviate from current regulations. This ruling was then taken to the court. While awaiting the court's hearing, Ahmad's asylum application was denied in final. The Court decided to dismiss the case on formal grounds (due to lack of procedural interest).[33] It thus remains uncertain if EU law precludes the Dutch limited labour market access of only 24 weeks.

3 Income Acquired Is to Pay for Reception

Next, we will discuss what comes of the income acquired by the asylum seeker. Article 17 of the Reception Conditions Directive states that Member States shall ensure that material reception conditions provide an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health. Member States may require applicants to cover or contribute to the cost of material reception and health care if they have sufficient resources, for example, if they have been working for *a reasonable period of time*. The Netherlands provides asylum seekers with a material means of existence, but seeks reimbursement once an asylum seeker starts to earn income, per the Asylum Seekers Provisions Regulations 2005 (*Regeling verstrekkingen asielzoekers 2005*, or Rva) and the Asylum Seekers Personal Contribution Regulations 2008 (*Regeling Eigen bijdrage Asielzoekers 2008*, or Reba).

Under the Rva, asylum seekers are provided with housing and a general allowance. Other expenses, such as travel, can be reimbursed. If asylum seekers have income, they are expected to help defray the expenses of room and board while at the asylum reception centre.[34] The Dutch regulation does not take into account whether the income is steady or merely occasional, thus, it leaves little discretion to the COA.[35] The COA cannot formally deviate from the requirement to recover that income. However, article 17 of the Reception

33 District Court Haarlem, case no. 17/5350, 22 February 2018 (not published).

34 Article 3b Reba and article 3a Reba.

35 Per article 20 of the Rva, in conjunction with article 5 of the Reba, an asylum seeker who enjoys any income whatsoever *must* reimburse housing expenses and the allowance.

Conditions Directive could be construed to mean that it is only possible to require asylum seekers to contribute to their own room and board if they have worked for a *reasonable* length of time.[36] Occasional income, such as income earned when participating in a workplace reintegration project, would not incur an obligation to surrender earnings, making participation in such a programme more appealing to asylum seekers. In this respect, Dutch regulation appears to conflict with the Directive.

The following examples show that the income an employed asylum seeker living in an asylum reception centre can expect to keep after reimbursing the COA is determined by the number of dependent family members. Asylum seekers with dependent family members are allowed to keep such a small portion of their earnings that it has been reported that they often just refuse employment.[37] The regulation discourages asylum seekers from accepting job offers – the earnings they are allowed to keep do not make it worth their while. The following three examples are extrapolated from previously mentioned Ahmad's monthly salary; 25 percent of earned income, with a maximum of € 196, is exempt.[38]

Figure 1 Amounts withheld from the salary of a single asylum seeker working full-time

	Income	Reimbursement amount	Remarks
After tax salary 40-hour work week	€ 1,463.48		25% of salary (max. € 196) exempt
Meals		– € 252.48	= 58.31 x 4.33
Room		– € 216.50	= 50 x 4.33
Total reimbursement to COA		– € 468.98	
Net income	**€ 994.50**		

In Figure 1, we see that Ahmad, single and with no dependents, is allowed to keep € 994.50 of his monthly earnings, which makes it worth his while to hold a job. He contributes € 216.50 monthly for his room and € 252.48 for meals. The COA pays for his health insurance. Travel expenses might prove prohibitive if not reimbursed.

36 Art. 17 para 4 Reception Conditions Directive 2013/33.

37 A. Stoffelen (11 November 2016), 'Asielzoekers weigeren werk door eigen bijdrage opvang,' *Volkskrant*, Amsterdam.

38 Article 5, para 3 and 4 Reba.

Figure 2 Amounts withheld from the salary of a married asylum seeker with two children, working full-time

	Income	Reimbursement amount	Remarks
After tax salary 40-hour work week	€ 1,463.48		25% of salary (max. € 196) exempt
Meals		– € 710.12	44.70 x 4.33 x2 = 387.10 37.30 x 4.33 x2 = 323.02
Room		– € 433.00	50 x 4.33 25 x 4.33 12.5 x 4.33 12.5 x 4.33
Total reimbursement to COA		– € 1,143.12	
Net income	**€ 320, 36**		

Source: based on examples provided by the COA

In Figure 2, we see that, if Ahmad has a wife and two children, he is only allowed to keep € 320.36 of his monthly full-time salary. The monthly contribution for a family of four is € 433 for room and € 710.12 for meals. The family would not receive child benefits, but would receive an extra allowance for the children. Travel expenses could have a negative effect on the net income, but, if his wife also has a job, no additional contributions are required.

The COA is not always able to recover the amounts due.[39] Within six weeks of receiving a pay slip, the COA issues a decision specifying the amount of the personal contribution, but, by that time, the money has often already been remitted to family left behind in the country of origin – for their support or perhaps to pay the travel expenses to be incurred by family reunification. The COA collected € 178,000 in 2014 and € 109,000 in 2015 in personal contributions from asylum seekers housed in an asylum seekers reception centre.[40] No data is available that explains the decline, but it could be due to the greater number of residence permit holders moving on from an reception centre to be housed by a municipality, because fewer asylum seekers and residence permit holders have work, or simply because there are fewer personnel available to recover the amounts due.

39 Interview and correspondence with the COA.

40 The COA's financial accounts for 2015 is available at: https://www.coa.nl/.

In the course of our research, it became clear that asylum seekers do not object to covering a portion of the expenses incurred for their room and meals, or (partially) paying back allowances. They did, however, often complain that it was difficult to save for an education or for the purchase of the equipment they might need – e.g., a laptop, tools, work clothes – to establish financial independence, especially if they were only able to find occasional work. The administrative burden faced by an employer requesting a work permit for perhaps only a few days' work, and by asylum seekers who have to report their income to the COA only to end up with scant financial gain, remains a major obstacle on the path to finding work while in the reception centre. This encourages undeclared work – or work for less than the minimum wage – in violation of the Foreign Nationals Employment Act. The high personal contributions to the COA end up discouraging asylum seekers from taking work, especially those with large families. We have heard stories of asylum seekers (and resident permit holders still housed in an asylum reception centre) turning down job offers because they cannot keep most of their earnings, have to do too much paperwork, must cover their own travel expenses, or because there is little to no chance of being transferred to an asylum seekers reception centre nearer to the job they have been offered.

Finally, it must be noted that the fact that, in some cases, it hardly pays to work is not a problem unique to asylum seekers and residence permit holders. It affects everyone working in the Netherlands at or near minimum wage who compares his or her meagre earnings to the (welfare) benefits and allowances he or she could otherwise claim.

4 Asylum Seekers at Work: Not Without Risks

The debate on whether to expand or restrict access to the job market frequently overlooks the fact that certain asylum seekers are particularly vulnerable to exploitation. They are generally unaware of Dutch labour law and may struggle to pay back debts accumulated during their journey.[41] This makes them more likely to accept work for lower wages than are considered appropriate in the Netherlands, and subject to worse working conditions.

41 J. O'Connell Davidson (2013), 'Troubling freedom: migration, debt, and modern slavery', *Migration Studies,* 2 pp. 176-195; H. Lewis and L. Waite (2015), 'Asylum, Immigration Restrictions and Exploitation: Hyper-precarity as a lens for understanding and tackling forced labour', *Anti-Trafficking Review*, 5 pp. 49-67.

Cognizant of such risks, the European Commission recommends that Member States should not keep asylum seekers waiting for more than six months before granting them access to the job market.[42] During our research period, we became aware of only one such incident: in 2016, a laundry in Zaandam was shut down following allegations that asylum seekers were being exploited.[43] The asylum seekers were initially housed in an reception centre, but bedding and a provisional kitchen observed during a workplace inspection indicated that they were actually living at the laundry. The asylum seekers had been promised an hourly wage of ten euros, but it was reported that they were actually paid 4.50 euros, and occasionally nothing.[44] Early 2018 the laundry shop owner was convicted for labour exploitation equaling trafficking of the asylum seekers.[45] We were also informed that the COA refuses requests from businesses to 'hand over' asylum seekers when the business is seeking labourers, if it seems unlikely that labour regulations will be observed properly. Reports of abuse and exploitation since the recent influx of asylum seekers to the Netherlands are, however, too anecdotal to warrant any conclusions.

5 Discussion

An efficient asylum procedure is a precondition for successful economic integration, but, if the procedure drags on for too long, the time spent waiting should be put to good use – hanging around in an asylum seekers' residence centre can be detrimental to one's health. It is the current common finding that speedy access to the job market encourages the social integration of those allowed to stay, and helps prepare those who must repatriate for the inevitable.[46] Asylum seekers are not allowed to work during the first six

42 L. Slingenberg (2014), 'Asylum seekers' access to employment: Tensions with human rights obligations in the recast of the directive on reception conditions for asylum seekers', in C. Matera and A. Taylor (eds.), *The Common European Asylum System and Human rights: enhancing protection in times of emergencies*, Cleer Working Papers p. 96.

43 The COA reports suspected exploitation to the IND's Expertise Centre for Human Trafficking and Human Smuggling (Expertisecentrum Mensenhandel en Mensensmokkel).

44 Arrests made in connection with the exploitation of refugees, news bulletin issued by the Inspectorate of the Ministry of Social Affairs and Employment, 10 November 2016. In another incident, an asylum seeker was hired to work without pay in a bar and grill. Available at: http://www.nhnieuws.nl/nieuws/196626/grillroom-en-steakhouse-dicht-na-ontdekking-syrische-asielzoekers.

45 District Court Amsterdam, 22 March 2018, case nr. 13/845229-16, ECLI:NL:RBAMS:2018:1637.

46 WRR, WODC, and SCP (2015), *Geen tijd verliezen: van opvang naar integratie van asielmigranten*, Policy Brief 4.

months of the asylum procedure but, as of 2017, few need to wait that long. It has been argued that, in the interest of their speedy integration, asylum seekers should be allowed to support themselves with paid employment if a decision takes longer than two months. Research has not revealed any heightened risk of displacement on the job market stemming from abuse of the asylum procedure. Nonetheless, any potential risk could be alleviated by granting staggered access to the job market. Our first recommendation in *Van azc naar een baan* thus laid out how staggered access to the job market could be implemented. Potential employers may apply for a work permit once an asylum seeker's application procedure extends beyond, for instance, two months. In this early stage, possibly the permit will only be granted if it does not displace priority workforce on the job market. The job market assessment may be dispensed with if a salary has been offered above the standard wage level that applies to highly skilled workers. Next, all asylum seekers should be allowed to work if the procedure exceeds four months, provided a work permit has been issued, but no longer subject to assessment of the job market. The 24-week limit on work in any six-month period is an unnecessary impediment to the integration of migrants on the job market, and is most likely in violation of the Reception Conditions Directive. We therefore recommend that the 24-week limit should be eliminated, in spite of the risk that rights to unemployment benefits could accrue. Unemployment benefits could be converted into 'repatriation compensation' in the event that an asylum application is denied. If asylum is granted, insurance premiums end up in the appropriate social insurance fund.

The mandatory contributions for room and board dictated by the Rva and the Reba tend to discourage asylum seekers and residence permit holders living in an asylum reception centre from seeking paid work. The COA is currently not allowed to deviate from the stipulations of the Reba. This is also in violation of the Reception Conditions Directive, article 17 para 4, which states that Member States *may* require applicants to contribute to the cost of the material reception conditions if they have sufficient resources, for example, if they have been working for a reasonable period of time. The Reba, however, requires asylum seekers who enjoy any income whatsoever to surrender it, no matter how long they have worked. Especially for asylum seekers with families, this arrangement makes work less attractive. Delays in settling amounts connected to implementation of the Reba occasionally cause asylum seekers to leave the reception centre still carrying debts to the COA. This makes them vulnerable to abuse and exploitation. Therefore, we recommend that the Reba should be amended to allow the COA greater discretion in deciding, pursuant to the Reception Conditions Directive,

whether to require a personal contribution taken from wages earned. This will make it more financially worthwhile for asylum seekers to engage in paid work while residing in an reception centre, and will help prepare them for their eventual financial independence.

Financial gain is not the only driving force behind a desire to work. Both asylum seekers *and* the bureaucracy need to commit to making it possible to engage in – formal – paid labour. The Reception Conditions Directive, however, obliges the Netherlands to take it a step further and grant effective access to the job market. In our report *Van azc naar een baan,* we thus recommend to remove the practical impediments to employment as we feel this will also limit the attractiveness of the informal labour market, likely to provide less decent work.

Bibliography

Bakker, L., Bekkers, R., Reitsma, R., Sederel, C., Smets, P., & Younes, Y. (2018), *Vrijwilligerswerk: stimulans voor tijdige participatie en integratie? Monitor- en evaluatieonderzoek vrijwilligerswerk door asielzoekers en statushouders die in de opvang verblijven*, Significant, Barneveld, voor het Ministerie van Sociale Zaken en Werkgelegenheid.

Berntsen, L. and T. de Lange (2018), 'Employer sanctions: instrument of labour market regulation, migration control ánd worker protection?' in C. Rijken and T. de Lange (2018), *Towards a Decent Labour Market for Low Waged Migrant Workers,* Amsterdam University Press.

COA, *Personen in de opvang uitgesplitst naar leeftijd en land van herkomst*. Available at: https://www.coa.nl/nl/over-coa/cijfers-en-jaarverslagen.

European Commission (2016), *An economic Take on the refugee crisis*, Institutional paper 033.

Heijer, M. den; J. Rijpma; and T. Spijkerboer (2016), 'Coercion, prohibition, and great expectations: The continuing failure of the Common European Asylum System', *CMLR,* 53 pp. 607-642.

Klap, A. and T. de Lange (2008), 'Marktordening via het werkgeversbegrip van de Wet Arbeid Vreemdelingen', *Sociaal Maandblad Arbeid*, pp. 390-396.

Klaver, J. and E. Tromp (2003), *Asielzoekers en werk. Evaluatie van de mogelijkheden van betaald werken in het kader van de Wet arbeid vreemdelingen,* Regioplan.

Lambrecht, N.; M. de Vos; and I. Van de Cloot (2016), *Arbeidsmarkt integratie van vluchtelingen: de klok tikt*, Itinera.

Lange, T. de (2018), 'Vrijwilligerswerk door vreemdelingen: klem tussen botsende beleidsvelden', in: *Nieuwe wegen voor vluchtelingen in Nederland*, AUP: Amsterdam.

Lange, T. de; E. Besselsen; S. Rahouti; and C. Rijken (2017), *Van azc naar een baan. De Nederlandse regelgeving over en praktijk van arbeidsmarktintegratie van vluchtelingen*, Universiteit van Amsterdam.

Lange, T. de; H. Oostrom; and P. Krop (2016), 'Arbeidsmigratie', in K. Zwaan ed., *Nederlands Migratierecht*, Boom Juridische Uitgevers.

Lange, T. de and C. Rijken (12 January 2016), 'Asielzoeker kan eerder aan de slag', *Opinie Volkskrant*.

Lewis, H. and L. Waite (2015), 'Asylum, Immigration Restrictions and Exploitation: Hyper-precarity as a lens for understanding and tackling forced labour', *Anti-Trafficking Review,* 5 pp. 49-67.

Migrantenrecht (1991) 'Werkvergunning asielzoekers', *Migrantenrecht* 2, pp. 39-40.

O'Connell Davidson, J. (2013), 'Troubling freedom: migration, debt, and modern slavery', *Migration Studies,* 2 pp. 176-195.

Slingenberg, L. (2014), 'Asylum seekers' access to employment: Tensions with human rights obligations in the recast of the directive on reception conditions for asylum seekers', in C. Matera and A. Taylor (eds.), *The Common European Asylum System and Human rights: enhancing protection in times of emergencies*, CLEER Working Papers, p. 96.

Stichting van de Arbeid, Recommendation letter (SA 0007896/HA, 2000).

Stoffelen, A. (11 November 2016), 'Asielzoekers weigeren werk door eigen bijdrage opvang', *Volkskrant*.

WRR, WODC, and SCP (2015), *Geen tijd verliezen: van opvang naar integratie van asielmigranten*, Policy Brief 4.

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Section 3

Imbalances and Vulnerabilities

8 When Bad Labour Conditions Become Exploitation

Lessons Learnt from the Chowdury Case

Conny Rijken

Abstract
This chapter explains how exploitation is related to practices of slavery, forced and compulsory labour, and trafficking in human beings. Understanding the different types and levels of abuse of workers and how such practices are legally qualified help to distinguish between bad labour conditions and exploitation. Rijken pays special attention to the recent case of *Chowdury et al., vs Greece* in which the European Court of Human Rights (ECtHR) clarified some aspects related to forced labour but left others untouched. Based on the concepts of consent, coercion, and vulnerability, Rijken provides a framework that can be used to determine when a situation is qualified as exploitation.

Keywords: labour exploitation, forced labour, Chowdury case, slavery, human trafficking

Introduction

Decent work can turn into bad labour and bad labour can degenerate into labour exploitation. A situation of labour exploitation is not static, nor are bad labour and decent work. Migrant workers, especially those at the low end of the labour market, are more prone to end up in a situation of exploitation caused by a complex array of (interrelated) factors, such as labour market demands for flexibility and migration opportunities, which

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flourish in today's globalised world.[1] When migrant workers are in the host country for only a limited period of time, it is more difficult for them to become familiar with their (labour) rights, to execute these rights, and they have fewer chances to be subjected to control by monitoring bodies.[2] Because of a lack of job opportunities and dire economic situations in their home countries, migrants may be willing to try their chances in another country, even under bad working conditions. These factors increase their vulnerability to be exploited. Apart from this more or less voluntary entry into exploitative working conditions, the exploitation of a person can also imply explicit involuntariness, pressure, and even force. The term 'exploitation' is easily used to point at practices in which labour laws are violated. In legal terms, however, it is not clear when bad labour practices qualify as exploitation.[3] On both national and international levels, academics, legislators, and practitioners struggle to clarify this term. In some countries, exploitation of persons, as such, is a criminal offence, while, in many other countries, exploitation is seen as the negative outcome or intent of the crime of human trafficking. Whether and how exploitation is related to practices of slavery, forced and compulsory labour, and trafficking in human beings still needs further scrutiny. This chapter aims to contribute to this process and will explain the different types and levels of abuse of workers and how such practices are legally qualified. It argues that exploitation is an overarching term including different forms of abuse in labour situations and a practice at the very end of the continuum of decent work, bad labour conditions, and exploitation. It will pay special attention to the recent case of *Chowdury et al., vs Greece,* in which the European Court of Human Rights (ECtHR) clarified some aspects of the discussion but left others untouched. Another important development at the international level is the adoption of the protocol to the Convention on forced and compulsory labour adopted by the ILO in 2014. The added value of this protocol will also be addressed in this chapter. First, the legal definition of labour exploitation

1 B. Anderson and J. O'Connell Davidson (2003), *Trafficking – A Demand Led Problem? A Multi Country Pilot Study,* International Organisation for Migration; A. van den Anker and I. van Liempt (eds.) (2012), *Human Rights and Migration. Trafficking for Forced Labour*, Palgrave Macmillan; H. F. Chang (2008), 'The Economics of International Labour Migration and the Case for Global Distributive Justice in Liberal Political Theory', *Cornell International Law Journal*, p. 1.

2 D. Mccann and J. Fudge (June 2017), 'Unacceptable forms of work: A multidimensional mode', in *International Labour Review*, 156(2) pp.147-184.

3 European Agency on Fundamental Rights (FRA) published its report (2015) *Severe Labour Exploitation: Workers Moving within or into the European Union, States' Obligations and Victims' Rights*.

will be explored, followed by a discussion of the Chowdury case. The chapter continues with the factors that determine the dividing line between bad labour conditions and exploitation. The reasons to distinguish between these two are: first, because practices of exploitation are a criminal offence in most jurisdictions, which implies competences for law enforcement authorities. Bad labour conditions are most often considered violations of labour law. Second, because exploitation is the detrimental outcome or the very aim of human trafficking and combating it implies specific obligations to protect its victims and to prevent the phenomenon.

Labour Exploitation: Forced Labour, Slavery, and Servitude

The term (labour) exploitation is often used, but rarely defined.[4] In some countries, a mere violation of labour rights is considered exploitation, whereas, in other countries, only cases of severe violation qualify as such, albeit without further defining such severity.[5] Questions as to whether or not coercion is a constitutive element of exploitation and whether or not exploitation exists or can exist if the worker has 'consented' to the long working hours or low pay, are addressed differently in different jurisdictions.[6] What conduct or circumstances constitute exploitation is not consistently understood and is dependent on how situations are framed in national legislation.[7] A lack of criteria for determining the existence of exploitation further contributes to this conceptual indistinctness.

Labour exploitation can be the objectionable outcome of the trafficking process and, therefore, is often related to human trafficking.[8] In order

4 UNODC issue paper (2015), *The Concept of 'Exploitation' in the Trafficking in Persons Protocol,* pp. 24-26.

5 International Labour Organization (2009), *Forced Labour and Human Trafficking. Casebook of Court Decisions.* Special Action Programme to Combat Forced Labour.

6 V. Ottonelli and T. Torresi (2013), 'When is Migration Voluntary?', *International Migration Review,* 47 pp. 783-813; J.G. Pope (2010), 'A Free Labor Approach to Human Trafficking', *University of Pennsylvania Law Review*, 158 pp. 1849-1875; R. Steinfeld (2009), *Coercion/Consent in Labour,* Centre on Migration, Policy and Society, Working Paper No. 66, University of Oxford; M. Szulecka (2012), 'The Rights to be Exploited: Vietnamese Workers in Poland', in C. van den Anker and I. van Liempt (eds.), *Human Rights and Migration. Trafficking for Forced Labour,* Palgrave Macmillan.

7 B. Anderson (2010), 'Migration, immigration controls and the fashioning of precarious workers', *Work, Employment and Society*, 24(2) pp. 300-317; J. O´Connell Davidson (2013), 'Troubling freedom: migration, debt, and modern slavery', *Migration Studies*, pp. 1-20.

