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**REVISITING EMPLOYER SANCTIONS IN THE UNITED STATES AND
EUROPE**

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Introduction

Employer sanction systems are made up of requirements upon employers to check immigration status and penalties for hiring workers in breach of immigration law. In the period of reduced demand for labour that began with the economic recession of the mid-1970s, many developed states either introduced new sanctions for employers who hired irregular workers, or else strengthened existing ones.¹ The current policy context in most developed economies, by contrast, is one of increased demand for migrant labour. In this new situation, policy-makers in many states have become concerned to deter irregular migration and employment², and have as a result been revisiting their employer sanction systems.

This paper offers an account of employer sanction systems in several established immigration states. It firstly offers a detailed outline of the quite similar history of employer sanctions in the United States (section 1) and the United Kingdom (section 2). In each of these states, there was initial reluctance to introduce employer sanctions, because of their possible impact upon employers and minorities. As a result, the system that emerged was comparatively weak, and has been the subject of significant reforms or reform proposals in recent years. The paper then considers the approach to employer sanctions in continental European states (section 3). This is done through a summary of the employer sanction systems in France and the Netherlands, and of the European Commission's proposal for a European Union directive on the subject in May 2007. The paper as a whole identifies a divide between the Anglo-American and continental European approaches to employer sanctions, but also a widespread recent tendency to innovation, with a view to enhancing the effectiveness of employer sanction systems.

1. The United States

Emergence

¹ See generally, Philip Martin and Mark Miller, *Employer Sanctions: French, German and US Experiences*, ILO International Migration Papers No 36 (2000).

² The term 'irregular' is used to describe an individual's presence on a territory or employment there which lacks permission under immigration law.

In the initial post-war period, US policy was to tolerate irregular work for economic reasons.³ This was seen in particular at the time of adoption of the Immigration and Nationality Act 1952. While that Act contained a new offence of concealing or harbouring an alien, agricultural employers succeeded in obtaining the incorporation of a clause which stated that neither employment nor "the usual and normal practices incident to employment" would constitute 'harbouring' for this purpose. This clause was known as the 'Texas proviso', and had the consequence that employers remained free to hire irregular workers, even if the workers themselves were subject to immigration enforcement.

Employer sanctions began to be actively debated in the 1970s. Prompted by Representative Peter Rodino, the House passed bills on employer sanctions in September 1972 and March 1973, but neither was taken up in the Senate.⁴ The main arguments of the time against the idea of sanctions were that it would impact upon labour supply in border regions, and that it would lead to discrimination by employers against Hispanic and Asian minorities.⁵ Political support for the principle continued to grow during the 1970s, with 17 Bills on the subject in the 1975-76 Congress and a further 15 in the 1977-78 Congress.⁶ The introduction of employer sanctions was also supported by the executive branch in the 1970s, with the Nixon administration encouraging the first Rodino proposal in 1972, the Ford administration calling for employer sanctions in a study on irregular migration in 1976, and the Carter administration introducing a proposal in both Houses of Congress in 1977.⁷

A key development in the eventual acceptance of employer sanctions was the 1981 report of the Select Commission on Immigration and Refugee Policy (SCIRP), which had been established by President Carter in 1978.⁸ The Commission's assessment was that "the vast majority of undocumented/ illegal aliens [were] attracted ... by employment opportunities," and it concluded that "the success of any campaign to curb illegal immigration [was] dependent on the introduction of new forms of economic deterrents". In order to avoid the difficulties associated with criminal prosecution, employers who hired irregular workers were to be subject to civil penalties, with criminal sanctions available only for "flagrant and extended violations". The SCIRP report took the view that it was insufficient to simply prohibit employers from "knowingly" hiring irregular workers, as had been proposed in the earlier Bills. Instead, it recommended that there should be "a means of verifying employee eligibility" that would "allow employers to

³ Kitty Calavita, *Inside the State: The Bracero Program, Immigration and the I.N.S.* (1992), pp 66-70.