8 Article 3 of the Trafficking Protocol defines human trafficking as: the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position

to identify the dividing line between bad labour conditions and labour exploitation, it is not only relevant to elucidate terminological ambiguity, but it also helps to clarify in which situations the anti-trafficking legal framework (including provisions on protection of victims) can be triggered.

The term 'labour exploitation' regained attention when it was included in the definition on human trafficking in the Trafficking Protocol to the UN Convention on Transnational Organised Crime in 2000.[9] Trafficking in human beings has long been associated with sexual exploitation and forced prostitution, but the Trafficking Protocol brought labour exploitation under the human trafficking umbrella. Without going into the nitty gritty of the definition of human trafficking,[10] exploitation in the Trafficking Protocol has not been defined, but is instead described in Article 3(2):

> Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

Hence, Article 3 only lists a number of situations, which, 'in any case', must be considered exploitation. It does not, however, indicate what factors determine 'exploitation'. As mentioned, forced labour or services, servitude, slavery, or practices similar to slavery are phenomena that fall within the scope of labour exploitation and we have to look into long-standing conventions addressing these topics to understand their content.[11]

Forced labour has been defined in the 29 ILO convention as: 'all work or service which is exacted from any person under the menace of any penalty

of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

9 Protocol to the United Nations Convention against Transnational Organised Crime to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 15 November 2000 UN Doc. A/RES/55/25.

10 J.A. Chuang (2014), 'Exploitation Creep and the Unmaking of Human Trafficking Law', *The American Journal of International Law*, 108 pp. 609-649; J. Allain (2008-2009), 'The Definition of Slavery in International Law', *Howard Law Journal,* 52 pp. 258-261. Also see various contributions in special issue, *Anti-Trafficking Review* (2015), issue 4.

11 Convention Concerning Forced or Compulsory labour (ILO no. 29) 39 UNTS 55, 1930; P 029 Protocol of 2014 to the forced labour convention, 1930; Slavery Convention of 1926, 25 September 1926, 60 LNTS 253. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 7 September 1956, 226 UNTS 3.

and for which the said person has not offered himself voluntarily'.[12] The ILO later explained that preventing people from leaving their jobs also equals to forced labour and, furthermore, that what commenced as a voluntary situation can later turn into a situation of forced labour.[13] In 2014, this convention was supplemented with a protocol attempting to explain the link between human trafficking and forced labour. The protocol reaffirms the definition of the 1930 Convention and states that 'therefore the measures referred to in this Protocol shall include specific action against trafficking in persons for the purposes of forced or compulsory labour'. This, however, does not elucidate how the connection between trafficking and forced labour must be understood, but it seems to imply that forced labour is a possible outcome of human trafficking, whereas, previously, human trafficking was seen by the ILO as a form of forced labour. It furthermore aims to establish similar protection for victims of forced labour as for victims of human trafficking. The protocol addresses three elements: prevention, protection of victims, and compensation to victims. According to the protocol, forced labour should be combatted by using criminal law, public law, and labour law.

Slavery is defined in the 1926 Slavery Convention as: 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'.[14]

Nowadays, the possibility to exercise legal ownership over a person has been abolished throughout the world. Still, factual ownership, people behaving as if they have ownership over another person e.g. by selling that person to someone else, still exists and is criminalised worldwide, and is qualified as (modern) slavery, human trafficking, or another serious offence.[15] The recent CNN reports about the selling of migrants in camps in Libya are proof of these practices.[16] Interestingly, the Slavery Convention distinguished between slavery and the slave trade. The slave trade was defined as:

> all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.

12 ILO Convention 29, 1930.

13 ILO Working Paper Forced Labour: *Definition, Indicators and Measurement*, 2004.

14 Article 1(1), Slavery Convention of 1926, (25 September 1926), 60 LNTS 253.

15 J. Allain (2009), 'R v Tang: Clarifying the Definition of 'Slavery' in International Law', *Melbourne Journal of International Law,* 10(1).

16 Available at: http://edition.cnn.com/specials/africa/libya-slave-auctions.

Similar to the earlier distinction made between human trafficking and exploitation in prostitution in the 1949 Convention[17], the exploitative practices (slavery and exploitation in prostitution) are the outcomes of the recruitment process (slave trade and human trafficking). With the adoption of the Trafficking Protocol, not only was exploitation in prostitution, other forms of sexual exploitation, and exploitation in labour merged into one definition, but the clear distinction between the recruitment process or the movement and actual exploitation was done away with. In the additional protocol to the Slavery Convention, the following practices were identified as practices similar to slavery: debt bondage, serfdom, forced marriage, women inheritance, and child exploitation.

Servitude is not defined in a separate treaty, but is prohibited, for instance, in Article 4 of the ECHR. In the case law of the EctHR, servitude is described as: a 'particularly serious form of denial of freedom', which includes, 'in addition to the obligation to perform certain services for others […] the obligation for the "serf" to live on another person's property and the impossibility of altering his condition'.[18] As such, servitude is a practice between forced labour and slavery.

Exploitation explained

Understanding exploitation has led to important academic debates. In the context of human trafficking, Chuang criticises the trafficking definition because 'forced labour is recast as trafficking' and 'all trafficking is labelled as slavery', which, in her view, creates an 'exploitation creep'. She explains the debate on whether or not all forms of forced labour must be considered human trafficking rather than only those situations of forced labour preceded by an act as defined in the trafficking definition, 'recruitments, transportation, transfer, harbouring or receipt of persons'. By turning the focus on forced labour and qualifying it as human trafficking, the expertise of human rights lawyers and labour rights lawyers, rather than merely criminal law lawyers, were naturally exerted to combat human trafficking. More recently, the term of 'modern slavery' has been used to replace the term human trafficking.[19] This is at odds with the human trafficking definition,

17 Article 1, Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949.

18 Case of Siliadin v. France, Application no. 73316/01, 26 July 2005 para 123.

19 J. Allain and K. Bales (2012), 'Slavery and Its Definition', *Global Dialogue,* 14(2).

which considers slavery and practices similar to slavery as examples of the exploitative purpose of human trafficking. Additionally, it seems overly dramatised to qualify less severe forms of trafficking as modern slavery. Furthermore, as we have seen above, slavery in the 1926 Convention is narrowly defined, and, even with the extended understanding of modern slavery as the factual exercise of ownership rather than a legal one, the concept of human trafficking must be understood to be broader than (modern) slavery.[20] For the crime of trafficking to exist, three elements must be present, namely an act of recruitment, a means (e.g. force, abuse of position of vulnerability, or deception), and an aim of exploitation. It cannot merely be reduced to only the third element, e.g. slavery as a form of exploitation.[21]

Chuang further argues that 'existing labour and migration frameworks have proven inadequate to the task of protecting those at the bottom of the global labour hierarchy', which she considers a core task of in anti-trafficking law and policy regimes. She concludes by saying that;

> trafficking is often labour migration gone horribly wrong and that it is at least partly due to the combination of tightened border controls, which have created a growing market for clandestine migration services, and lax labour laws, which permit employers and recruiters to coercively exploit their workers with impunity.[22]

Thus, the situation of labour exploitation must not be looked at in isolation but in the broader context of structural market dynamics and practices, labour policies, and migration policies that shape workers' vulnerability. For this reason, many scholars advocate a combined approach to trafficking as well as to labour exploitation of which a labour approach is a part.[23]

Labour exploitation not only takes place in a migratory setting, but also occurs in domestic situations. Nevertheless, the examples in this volume show that migrant workers and especially undocumented migrants and migrant workers in flexible contracts and at the low and of the labour market are more vulnerable to exploitative practices.

20 Chuang, J. A. (2014), 'Exploitation Creep and the Unmaking of Human Trafficking Law', *The American Journal of International Law*, 108 pp. 624-625.

21 Chuang (2014), pp. 631-632.

22 Chuang (2014), p. 639.

23 D. Mccann and J. Fudge (June 2017), 'Unacceptable forms of work: A multidimensional model', *International Labour Review*, 156(2), pp. 147-184; J.G. Pope (2010), 'A Free Labor Approach to Human Trafficking', *University of Pennsylvania Law Review*, 158 pp. 1849-1875.

To elucidate the elements of exploitation and related phenomena further, we now turn to discuss the recent case Chowdury and others v. Greece of March 2017 of the ECtHR.[24]

The Case of Chowdury

Manolada Region in Greece is well-known for its agriculture. Farmers make use of migrant workers who often do not possess residency or work permits (hereafter referred to as undocumented workers) for harvesting the fruits and vegetables. The case of Chowdury started in April 2013 when a group of 150 undocumented Bangladeshi workers were shot at when they protested because they were not being paid the salary they were promised, or were not paid at all. Over 30 workers were severely injured during the shooting. The workers had to work and live under abhorrent circumstances; they worked twelve hours a day in the fields watched by armed guards, they were promised 22 euros a day, but the salaries were not paid. They lived in sheds without toilets or running water. The case was brought before the national court, which acquitted the employers for human trafficking. The migrant workers were not completely powerless and deprived of freedom of movement and therefore the case could not qualify as human trafficking, according to the Greek court. The Greek court convicted the employers to pay the victims 43 euros each, for causing grievous bodily harm caused by the shootings, and for the unlawful use of firearms. Disappointed by the outcome at the national level, 42 Bangladeshi workers filed a case against Greece at the ECtHR for violation of the positive obligations under Article 4 ECHR, containing a prohibition of slavery, forced labour, and servitude. The migrants claimed they had been subjected to forced labour and human trafficking. The Court held Greece liable for violating Article 4(2), the prohibition of forced labour, and noted that the applicants' situation was one of human trafficking and forced labour, and that Greece failed in its positive obligations to prevent and investigate the situation as well as to protect the victims.

The Chowdury case is considered a landmark case because of the reasoning of the Court to qualify the situation as one of forced labour and human trafficking and because, by using the 'disproportionate burden' test, it helps

24 Affaire Chowdury et autres c. Grèce, Requête no 21884/15, 30 March 2017.

us to distinguish between bad labour conditions and forced labour. The importance of the case will be discussed in seven points.

First, in para. 123, the Court held that restrictions upon freedom of movement cannot be a necessary element (*a condition sine qua non*) for qualifying a situation as forced labour (and as human trafficking). It responded to the Greek government that argued that this case is not a case of forced labour nor human trafficking because the migrant workers had the opportunity to leave, go out and go shopping when they were not at work. If such freedom and movement were also restricted, it could have amounted to situations of servitude or slavery.

Second, the Court considers the fact that applicants are undocumented migrants relevant to determine their position of vulnerability, especially because of the threats from the employer should they refuse to cooperate. The employer told the workers that they would not be paid or that they would be killed if they did not continue to work for him (para. 98). In addition, the Court took into account the fact that the workers felt obliged to continue to work, knowing that, if they stopped working, they would not receive the wages owed to them, especially considering that they had no other means of subsistence (paras. 95 and 97). In case of *abuse* of such a position of vulnerability, it cannot be claimed that the workers offered themselves voluntarily (para. 96). The absence of voluntariness in accepting a job is a requirement of forced labour under the ILO Convention 29 as we have seen above.

This ties into the third interesting aspect of the case, namely that the Court reconfirms that prior consent is not an obstacle to define a situation of forced labour. The Greek authorities considered that the workers had consented to the working conditions, as they had been informed of the conditions at the point of recruitment. The ECtHR, however, concluded that, given the circumstances of this case and especially the abuse of power and the position of vulnerability (i.e. undocumented migrants, risk of expulsion), deprived the prior consent from its meaning.

> 96. The Court further considers that where an employer abuses his power or takes advantage of the vulnerability of his workers in order to exploit them, they do not offer themselves for work voluntarily. The prior consent of the victim is not sufficient to exclude the characterisation of work as forced labour.

This is very much in line with how consent is understood in the context of human trafficking. In case any of the means listed in the trafficking

definition are used, the consent given to the situation is irrelevant.[25] Two NGOs, PICUM and AIRE Centre, in their joint intervention letter in the Chowdury case, consider an assessment of the level of 'control' exercised by the employer over the victim, the nature of the menace and the severity of the penalty, to be an essential element in defining forced labour. According to them, factors that are relevant for such assessment include violence, restriction of movement, debt bondage, withholding of wages, retention of passports, and threat of denunciation to authorities.[26] Thus, the level of control is often determined by a form of coercion.

A fourth contribution of the Chowdury case is the fact that it clarified the 'disproportionate burden' test (*fardeau disproportionné*, para. 91) originally introduced in Van der Mussele v. Belgium.[27] This test attempts to distinguish forced or compulsory labour in the context of forced labour and forced or compulsory labour in the context of one's position or duties in an ordinary work situation. Para. 37 of the van der Mussele case states:

> This could be so in the case of a service required in order to gain access to a given profession, if the service imposed a burden which was so excessive or disproportionate to the advantages attached to the future exercise of that profession, that the service could not be treated as having been voluntarily accepted beforehand.

Thus, if the service or work required (in the case of Van der Mussele in order to become an advocate) is excessive or disproportionate compared to the advantages it generates, it must be considered as not voluntarily accepted and (if other elements are fulfilled) constitutes forced labour. Labour that is in the 'general interest, social solidarity and what is in the normal or ordinary course of affairs' and is not unreasonable or disproportionate cannot be considered as forced labour (para. 38-39 van der Mussele). In other words, it tries to define when a person is subjected to an 'excessive and disproportionate burden', justifying the qualification of forced labour. In Chowdury, the Court notes that, for such assessment, all circumstances

25 Article 3(b) Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

26 Submission for intervenors, The AIRE Centre (Advice for Individual Rights in Europe) and Platform for International Cooperation on Undocumented Migrants (PICUM), Application No. 21884/15, para 6. ILO Report, Human Trafficking and Forced Labour Exploitation Guidance for Legislation and Law Enforcement (2005) pp. 20-21.

27 ECtHR, Van der Mussele v. Belgium, Application No. 8919/80, 23 November 1983.

of the case need to be taken into account.[28] Therefore, the fact that migrants were undocumented, ran the risk of not being paid at all when leaving, and the risk of being arrested and deported contributed to their vulnerability and were taken into account by the court (para. 95-96).

Fifth, the court tries to explain the relation between forced labour and human trafficking but complicates a conceptual divide by referring to the concept of exploitation. Although it strengthens the relevance of the defining forced labour, servitude, and slavery as prohibited in Article 4 ECHR, this case does not further add to the relation between these concepts nor to how the concept of 'exploitation' fits in, as Stoyanova rightly pointed out in her blog post on this case.[29]

Sixth, this case points out that the obligations to protect and assist trafficking victims also apply to those who have been subjected to forced labour. Here, the Court follows its line of reasoning initiated in *Rantsev,* in which the Court decided that human trafficking falls within the scope of Article 4 ECHR.[30] Furthermore, it is also in line with the protocol to the Forced Labour Convention that requires the equal treatment of victims of trafficking and forced labour.

Seventh, and, logically, in light of Article 2 ECHR, the obligations following from the ECHR including the positive obligations to protect, also apply to undocumented migrants present on the territory of a State and not only to those legally residing in a country.

Bad Labour Conditions and Exploitation

So far, we have discussed concepts and practices that are clear examples of exploitation: forced labour, slavery, modern slavery, and human trafficking. It is, however, more challenging to take a look at those situations that are less obviously qualified as exploitation. Such situations arise, for instance, when no force or coercion is used, when the labour migrant has consented to the low salary, horrible living conditions, and excessive working hours.

Labour exploitation is an overarching term and can be situated at the very end of the continuum of decent work, bad labour conditions, and

28 Very much in line with D. McCann and J. Fudge (June 2017), 'Unacceptable forms of work: A multidimensional model', *International Labour Review*, 156(2), pp.147-184.

29 V. Stoyanova, *Irregular Migrants and the Prohibition of Slavery, Servitude, Forced Labour & Human Trafficking under Article 4 of the ECHR,* blog post available at: https://www.ejiltalk.org/author/vladislavastoyanova/

30 ECtHR, *Rantsev v. Cyprus and Russia*, Application no. 25965/04, 7 January 2010.

exploitation (including forced labour and human trafficking).[31] Decent work can turn into bad labour conditions and bad labour conditions sometimes degenerate into exploitation. But when do violations of labour law qualify as labour exploitation? Consent, control (or coercion), and vulnerability are three relevant factors that can be distilled from the Chowdury case. Below, we will further explore these elements of consent, vulnerability, and control (or coercion) to distinguish between bad labour conditions and labour exploitation. The case of Chowdury made clear that consent is irrelevant in a case in which a person's situation of vulnerability is abused. It furthermore made explicit that restricting liberty to move can exist both in physical and psychological restriction. Chowdury, made clear that we need to consider the situation as a whole and assess every case individually.[32] Furthermore, if circumstances imply an excessive or disproportionate burden for accessing a job, it must be considered forced labour. Logically, this equally applies during the execution of a job or when leaving a job. The next question, then, is when are circumstances excessive or disproportionate?

This question on excessive or disproportionate circumstances ties into more philosophical debates about exploitation. Wertheimer, for instance, considers a situation in which unfair advantage is taken of another person as exploitation.[33] Goodin takes a vulnerability approach and argues that a person's vulnerability creates obligations *vis a vis* the vulnerable person. He considers (unusual) advantage-taking behaviour over a vulnerable person to be decisive for the qualification of exploitation.[34] Sample,[35] critiquing Wertheimer and Goodin, uses the criteria of degrading (disrespectful or harmful treatment) to qualify a situation of exploitation because this better reflects the moral wrongness of the exploitation, an aspect she considers to be absent in the theories of Wertheimer and Goodin. Though worded differently, what is key in all three theories is the taking advantage of a person for one's own benefit and to the detriment of the other person; either by taking unfair advantage, by abusing someone's vulnerability, or by degrading treatment.

31 K. Skrivankova (November 2010), *Between Decent Work and Forced Labour: Examining the Continuum of Exploitation*, paper for the Joseph Rowntree Foundation, available at: https://www.jrf.org.uk/.

32 D. Mccann and J. Fudge (June 2017), 'Unacceptable forms of work: A multidimensional model', *International Labour Review*, 156(2), pp. 147-184.

33 A. Wertheimer (1996), *Exploitation,* Princeton University Press, p. 10.

34 R. Goodin (1985), *Protecting the Vulnerable: A Reanalysis of Our Social Responsibilities,* University of Chicago Press.

35 R.J. Sample (2003), *Exploitation. What It Is and Why It's Wrong*, Rowman & Littlefield, p. 56.

Control (Including Coercion) as a Condition to Exploitation

As we have learned from the Chowdury case, control can be both physical control and psychological control. This is also reflected in the means included in the trafficking protocol, which includes force and coercion, but also abuse of power or position of vulnerability, deception, and fraud. In fact, the way control is exercised is not predetermined and can be any act. It is the effect of such an act on the freedom of the person that determines whether it can be considered unfair. In line with Bales and Allain, the exercise of control by a person over another person, because the other person finds him or herself in a position of vulnerability, is relevant to qualifying a situation as exploitative. Control, as well, is a subjective element since it depends on the level of resistance one is able to create, which determines the vulnerability of the affected person (see below).[36] With more severe forms of control such as violence and coercion, it is reasonable that the person cannot resist the pressure. This, however, might be more difficult to understand in case the control is more subtle, for instance, in case of deception or abuse of vulnerability.

What, in such cases, can be expected from the person in terms of resistance? Although labour standards in a country are helpful, this question cannot be answered in general terms. The position of vulnerability, personal circumstances, the social location, and the social context are all relevant.[37] Thus, although the element of control the employer has over the worker (including coercion) is an important factor, it needs to be assessed in conjunction with other elements of vulnerability and the broader circumstances of the specific case. Consequently, a situation can be qualified as exploitation even if a person has consented to e.g. exploitative conditions. In such a case, the level of control over the worker might distract consent from its effect, or nullify consent. In the case of Chowdury, the initial consent and the ability to leave the workplace does not hamper the conclusion that this was a case of forced labour and human trafficking.

The Role of Consent in Defining Exploitation

Following the above, the existence of consent is not a burden for qualifying a situation as exploitation. Translated to the situation of migrant workers,

36 J. Allain and K. Bales (2012), 'Slavery and Its Definition', *Global Dialogue,* 14(2).

37 D. McCann and J. Fudge (June 2017), 'Unacceptable forms of work: A multidimensional model', *International Labour Review*, 156(2), pp.

this observation is highly relevant because, due to a lack of information and often dire economic situations in the home country, migrant workers are often prepared to accept working conditions and payment that are far below the standard in the host country, but nonetheless can be beneficial for the migrant worker. As mentioned above, consent is irrelevant when means (forms of coercion) are used in the process of forced labour and human trafficking.[38] In other cases in which consent was given, objective indicators are needed to determine whether a situation is exploitative, regardless of the consent given.[39] Such objective indicators can be found in regulations on compulsory wages, labour conditions, working hours, etc. The level of coercion used can be taken into account when determining the severity of a case. Still, the question remains what the level of deviation from the standard, or minimum rule, is needed to justify the exploitation label. Again, this question needs to be answered taking into account all circumstances of the case, and depends on the national situation and legislation. The ILO indicators for trafficking for the purpose of labour exploitation are helpful to objectify criteria and include e.g. low or no salary, excessive working hours, bad living and working conditions, absence of contract.[40] Further translation to the national levels is needed for a concrete assessment.

The Role of Vulnerability in Defining Exploitation

According to the *Travaux préparatoires* to the Trafficking Protocol, the state of vulnerability 'is understood as referring to any situation in which the person involved has no real or acceptable alternative but to submit to the abuse involved'.[41] This circular reasoning is not very helpful in defining vulnerability. Vulnerability is not a static concept, and the impact of this concept largely depends on the position of the person at risk of exploitation. Gallagher, in her position paper for the UNODC, distinguished between

38 Article 3(b) of the Palermo Protocol states: (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in sub paragraph (a) have been used; UNODC Issue Paper (2014), *The role of 'consent' in the trafficking in persons protocol*, p. 7.

39 C. Rijken (2015), 'Legal Approaches to Combating the Exploitation of Third-Country National Seasonal Workers', *The International Journal of Comparative Labour Law and Industrial Relations,* 31(4) pp. 431-452.

40 ILO Operational indicators for trafficking in human beings, available at: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_105023.pdf

41 A.T. Gallagher (2011), *The International Law Making of Human Trafficking*, Cambridge University Press, p. 32.

intrinsic factors linked to the victim, such as age, illness, gender, and poverty, on the one hand, and control factors such as isolation, dependency, and irregular legal status created by the exploiter, on the other hand.[42] Elsewhere, we suggested to distinguish between internal factors, external factors, and triggers or situational factors.[43] Vulnerability can consist of more objective elements that represent the external factors, such as poverty, lack of education, and irregular legal status. But not all persons in such a vulnerable situation end up being exploited. The individual circumstances and state of mind – the internal factors – are relevant in creating a heightened risk of vulnerability. There are individualised factors that make people more or less vulnerable, such as an adventurous and thrill-seeking nature, dependence, and level of intelligence. These internal factors elucidate why, in similar circumstances, person A is vulnerable for exploitative practices while person B is not. Triggers or situational circumstances can also cause vulnerable people to become subject to abuse, for instance, if a potential migrant worker is out of a job in his or her home country and the child of the worker is in need of expensive medical treatment, or the addiction of a spouse causes debts and consequently an acute need for money. It is a combination of these three groups of factors that can cause a toxic mix in which persons become vulnerable to exploitation. The *abuse* of a situation of vulnerability refers to the act of the exploiter and cannot be justified by the motivations of a person to put himself or herself in the position of vulnerability. For instance, in the Dutch Chinese Restaurant case, the trafficking victims, who were undocumented, had asked to work in the Chinese Restaurant.[44] The abuse that was made of their vulnerable status as undocumented could not be justified by the fact that they had offered themselves voluntarily, nor by the fact that they had consented to work for eleven to fourteen hours a day for a monthly income of €450 to €800, to having only five days off a month, and to sharing bedrooms.

For Hill as well as for Goodin, exploitation and vulnerability are inextricably bound. Reducing ones vulnerability diminishes the risk of being exploited. They recognise that vulnerability is a precondition to exploitation and is defined by Hill as "a disposition of personality or circumstance of

42 UNODC Issue Paper (2012), *Abuse of a Position of Vulnerability and other "Means" within the Definition of Trafficking in Persons,* Vienna.

43 L. van Waas, C. Rijken, M. Gramatikov, and D. Brennan (2015), *Researching the nexus between statelessness and human trafficking. The Example of Thailand,* Wolf Legal Publishers, pp. 98-107, 159-163.

44 LJN: BI7099, Supreme Court, 08/03895

life that serve to hamper the rational-emotive process".[45] Put differently, all exploited persons are vulnerable in one way or another. However, this does not mean that all vulnerable people are exploited, as was explained above, nor does it mean that vulnerable people are unable to make rational decisions. Poverty or political oppression, for instance, can be qualified as vulnerability factors relevant to exploitation only if being poor or oppressed creates some internal psychological disability affecting the person's capacity to make a decision. Merely qualifying one's vulnerability as relevant for exploitation, without the abuse thereof, would have the effect of victimising people who should not be victimised.[46]

Conclusion

The question of when bad labour conditions turn into exploitation cannot be answered in general terms. This chapter, however, identified three key factors that play a role in defining the tipping point between the two. These key factors are control (including coercion) over the worker, vulnerability, and consent. Coercion is not a constitutive element for exploitation, but, in a situation in which coercion has been used, exploitation is more easily established. In the same vein, the absence of consent also is not a prerequisite for exploitation. In a consensual situation, objectified criteria can serve as assessment tools for the existence of exploitation, which has to be determined on a case by case basis and by taking into account all aspects relevant to the specific situation.

Having a better understanding of the continuum between bad labour conditions and exploitation and recognising the tipping points and key elements, is a prerequisite for fighting both bad labour conditions and exploitation. The former are more effectively addressed with enforcement of labour standards, while the latter are also to be combatted under criminal law and the protection mechanisms offered to victims of exploitation and trafficking. The question left unanswered in this chapter is whether or not such mechanisms should also be made available for those who have been subjected to bad labour conditions. At the EU level, and specifically in the

45 J.L. Hill (1994), 'Exploitation', *Cornell Law Review*, 79 p. 686.

46 UNODC Issue paper (2012), *Abuse of position of vulnerability and other "means" within the definition of trafficking in persons*, 9, pp. 84-86; J. L. Pérez (2015), 'A criminological reading of the concept of vulnerability: A case study of Brazilian trafficking victims', *Social and Legal Studies,* 25(1) pp. 23-42.

employers sanction directive[47] and the seasonal workers directive,[48] some indications can be found to answer this question in the affirmative.

Bibliography

Affaire Chowdury et autres c. Grèce, Requête no 21884/15, 30 March 2017.

Allain, J. (2008-2009), 'The Definition of Slavery in International Law', *Howard Law Journal*, 52 pp. 239-266.

Allain, J. (2009), 'R v Tang: Clarifying the Definition of "Slavery" in International Law', *Melbourne Journal of International Law,* 10(1), pp. 246-257.

Allain. J. and K. Bales (2012), 'Slavery and Its Definition', *Global Dialogue,* 14(2) pp. 1-8.

Anderson, B. (2010), 'Migration, immigration controls and the fashioning of precarious workers', *Work, Employment and Society*, 24(2) pp. 300-317.

Anderson, B. and J. O'Connell Davidson (2003), *Trafficking – A Demand Led Problem? A Multi Country Pilot Study,* International Organisation for Migration.

Case of Siliadin v. France, Application no. 73316/01, 26 July 2005 para. 123.

Chang, H.F. (2008), 'The Economics of International Labour Migration and the Case for Global Distributive Justice in Liberal Political Theory', *Cornell International Law Journal*, 1 pp. 1-27.

Chuang, J.A. (2014), 'Exploitation Creep and the Unmaking of Human Trafficking Law', *The American Journal of International Law*, 108 pp. 609-649.

European Agency on Fundamental Rights (FRA) (2015), *Severe Labour Exploitation: Workers Moving within or into the European Union, States' Obligations and Victims' Rights*.

Gallagher, A.T. (2011), *The International Law Making of Human Trafficking*, Cambridge University Press, p. 32.

Goodin, R. (1985), *Protecting the Vulnerable: A Reanalysis of Our Social Responsibilities,* University of Chicago Press.

Hill, J.L. (1994), 'Exploitation', *Cornell Law Review*, 79 pp. 631-699.

ILO Operational indicators for trafficking in human beings, available at: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_105023.pdf

International Labour Organization (2009), *Forced Labour and Human Trafficking. Casebook of Court Decisions.* Special Action Programme to Combat Forced Labour.

Mccann, D. and J. Fudge (June 2017), 'Unacceptable forms of work: A multidimensional mode', *International Labour Review*, 156(2), pp.147-184.

47 See the chapter by Berntsen & de Lange in this volume.

48 See the chapter by Zoeteweij in this volume.

O'Connell Davidson, J. (1 July 2013), 'Troubling freedom: migration, debt, and modern slavery', *Migration Studies*, 1(2) pp. 176-195.

Ottonelli, V. and T. Torresi (2013), 'When is Migration Voluntary?', *International Migration Review,* 47(4) pp. 783-813.

Pope, J.G. (2010), 'A Free Labour Approach to Human Trafficking', *University of Pennsylvania Law Review*, 158 pp. 1849-1875.

Pérez, J.L. (2015), 'A criminological reading of the concept of vulnerability: A case study of Brazilian trafficking victims', *Social and Legal Studies*, 25(1) pp. 23-42.

Rijken, C. (2015), 'Legal Approaches to Combating the Exploitation of Third-Country National Seasonal Workers', *The International Journal of Comparative Labour Law and Industrial Relations* 31(4) pp. 431-452.

Sample, R.J. (2003), *Exploitation. What It Is and Why It's Wrong*, Rowman & Littlefield, p. 56.

Skrivankova, K. (November 2010), *Between Decent Work and Forced Labour: Examining the Continuum of Exploitation*, paper for the Joseph Rowntree Foundation, available at: http://www.jrf.org.uk.

Steinfeld, R. (2009), *Coercion/Consent in Labour.* Centre on Migration, Policy and Society, Working Paper No. 66, University of Oxford.

Szulecka, M. (2012), 'The Rights to be Exploited: Vietnamese Workers in Poland', in C. van den Anker and I. van Liempt (eds.), *Human Rights and Migration. Trafficking for Forced Labour,* Palgrave Macmillan.

UNODC Issue Paper (2012), *Abuse of a Position of Vulnerability and other "means" within the Definition of Trafficking in Persons,* Vienna.

UNODC Issue Paper (2014), *The role of 'consent' in the trafficking in persons protocol*.

UNODC issue paper (2015), *The Concept of 'Exploitation' in the Trafficking in Persons Protocol,* pp. 24-26.

Van den Anker, A. and I. van Liempt (eds.) (2012), *Human Rights and Migration. Trafficking for Forced Labour*, Palgrave Macmillan.

Van Waas, L.; C. Rijken; M. Gramatikov; and D. Brennan (2015), *Researching the nexus between statelessness and human trafficking. The Example of Thailand,* Wolf Legal Publishers, pp. 98-107, 159-163.

Wertheimer, A. (1996), *Exploitation,* Princeton University Press.

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9 Employer Sanctions

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

Lisa Berntsen and Tesseltje de Lange[1]

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 2009providing for minimum standards on sanctions and measures against employers

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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', *Journaal 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.' 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 once[31] – 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. 37043[33]

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 imposed[36], 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', *Journaal 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 employment[39], 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 resident[42]; 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. Sommarribas, 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' *Journaal 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, underthetable 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.

Bibliography

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

Berg, L. (2016), *Migrant rights at work: Law's precariousness at the intersection of immigration and labour,* New York: Routledge.

Berntsen, L.; T. de Lange; and C. Rijken (2018), *De sociaal-economische en rechtspositie van ongedocumenteerde migranten in Nederland,* Amsterdam: Amsterdam University Press, forthcoming.

Bloch, A.; L. Kamurappan; and S. Mckay (2015), 'Employer sanctions: The impact of workplace raids and fines on undocumented migrants and ethnic enclave', *Critical Social Policy,* 35(1), pp. 132-151.

Carrera, S. and E. Guild (2007), 'An EU Framework on Sanctions Against Employers of Irregular Immigrants: Some Reflections on the Scope, Features & Added Value', Centre for European Policy Studies Policy Brief no. 140, Brussels: Centre for European Policy Studies.

Chauvin, S. and B. Garcés-Mascareñas (2012), 'Beyond Informal Citizenship: The New Moral Economy of Migrant Illegality', *International Political Sociology* 6, pp. 241-259.

Della Torre, L. and T. de Lange (2017), 'The "importance of staying put": third country nationals' limited intra-EU mobility rights', *Journal of Ethnic and Migration Studies*, e-pub ahead of print, DOI: 10.1080/1369183X.2017.1401920

Dwyer, P.; H. Lewis; L. Scullion; and L. Waite (2011), 'Forced Labour and UK Immigration Policy: Status Matters?' Joseph Rowntree Foundation programme paper, York: University of Salford.

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.

Freedland, M. 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,* Oxford: Oxford University Press.

Groenendijk, C.A. and T. de Lange (2015), 'Case note ECJ C-311/13 Tümer [2014]', *Jurisprudentie Vreemdelingenrecht* 2015/2.

Heijden, P. van der; M. Cruyff; and G. van Gils (2015), *Schattingen illegaal in Nederland verblijvende vreemdelingen 2012-2013:* (*in opdracht van Ministerie van Veiligheid en Justitie*), Utrecht: Utrecht University.

Inspectorate SZW (labour inspectorate) (2012), *Annual report 2012*, The Hague: Inspectorate SZW.

Inspectorate SZW (labour inspectorate) (2013), *Annual report 2013*, The Hague: Inspectorate SZW.

Inspectorate SZW (labour inspectorate) (2014), *Annual report 2014*, The Hague: Inspectorate SZW.

Inspectorate SZW (labour inspectorate) (2016), *Annual report 2016*, The Hague: Inspectorate SZW.

Inspectorate SZW (labour inspectorate) (2014), *Meerjarenplan 2015-2018*, The Hague: Inspectorate SZW.

Klap, A. and T. de Lange (2008), 'Marktordening via het werkgeversbegrip van de Wet Arbeid Vreemdelingen', *Sociaal Maandblad Arbeid* 2008/10, pp. 278-288.

Kloosterman, R.; J. van der Leun; and J. Rath (1999), 'Mixed embeddedness: (in) formal economic activities and immigrant businesses in the Netherlands', *International Journal of Urban and Regional Research,* 23(2), pp. 259-263.

Krop, P.J. (2014), *De handhaving van het verbod op illegale tewerkstelling. De verhouding tussen strafrechtelijke en bestuursrechtelijke handhaving in de Werkgeverssanctierichtlijn, Nederland en Duitsland,* Hoofddorp: Boom Juridische uitgevers.

Labour inspectorate (2008), *Projectverslag Inspectie naleving WAV en WML in de sector Detailhandel voor niet Westerse producten*, The Hague: Inspectorate SZW.

Lange, T. de (2011), 'De verborgen schat van artikel 23 WAV', *Journaal Vreemdelingenrecht* 1(4) pp. 20-29.

Lange, T. de (2011), 'The privatization of control over labour migration in the Netherlands: in whose interest?' *European Journal of Migration and Law*, 13(2) pp. 185-200.

Lange, T. de (2015), 'Third-Country National Students and Trainees in the EU: Caught between Learning and Work', *International Journal of Comparative Labour Law and Industrial Relations,* 31(4) pp. 453-471.

Lange, T. de (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*, Oxford: Hart Publishing, *forthcoming*.

Leun, J. van der (2006), 'Excluding illegal migrants in The Netherlands: Between national policies and local implementation', *West European Politics* 29(2) pp. 310-326.

Leun, J. van der and M. Ilies (2008), *Undocumented migration: counting the uncountable. Data and trends across Europe,* the Netherlands country report, Clandestino Project.

Leun, J. van der 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) pp. 59-68.

LeVoy, M. 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*. London: Migrants' Rights Network.

Ministry of Security and Justice (2017), *Rapportage Vreemdelingenketen – periode januari-december 2016*, The Hague: Ministry of Security and Justice.

Nicholls, W.J. (2015), 'Policing Immigrants as Politicizing Immigration: The Paradox of Border Enforcement', *ACME: An International Journal for Critical Geographies*, 14(2) pp. 512-521.

Platform for International Cooperation on Undocumented Migrants (2015), *Employers' sanctions: impacts on undocumented migrant workers' rights in four EU countries,* Position paper, Brussels: Platform for International Cooperation on Undocumented Migrants.

de Sancho Alonso, I. (2007), 'Access to labour rights for undocumented workers', in S. Carrera and M. Merlino (eds) *Assessing EU Policy on Irregular Immigration under the Stockholm Programme*, Centre for European Policy Studies Policy Brief, pp. 10-14, Brussels: Centre for European Policy Studies.

Schneider, F. (2015), 'Size and Development of the Shadow Economy of 31 European and five other OECD Countries from 2003 to 2014: Different Developments?' *Journal of Self-Governance and Management Economics* 3(4) pp. 7-29.

Sommarribas, A.; R. Petry; and B. Nienaber (2017), *Illegal employment of third-country nationals in the European Union,* European Migration Network Synthesis Report, Brussels: European Migration Network.

Tramonte, L. (2011), *Debunking the myth of "sanctuary cities": Community policing policies protect American communities,* Washington DC: Immigration Policy Center.

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10 Bottom-up Approaches to the Regularisation of Undocumented Migrants

The Swiss Case

Lucia Della Torre

Abstract
Silence seems to have fallen yet again on the fate of those who, though most of the time significantly contributing to European States' economies, are presumed invisible by those same States' governments and administrations. The Swiss stance towards undocumented migrants has, for quite some time, mirrored the European one of – at best –isolation and indifference. Yet, it is precisely from Switzerland that a new attempt to promote the regularisation of *Sans-Papiers* has very recently arisen. Coming from a Cantonal government, this operation resembles the creative practices of social inclusion already experimented with in some communities. Unlike the latter, however, this Swiss operation received the endorsement of the Federal Government, thus presenting itself as an example of 'Swiss pragmatism', which could become an interesting model for other European countries.

Keywords: regularisation, undocumented migrants, Swiss policy, social inclusion

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Introduction

If migration represents, generally speaking, a 'challenge to the Nation State', all the more so can be said about irregular (economic) migration:[1] those who enter and take residence within the State in breach of its migration provisions openly defy its control over its borders and its population, with the risk of increasing social discontent and eventually creating political instability.[2] It is common knowledge that, in trying to reassert their sovereignty over their national territories, States have enacted ever more restrictive immigration policies over the years, but not all the measures that States have taken to address irregular migration are 'exclusionary' in nature. In some cases, States have decided to adjust to, rather than fight against, undocumented people, or *Sans-Papiers*. The tools that they primarily use to do so are regularisation programs, i.e. 'broad legal shifts through which a group of people without immigration status or a legal right to remain are granted that right', and regularisation mechanisms, which, on the contrary, operate on a case-by-case basis.[3] Such measures were, in fact, quite broadly used between the mid-1990s and the first years of the 21st century: the practice of Southern European

1 S. Schech (2013), 'Rescaling sovereignty?', *Griffith Law Review*, 22, pp.758-803. 'Irregular migrant' is used here to describe people who migrate without established travel arrangements (IOM World Migration Report 2008) and/or who do not have the legal status to allow them to live permanently in the country of destination (Nyers, 2010). Using this term does not make any presumptions about the legitimacy of the migrant's reasons for migrating.

2 S. Joppke (1998), *Challenge to the Nation-State,* Oxford: Oxford University Press; See also S. Blinder and B. Allen (2016), *UK Public Opinion toward immigration: overall attitudes and Level of Concern.* Retrieved from: http://www.migrationobservatory.ox.ac.uk/wp-content/uploads/2016/04/Briefing-Public_Opinion_Immigration_Attitudes_Concern.pdf. According to the study, 34% of the respondents picked 'immigration' as the most important issue facing the nation. The think tank Chatham House carried out a survey according to which: 'overall, an average of 55% [of interviewees] agreed that *all* further migration from mainly Muslim countries should be stopped'. Results and further comments available online at: https://www.chathamhouse.org/expert/comment/what-do-europeans-think-about-muslim-immigration.

3 D. Dauvergne (2008), *Making people illegal,* Cambridge: Cambridge University Press. p. 139. On regularisations, see, among others: P. de Bruycker (2000), *Les regularisations des étrangers illégaux dans l'Union Européenne/Regularisations of illegal immigrants the European Union*. Brussells: Bruyant; J. Apap, P. de Bruycker, and C. Schmitter (2000), 'Regularisations of Illegal Aliens in the European Union. Summary Report of a Comparative Study,' *European Journal of Migration and Law,* pp. 263-308; A. Levinson (2005), *The Regularisation of Unauthorized Migrants: Literature Survey and Country Case Studies*, Oxford: Centre on Migration, Policy and Society, retrieved from: https://www.compas.ox.ac.uk/media/ER-2005-Regularisation_Unauthorized_Literature.pdf; D. Papademetriou (2005), *The regularisation option in managing illegal migration more effectively: a Comparative Perspective*, MPI policy brief, retrieved form: http://www.migrationpolicy.org/research/regularization-option-managing-illegal-migration-more-effectively-comparative-perspective.

States (Italy, Greece, and Spain) to enchain one 'one-shot' general amnesty after the other had even sparked the dismay of some of their Northern European counterparts.[4] The use of these tools (especially large regularisation programs) began to decrease after the 'moral panic' that followed the 9/11 attacks on American soil, and practically came to an end with the economic crisis of 2008, which brought along increased discontent towards economic migration.[5] While in 2007 the Council of Europe maintained that 'if it is not possible to return [irregular migrants] then Member States should consider the option of regularising their situation', in 2008, the Council of the European Union specified that Member States should refrain from using 'generalised amnesties', rather preferring 'case-by-case' regularisations.[6] In addition, while in 2009 the European Commission suggested that European guidelines for the implementation of regularisations should be set, together with common standards on irremovable irregular immigrants, neither of the two points was mentioned in the final version of the Stockholm Programme, endorsed at the end of that same year.[7]

4 The frequent use of amnesties by Southern European States had caused some frictions with Northern European States, generally more reluctant to use broad regularisation programmes. In this sense, see: C. Finotelli and J. Arango (2011), 'Regularisation of unauthorised immigrants in Italy and Spain: determinants and effects', *Documents d'Analisi Geografica*, 57, pp. 494-515. Some European countries clearly withdrew from regularisations in other Member States. After the 2002 Italian regularisation, representatives of certain Member States attempted to exclude regularised immigrants from the categories encompassed by the European directive on long-term residents from third countries. Furthermore, in 2005, both the German and Dutch governments sharply criticised the decision by the Spanish government to carry out a mass regularisation of irregular immigrants. The same government was also blamed for not having informed its fellow EU Member States about the process in an adequate time frame. In particular, German and Dutch criticism was fueled by a widespread fear that regularised immigrants in Spain would invade other EU Member States, attracted by their generous welfare systems.

5 S. Hauptman (2013), *The Criminalization of Immigration. Post 9/11 Moral Panic,* El Paso: LFB Scholarly Publishing LLC.

6 Council of Europe, Parliamentary Assembly (6 July 2007), *Regularisation Programmes for irregular migrants, Report*, Doc. 11350, and Council of the European Union (24 September 2008), *European Pact on Immigration and Asylum*, 13440/08, Brussels. Many studies were also commissioned on the topic. Apart from the known Clandestino Project (European Commission, 'Clandestino Project Final Report', 2009, available at: http://www.gla.ac.uk/media/media_147171_en.pdf), see also: Council of Europe Parliamentary Assembly and J. Greenway (2007), *Regularisation programmes for irregular migrants,* available at: http://www.unhcr.org/4b9fac519.pdf; ICMPD (2009), 'Regine – Regularisations in Europe. Final Report', Vienna, Austria, available at: http://ec.europa.eu/home-affairs/doc_centre/immigration/docs/studies/regine_report_january_2009_en.pdf.

7 European Commission (10 June 2009), *Communication on an Area of Freedom, Security and Justice serving the citizen: Wider freedom in a safer environment,* COM (2009) 262, Brussels. For an analysis of these texts, see: E. Guild and S. Carrera (August 2009), *Towards the Next Phase*

Theoretical Framework

Almost ten years after the economic breakdown of 2008, the landscape does not seem to have changed much. Silence seems to have fallen on the fate of undocumented migrants in Europe, their presence overshadowed by issues related to the significant number of new arrivals over the past years. While more 'attractive' migrants such as students, highly skilled, or intra-corporate transferees are quite well looked after[8], there are very few European legislative provisions that relate to low-skilled/unskilled migrant workers who, on the other hand, constitute the great majority of the *Sans-Papiers* population.[9]

The most prominent example, the Seasonal Worker Directive (see Zoeteweij in this volume), only targets 'new arrivals' (and circular migration): it thus refrains from taking into account the situation of those *already* present within the Schengen Space who, on the other hand, might have benefited from a directive related to low-skilled labour, had it been retroactively applicable. The main provisions that affect the situation of *Sans-Papiers* thus remain those that criminalise their irregular status (Facilitator unauthorized entry Directive, 2002/90/EC, Employers' Sanctions Directive, 2009/52/EC, Returns Directive, 2008/115/EC; see Berntsen and De Lange in this volume), conveying the message that undocumented migration should not be tolerated. Also, single Member States have become more cautious in the use of regularisation measures and have, at the same time, both tightened their grip over national borders and increased pressure on irregular migrants already present in their territories, fast-tracking deportation and expulsion measures and making broad use of criminal and administrative detention, alongside strong anti-immigration rhetoric.

At European and national levels, laws are thus framed and policies passed that primarily aim at excluding and removing irregular migrants, often making their access to very basic human rights such as health, housing, or education particularly difficult. Yet, 'the incapacity of certain

of the EU's Area of Freedom, Security and Justice: The European Commission Proposals for the Stockholm Programme, CEPS Policy Brief No. 196, Centre for European Policy Studies, Brussels. And S. Carrera and M. Merlino (October 2010), *Assessing EU policy on irregular immigration under the Stockholm Programme*, CEPS, Centre for European Policy Studies, Brussels.

8 Student Directive, 2004/114/EC: Blue Card Directive, 2009/50EC: Intra-Corporate Transfers directive, 2014/66/EU

9 The fact that *Sans-Papiers* are mostly active in the low/unskilled fragments of the job market is, for example, highlighted by the Clandestino Project; see, for instance, pp. 49, 84, 89, and 135 of the 'Final Report'.

national immigration legislation in terms of meeting local social realities and ensuring that those who reside in their territories have access to basic socio-economic rights has led to situations whereby local actors (mainly cities) have been encouraged to develop ¨creative¨ (informal) practices for social inclusion, community well-being and the provision of services to all their residents'.[10] Such practices, which, without legally regularising it, do somehow 'normalise' the situation of undocumented migrants, are often carried out without, or even in defiance of, national directives and policies on irregular migration.[11] With the passing of time, the void left by European and national legislative indifference towards the fate of *Sans-Papiers* has thus been filled by bottom-up initiatives, fostered by grassroots movements that sensitise the population to the vulnerability of undocumented migrants and progressively facilitate their integration into the hosting society. These strategies bring to the fore the role that cities can play in the management of the migration process: academic research has already investigated the very significant contribution that municipalities make to improve the conditions of those *Sans-Papiers* living within their territory.[12]

Research dedicated to the inclusion policies enacted at the intermediate level between the two poles of State and municipality is less developed, conveying the impression of a dichotomous management of migration, torn

10 S. Carrera and M. Merlino, *Assessing EU policy on irregular immigration under the Stockholm Programme*, p. 7. See also: B. Barber (2013), *If Mayors Ruled the World: Dysfunctional Nations, Rising Cities,* Yale: Yale University Press.

11 E. Hepburn and R. Zapata-Barrero (2014), 'Introduction: Immigration Policies in Multilevel States', in R. Zapata Barrero and E. Hepburn (eds.) *The Politics of Immigration in Multi-level States*, New York: Palgrave, p. 5: 'Sub-state governments and parties may adopt quite distinctive policies on migration, which may diverge from, or even contradict, those of the State [...] often, these sub-state political approaches to immigration conflict directly with central-state (national) models, resulting in tensions over policy coordination and the framing of immigration in different parts of a country'.

12 On the topic, amongst others: T. Caponio (2005), 'Policy networks and immigrants' associations in Italy. The cases of Milan, Bologna and Naples', *Journal of Ethnic and Migration Studies*, 31 pp. 931-950; M. Alexander (2007), *Cities and labour immigration. Comparing policy responses in Amsterdam, Paris, Rome and Telaviv,* Aldershot: Ashgate; P. Neyers and K. Rygiel (eds.) (2012), *Citizenship, Migrant Activism and the Politics of Movement* London: Routledge; P. Neyers (2012), 'No One is Illegal between City and Nation', *Studies in Social Justice*, 4(2) pp. 127-143; R. Dekker, H. Emilsson, B. Krieger, and P. Scholten (2015), 'A Local Dimension of Integration Policies? A comparative Study of Berlin, Malmo and Rotterdam', *International Migration Review*, 49(3) pp. 633-658; H. Bauder (2017), 'Sanctuary Cities: Policies and Practices in International Perspective', *International Migration,* 55(2) pp. 174-187. See also the website of the EUROCITIES network. Retrieved from: http://www.eurocities.eu/eurocities/issues/migration-integration-issue. The experience of CLIP (Cities for Local Integration Policies) can also be mentioned: https://www.eurofound.europa.eu/clip-european-network-of-cities-for-local-integration-policies-for-migrants

between rigid national attitudes, and (in some happy cases) more welcoming local ones.[13] However, this approach risks overlooking some interesting examples in which effective 'normalisation' processes are carried out at a subnational, but not yet municipal level.[14] Such cases are of particular interest because they are likely to involve a higher number of undocumented migrants and therefore have a bigger impact than merely municipal operations. Furthermore, practices recognised at a federal/regional level may have a more official character (and therefore more stability) than those only practised at a municipal level. In most of these cases, they would still only impact the undocumented migrants' everyday lives, making them easier and safer, but, in some situations, they may end up impacting their official migration statuses. In these occurrences, they may practically turn into real regularisation mechanisms, thus adding an additional layer to the multifaceted legal framework related to the management of irregular migration.[15]

This latter possibility has been concretely enacted by a Swiss regularisation programme that began in 2017 in Canton Geneva, which will be discussed in the present paper. The discussion will be structured as follows: the first part will provide a brief overview of the functioning of the Swiss system in general, then zoom in on the framework related to irregular migration. We will then focus on the Papyrus Operation, presenting its main characteristics and elements of originality. Finally, we will draw a comparison between

13 'Local policy is essentially identified with city level policy and, even more narrowly, with the interventions carried out by local/municipal administrations', M. Borkert and T. Caponio (2010), *Introduction*, in C. Tiziana and B. Maren (eds.), *The local dimension of migration policy and policymaking,* Imiscoe Report Series, Amsterdam: Amsterdam University Press.

14 Very interesting in this respect is the case of Catalonia: on the basis of the Statute of Autonomy of 2006, the Catalan government is able to pass legislation on the reception of migrants and to formulate, within the limits of its devolved powers, its own integration policies. S. Schech, in '*Rescaling Sovereignty?*' mentions 'the Catalan Citizenship and Immigration Plan (2005-2008) [which] makes residency in Catalonia the sole criterion for a migrant's inclusion in public policies and access to services'. See also: M. Bruquetas-Callejo et al. *Immigration and Integration Policy-making in Spain*, IMISCOE Working Paper 21, 2008; À. Castiñeira (2009), *Immigration in Multinational States: The Case of Catalonia,* in R. Zapata Barrero (ed.), *Immigration and Self-Government of Minority Nations,* Bern: Peter Lang.

15 E. Hepburn and R. Zapata-Barrero, *Introduction: Immigration Policies in Multilevel States*, p. 6: 'As immigration has become 'rescaled' across several levels of multilevel states, there is an urgent need to develop a deeper understanding of how immigration is governed and framed by political actors across different territorial levels [...] since the elaboration of multilevel governance, there have been far fewer examinations of this multilevel perspective at the state/sub-state political level, nor has it ever been examined with regard to the specific area of immigration, which is clearly a cross-cutting policy issue that affects both levels'.

this experiment and other similar ones already carried out in Europe, and we will close with a tentative assessment of whether such a model could ever be implemented outside of Switzerland.

Swiss Federalism and Migration Management

The Swiss confederation consists of 26 Cantons: each canton -- with its own territory, population, financial resources, and political power -- represents one almost statuary entity. Despite not being sovereign in external relations and also not fully independent in some internal matters, cantons enjoy a very significant degree of independence.[16] Swiss federalism is oftentimes presented as '*federalisme d'execution*' (which could be translated as 'executive federalism') because, while the federal government retains legislative responsibility, the implementation of the single normative provisions is delegated to each single canton, thus allowing a high degree of policy-making autonomy in such areas as education, health, and policing. While this type of organisation allows adaptation of the federal law to the specific situation of each single canton, such a high level of autonomy can lead to significant policy differences between one canton and another.

Such differences are particularly sharp when it comes to the implementation of national provisions in the field of migration: from the process of naturalisation to the one of renewal of long-term or short-period permits, cantons have the liberty to shape the general requirements set out in national legislation according to their own social, economic, and political specificities.[17] The same goes for the implementation of the only provision that allows for the regularisation of undocumented migrants present in the country, namely art. 30, al. 1, lett. b of the Law on Foreigners.

According to this provision, 'derogations from the admission requirements are permitted in order to [...] b. take account of serious cases of personal hardship or important public interests'. The content of the normative provision is further specified by an administrative memorandum, the OASA (Ordinance on admission, residence and economic activity), which states (art. 31) the criteria that should be taken into account when assessing a

16 Art. 3 of the Swiss Constitution, and Title 3, Ch. 1, Sect. 1, artt. 42-49. See also H. Kriesi (1998), *Le systeme politique suisse,* Paris: Economica.

17 N. Wichmann, M. Hermann, G. D'Amato, D. Efionay-Mader, R. Fibbi, J. Menet, D. Ruedin (2011), *Les marges de manœuvre au sein du fédéralisme: La politique de migration dans le cantons, Commission fédérale pour les questions de migration*, Bern: CFM, retrieved from: https://www.ekm.admin.ch/dam/data/ekm/dokumentation/materialien/mat_foederalismus_f.pdf.

claim for 'serious case of personal hardship'. According to this framework, a *Sans-Papier* willing to apply for regularisation needs, first of all, to show good integration into the country and, secondly, respect for the Swiss legal order. The third and fourth criteria relate to the claimant's family and economic situation: in respect to the former, special attention is paid to the situation of the claimant's children; in respect to the latter, the claimant's ability and willingness to work will also be evaluated, thus becoming the fifth object of scrutiny. The sixth element to be taken into account is related to the length of the migrants' presence in Switzerland. The administrative guidelines clearly state that neither 'the law, nor the jurisprudence of the Federal Tribunal explicitly foresee a minimum or a maximum length of stay [for the claim to be considered or to succeed]'. Nevertheless, possibly taking into account other normative references that are present in the Law on Foreigners (art. 84, al. 5) and in the Law on Asylum (art. 14, co. 2), the same guidelines state that 'a presence of five years in Switzerland should be considered as a relevant indicator'. The seventh and the eighth elements relate to the health status of the migrant and to the migrant's possibility to reintegrate into his or her country of origin.[18]

Migrants who would like to avail themselves of the provisions contained in art. 30, lett. b of the Federal Act should address their requests to the local migration authority, which gives a first consideration to the dossier and decides whether to pass it on to the central administrative authority on migration (State Secretariat for Migration), which gives the final decision. As art. 30, para. 1, lett b) was redacted as a 'may' and not as a 'shall' clause, there is no right for the migrant to be granted the permit – the concession of it depends solely on the discretionary evaluation of the administrative authority. The decision of the central authority on the dossier is free and does not necessarily have to take into account the evaluations of the local authority. On the other hand, statistics show that once the dossier has made it to the second step of the bureaucratic structure, the rate of approval is

18 M. Caroni, T. Grasdorf-Meyer, L. Ott, and N. Scheiber (2014), *Migrationsrecht,* Stämpfli Verlag: Bern, p. 19; D. Efionay-Mäder, S. Schönenberger, and I. Steiner (2010), *Visage des Sans-Papiers en Suisse*, Federal Commission for Migration. Retrieved from: https://www.ekm.admin.ch/dam/data/ekm/dokumentation/materialien/mat_sanspap_f.pdf ; M. Morlok, A. Oswald, H. Meier (B,S,S.), D. Efionayi-Mäder, D. Ruedin, D. Bader, and P. Wanner (2015), *Les Sans-Papiers en Suisse en 2015*, State Secretariat for Migration. Retrieved from: https://www.sem.admin.ch/dam/data/sem/internationales/illegale-migration/sans_papiers/ber-sanspapiers-2015-f.pdf; R. Petry (2013), *La situation juridique des migrants sans statut legal,* Geneva: Schulthess; E. Piguet, 'Quotas d'Immigration: L'expérience Suisse' Retrieved from: http://www2.unine.ch/repository/default/content/sites/sfm/files/shared/pub/o/o_03.pdf.

quite high – in other words, the federal office tends to rely on the evaluations made by the cantons and to stand by their decisions. The decision of the local authority not to pass the dossier on to the federal office can be appealed before the cantonal tribunals according to the provisions of the cantonal law. The decision of the federal office can be appealed to the Federal Administrative Tribunal. The procedure clearly follows a path that takes into account the specific structure of the Swiss administration, first allowing the local authorities to have their say on the claim and then passing the dossier on to the central level.

As is apparent by the very structure of the norm, what is crucial in every aspect is the way each single canton decides to decline the very broad requirements set out in the OASA. Recent studies have confirmed that the rates of regularisation for individuals are extremely varied from one canton to another: it is thus very difficult, if not impossible, for an individual to be able to predict the outcome of his or her application, which clearly discourages interested people from applying and thus keeps the number of irregular permanencies quite stable.[19] The elbow room is so broad that scholars agree that this Swiss regularisation mechanism is extremely patchy and not very effective. It is even argued by some, whether such a tool deserves the name of 'regularisation mechanism' at all.[20] This trend is, on the other hand, very much in line with the official stance that Switzerland has on migration, which, traditionally cautious, has become very restrictive with the passing of the new Law on Foreigners in 2008.[21]

19 According to Philippe Wanner (2015), in *Les Sans-Papiers en Suisse en 2015*, the number of undocumented migrants in the country is around 76000. On the very limited legal certainty that *Sans-Papiers* can rely upon when submitting their application, see again D. Efionay-Mäder, S. Schönenberger, and I. Steiner (2010), *Visage des Sans-Papiers en Suisse*: ' la décision d'examiner les demandes de cas de rigueur ainsi que l'interprétation et la pondération des critères sont laissés à l'appréciation des cantons [...] les requérants, mais également les organisations de soutien, ignorent toujours quels sont les critères décisifs pour l'acceptation des demandes de cas de rigueur par les cantons et les autorités fédérales. Aucun des spécialistes interrogés n'était réellement à même de définir des critères de décision manifestes et transparents. Ainsi, peu de Sans-Papiers prennent le risque de déposer une demande, puisqu'ils sont obligés de décliner leur identité et qu'en cas de décision négative, ils risquent le renvoi. Même les services de consultation sont extrêmement prudents lorsqu'ils évaluent l'opportunité du dépôt d'un dossier et parfois ils le déconseillent aux personnes concernées'.

20 R. Diethelm (2016), *La régularisation des Sans-Papiers a l'aune de l'art. 30 al 1 let. B Letr*, Actualité du droit des étrangers. Jurisprudence et analyses, ed. by Gaëlle Sauthier and Minh Son Nguyen, Bern: Stämpfli Verlag pp. 1- 28.

21 M. Caroni (2016), 'Die rechtliche Stellung der Sans-Papiers verbessern', in C. Abbt and J. Rochel (eds.), *MigrationsLand Schweiz*.15. *Vorschlage für die Zukunft*, Lucerne: Hier und Jetzt, pp. 103-116.

Operation Papyrus

Against this background, a very recent case has emerged, under the name 'Papyrus Operation'. The Canton of Geneva is amongst the richest and most highly populated in Switzerland, with a traditionally open attitude towards immigration. Almost 40% of the population is foreign, and the territory also has one of the highest percentages of regularisation by way of art. 30, al. 1, lett. b).

At the beginning of the 21st century, an attempt had already been made to ask for the regularisation, at the cantonal level, of all the *Sans-Papiers* working in the domestic economy, but the initiative was not successful.[22] Yet, lawyers and legal experts operating in associations representing and supporting irregular migrants kept the channels of communication with the cantonal authorities open. In turn, the latter remained aware of the presence of the roughly 13000 undocumented migrants in the canton. In 2011, with a mandate of the *Conseil d'Etat*, the highest executive authority in the canton, a group of experts finally had the chance to take concrete action. This was done by sampling cases that would stand a good chance of being regularised via the usual procedure, and drawing from them common characteristics that, in turn, could be used to revitalise the extenuated criteria set out in the OASA. These common elements were then converted into general requirements to be complied with in order to qualify for the new case-by-case regularisation programme that would be enacted by the canton.

The newly drafted provisions, while entirely respecting the guidelines set out in art. 30, al. 1, lett. b) of the Law on Foreigners, also materialised them into clear-cut and concrete provisions, reducing the discretion of the single decision maker. The applicants would now know that, in order to be able to submit their request, they would need to show complete financial independence (though without having to sustain further enquiries on the level of success attained with their professional activity, for instance), effective integration into the host society (which is simply proven with an A2 level of French), no criminal records, and ten years of uninterrupted stay in the territory of the canton (5 for families with school-aged children). Additionally, the drafters removed the requirement related to the possibility or impossibility for the applicants to return to their country of origin, which

22 The proposition came from the Conseil d'État, and aimed at a case-by-case regularisation of domestic workers living in the Canton. See, for instance, the Press-communicate of 5 April 2005. Retrieved from: https://www.ge.ch/conseil_etat/2005-2009/communiques/20050406.asp.

somewhat confused the intent of art. 30, al. 1, lett b), blurring the lines between regularisations for so called 'humanitarian reasons' on the one hand, and 'economic regularisations' on the other.[23]

Once the criteria were drafted, the group of experts and the cantonal authorities engaged in multiple meetings with their federal counterparts, in order to define in detail all the aspects of the procedure, which then ceased to be only an 'internal' matter, becoming instead an official project, known and endorsed by the national authorities. This passage was of crucial importance. As seen previously, after a preliminary evaluation by the canton, the *Sans-Papier*'s dossier needs to be evaluated by the State Secretariat for Migration for final approval. Without the support of the federal authorities, the whole procedure would thus remain at the level of the practices we have mentioned at the beginning of this contribution, which, though facilitating undocumented migrants' lives, do not assure them a secure legal status outside the city or town (or canton) of reference. Federal administration instead granted its support to the initiative, and thus committed to look favourably at the dossiers that, coming from Canton Geneva, would comply with the newly developed requirements. National authorities took a positive stance because cantonal ones took the commitment, through the regularisation of the *Sans-Papiers*, to bring the underground economy of some labour markets (mostly domestic work, but also construction and services) to the surface. The Government of the Canton of Geneva officially launched the operation on 21 February 2017.

The authorities have carefully stressed that this should, in no way, be considered as amnesty, in the sense that each individual application will be assessed on its merits, and there is no automatic guarantee of a positive outcome. Yet, Operation Papyrus presents a significant improvement for the condition of the *Sans-Papiers* living in the Canton of Geneva in comparison with that of undocumented migrants living elsewhere in the country because, as said, this time the content of the broad criteria listed in art. 30, al. 1, lett. b) Law on Foreigners has been spelled out. Through this operation, Canton Geneva takes a stand against the excessive discretion of the cantonal authorities in the implementation of the 'personal hardship' provision and against the consequent lack of transparency of the criteria

23 R. Petry (2017), *La situation juridique des migrants sans statut legal*; L. Della Torre (2017), State's Discretion and the Challenge of Irregular Migration – the Example of Permanent Regularization Practices in Spain and Switzerland, NCCR Working Papers. Retrieved from: http://nccr-onthemove.ch/publications/states-discretion-and-the-challenge-of-irregular-migration-the-example-of-permanent-regularization-practices-in-spain-and-switzerland-2/

used to interpret this provision. This change, besides possibly facilitating the tasks of the administrative personnel called upon to apply the legal requirements should, most of all, make it easier for undocumented migrants to foresee the results of their requests, thus increasing their trust in the system and, ultimately, allowing them to take concrete steps to get out of their precarious status.

Analysis and Conclusions

The operation launched by Canton Geneva is the first of its kind ever tried in Switzerland. Yet, it can be placed against the broader framework represented by other de-irregularisation practices already well-established in other parts of Europe, with some very peculiar elements of distinction.

As anticipated at the beginning of the paper, in many cities, the common practice is to normalise the situation of *Sans-Papiers* substantially, through the use of informal routines that allow them to carry on a relatively safe life, e.g. refraining from asking them for papers when they attend hospitals, and allowing their children to go to school. In some cases, such as in the American 'sanctuary cities', for example, this support goes one step further, becoming something of a challenge towards the central government. In these 'sanctuary cities', local authorities refuse to carry out removal orders or to report *Sans-Papiers* migrants to the local police forces, thus *de facto* voiding national provisions and law enforcement measures and eliminating much of their effectiveness.[24]

With all their many specificities and differences, it seems that the protection mechanisms for *Sans-Papiers* at a local level share some common elements. First of all, and as with almost anything that relates to undocumented migrants, they are para-legal, in the sense that it is difficult to place them within a firm legal framework. Furthermore, they are generally carried out in the face of opposition – or, at best, indifference – from the national authorities: thus, even when not only implemented by civil society, but also endorsed by local authorities, such mechanisms generally do not have any effect outside the municipality that implements them. Finally, while the arguments behind these practices may sometimes make reference to the positive role that irregular migrants could play in addressing local labour shortages, they are mostly human rights-based, structured on the assumption that granting protection to *Sans-Papiers* is the only way to make sure

24 S. Schech, 'Rescaling sovereignty?', *Griffith Law Review,* 22 pp.758-803.

that they are effectively in the position of exercising those human rights to which they should be entitled.

The Swiss case is very interesting because it adds new elements to the ones we have considered up to this point. It is still an operation launched only at a local, even if not municipal, level: as such, it has a broader effect than municipal practices, but, at the same time, it does not reach the national level. It is thus by no means to be confused with a national regularisation programme. Similar to local practices of support and protection for irregular migrants, Operation Papyrus was also prepared by the intense work of the local organisations acting for the support and assistance of migrants. It is thus, by all standards, a 'bottom-up' operation, which, over the years, has managed to gain acknowledgement of the cantonal authorities. At the same time, though, despite being a 'bottom-up' operation, it is much more effective and much more pervasive than the ones generally carried out at a municipal level: the operation does not content itself with facilitating the access of migrants to school, education, health care, and the like; rather, it grants these migrants a permission to remain that, once obtained, is viable throughout the country. This was possible because, and this is the second element that sets the Geneva example apart, the operation was not carried out *against* federal authorities, but in *accordance* with them. Finally, while the human rights approach certainly played a part in the motivations and pursued goals of those directly involved in the drafting of the Papyrus criteria, the economic goal of facilitating the emergence of some half-hidden and highly precarious labour sections was important to gain the attention and support of the cantonal and federal authorities.

Despite its severe official stance against irregular migration, Switzerland has thus managed to establish itself as one of the first countries in Europe that has allowed a regularisation procedure to take place at the local level, at the same time granting it national validity.

Such an operation was made possible by the combination of multiple factors. The peculiar conditions of Canton Geneva, very rich in migrant population and traditionally open to foreign work, need to be considered, as well as the very effective mobilisation of the organisations supporting irregular migrants. To this, the very peculiar characteristics of the Swiss Federalism and the great margin of manoeuvre granted to cantons in the handling of migration need to be added, together with a touch of that 'Swiss pragmatism' that entails shying away from all-inclusive theoretical approaches, refusing generalised definitions of any *modus operandi* and, on the contrary, favouring a very concrete and case-by-case approach.

It is difficult to foresee whether such elements could be reproduced again, either inside or outside of Switzerland. As for the national level, the same pragmatic approach that allows for the possibility of reaching tailored and effective solutions also brings along the risk of fragmentation, and of 'conducting a sectoral policy, disregarding a coherent overview'.[25] Some cantons have already specifically declared that they will not enact such operations as Papyrus in their territory, and the occurrence of a patchwork legal framework for *Sans-Papiers* in the country thus becomes a concrete possibility. As for the international level, it remains to be seen whether other European states will ever allow municipalities and regional governments to enjoy the same elbow room as their Swiss counterparts, and whether they will be capable of structuring a regularisation reform that does not defy, but rather persuades, national authorities.

Migration is one of the phenomena that most challenge states to reassert their sovereignty and their power. Yet, it is precisely in this field that sovereignty is being rescaled. The impact and the persuasiveness of the Swiss example make a case of their own, but, at the same time, they confirm that the subnational level is the one where some of the most interesting attempts are made to absorb foreign population, to integrate it, and to overcome anti-immigration rhetoric, and, thus, the need to continue monitoring it. Switzerland, with its peculiar federal structure, could be, in this sense, an excellent laboratory.

Bibliography

Alexander, M. (2007), *Cities and labour immigration. Comparing policy responses in Amsterdam, Paris, Rome and Telaviv,* Aldershot: Ashgate.

Apap, J.; P. de Bruycker; and C. Schmitter (2000), 'Regularisations of Illegal Aliens in the European Union. Summary Report of a Comparative Study', *European Journal of Migration and Law,* 2, (3) pp. 263-308.

Barber, B. (2013), *If Mayors Ruled the World: Dysfunctional Nations, Rising Cities,* Yale: Yale University Press.

Bauder, H. (2017), 'Sanctuary Cities: Policies and Practices in International Perspective', *International Migration,* 55(2) pp. 174-187.

Borkert, M. and T. Caponio (2010), 'Introduction', in C. Tiziana and B. Maren (eds.), *The local dimension of migration policy and policymaking,* Imiscoe Report Series, Amsterdam: Amsterdam University Press.

25 M. Francesco (2011), *La ou des inconvénients du pragmatisme helvétique dans la gestion des rapports entre droit européen, droit bilatéral et droit interne*, Revue de droit Suisse, pp. 27-53.

De Bruycker, P. (2000), *Les regularisations des étrangers illégaux dans l'Union Européenne/Regularisations of illegal immigrants the European Union*. Brussells: Bruyant.

Caponio, T. (2005), 'Policy networks and immigrants' associations in Italy. The cases of Milan, Bologna and Naples', *Journal of Ethnic and Migration Studies*, 31 pp. 931-950.

Caroni, M.; T. Grasdorf-Meyer; L. Ott; and N. Scheiber (2014), *Migrationsrecht,* Bern: Stämpfli Verlag, p. 19.

Caroni, M. (2016), 'Die rechtliche Stellung der Sans-Papiers verbessern', in C. Abbt, J. Rochel (eds.), *MigrationsLand Schweiz*. 15 Vorschlage fur die Zukunft, Lucerne: Hier und Jetzt, pp. 103-116.

Carrera, S. and M. Merlino (October 2010), *Assessing EU policy on irregular immigration under the Stockholm Programme*, Centre for European Policy Studies (CEPS), Brussels.

Dauvergne, D. (2008), *Making people illegal.* Cambridge: Cambridge University Press.

Dekker, R.; H. Emilsson; B. Krieger; and P. Scholten (2015), 'A Local Dimension of Integration Policies? A comparative Study of Berlin, Malmo and Rotterdam', *International Migration Review,* 49(3) pp. 633-658.

Della Torre, L. (2017), State's Discretion and the Challenge of Irregular Migration – the Example of Permanent Regularization Practices in Spain and Switzerland, NCCR [National Centre for Competence in Research] Working Papers.

Diethelm, R. (2016), *La régularisation des Sans-Papiers a l'aune de l'art. 30 al 1 let. B Letr,* Actualité du droit des étrangers. Jurisprudence et analyses, ed. by Gaëlle Sauthier and Minh Son Nguyen, Bern: Stämpfli Verlag pp. 1- 28.

Efionay-Mäder, D.; S. Schönenberger; and I. Steiner (2010), *Visage des Sans-Papiers en Suisse*, Federal Commission for Migration.

Finotelli, C. and J. Arango (2011), 'Regularisation of unauthorised immigrants in Italy and Spain: determinants and effects', *Documents d'Analisi Geografica*, 57, pp. 494-515.

Guild, E. and S. Carrera (August 2009), *Towards the Next Phase of the EU's Area of Freedom, Security and Justice: The European Commission Proposals for the Stockholm Programme*, CEPS Policy Brief No. 196, Centre for European Policy Studies, Brussels.

Hauptman, S. (2013), *The Criminalization of Immigration. Post 9/11 Moral Panic*, El Paso: LFB Scholarly Publishing LLC.

Hepburn, E. and R. Zapata-Barrero (2014), 'Introduction: Immigration Policies in Multilevel States', in *The Politics of Immigration in Multi-level States,* New York: Palgrave, pp. 3-18.

Joppke, S. (1998), *Challenge to the Nation-State.* Oxford: Oxford University Press.

Kriesi, H. (1998), *Le systeme politique suisse*, Paris: Economica.

Levinson, A. (2005),*The Regularisation of Unauthorized Migrants: Literature Survey and Country Case Studies*, Oxford: Centre on Migration, Policy and Society.

Morlok, M.; A. Oswald; H. (B.S.S.) Meier; D. Efionayi- Mäder; D. Ruedin; D. Bader; and P. Wanner (2015), *Les Sans-Papiers en Suisse en 2015*, State Secretariat for Migration.

Neyers, P. (2012), 'No One is Illegal between City and Nation', *Studies in Social Justice*, 4(2) pp. 127-143.

Papademetriou, D. (2005), *The regularisation option in managing illegal migration more effectively: a Comparative Perspective*, MPI policy brief, retrieved from: http://www.migrationpolicy.org/research/regularization-option-managing-illegal-migration-more-effectively-comparative-perspective.

Schech, S. (2013), 'Rescaling sovereignty?', *Griffith Law Review*, 22, pp.758-803.

Wichmann, N.; M. Hermann; G. D'Amato; D. Efionay-Mader; R. Fibbi; J. Menet; and D. Ruedin (2011), *Les marges de manœuvre au sein du fédéralisme: La politique de migration dans le cantons, Commission fédérale pour les questions de migration*, (*CFM*), Bern.

About the Author

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11 When Nationalism Meets Soft Skills

Towards a Comprehensive Framework for Explaining Ethno-migrant Inequality in the Dutch Labour Market

Hans Siebers

Abstract
The aim of this chapter is to outline a framework of explanation. Why is it so difficult for people with a 'non-Western' background to participate in the labour market on equal terms with people without a migration background? There are different ways of structuring the various explanations in the literature. On the one hand, inspired by Bourdieu, Siebers will distinguish various forms of capital – human, social, cultural – that may give access to economic capital, such as getting a well-paid or satisfying job. On the other hand, Siebers will discuss indirect discrimination when non-job-related capitals, such as social and cultural capital, play a role in harming the chances for people with a 'non-Western' migration background to access economic capital.

Keywords: soft skills, Bourdieu, forms of capital, non-Western migration background

Introduction

Ethno-migrant inequality in the labour market is a persistent problem in many countries.[1] In the Netherlands, especially people with a first- or

1 A. Heath and S. Y. Cheung (2007), *Unequal Chances: Ethnic Minorities in Western Labour Markets,* Oxford: Oxford University Press; F. van Tubergen, F. Maas, and H. Flap (2004), 'The economic incorporation of immigrants in eighteen western countries: Origin, destination, and community effects', *American Sociological Review* 69(5) pp. 704-727.

Rijken, Conny and Tesseltje de Lange (eds): *Towards a Decent Labour Market for Low Waged Migrant Workers.* Amsterdam: Amsterdam University Press, 2018
DOI: 10.5117/9789462987555_SIEB

second-generation 'non-Western' migration background[2] find themselves in subordinated positions in the labour market. Their unemployment rates in particular, are a matter of great concern. In the first quarter of 2017, their unemployment rate was 12.8 percent, compared to 4.4 percent of the nonmigrant population.[3] This factor of three of having higher chances of becoming unemployed if you have a migration background, than if you do not, has been visible and consistent for several decades already. This problem cannot be attributed to nationality. Unemployment rates amongst people with a second-generation 'non-Western' background (45 percent of the total population with a 'non-Western' migration background) are even higher (17 percent) than those belonging to the first generation (14 percent), even though many people of the second generation have Dutch nationality.[4]

At the meso level, these macro figures are reflected in findings of a number of case studies we carried out in the Dutch public sector.[5] In these organisations, people with a 'non-Western' background are underrepresented in the labour force. If they have a job, these jobs are usually low-waged and on the lower job levels. Having a 'non-Western' migration background, or

2 Dutch classification systems define someone as having a migration background if at least one of his or her parents was born abroad. That includes first- and second-generation migrants. Subsequently, this classification differentiates between origins: so-called 'Western' and 'non-Western' parts of the world. 'Non-Western' includes Latin America, the Caribbean, Africa, the Middle East, Turkey, and Asia (except Japan and Indonesia). Other parts are seen as 'Western'. This classification is based on a combination of assumed economic progress and assumed cultural difference, with the Netherlands presumably being closer to the 'West' than to 'non-Western' parts of the world. See: http://statline.cbs.nl/Statweb/publication/?DM=SLNL&PA=82809NED&D1=a&D2=0&D3=0&D4=a&D5=l&VW=T

3 Cbs.statline.nl.

4 CBS (2016), *Jaarrapport Integratie 2016,* Den Haag/Heerlen: Centraal Bureau voor de Statistiek.

5 See H. Siebers (2009a), '(Post)bureaucratic organizational practices and the production of racioethnic inequality at work', *Journal of Management and Organization*, 15(1), pp. 62-81; H. Siebers (2009), 'Struggles for Recognition: The Politics of Racioethnic Identity among Dutch National Tax Administrators', *Scandinavian Journal of Management*, 25(1), pp. 73-84; H. Siebers (2010), 'Organisatiecultuur en verhulde discriminatie: Over het onthullen van discriminatie in hedendaagse organisaties', in C.J. Forder (ed.), *Gelijke Behandeling: Oordelen en Commentaar,* Nijmegen: Wolf Legal Publishers; H. Siebers (2010), 'The Impact of Migrant-Hostile Discourse in Media and Politics on Racioethnic Closure in Career Development in The Netherlands', *International Sociology* 25(4) pp. 475-500; H. Siebers (2017), 'What turns migrants into ethnic minorities at work? Factors erecting ethnic boundaries among Dutch police officers', *Sociology* 51(3), pp. 608-625; H. Siebers and M.H.J. Dennissen (2015), 'Is it cultural racism? Discursive oppression and exclusion of migrants in the Netherlands', *Current Sociology* 63(3), pp. 470-489; H. Siebers and J. van Gastel (2015), 'Why migrants earn less: In search of the factors producing the ethno-migrant pay gap in a Dutch public organization', *Work, Employment and Society* 29(3), pp. 371-391.

not, makes a difference in recruitment, hiring decisions, access to higher job levels, fair pay, development opportunities, promotion chances, and so on.

The aim of this chapter is to outline a framework of explanation. Why is it so difficult for people with a 'non-Western' background to participate in the labour market on equal terms with people without a migration background? There are different ways of structuring the various explanations in the literature. On the one hand, inspired by Bourdieu[6], I will distinguish various forms of capital – human, social, and cultural – that may give access to economic capital, such as getting a well-paid or satisfying job. On the other hand, I will discuss indirect discrimination when non-job-related capitals, such as social and cultural capital, play a role in harming the chances for people with a 'non-Western' migration background to access economic capital. Direct discrimination is apparent when these people's access to economic capital is directly diminished or when their capital is depreciated – Bourdieu uses the term symbolic violence here.

The chapter first discusses human capital, social capital, and discrimination, drawing on existing explanations in the literature. Next, my own contributions to the literature will be presented. I will demonstrate the impact of nationalist discourses in media and politics on relations between nonmigrant employees and applicants, and their colleagues with a 'non-Western' migration background. I will also develop a cultural capital understanding of 'soft skills' requirements to understand how they exclude people with a 'non-Western' migration background in the labour market. I will highlight how 'soft skills' requirements converge with Dutch nationalism to fuel discrimination against people with a 'non-Western' migration background in Dutch work settings.

I will do so with a broad view drawing on research projects carried out in Dutch organisations, including the Dutch police; the Dutch tax administration; The Hague University of Applied Sciences; the provincial administration of Noord-Holland; the Dutch ministry of Agriculture, Nature and Food Quality; the Dutch ministry of Education, Culture and Science; Deloitte; and the municipality of Eindhoven. Most of these projects combine a meso perspective (questionnaires and document analysis) with a micro focus on everyday interactions and experiences (observations and interviews).

They start with exploring the mechanisms and factors that may produce unequal chances in, for example, getting a job, fair promotion chances, and pay.

6 P. Bourdieu, (1977), *Outline of theory of practice,* Cambridge: Cambridge University Press. ; P. Bourdieu, (1984), 'Social space and symbolic power', *Sociological Theory* 7(1), 14-25; P. Bourdieu, (1986), 'The forms of capital', in J Richardson (ed.) *Handbook of Theory and Research for the Sociology of Education,* Westport, CT: Greenwood.

That means doing observations or asking respondents to keep a diary on their daily experiences, and conducting interviews with mixed samples of employees, applicants, supervisors, and selectors with nonmigration and 'non-Western' migration backgrounds to allow for comparison. Usually, we focus on triads of employees or applicants with similar characteristics in terms of gender, age, education, and work experiences, one being a nonmigrant and the other one having a 'non-Western' migration background, and their supervisor or selector.

Subsequently, the representativity of these explorative findings is assessed based on distributing questionnaires amongst all employees and applicants. These findings are used for building models through structural equation modelling, to explain inequality between nonmigrant and 'non-Western' migrant respondents in access to economic capital like jobs, promotions, pay, etc. statistically.

That means that these projects are about those people with a migration background who are relatively well-off. The civil servants who work in public organisations have permanent residency rights, and, in most cases, also Dutch nationality. They have also had access to formal education, most of them at middle- or higher-education levels in the Netherlands. These people are not in the most precarious positions, like the undocumented migrants discussed by Berntsen & de Lange and Della Torre, the seasonal workers discussed by Herzfeld Olsson and Zoeteweij, or most of the intra-EU migrant workers discussed elsewhere in this volume.

Nevertheless, many of these civil servants with a 'non-Western' migration background were born from parents who came to the Netherlands in the second half of the previous century, often living and working in precarious positions. They currently face factors and mechanisms that have a negative impact on their chances to get a job, and to receive compensation appropriate to their qualifications: they face ethno-migrant inequality.

Ethno-migrant Inequality

The term ethno-migrant inequality[7] is used here since it is often unclear whether the inequality and the exclusion processes migrants face are due to their migration status or to them becoming the object of ethnicisation. For example, migrants may have less contact with influential people who may

7 H. Siebers and J. van Gastel (2015), 'Why migrants earn less: In search of the factors producing the ethno-migrant pay gap in a Dutch public organization', *Work, Employment and Society* 29(3), pp. 371-391.

help them to get a job. That may be due to their recent arrival (migrancy status) having had little time so far to develop such contacts. However, fewer contacts may also result from the processes of ethnicisation when they are identified as people who represent a particular ethnic group with different cultural characteristics.[8] Such ethnic identification may induce nonmigrants to consider them to not belong to their own group, and thus to avoid contact with them. It is difficult for migrants to network at a reception when no one wants to talk with them. Such contact avoidance means that ethnicity is salient and operational. On many such issues, we have insufficient knowledge about what is at stake, 'migrancy'[9] or ethnicity. Therefore, the provisional term ethno-migrant inequality is used.

Human Capital

The first explanation of this inequality in the labour market highlights human capital, i.e. having a certain level and type of education, relevant work experience, on-the-job learning, being in good mental and physical health, and having proficiency in the required language(s). Migrants may possess less human capital and therefore have less access to (better paid) jobs and other forms of economic capital. This argument refers to migrants irrespective of nationality. Here, the place where one has acquired this human capital may make a difference: in the country of origin or the host country. The former may be rewarded less than the latter.

These sources of inequality seem quite harmless, since human capital requirements are functional to the work that needs to be done. Thus, mastering the right knowledge and skills is a legitimate reason for having more chances to get a job. However, that does not solve the problem, it mainly transfers it to the field of education. Migrants may have come here with lower levels of education, but may also have experienced exclusion in the educational system here. Moreover, there is a problem of getting one's foreign education credentials recognised, particularly for non-EU migrants and refugees.[10]

8 H. Siebers (2017), 'What turns migrants into ethnic minorities at work? Factors erecting ethnic boundaries among Dutch police officers', *Sociology* 51(3), pp. 608-625; A. Wimmer (2013), *Ethnic Boundary Making. Institutions, Power, Networks,* Oxford: Oxford University Press.

9 Migrancy status refers to whether one has a first- or second-generation migration background or having no such background.

10 T. de Lange, E. Besselsen, S. Rahouti, and C. Rijken (2017), *Van azc naar een baan. De Nederlandse regelgeving over en praktijk van arbeidsmarktintegratie van vluchtelingen,* Amsterdam: Universiteit van Amsterdam.

In one of the organisations we studied, inequality in educational levels explains 24.5 percent of the lower chances that applicants with a 'non-Western' migration background have of getting hired, compared to nonmigrant applicants. Here, ethno-migrant inequality in language proficiency and in tenure (proxy for the accumulation of relevant work experience) explains 41.1 per cent of ethno-migrant inequality in access to good jobs and corresponding salary scales. In yet another organisation, ethno-migrant inequality in levels of education and language proficiency explains 45.9 per cent of this inequality.[11]

Social Capital

Drawing on Bourdieu and Granovetter,[12] a body of literature shows that ethno-migrant inequality may also be produced by unequal access to social capital. Having developed many weak ties, with influential people beyond your immediate social environment, is more effective for advancing in the labour market than having a smaller number of strong network ties within this environment. Migrants may rely on those strong or bonding ties when having arrived recently, especially in a not very hospitable society.

Ethno-migrant inequality in access to jobs due to migrants having fewer and weaker bridging ties is quite problematic. After all, getting a job with the help of someone in an influential position tells little about someone's capacity to perform a particular job properly. In principle, having social capital is not something job-related, unless having an extensive network of contacts is helpful in doing the job. If migrants face more difficulties to get hired due to having fewer network ties, without such network ties being instrumental for performing the job, we have a case of indirect discrimination.

In almost all organisations we studied, we found that people with a 'non-Western' migration background find it more difficult to network. To them, there is always the risk of becoming identified in ethnic terms, as a member of an ethnic minority. The fear associated with such risks affects their ability for networking for career purposes. Many feel hampered and uncomfortable in network activities, to move around in receptions and after-work drinks smoothly, and so on. They also feel uncomfortable when

11 H. Siebers and J. van Gastel (2015), 'Why migrants earn less: In search of the factors producing the ethno-migrant pay gap in a Dutch public organization', *Work, Employment and Society* 29(3), pp. 371-391.

12 P. Bourdieu (1986), 'The forms of capital', in J. Richardson (ed.) *Handbook of Theory and Research for the Sociology of Education*, Westport, CT: Greenwood; M. Granovetter (1983), 'The strength of weak ties: A network theory revisited', *Sociological theory,* 1(1) pp. 201-233.

they need to make use of their network connections, such as gathering information about a particular vacancy they would like to apply for, or to mobilise support for themselves in general. In some organisations, the fear of becoming involved in ethnic conflicts becomes very real, actually triggering processes of exclusion against them.[13]

In one organisation, we found that 21 percent of the reasons why applicants with a 'non-Western' migration background have less chances for being hired is due to them having fewer contacts within that organisation that may help them in the application procedure. In another organisation, though, we found that such network effects were ruled out in application and promotion decisions due to very strict formalisation and accountability regulations. Such bureaucratic procedures may help to meet justice demands and to ensure that the best person gets the right job.[14]

Direct Discrimination

As indicated, the fact that migrants' lower levels of social capital make it more difficult for them to get a well-paid and satisfying job, indicates indirect discrimination. Direct discrimination is the case when nonmigrants avoid or reject migrants in their efforts to establish network ties with them. Direct discrimination is also the case when migrants' human capital is not recognised on equal terms as nonmigrants' human capital, or when migrants are underemployed, i.e. working on job levels below their human capital qualifications.

Many studies point to direct discrimination taking place in key personnel management activities. For example, there are many field experiments in which identical application letters are sent for vacancies, with only different names, indicating a migration background or not. Applications suggesting a migration background have a significantly lower chance of being invited for an interview, rather than those suggesting a nonmigrant background.[15]

13 H. Siebers (2017), 'What turns migrants into ethnic minorities at work? Factors erecting ethnic boundaries among Dutch police officers', *Sociology,* 51(3) pp. 608-625.

14 H. Siebers (2009), '(Post)bureaucratic organizational practices and the production of racioethnic inequality at work', *Journal of Management and Organization,* 15(1) pp. 62-81; H. Siebers (2010), 'Organisatiecultuur en verhulde discriminatie: Over het onthullen van discriminatie in hedendaagse organisaties', in C.J. Forder (ed.)(2009) *Gelijke Behandeling: Oordelen en Commentaar,* Nijmegen: Wolf Legal Publishers.; H. Siebers and J. van Gastel (2015), 'Why migrants earn less: In search of the factors producing the ethno-migrant pay gap in a Dutch public organization', *Work, Employment and Society,* 29(3) pp. 371-391.

15 E. Zschirnt and D. Ruedin (2016), 'Ethnic discrimination in hiring decisions: a meta-analysis of correspondence tests 1990-2015', *Journal of Ethnic and Migration Studies,* 42(7) pp. 1115-1134.

There are also many case studies of discrimination in everyday interactions at work.[16]

Thus, direct discrimination may explain a substantial part of ethno-migrant inequality in the labour market, but what, in turn, explains direct discrimination? There are several theories that provide an explanation. There are racism theories that argue that racism drives discrimination.[17] There are also sociopsychological explanations for discrimination that point to cognitive and affective processes of stereotyping and prejudices driving discriminatory behaviour.[18]

These explanations are not convincing for several reasons. Firstly, they tend to ignore one another. Racism scholars tend to conclude that it must be racism whenever migrants experience discrimination, without considering other possible explanations. They also often equate dependent and independent variables – discrimination *is* racism –; but then racism can no longer explain discrimination. It cannot be a dependent and independent variable simultaneously.[19]

In a similar way, sociopsychological studies conclude that, when field experiments demonstrate discrimination in the labour market, it must be driven by stereotyping and prejudices, but without empirically showing that this is the case. They draw on experimental research on stereotyping

For the Netherlands, see I. Andriessen, E. Nievers, L. Faulk, and J. Dagevos (2010), *Liever Mark dan Mohammed? Onderzoek naar arbeidsmarktdiscriminatie van niet-westerse migranten via praktijktests,* SCP; and L. Blommaert, F. van Tubergen, and M. Coenders (2012), 'Implicit and explicit interethnic attitudes and ethnic discrimination in hiring', *Social Science Research,* 41(1) pp. 61-73.

16 E.g. H. Siebers (2009), 'Struggles for Recognition: The Politics of Racioethnic Identity among Dutch National Tax Administrators', *Scandinavian Journal of Management,* 25(1) pp.,73-84; K. Van Laer and M. Janssens (2011), 'Ethnic minority professionals experiences with subtle discrimination in the workplace', *Human Relations,* 64(9) pp. 1203-1227.

17 For overviews, see L. Back and J. Solomos (eds.) (2009), *Theories of Race and Racism. A Reader,* London and New York: Routledge; Ph. Essed and D.Th. Goldberg (eds.) (2002), *Race and Critical Theories,* Oxford: Blackwell Publishers; P. Hill Collins and J. Solomos (2010),*The SAGE Handbook of Race and Ethnic Studies,* London: Sage.

18 For example, M. Chen and J.A. Bargh (1997), 'Nonconscious Behavioral Confirmation Processes: The Self-Fulfilling Consequences of Automatic Stereotype Activation', *Journal of Experimental Social Psychology,* 33(5) pp. 541-560; N. Ellemers and M. Barreto (2008), 'Putting your own down: How members of disadvantaged groups unwittingly perpetuate or exacerbate their disadvantage', in A. Brief (ed.), *Diversity at Work*, Cambridge: Cambridge University Press; A.G. Greenwald, M.R. Banaji, L.A. Rudman, S.D. Farnham, B.A. Nozek, and D.S. Mellott (2002), 'A Unified Theory of Implicit Attitudes, Stereotypes, Self-Esteem, and Self-Concept', *Psychological Review,* 109(1) pp. 3-25.

19 H. Siebers (2017), '"Race" versus "ethnicity"? Critical race essentialism and the exclusion and oppression of migrants in the Netherlands', *Ethnic and Racial Studies,* 40(3) pp. 369-387.

and prejudices, but experimental findings cannot simply be extrapolated to real-life settings in the labour market itself. These real-life settings are far more complicated than any experiment would be able to reconstruct.

Secondly, racism theories and sociopsychological explanations cannot explain variation in discrimination. Racism theories understand racism as a structural characteristic of the rise of modern societies. However, if defined as a trait of something as totalising as modernity, discrimination would have to be something that always happens, under all circumstances.

Likewise, sociopsychological explanations argue that people automatically create cognitive in-group and out-group classifications when they meet others whom they identify as belonging to another ethnic group. Due to the need for uncertainty reduction and self-esteem promotion, they tend to overestimate the traits of one's own category and underestimate out-group traits, as social identity theory has it. Or people would have a natural tendency to prefer in-group members because they feel attracted to similar others, as similarity-attraction paradigm claims. Therefore, people would have a natural tendency to produce stereotypes, prejudices, and discriminatory behaviour towards out-group members. If creating stereotypes and prejudices is something people naturally do and if possibilities to control such creation are limited,[20] discrimination would almost always have to occur.

The facts are different. As we found in our projects, in many day-to-day instances, migrant and nonmigrant colleagues cooperate very well most of the time. In the Netherlands, the vast majority of the migrant working population has found a job, independent of the help of fellow migrants. Ethnic identification does take place in some settings, but in other settings the very same people do not identify each other in ethnic terms but as colleagues.[21] Identification processes and discrimination are much more variable than racism and sociopsychological theories assume.

Nationalism

There is another possible driver of direct discrimination: nationalism. So far, very little attention has been paid to it,[22] whereas my own findings

20 E.g. B.D. Stewart and B.K. Payne (2008), 'Bringing Automatic Stereotyping Under Control: Implementation Intentions as Efficient Means of Thought Control', *Personality and Social Psychology Bulletin,* 34(10) pp. 1332-1345.

21 H. Siebers (2017), 'What turns migrants into ethnic minorities at work? Factors erecting ethnic boundaries among Dutch police officers', *Sociology,* 51(3) pp. 608-625.

22 For an exception, see R. Gowricharn and S. Çankaya (2015), 'Policing the Nation: Acculturation and Street-level Bureaucrats in Professional Life', *Sociology,* Epub ahead of print 29 September

highlight its central role in fomenting direct discrimination in the labour market.[23] Nationalism alludes to the impact of politics and here we need to distinguish between direct policy impact and its wider discursive impact.

Policy interventions and regulations may produce ethno-migrant inequality. Van Tubergen et al.[24] have shown that guest workers' programmes in the 1960s, deliberately selecting labour migrants for their low educational qualifications, hamper the labour market chances even for their children. Anderson[25] has demonstrated how UK government policies are instrumental in reinforcing the precarity of migrant workers with a temporary work permit in the UK, as they need a recommendation letter from their employer to get their work permit renewed. Work permit schemes, such as the EU Blue Card, as well as the seasonal workers permit, discussed elsewhere in this volume, tie a migrant worker to a certain employer, specific sector, or specific job.

Politics also involves a wider discursive impact. From the 1980s onwards, so-called 'non-Western' migrants have been identified by the Dutch government as 'ethnic minorities'. Until recently,[26] this definition had a double foundation. On the one hand, these people are culturalised,[27] i.e. understood as carriers of deviant cultural characteristics. On the other hand, they are understood as being in need for integration, i.e. find their place in societal institutions like the labour market.

At first, their cultural and ethnic identity were seen as beneficial to their participation in society. Some modest policies were initiated to support

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23 H. Siebers (2010), 'The Impact of Migrant-Hostile Discourse in Media and Politics on Racioethnic Closure in Career Development in The Netherlands', *International Sociology,* 25(4) pp. 475-500; H. Siebers (2017), 'What turns migrants into ethnic minorities at work? Factors erecting ethnic boundaries among Dutch police officers', *Sociology,* 51(3) pp. 608-625; P. Mutsaers, H. Siebers, and A. de Ruijter (2014), 'Becoming a Minority: Ethno-Manufacturing in the Netherlands', in J. Tripathy and S. Padmanabhan (eds.), *Becoming Minority: How Discourses and Policies Produce Minorities in Europe and India*, New Delhi: Sage.

24 F. van Tubergen, I. Maas, and H. Flap (2004), 'The economic incorporation of immigrants in eighteen western countries: Origin, destination, and community effects', *American Sociological Review,* 69(5) pp. 704-727.

25 B. Anderson (2010), 'Migration, immigration controls and the refashioning of precarious workers', *Work, Employment and Society,* 24(2) pp. 300-317.

26 M. Bovens, M. Bokhorst, R. Jennissen, and G. Engbersen (2016), *Migratie en classificatie: naar een meervoudig migratie-idioom,* Den Haag: Wetenschappelijke Raad voor het Regeringsbeleid.

27 J.W. Duyvendak, P. Geschiere, and E. Tonkens (2016), *The Culturalization of Citizenship. Belonging and Polarization in a Globalizing World,* London: Palgrave Macmillan.; H. Siebers (2009), 'Registreren van etniciteit is spelen met vuur', *Openbaar Bestuur,* 19(2) pp. 2-6; H Siebers and M.H.J. Dennissen (2015), 'Is it cultural racism? Discursive oppression and exclusion of migrants in the Netherlands', *Current Sociology,* 63(3) pp. 470-489.

this identity, such as education in their own language and culture. The government acknowledged a joint responsibility to facilitate their ways into the labour market. Until 2004, the *Stimulering Evenredige Arbeidsdeelname Minderheden* (SAMEN) law obliged organisations and companies to file reports annually on their efforts to let their labour force be a reflection of the regional demographic composition.

However, Wimmer and Glick Schiller[28] remind us that the ethnicisation of migrants usually takes place within the construction of nationalism. Nationalism invents categorical distinctions between nationals and outsiders, distinctions that subsequently develop into boundaries. By framing 'non-Western' migrants as ethnic groups, they were turned into the outsiders within. In the 1990s, this nationalist approach took on a civic form,[29] with emphasis on creating the conditions for participation in society, like the labour market.

However, since the turn of the century, nationalism has shifted in an ethno-nationalist direction[30] in which assumed Dutchness has become the standard in public discourse and policies.[31] The same previous two aspects of the definition of ethnic minorities, assumedly being culturally different and needing societal integration, have reappeared in a new articulation. On the one hand, assumed cultural traits of 'non-Western' migrants are seen as incompatible with assumed Dutch values.[32] On the other hand, these assumed incompatible cultural traits are held responsible for their poor levels of integration in society. Their exclusion is justified, arguing that their cultural traits are incompatible with assumed Dutchness and that they have poor prospects for participation in society anyway.[33]

This means blaming the victims. The nationalist 'othering' of migrants triggers exclusion processes and symbolic violence against people with a 'non-Western' migration background. The contents of the stigmas and

28 A.Wimmer and N. Glick Schiller (2002), 'Methodological nationalism and beyond: Nation-state building, migration and the social sciences', *Global Networks,* 2(4) pp. 301-334.

29 E. Gellner (1983), *Nations and Nationalism,* Ithaka, NY: Cornell University Press.

30 A.D. Smith (1986), *The Ethnic Origins of Nations,* Oxford: Blackwell.

31 R. van Reekum (2012), 'As nation, people and public collide: enacting Dutchness in public discourse', *Nations and Nationalism,* 18(4) pp. 583-602; R. van Reekum and J.W. Duyvendak (2012), 'Running from our shadows: the performative impact of policy diagnoses in Dutch debates on immigrant integration', *Patterns of Justice,* 46(5) pp. 445-466.

32 S. Suvarierol (2012), 'Nation-freezing: images of the nation and the migrant in citizenship packages', *Nations and Nationalism,* 18(2), pp. 210-229.

33 H. Siebers and M.H.J. Dennissen (2015), 'Is it cultural racism? Discursive oppression and exclusion of migrants in the Netherlands', *Current Sociology,* 63(3) pp. 470-489; S. Bonjour and J.W. Duyvendak (2017), 'The "migrant with poor prospects": racialized intersections of class and culture in Dutch Civic integration debates', *Ethnic and Racial Studies*. DOI: 10.1080/01419870.2017.1339897.

meanings that incite acts of discrimination in the organisations we studied exclusively reflect the negative connotations that the nationalist discourse in Dutch media and politics attributes to 'non-Western' migrants, such as their assumed involvement in crime, in terrorism, and in gender- and sexuality-related violence. These nationalist stigmas are adopted by nonmigrants and trigger conflicts and exclusion against people with a 'non-Western' migration background in work settings, with negative consequences for the latter's careers and payment.[34]

To give a few examples, one of our female respondents with a Moroccan background heard from her nonmigrant colleagues when she went to an after-work party, 'Were you allowed off the chain this evening?'. Muslim employees have to answer questions from colleagues about why Islam incites terrorism, apparently suggesting they have something to do with it. A civil servant with a Surinamese background, working for the government supported by the nationalist PVV party, was told by her colleagues, after she was turned down for a promotion, 'Where do your sort of people get the courage from to apply for such a job?'. A police officer with a Turkish background was informed about the reasons why she did not get promoted to a managerial job, 'You and me, we have been at war for centuries already'. Here, the nonmigrant selector reproduced images of cultural incompatibility and nationalist confrontations propagated by nationalist politicians.

The nationalist framing of particular categories of migrants as 'ethnic minorities' also creates feelings of insecurity on the part of these migrants when trying to network or use their social capital. An employee with a 'non-Western' migration background who did manage to get promoted to a supervision post, at the start of team meetings, deliberately displayed a screen saver with a picture of his children. This was an attempt to remind his colleagues of the fact that he is a human being after all. He was compelled to do this when they tended to simply ignore him. Eventually, he had to be transferred to a nonmanagerial job.

The contents of these discrimination-inciting stigmas, stemming from Dutch nationalist discourses in media and politics, also explain part of the variability in direct discrimination. In organisations in which the primary process is closely linked to these contents, we see overt and blunt events of discrimination taking place. For example, in the Dutch police force, the association of 'non-Western' migrants with crime, in nationalist discourses

34 H. Siebers (2010), 'The Impact of Migrant-Hostile Discourse in Media and Politics on Racioethnic Closure in Career Development in The Netherlands', *International Sociology,* 25(4) pp. 475-500.

in media and politics, creates suspicion towards officers with a 'non-Western' background and triggers incidents of discrimination against them. Crime fighting is a core business of the Dutch police.[35] By contrast, no such incidents took place in the former Dutch ministry of agriculture, since there is no connection between the ministry's work and these nationalist stigmas.[36]

Cultural Capital: 'soft skills'

My second contribution to understanding ethno-migrant inequality in the labour market refers to the role of so-called 'soft skills'. It builds upon what Alvesson and Willmott[37] have coined as identity regulation or socio-ideological labour control. It means that job applicants and workers are no longer only assessed on input (human capital) and output (quantity and quality of one's work and the observance of regulations and protocols), but also on the ways in which they perform their work and with which personality traits. These personality traits are often phrased as attitudes and 'soft skills' (being enthusiastic, motivated, communicative, proactive, assertive, authentic, creative, flexible, etc.).

All the organisations that we studied have introduced these kinds of selection and assessment criteria. Nevertheless, their functionality is often very questionable. Most of the time, HR advisors and supervisors were unable to answer our question about why these qualifications are necessary for achieving the work targets and results. Why should a tax administrator, whose job it is to control tax files, be creative? Why is a police officer supposed to be authentic? In addition, what is the surplus value for controlling how one achieves his or her targets, if the targets themselves are already assessed?

The processes to be achieved by requiring soft skills from employees, like open and fluent communication, are basically social processes. It has become fashionable to rephrase traits of social relations into personal or psychological traits,[38] but this cannot be done without serious distortions.

35 H. Siebers, (2017), 'What turns migrants into ethnic minorities at work? Factors erecting ethnic boundaries among Dutch police officers', *Sociology* 51(3) 608-625.

36 H. Siebers and J. van Gastel, (2015), 'Why migrants earn less: In search of the factors producing the ethno-migrant pay gap in a Dutch public organization', *Work, Employment and Society* 29(3) 371-391.

37 M. Alvesson and H. Willmott (2002), 'Identity regulation as organizational control: producing the appropriate individual', *Journal of Management Studies,* 39(5) pp. 619-644.

38 K.T. DiFruscia (2012), 'Work Rage: The Invention of a Human Resource Management Anti-Conflictual Fable', *Anthropology of Work Review* 33(2) pp. 89-100.

For example, it is inappropriate to lay the responsibility for good communication processes unilaterally on the shoulders of individual applicants and employees. One could just as well argue that it is the responsibility of an organisation to ensure that someone with the right human capital is able to work effectively and communicatively.

Thus, I argue that these 'soft skills' or personality prescriptions do not qualify as human capital, but as cultural capital. They are about cultural issues of identity construction and the presentation of self in everyday life.[39] They are resources for individuals to profile and distinguish themselves from others, to create distinction framed as higher valued culture.[40] They become capital if people manage to infer the suggestion that they possess a scarce and valued property that can be used to access economic capital. Bourdieu[41] shows that those who can claim to possess cultural capital are not worried about its functionality; those worries are only expressed by those with less such capital.

In all the organisations we studied, competition over soft skills, such as cultural capital in selection and promotion procedures, constitutes one of the main factors producing ethno-migrant inequality. Applicants and employees with a 'non-Western' migration background encounter serious problems whilst profiling themselves in these terms, which reduces their chances for getting hired or promoted. In one of these organisations, this factor is responsible for 47.4 per cent of their lower chances for getting hired.

Next, in general, applicants and employees with a 'non-Western' migration background try to perform on human capital or job-related criteria. They profile their human capital in application procedures and perform in terms of quantity and quality of results. However, they are basically assessed on criteria that apply to the cultural field. Non-migrant applicants and employees are more aware of these real assessment criteria and focus more on those in application and assessment interviews. Thus, there is a mismatch between criteria that applicants and employees with a 'non-Western' migration background focus on, and the real criteria by which they are assessed, by their predominantly non-migrant selectors and supervisors.

In addition, human capital can be assessed in relatively objective terms, by checking one's diplomas and relevant work experience. By contrast, 'soft skills' requirements are much more vague and ambiguous. There is no clear

39 E. Goffman (1959), *The Presentation of Self in Everyday Life,* New York: Radom House.

40 P. Bourdieu (1984), *Distinction: A Social Critique of the Judgement of Taste,* Boston: Harvard University Press.

41 Ibidem.

relationship between the linguistic sign of, for example, 'creativity' and the processes in reality to which the sign would refer. Criteria such as having to be 'authentic' are highly ambiguous. In other words, 'soft skills' suffer from denotational indeterminacy, which opens the door for their strategic use against people with a 'non-Western' migration background.[42]

As a result, assessments of an applicant's or employee's 'soft skills' can only be made drawing on the assessor's subjective interpretations and impressions. Assessments in the cultural field are a matter of taste, Bourdieu[43] argues, in which the above-mentioned negative images about migrants in political and media discourse can easily become salient. Selectors told us that they base their assessment on the impression they get from an applicant in the first seconds of the interview. Thus, the applicant who is identified as someone with a 'non-Western' migration background is at a disadvantage because such an identification can easily trigger the negative connotations nationalist discourses in media and politics attribute to such people. They have a double burden: they not only need to show that they have the right human capital, but also that they are properly assimilated in the cultural field.

This symbolic violence in assessing cultural capital at the cost of a particular group is legitimised in a culturalist way. In line with nationalist discourses, selectors and supervisors attribute the lower scores of migrant applicants and employees based on 'soft skills', such as assertiveness, communicativeness, and proactiveness, to the cultural backgrounds of these applicants and employees. They tend to bring values of modesty and reactive attitudes to work from their cultural backgrounds, which apparently are incompatible with what is demanded from them at work, just like the current nationalist discourse argues that 'values' 'non-Western' migrants would cherish would be incompatible with 'Dutch values'. The question whether people with such diverse cultural backgrounds, stemming from very different parts of the world, would all have those same 'non-Western' values in common, is not raised.

It is much more likely that less proactive or assertive behaviour stems from the latent or overt insecurity these people have in common, due to fact that they have become the object of nationalist discourses. It is hard

42 H. Siebers (2017), 'What turns migrants into ethnic minorities at work? Factors erecting ethnic boundaries among Dutch police officers', *Sociology,* 51(3) pp. 608-625; B. Urciuoli (2008), 'Skills and selves in the new workplace', *American Ethnologist,* 35(2) pp. 211-228.

43 P. Bourdieu (1984), *Distinction: A Social Critique of the Judgement of Taste,* Boston: Harvard University Press.

to become proactive and assertive if you do not feel secure.[44] By introducing criteria for control and assessment that belong to the cultural field, discourses that are active and appropriate in that cultural field come to determine outcomes of the struggle for capital. The application of 'soft skills', i.e. cultural capital, as criteria for assessment and control, allows nationalist discourses on migrants and migration to land at the gate and on the work floor of organisations, so to speak, to erect boundaries between applicants and employees with a 'non-Western' migration background and those without a migration background, producing ethno-migrant inequality in Dutch public organisations.

Migrants are instructed on assumedly Dutch 'soft skills' in civic integration programmes[45], and Dutch authorities such as COA make a lot of effort to train refugees in Dutch 'soft skills,[46] but that seems like an uphill battle. It would be far more fruitful to stop assessing applicants and employees based on their 'soft skills' altogether. Assessing applicant and employees on their 'soft skills' represents a clear example of indirect discrimination, as these skills are not job-related and work out disproportionately negatively for people with a 'non-Western' migration background.

Conclusion

Ethno-migrant inequality in access to economic capital in the labour market may be produced by several factors, including unequal access to human capital and social capital, direct discrimination, the impact of nationalist discourses, and the competition over cultural capital through the introduction of 'soft skills' as criteria for selection and assessment. In theory, sociopsychological factors and racism may also contribute to ethno-migrant inequality through triggering discriminatory behaviour. However, in the Dutch case, explanations referring to them are not convincing, which

44 Efforts like those by Geert Hofstede to pinpoint 'cultures' to specific traits ('Dutch culture is[...]') in a globalized world have been unsuccessful for various conceptual and methodological reasons. I argue that it is more likely that both assertive and nonassertive behaviour, for example, are present in and available from each and every cultural repertoire and that it is the context that renders one salient and not the other. That means that context matters, in this case, insecurity, not the cultural repertoires as such.

45 S. Suvarierol (2012), 'Nation-freezing: images of the nation and the migrant in citizenship packages', *Nations and Nationalism,* 18(2) pp. 210-229.

46 T. de Lange, E. Besselsen, S. Rahouti, and C. Rijken (2017), *Van azc naar een baan. De Nederlandse regelgeving over en praktijk van arbeidsmarktintegratie van vluchtelingen,* Amsterdam: Universiteit van Amsterdam.

does not rule out their salience and relevance elsewhere. Individual cases of ethno-migrant inequality on the macro, meso, and micro levels may be produced by different mixes of the factors discussed above. They are very historical, contextual, and thus variable. The explanatory framework set out here will, however, be helpful in analysing individual cases to produce those different results and to avoid biases and blind spots. With those results, much needed recommendations can be made for changing macro government policies and discourses, management and intervention approaches on the organisational level, and expectations and strategies taken by individual actors. These are good reasons for being prudent in developing national and macro level policies and focussing on individual sectors and organisations instead. The framework is far from perfect, though. More research is needed, in particular on how those various factors and explanations interrelate and articulate.

Bibliography

Alvesson, M. and H. Willmott (2002), 'Identity regulation as organizational control: producing the appropriate individual', *Journal of Management Studies,* 39(5) pp. 619-644.

Anderson, B. (2010), 'Migration, immigration controls and the refashioning of precarious workers, Work', *Employment and Society,* 24(2) pp. 300-317.

Back, L. and J. Solomos (eds.) (2009), *Theories of Race and Racism. A Reader,* London and New York: Routledge.

Blommaert, L.; F. van Tubergen; and M. Coenders (2012), 'Implicit and explicit interethnic attitudes and ethnic discrimination in hiring', *Social Science Research,* 41(1) pp. 61-73.

Bonjour, S. and J.W. Duyvendak (2017), 'The "migrant with poor prospects": racialized intersections of class and culture in Dutch Civic integration debates', *Ethnic and Racial Studies Epub*. DOI: 10.1080/01419870.2017.1339897, pp. 1-20.

Bourdieu, P. (1977), *Outline of theory of practice,* Cambridge: Cambridge University Press.

Bourdieu, P. (1984), *Distinction: A Social Critique of the Judgement of Taste,* Boston: Harvard University Press.

Bourdieu, P. (1984), 'Social space and symbolic power', *Sociological Theory,* 7(1) pp. 14-25.

Bourdieu, P. (1986), 'The forms of capital', in J. Richardson (ed.), *Handbook of Theory and Research for the Sociology of Education,* Westport, CT: Greenwood.

Bovens, M.; M. Bokhorst; R. Jennissen; and G. Engbersen (2016), *Migratie en classificatie: naar een meervoudig migratie-idioom,* Den Haag: Wetenschappelijke Raad voor het Regeringsbeleid.

CBS (2016), *Jaarrapport Integratie 2016,* Den Haag/Heerlen: Centraal Bureau voor de Statistiek.

Chen, M. and J.A. Bargh (1997), 'Nonconscious Behavioral Confirmation Processes: The Self-Fulfilling Consequences of Automatic Stereotype Activation', *Journal of Experimental Social Psychology,* 33(5) pp. 541-560.

DiFruscia, K.T. (2012), 'Work Rage: The Invention of a Human Resource Management Anti-Conflictual Fable', *Anthropology of Work Review,* 33(2) pp. 89-100.

Duyvendak, J.W.; P. Geschiere; and E. Tonkens (2016), *The Culturalization of Citizenship. Belonging and Polarization in a Globalizing World,* London: Palgrave Macmillan.

Ellemers, N. and M. Barreto (2008), 'Putting your own down: How members of disadvantaged groups unwittingly perpetuate or exacerbate their disadvantage', in A. Brief (ed.), *Diversity at Work,* Cambridge: Cambridge University Press.

Essed, P., and D.T. Goldberg (eds.) (2002), *Race and Critical Theories,* Oxford: Blackwell Publishers.

Gellner, E. (1983), *Nations and Nationalism,* Ithaka, NY: Cornell University Press.

Goffman, E. (1959), *The Presentation of Self in Everyday Life,* New York: Random House.

Gowricharn, R. and S. Çankaya (2015), 'Policing the Nation: Acculturation and Street-level Bureaucrats in Professional Life', *Sociology* Epub. DOI: 10.1177/0038038515601781.

Granovetter, M. (1983), 'The strength of weak ties: A network theory revisited', *Sociological theory,* 1(1) pp. 201-233.

Greenwald, A.G.; M.R. Banaji; L.A. Rudman; S.D. Farnham; B.A. Nozek; and D.S. Mellott (2002), 'A Unified Theory of Implicit Attitudes, Stereotypes, Self-Esteem, and Self-Concept', *Psychological Review,* 109(1), pp. 3-25.

Heath, A. and S.Y. Cheung (2007), *Unequal Chances: Ethnic Minorities in Western Labour Markets,* Oxford: Oxford University Press.

Hill Collins, P. and J. Solomos (2010), *The SAGE Handbook of Race and Ethnic Studies,* London: Sage.

Laer, K. van and M. Janssens (2011), 'Ethnic minority professionals experiences with subtle discrimination in the workplace', *Human Relations,* 64(9) pp. 1203-1227.

Lange, T. de; E. Besselsen; S. Rahouti; and C. Rijken (2017), *Van azc naar een baan. De Nederlandse regelgeving over en praktijk van arbeidsmarktintegratie van vluchtelingen,* Amsterdam: Universiteit van Amsterdam.

Mutsaers, P.; H. Siebers; and A. de Ruijter (2014), 'Becoming a Minority: Ethno-Manufacturing in the Netherlands', in J. Tripathy and S. Padmanabhan (eds.),

Becoming Minority: How Discourses and Policies Produce Minorities in Europe and India, New Delhi: Sage.

Reekum, R. van (2012), 'As nation, people and public collide: enacting Dutchness in public discourse', *Nations and Nationalism,* 18(4) pp. 583-602.

Reekum, R. van and J.W. Duyvendak (2012), 'Running from our shadows: the performative impact of policy diagnoses in Dutch debates on immigrant integration', *Patterns of Justice,* 46(5) pp. 445-466.

Siebers, H. (2009) '(Post)bureaucratic organizational practices and the production of racioethnic inequality at work', *Journal of Management and Organization*, 15(1) pp. 62-81.

Siebers, H. (2009), 'Registreren van etniciteit is spelen met vuur', *Openbaar Bestuur,* 19(2) pp. 2-6.

Siebers, H. (2009), 'Struggles for Recognition: The Politics of Racioethnic Identity among Dutch National Tax Administrators', *Scandinavian Journal of Management*, 25(1) pp. 73-84.

Siebers, H. (2010), 'Organisatiecultuur en verhulde discriminatie: Over het onthullen van discriminatie in hedendaagse organisaties', in C.J. Forder (ed.), *Gelijke Behandeling: Oordelen en Commentaar 2009*, Nijmegen: Wolf Legal Publishers.

Siebers, H. (2010), 'The Impact of Migrant-Hostile Discourse in Media and Politics on Racioethnic Closure in Career Development in The Netherlands', *International Sociology,* 25(4) pp. 475-500.

Siebers, H. (2017), 'What turns migrants into ethnic minorities at work? Factors erecting ethnic boundaries among Dutch police officers', *Sociology,* 51(3) pp. 608-625

Siebers, H. (2017), '"Race" versus "ethnicity"? Critical race essentialism and the exclusion and oppression of migrants in the Netherlands', *Ethnic and Racial Studies,* 40(3) pp. 369-387.

Siebers, H. and M.H.J. Dennissen (2015), 'Is it cultural racism? Discursive oppression and exclusion of migrants in the Netherlands', *Current Sociology,* 63(3) pp. 470-489.

Siebers, H. and J. van Gastel (2015), 'Why migrants earn less: In search of the factors producing the ethno-migrant pay gap in a Dutch public organization', *Work, Employment and Society,* 29(3) pp. 371-391.

Smith, A.D. (1986), *The Ethnic Origins of Nations,* Oxford: Blackwell.

Stewart, B.D. and B.K. Payne (2008), 'Bringing Automatic Stereotyping Under Control: Implementation Intentions as Efficient Means of Thought Control', *Personality and Social Psychology Bulletin,* 34(10) pp. 1332-1345.

Suvarierol, S. (2012), 'Nation-freezing: images of the nation and the migrant in citizenship packages', *Nations and Nationalism,* 18(2) pp. 210-229.

Tubergen, F. van; I. Maas; and H. Flap (2004), 'The economic incorporation of immigrants in eighteen western countries: Origin, destination, and community effects', *American Sociological Review,* 69(5) pp. 704-727.

Urciuoli, B. (2008), 'Skills and selves in the new workplace', *American Ethnologist,* 35(2) pp. 211-228.

Wimmer, A. (2013), *Ethnic Boundary Making. Institutions, Power, Networks,* Oxford: Oxford University Press.

Wimmer, A. and N. Glick Schiller (2002), 'Methodological nationalism and beyond: Nation-state building, migration and the social sciences', *Global Networks,* 2(4) pp. 301-34.

Zschirnt, E. and D. Ruedin (2016), 'Ethnic discrimination in hiring decisions: a meta-analysis of correspondence tests 1990-2015', *Journal of Ethnic and Migration Studies,* 42(7) pp. 1115-1134.

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12 Collective Agreements and Equal Opportunities for Women and Disadvantaged Groups

Johan Graafland

Abstract

This contribution researches the impact of collective agreements on female management and job opportunities of employees from disadvantaged groups (including migrants or their descendants) in 4053 enterprises in Europe. Graafland finds that collective agreements stimulate female presence in board and executive positions, and the inflow of employees from disadvantaged groups (e.g. migrant workers, people with disabilities, long-term unemployed). Moreover, female management further enforces job opportunities of disadvantaged workers. Countries with high coverage of collective agreements therefore, directly as well as indirectly, through female management, foster integration of employees from disadvantaged groups into the labour market. The results imply that dismantling extensions of collective agreements in the labour market increases gender inequality and inequality between advantaged and disadvantaged groups of employees.

Keywords: disadvantaged groups, collective agreements, female management

Introduction

Because of international differences in Corporate Social Responsibility (CSR) policies of companies, research into CSR has become more focussed

Rijken, Conny and Tesseltje de Lange (eds): *Towards a Decent Labour Market for Low Waged Migrant Workers.* Amsterdam: Amsterdam University Press, 2018
DOI: 10.5117/9789462987555_GRAA

on its institutional roots.[1] One of the institutions that has been relatively unexplored in CSR research is collective agreements. Only Ioannou and Serafeim have researched how labour unions affect CSR.[2] Using ratings from ASSET4[3] for public companies in 42 countries, they found that union density stimulates both environmental and social CSR. The research of Ioannou and Serafeim does not, however, address which of the many social aspects that are included in the social dimension of CSR as constructed by ASSET4, are more or less encouraged by union coverage.

The social dimension of CSR comprises very heterogeneous aspects in the rating system of ASSET4, including customer and product responsibility, community interests, respect of human rights, diversity and opportunities, quality of employer-workforce relation,[4] employment health and safety, and training and development. It is not surprising that union coverage improves aspects of the social dimension of CSR that concern core interests of incumbent employees that unions aim to protect, such as fair wages, the use of fixed-term contracts, training and development, and health and safety. Previous research has shown, for example, that relative to uncovered workers, union-covered workers are more likely to receive more days of training.[5] In addition, union-covered workers experience greater returns from training and face a higher wage growth. In establishments where unions are recognised, labour turnover is also reduced.[6] Furthermore,

1 R.V. Aguilera and G. Jackson (2003), 'The cross-national diversity of corporate governance: Dimensions and determinants', *Academy of Management Review*, 28 pp. 447-465; J.L. Campbell (2007), 'Why would corporations behave in socially responsible ways? An institutional theory of corporate social responsibility', *Academy of Management Review*, 32 pp. 946-967; G. Jackson and A. Apostolakou (2010), 'Corporate social responsibility in Western Europe: an institutional mirror or substitute?', *Journal of Business Ethics,* 94 pp. 371-394; S. Brammer, G. Jackson, and D. Matten (2012), 'Corporate social responsibility and institutional theory: new perspectives on private governance', *Socio-Economic Review*, 10 pp. 3-28.

2 I. Ioannou and G. Serafeim (2012), 'What drives corporate social performance & quest; The role of nation-level intitutions', *Journal of International Business Studies*, 43(9) pp. 834-864.

3 ASSET 4 is one of the major sustainability ratings agencies, often called ESG raters, as they rate companies on the three dimensions: environment, social, and governance. Other well-known ESG rating agencies are KLD, Sustainalytics, Vigeo, and FTSE4Good.

4 It seems that Ioannou and Serafeim (2012) failed to notice that the workforce and employment category in ASSET4 includes trade union representation, which makes their analysis partly tautological.

5 A.L. Booth, M. Francesconi, and G. Zoega (2003), 'Unions, work-related training, and wages: Evidence for British men', *Industrial and Labour Relations Review*, 57(1) pp. 68-91.

6 F.D. Blau and L.M. Kahn (1983), 'Unionism, seniority, and turnover', *Industrial Relations*, 22(3) pp. 362-73.

labour unions use their collective bargaining and participation in health and safety committees to influence workplace health and safety standards.[7]

However, these findings do not give insight into how coverage by collective agreement affects labour issues that have a wider societal interest. In our research, we focus on two important, yet unexplored, social aspects of CSR that go beyond the immediate interests of incumbent workers, namely gender diversity in the management of the company and equal opportunities for groups that have a relative disadvantaged position on the labour market. To date, there has been no large scale, multi-country research into the relationship between collective agreements and these two dimensions of labour market equality. The core research question of this paper is therefore: Do collective agreements encourage gender diversity in the management of the company and equal opportunities for groups that have a relative disadvantaged position on the labour market, including migrants or their descendants?

We test our hypotheses on a sample of 4053 enterprises in twelve European countries for which detailed information about the share of employees represented by collective agreement, per firm, is available. This data provides information about differences in union coverage among companies within countries and, therefore, provides a more accurate picture of the influence of collective agreements than macro indicators of union density do. In the next section, we present the conceptual framework. In section three, we describe our methodology. Following the methodology, we present our empirical findings, followed by a discussion.

Conceptual Framework

Background

One of the neglected forces in institutional CSR theory is the role of collective agreements. A collective agreement is written between a representation of workers and an entrepreneur or business representation, and regulates the working and employment conditions as well as the labour relations management.[8] It is established between the elected representatives of the

7 For an overview, see K. Pouliakas and I. Theodossiou (2013), 'The economics of health and safety at work: an interdisciplinary review of the theory and policy', *Journal of Economic Surveys*, 27(1) pp. 167-208.

8 J.M. Biedma-Ferrer, M. Lopez-Fernandez, and P.M. Romero-Fernandez (2015), *The collective labour agreement as a key tool for driving corporate social responsibility: banking sector analysis,* Retrieved from: http://www.ehu.eus/cuadernosdegestion/documentos/150525jb.pdf.

workers and those who act on behalf of the company, but can be extended to employees and employers of other companies. Such cases of extension mechanisms exist to varying degrees in EU Member States.[9]

According to Aguilera and Jackson, the lack of attention to the role of collective agreements in CSR reflects weak employee participation in the United States, where the concept of CSR originated.[10] Also, in the practice of CSR, labour unions have been largely excluded from participating as equal partners. Consequently, organised labour greeted CSR with ambivalence.[11] To unions, the concept of CSR lacks a distinct connection to the central role that corporations have as employers.[12]

Still, unions may play an important role in the realisation of CSR-related goals, because they are instrumental to voicing workers' collective needs and desires to the management.[13] Campbell argues that companies are more likely to behave in socially responsible ways when they are engaged in institutionalised dialogue with unions.[14] Their influence may not be visible in voluntary, explicit CSR measures, but is more implicit through sector and national negotiations on labour-related issues.[15] In countries that showed weakening of labour unions, firms started to score higher on explicit CSR as a substitute for institutional regulation and social coordination.[16] Still, to the extent that unions empower employees, corporations may also face pressure to adopt explicit CSR measures. For example, powerful labour unions may use their influence to pressure companies to adopt better labour standards throughout their supply chain and push for extended benefits for employees, focussing on health and safety provisions, labour relations policies, and more workplace amenities.[17] For instance, they can pressure suppliers, who are known for the abuse of migrant workers, into paying them properly.

9 As a result, collective agreements can apply to (temporary) migrant workers, whether EU or non-EU nationals, ethnic minorities, and (or as) nationals alike.

10 R.V. Aguilera and G. Jackson (2003).

11 S. Brammer, G. Jackson, and D. Matten (2012).

12 H. de Geer, T. Borglund, and M. Frostenson (2010), 'Reconciling CSR with welfare state actor roles – The problematic Swedish case', *Journal of Business Ethics*, 89 pp. 269-283.

13 R.B. Freeman and J.L. Medoff (1984), *What do unions do?,* New York: Basic Books.

14 J.L. Campbell (2007).

15 D. Matten and J. Moon (2008), '"Implicit" and "explicit" CSR: a conceptual framework for a comparative understanding of corporate social responsibility', *Academy of Management Review*, 33(2) pp. 404-424.

16 G. Jackson and A. Apostolakou (2010).

17 I. Ioannou and G. Serafeim (2012).

Collective Agreements and Equal Opportunities for Women and Disadvantaged Groups

Based on union representation theory, we expect, however, that collective agreements might have negative effects on social issues of wider societal interest, such as equal opportunities for women and disadvantaged outsiders on the labour market.[18] Union representation theory predicts that unions tend to advocate the interests of the median worker who often works full-time for a single employer. A union's duty to protect and advance the collective interests of all of its members might conflict with the particular interests of specific groups. Although a minority of union members may significantly value equal opportunities for specific groups, the majority of union members may have little interest in these issues, which induces the union to disregard the interests of specific groups that are victims of discrimination.[19] Consequently, union representation may encourage packages that do not reflect the preferences of marginal worker groups.[20]

Women and employees from disadvantaged groups are disproportionately represented in nonstandard atypical work, which may include part-time work, temporary agency work, flex-work, self-employed home care work, and contractor work.[21] Previous studies have found that unions tend to underrepresent women's interests systematically and to promote discriminatory policies, notwithstanding high rates of unionised women.[22] One of the reasons might be that women are underrepresented in union decision-making structures.[23] Most of the union representatives are men and this may have a negative outcome for gender equality in the bargaining process. Previous research has also shown that unions tend to underrepresent the interests of foreign workers.[24] Unions face the tension that the more immigrants that become active in the domestic labour market, the more competition there

18 L. Lurie (2015), *Do unions promote gender equality?,* Retrieved from: http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1290&context=djglp

19 D.A. Widiss (2012), 'Divergent Interests: Union Representation of Individual Employment Discrimination Claims'*, Indiana Law Journal*, 87(1).

20 J.W. Budd (2007), 'The Effect of Unions on Employee Benefits and Non-Wage Compensation: Monopoly, Power, Collective Voice and Facilitation'*,* in J.T. Bennett and B.E. Kaufman (eds.), *What do unions do? A twenty year perspective*, pp. 162-164.

21 L. Lurie (2013), 'Can Unions Promote Employability? Senior Workers in Israel's Collective Agreements'*, Industrial Law Journal*, 42 pp. 249-280.

22 A. McBride (2001), *Gender Democracy in Trade Unions*, Aldershot: Ashgate.

23 L. Lurie (2015).

24 E. Albin (2013), 'Union Responsibility to Migrant Workers: A Global Justice Approach', *Oxford Journal of Legal Studies*, 34 pp. 133-153.

is for traditional groups of employees that they represent, and the worse working conditions might become for these groups. Particularly in times of ample national supply of labour (such as in the years following the credit crisis in 2008), trade unions are likely to oppose recruitment of immigrant workers. Due to widespread unemployment, labour market competition might increase and inclusive union policies towards immigrants may thus clash with the interests of native workers.[25] Unions may therefore be inclined to defend the interests of national members and resist migrants or hesitate to defend them, for example, against exploitation.

Based on union representation theory and previous empirical research, we therefore posit the following hypotheses:

Hypothesis 1: *Collective agreements reduce female representation in board and executive positions*

Hypothesis 2: *Collective agreements reduce the inflow of employees from disadvantaged groups*

Interrelationship between Women in Management and Hiring of Disadvantaged Groups

Besides a direct negative influence from collective agreements on the inflow of employees from disadvantaged groups, we also expect a negative indirect effect mediated by the share of women in the top management of the company. We base this argument on social role theory that predicts that women are more socialised into communal values reflecting a concern for others than men, and, therefore, more likely to be motivated by altruistic concerns.[26] This has been confirmed by research that shows that female managers are more involved in corporate philanthropy.[27] Because of their altruistic concerns, it is therefore likely that female board members or

25 R. Penninx and J. Roosblad (Eds.) (2000), *Trade unions, immigration, and immigrants in Europe, 1960-1993: A comparative study of the attitudes and actions of trade unions in seven West European countries,* New York/Oxford: Berghahn Books.

26 E.S. Mason and P.E. Mudrack (1996), 'Gender and ethical orientation: A test of gender and occupational socialization theories', *Journal of Business Ethics*, 15(6) pp. 599-604; M. Williams and E. Polman (2015), 'Is It Me or Her? How Gender Composition Evokes Interpersonally Sensitive Behavior on Collabourative Cross-Boundary Projects', *Organization Science,* 26(2) pp. 334-355.

27 R.J. Williams (2003), 'Women on corporate boards of directors and their influence on corporate philanthropy', *Journal of Business Ethics*, 42(1) pp. 1-10; N.A. Ibrahim and J.P. Angelidis (2011), 'Effect of board members' gender on corporate social responsiveness orientation', *Journal of Applied Business Research* , 10(1) pp. 35-40; C. Marquis and M. Lee (2013), 'Who is governing whom? Executives, governance, and the structure of generosity in large U.S. firms', *Strategic Management Journal*, 34(4) pp. 483-497.

executives will take more responsibility for providing job opportunities to people from disadvantaged groups than male top managers. Therefore, we hypothesize that:

Hypothesis 3: *Female representation in board and executive positions increases the inflow of employees from disadvantaged groups*

Methodology

Data Collection

The data has been taken from a large online survey that targeted small- and medium-sized enterprises (SMEs) and was set out in twelve European countries (Austria, Denmark, Finland, France, Germany, Hungary, Italy, Poland, Spain, Sweden, The Netherlands, and the UK). The methodology of the survey has been described elsewhere.[28] 4053 responses were useable for our research. Using Cochran's sample size formula, we find that this response is adequate for inferring reliable research findings for the total population of companies in the twelve countries, using an alpha of 0.05.[29] Test results showed no response bias.

General Characteristics of the Sample

Table one presents an overview of the general characteristics of the companies in the sample. The use of collective agreements differs significantly among the twelve countries that we distinguish, ranging from 15% in the UK to 95% in France due to the large-scale extension of collective agreements in that country. The different shares of employees in our sample of SMEs that is covered by collective agreements per country reflect the differences in macro shares reported by the European Union.

28 J.J. Graafland (2016), 'Price competition, short-termism and environmental performance', *Journal of Cleaner Production,* 116 pp. 125-134.

29 The total number of companies in the twelve countries equals 16091476 (Source: EU, http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/performance-review/index_en.htm#h2-1).

Table 1 Sample characteristics (in %)

Country	% in sample	Union density (2013)[a]	Extension collective agreements[b]	Coverage collective agreements[c]	Share of employees covered by collective agreement in sample
UK	3	26	not	29	15
Denmark	7	67	not	80	65
Finland	4	69	very frequent	91	87
Sweden	5	68	not	88	84
Austria	2	28	seldom	95	72
France	7	8	very frequent	98	95
Germany	9	18	moderate	59	54
Netherland	11	18	frequent	81	75
Hungary	4	11	seldom	33	29
Poland	7	13	seldom	25	47
Italy	31	37	not	80	94
Spain	11	17	very frequent	70	92

Company size		
Micro (≤10 FTE)	*Small (11-50 FTE)*	*Medium-sized (51-250 FTE)*
30	41	29

Sector							
Energy	*Material*	*Industrial*	*Consumer discretionary*	*Consumer staples*	*Financial*	*ICT*	*Other*
4	17	19	19	4	3	4	30

[a] Source: OECD (https://stats.oecd.org/Index.aspx?DataSetCode=UN_DEN).
[b] Source: Eurofound (http://adapt.it/adapt-indice-a-z/wp-content/uploads/2013/08/efficacia_ccnl_eu.pdf**).**
[c] Source: http://www.worker-participation.eu/National-Industrial-Relations/Across-Europe/Collective-Bargaining2**.**

Measurements

The descriptive statistics and correlations of the dependent and independent variables and among dependent, independent, and the control variables are reported in Table 2.

The independent variable 'collective agreements', was measured by a survey question measuring the 'Share of employees covered by collective bargaining agreement as a % of the total number of employees in 2010.' The representation of females in board or executive positions was measured by a

survey question asking for the 'Share of women in the board and/or executive positions in 2010.' The inflow of employees from disadvantaged groups was measured by a survey question on the 'Share of employees recruited from disadvantaged groups (e.g. migrant workers, people with disabilities, long term unemployed) as a % of the total inflow in 2010.'

Table 2 Descriptive statistics

	Variable	*Mean*	*SD*	*1*	*2*	*3*
1	Collective agreement	70.06	43.45	1		
2	Women in board	23.38	25.82	0.02	1	
3	Inflow disadvantaged	7.18	14.61	0.02	**0.17**	1
4	Austria	0.03	0.17	-0.02	-0.01	-0.03
5	Denmark	0.15	0.38	**-0.11**	**-0.07**	0.01
6	Finland	0.29	0.45	**0.04**	**0.08**	**-0.05**
7	France	0.11	0.31	**0.14**	**0.05**	**0.11**
8	Germany	0.42	0.49	**-0.16**	-0.02	-0.02
9	Hungary	0.04	0.20	**-0.19**	**0.06**	**0.05**
10	Italy	0.28	0.45	**0.24**	-0.01	**-0.09**
11	Netherlands	0.10	0.30	**-0.04**	**-0.11**	**0.05**
12	Poland	0.09	0.29	**-0.19**	**0.14**	0.02
13	Spain	0.11	0.31	**0.16**	-0.01	**-0.06**
14	Sweden	0.05	0.21	-0.01	-0.02	**0.05**
15	UK	0.03	0.17	**-0.19**	-0.01	0.03
16	Company size (FTE, natural logarithm)	0.30	0.46	**0.15**	**-0.07**	*0.05*
17	Low skilled	33.05	32.27	**0.15**	**-0.09**	**0.13**
18	Medium skilled	41.92	29.99	**0.07**	-0.01	**-0.07**
19	High skilled	24.62	28.67	**-0.24**	**0.12**	**-0.07**
20	Young	10.20	13.83	0.00	-0.01	**0.06**
21	Medium age	67.88	23.28	**0.12**	-0.02	*-0.04*
22	High aged	21.87	21.53	**-0.13**	*0.03*	0.00
23	Energy	0.04	0.19	**0.05**	-0.01	0.01
24	Material	0.17	0.38	**0.09**	**-0.07**	0.01
25	Industrial	0.19	0.39	0.02	**-0.13**	*-0.04*
26	Consumer discretionary	0.19	0.39	0.02	**0.06**	*-0.04*
27	Consumer staples	0.04	0.20	**0.05**	0.02	0.02
28	Financial	0.03	0.16	**-0.04**	0.01	*-0.04*
29	IT	0.04	0.20	**-0.07**	-0.02	-0.03
30	B2C	1.93	1.02	0.02	**0.10**	0.01
31	Intensity of price competition	5.10	1.87	**0.08**	**-0.06**	0.01

Spearman's correlation coefficients. Italics $p<0.05$, bold $p<0.01$.

In the regression analysis, we controlled for the external environment of the company (sector, position in the supply chain, intensity of price competition, and country) and for internal characteristics of the company (company size [number of FTEs], skill structure, and age structure). To define sectors, we used the Global Industry Classification Standard (GICS) (taking 'other business' as a reference). The position in the supply chain is measured by a five-point Likert scale ranging from 'Business to Business' (B2B) to 'Business to Consumer' (B2C). The intensity of price competition is measured by the survey question 'In the market for your main product or service, your enterprise is prone to price competition' using a seven-point Likert scale ranging from 'not at all' (1) to 'very much' (7). The more competitive the market environment, the lower profitability, and, according to slack resource theory,[30] the fewer resources a company has available for investing in CSR-related goals.

Results

Using regression analysis,[31] we first estimated a null model consisting of all dependent, independent, and control variables. Then, we used stepwise estimation with backward selection in which we eliminated all insignificant control variables based on a criterion of alpha = 0.05. The results of final model are reported in Table 3.

Table 3 Estimation results[a]

	Women in board	Inflow of disadvantaged
Collective agreements	0.04***	0.06**
Women in board		0.17***
R^2	0.08	0.08

[a] N = 4,053. Standardised coefficients; * p<0.05, ** p<0.01, *** p<0.001. The (Santorra-Bentler) global fit indices for Model 2 are: Chi2 = 0.068; RMSEA = 0.012; CFI = 0.987; TLI = 0.966; SMRS = 0.004; R^2 = 0.133. We controlled for sector, position in the supply chain, intensity of price competition, company size, skill structure, and age structure.

30 S.A. Waddock and S.B. Graves (1997), 'The corporate social performance-financial performance link', *Strategic Management Journal,* 18 pp. 303-319.

31 We used structural equation modeling (SEM) in STATA with maximum likelihood as estimation technique and Satorra-Bentler correction for non-normality. For large samples (as in our research), SEM also provides a convenient method to estimate indirect effects. See P.E. Shrout and N. Bolger (2002), 'Mediation in experimental and nonexperimental studies: New procedures and recommendations', *Psychological Methods,* 7 pp. 422-445; T.D. Little, N.A. Card, J.A. Bovaird, K.J. Preacher, and C.S. Crandall (2007), *Structural Equation Modeling of Mediation and Moderation With Contextual Factors.* Retrieved from: http://quantpsy.org/pubs/little_card_bovaird_preacher_crandall_2007.pdf.

The global fit indices – CFI, TLI, and RMSEA – suggest a good model fit.[32] The estimation results show that the representation of women in the board and executive positions and the inflow of employees from disadvantaged groups are significantly, but positively, related to collective agreements. Hence, we reject hypothesis one and two. Hypothesis three, that the share of female managers increases the inflow of employees from disadvantaged groups, is supported. If we test the indirect effect of collective agreements on the inflow of employees from disadvantaged groups as mediated by the share of female managers, we find a small but significant positive effect (p value<0.001). Hence, by fostering the share of female managers, collective agreements indirectly increase the inflow of disadvantaged employees as well.

Discussion

In this paper, we set out to research the effect of collective agreements on social dimensions of CSR that concern wider societal interests, beyond the immediate interests of incumbent workers that unions typically represent, namely gender diversity in the management of the company and equal opportunities for groups that have a relative disadvantaged position in the labour market. Whereas previous cross-country research by Ioannou and Serafeim has shown that union coverage stimulates social and environmental performance of large companies, we expected to find opposite results for gender equality and job opportunities for applicants that have a disadvantaged position in the labour market.[33] This expectation was based on the union representation theory that predicts that unions advocate for the interests of the median worker, and that advancement of these interests conflict with the particular interests of specific groups that are disproportionately represented in nonstandard, atypical work.

Based on a sample of 4053 enterprises in Europe, and using micro data of the share of employees covered by collective bargaining agreement per company, we found, however, that collective bargaining stimulates both the presence of women managers in the top management of the enterprise as

32 B.M. Byrne (2010), *Structural equation modelling with AMOS. Basic concepts, applications, and programming,* New York/London: Routledge; L.T. Hu and P.M. Bentler (1999), 'Cutoff criteria for fit indexes in covariance structure analysis: Conventional criteria versus new alternatives', *Structural Equation Modeling*, 6 pp. 1-55.

33 I. Ioannou and G. Serafeim (2012).

well as the inflow of employees from disadvantaged groups. Moreover, we also detected a positive, indirect effect from collective agreements on the inflow of disadvantaged employees, as women managers are more inclined to hire labour from these groups, than male managers.

These results provide additional evidence for the positive effects of union coverage on CSR identified by Ioannou and Serafeim.[34] Ioannou and Serafeim argue that labour unions may increase overall awareness within society by acting as the firm's ambassador for environmental and social policies. But the question remains why this is the case. A possible explanation is that unions take account of the negative societal effects that result from unemployment of employees from disadvantaged groups, because they often coordinate their actions at the macro level. For individual companies, these negative effects are largely a given and the benefits from fighting them are negligible to the individual company. At the macro level, however, the unemployment of employees from disadvantaged groups is not a given and is rather dependent on the policies of unions at this level. They cause substantial societal costs that harm the interests of all union members. This motivates unions operating at the national level to bargain for policies at the meso and micro level in sectoral or firm level agreements that provide more equal opportunities for disadvantaged groups. An example of such a policy is an agreement of the Dutch national unions Federatie Nederlandse Vakbeweging (FNV), Christelijk Nationaal Vakbond (CNV), and Reformatorisch Maatschappelijke Unie (RMU) with the company CêlaVíta that agreed to offer partly disabled employees jobs.[35]

Another explanation is that the weakening of the position of trade unions during that last decennia has triggered attempts to revitalise unions, with inclusion of underrepresented groups being a foremost strategy. In Europe, such organising has been implemented in the United Kingdom and, more recently, in the Netherlands.[36] For example, in 2005, the FNV published a report *De vakbeweging van de toekomst: Lessen uit het buitenland* with the intent to redefine itself. One of the issues addressed in this report was the importance of 'organising' new groups of people, including migrant

34 I. Ioannou and G. Serafeim (2012).

35 Retrieved from: http://www.rmu.nu/weblog/akkoord+over+cao+clavta_1312

36 S. Marino, R. Penninx, and J. Roosblad (2015), 'Trade unions, immigration and immigrants in Europe revisited: Unions' attitudes and actions under new conditions', *Comparative Migration Studies,* 3(1) pp.?-? retrieved from: https://doi.org/10.1007/s40878-015-0003-x

workers.[37,38] Marino et al. conclude that these revalidation efforts of unions, by a more inclusive strategy that takes seriously the interests of previously marginalised groups, suggest that inclusive attitudes toward migrant workers are inversely related to the degree of institutional embeddedness of unions.[39] If the institutional power of unions reduces, they become more dependent on union membership, which stimulates them to attract new, underrepresented groups of workers to increase union membership. However, this conclusion is not supported by our research, as our findings indicate that union coverage stimulates a wider societal orientation.[40] Consequently, collective agreements improve companies' implementation of policies that foster equal opportunities for women and employees from disadvantaged groups in the labour market.

The policy implication that can be derived from our findings is that societies should be careful in diminishing the role of unions, for example, by abolishing the legal extension of collective agreements. The results indicate that nullifying the power of unions may reduce the incentives for creating more equal opportunities for women in board positions and for hiring employees from groups with a disadvantaged position in the labour market. If the influence of unions diminishes, public spirit may decline and this will make it more challenging to integrate people with a migrant history into the labour market, amongst them, the refugees that recently entered Europe.

37 H. Connolly, S. Marino, and M.M. Lucio (2014), 'Trade union renewal and the challenges of representation: Strategies towards migrant and ethnic minority workers in the Netherlands, Spain and the United Kingdom', *European Journal of Industrial Relations,* 20(1) pp. 5-20.

38 In 2004, former FNV chairwomen Jongerius proposed to introduce legally binding minimum quotas for the inflow of employees from migrant groups, but employers refused to support this idea. In a phone call with FNV in August 2017, it appeared that there are no examples yet of collective agreements that provide provisions to increase employment among migrant employees.

39 S. Marino, R. Penninx, and J. Roosblad (2015).

40 If we also include the degree to which collective agreements are extended (based on the third column in Table 1) as indicator of institutional embeddedness of unions (besides the influence of coverage of collective agreements per firm), we find no significant effects on the share of women in the board or the inflow of employees from disadvantaged groups. Hence, institutional embeddedness through extension of collective agreement does not negatively affect the share of women in the board or the inflow of employees from disadvantaged groups.

Bibliography

Aguilera, R.V. and G. Jackson (2003), 'The cross-national diversity of corporate governance: Dimensions and determinants', *Academy of Management Review*, 28 pp. 447-465.

Albin, E. (2013), 'Union Responsibility to Migrant Workers: A Global Justice Approach', *Oxford Journal of Legal Studies*, 34 pp. 133-153.

Biedma-Ferrer, J.M.; M. Lopez-Fernandez; and P.M. Romero-Fernandez (2015), *The collective labour agreement as a key tool for driving corporate social responsibility: banking sector analysis,* Universidad de Cádiz.

Blau, F.D. and L.M. Kahn (1983), 'Unionism, seniority, and turnover', *Industrial Relations*, 22(3) pp. 362-73.

Booth, A.L.; M. Francesconim; and G. Zoega (2003), 'Unions, work-related training, and wages: Evidence for British me', *Industrial and Labour Relations Review*, 57(1) pp. 68-91.

Brammer, S.; G. Jackson; and D. Matten (2012), 'Corporate social responsibility and institutional theory: new perspectives on private governance', *Socio-Economic Review*, 10 pp. 3-28.

Budd, J.W. (2007), 'The Effect of Unions on Employee Benefits and Non-Wage Compensation: Monopoly, Power, Collective Voice and Facilitation', in J.T. Bennett and B.E. Kaufman (eds.), *What do unions do? A twenty year perspective*, Transaction Publishers, pp. 162-164.

Byrne, B.M. (2010), *Structural equation modelling with AMOS. Basic concepts, applications, and programming*. New York/London: Routledge.

Campbell, J.L. (2007), 'Why would corporations behave in socially responsible ways? An institutional theory of corporate social responsibility', *Academy of Management Review*, 32 pp. 946-967.

Connolly, H.; S. Marino; and M.M. Lucio (2014), 'Trade union renewal and the challenges of representation: Strategies towards migrant and ethnic minority workers in the Netherlands, Spain and the United Kingdom', *European Journal of Industrial Relations*, 20(1) pp. 5-20.

Freeman, R.B. and J.L. Medoff (1984), *What do unions do?,* New York: Basic Books.

Geer, H. de; T. Borglund; and M. Frostenson (2010), 'Reconciling CSR with welfare state actor roles – The problematic Swedish case', *Journal of Business Ethics*, 89 pp. 269-283.

Graafland, J.J. (2016), 'Price competition, short-termism and environmental performance', *Journal of Cleaner Production,* 116 pp. 125-134.

Hu, L.T. and P.M. Bentler (1999), 'Cutoff criteria for fit indexes in covariance structure analysis: Conventional criteria versus new alternatives', *Structural Equation Modeling*, 6 pp. 1-55.

Ibrahim, N.A. and J.P. Angelidis (2011), 'Effect of board members' gender on corporate social responsiveness orientation', *Journal of Applied Business Research* (*JABR*), 10(1) pp. 35-40.

Ioannou, I. and G. Serafeim (2012), 'What drives corporate social performance & quest; The role of nation-level intitutions', *Journal of International Business Studies*, 43(9) pp. 834-864.

Jackson, G. and A. Apostolakou (2010), 'Corporate social responsibility in Western Europe: an institutional mirror or substitute?', *Journal of Business Ethics,* 94 pp. 371-394.

Little, T.D.; N.A. Card; J.A. Bovaird; K.J. Preacher; and C.S. Crandall (2007), 'Structural Equation Modeling of Mediation and Moderation With Contextual Factors', *Modeling contextual effects in longitudinal studies,* 1 pp. 207-230.

Lurie, L. (2013), 'Can Unions Promote Employability? Senior Workers in Israel's Collective Agreements', *Industrial Law Journal*, 42 pp. 249-280.

Marino, S.; R. Penninx; and J. Roosblad (2015), 'Trade unions, immigration and immigrants in Europe revisited: Unions' attitudes and actions under new conditions', *Comparative Migration Studies*. 3(1) pp. 1-16.

Marquis, C. and M. Lee (2013), 'Who is governing whom? Executives, governance, and the structure of generosity in large U.S. firm', *Strategic Management Journal*, 34(4) pp. 483-497.

Mason, E.S. and P.E. Mudrack (1996), 'Gender and ethical orientation: A test of gender and occupational socialization theories', *Journal of Business Ethics*, 15(6) pp. 599-604.

Matten, D. and J. Moon (2008), '"Implicit" and "explicit" CSR: a conceptual framework for a comparative understanding of corporate social responsibility', *Academy of Management Review*, 33(2) pp. 404-424.

McBride, A. (2001), *Gender Democracy in Trade Unions*. Aldershot: Ashgate.

Penninx, R. and J. Roosblad (Eds.) (2000), *Trade unions, immigration, and immigrants in Europe, 1960-1993: A comparative study of the attitudes and actions of trade unions in seven West European countries*. New York/Oxford: Berghahn Books.

Pouliakas, K. and I. Theodossiou (2013), 'The economics of health and safety at work: an interdisciplinary review of the theory and policy', *Journal of Economic Surveys*, 27(1) pp. 167-208.

Shrout, P.E. and N. Bolger (2002), 'Mediation in experimental and nonexperimental studies: New procedures and recommendations', *Psychological Methods,* 7 pp. 422-445.

Waddock, S.A. and S.B. Graves (1997), 'The corporate social performance-financial performance link', *Strategic Management Journal,* 18 pp. 303-319.

Widiss, D.A. (2012), 'Divergent Interests: Union Representation of Individual Employment Discrimination Claims', *Indiana Law Journal,* 87(1), pp. 421-430.

Williams, M. and E. Polman (2015), 'Is It Me or Her? How Gender Composition Evokes Interpersonally Sensitive Behavior on Collabourative Cross-Boundary Projects', *Organization Science*, 26(2) pp. 334-355.
Williams, R.J. (2003), 'Women on corporate boards of directors and their influence on corporate philanthropy', *Journal of Business Ethics*, 42(1) pp. 1-10.

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