⁴ These were Bills HR 16188 (1971-1972 Congress) and HR 982 (1973-1974 Congress), respectively. Peter Rodino was a pro-labour Democrat, who was Chair of the House sub-committee on Immigration in the 92nd Congress, and chair of the House Judiciary Committee in the 93rd Congress.

⁵ James Gimpel and James Edwards, *The Congressional Politics of Immigration Reform* (1999), pp 112-118. Their summary refers to the debate in the House, as sanctions were not debated in the Senate.

⁶ Select Commission on Immigration and Refugee Policy (SCIRP), *Staff Report* (1981), p 630.

⁷ See Alan Simpson, 'The Politics of Immigration Reform' (1984) 18 (3) *International Migration Review* 486, pp 490-491. The Carter administration proposal was introduced as Bills S 2252 and HR 9531 (1977-1978 Congress).

⁸ *US Immigration Policy and the National Interest* (1981). The discussion of employer sanctions is at pp 59-69 of the report.

confidently and easily hire those persons who may legally accept employment". To avoid discrimination, any checks should apply equally to all workers, including US citizens.

The SCIRP report was followed by protracted attempts at legislation. These centred on Bills proposed jointly by Republican Senator Alan Simpson and Democrat Representative Romano Mazzoli, first in 1982 and then in the 1983-1984 Congress. Their Bill included employer sanctions among its elements, and followed the Select Commission in proposing an obligation to check all new hires (the 'paperwork offence'), civil penalties for the basic violations of hiring an irregular worker, and criminal sanctions for a "pattern or practice" of doing so.⁹ The Simpson-Mazzoli Bill passed the Senate in August 1982 and again in May 1983. Related legislation passed the House in June 1984, but was different in key respects to the Bill adopted in the Senate.¹⁰ In particular, the House Bill exempted employers of three or fewer employees, did not provide for criminal penalties, and introduced anti-discrimination provisions to protect lawful workers who were discriminated against by employers. The conference committee succeeded in reaching agreement on the employer sanctions element of legislation, by removing the exemption for small employers, restoring criminal sanctions and allowing a modified version of the anti-discrimination provisions. The Bill as a whole failed, however, because of the conference committee's failure to reach agreement on the funding of its provisions in relation to regularisation.

Immigration reform legislation was finally achieved in the 1985-1986 Congress. As previously, the Senate acted first, on a Bill proposed by Senator Simpson.¹¹ His proposal was less concerned with the avoidance of discrimination than the Bills in the previous Congress, and omitted both the requirement to check all new hires and the proposed anti-discrimination rules to protect legal workers. In the House, a proposal for immigration reform was made by Representatives Rodino and Mazzoli in May 1985.¹² This Bill did seek to address the fear of discrimination, and so retained a civil penalty for failure to verify an individual's status, prohibited discrimination against legal workers, and proposed the establishment of an Office of Special Counsel within the Justice Department to enforce the new rules against discrimination. After considerable difficulty, due to a coalition of the many groups opposed to the Bill - including Hispanic Democrats opposed to employer sanctions - the Bill passed through the House in October 1986. Within days,

⁹ The summary here draws on Simpson, 1984, pp 487-488.

¹⁰ The information in this paragraph is drawn from the following: 'House Votes to Prohibit Employing Illegal Aliens', *New York Times*, 13 June 1984; 'Fines For Hiring Aliens Endorsed In House Vote On Immigration Bill', *New York Times*, 14 June 1984; 'Conferees Agree on Sanctions in Immigration Bill', *New York Times*, 14 September 1984; 'Immigration Revision Dies Hard', *Washington Post*, 15 October 1984.

¹¹ This paragraph draws upon the following: 'Senate Gets New Version of Immigration Bill', *New York Times*, 24 May 1985; 'Immigration Bill Advances: Final Senate Vote Is 69 to 30', *Washington Post*, 20 September 1985.

¹² This paragraph draws upon the following: 'Immigration Issue Heats Up Again', *Washington Post*, 28 July 1985 and 'House Approves Immigration Bill Considered Dead Two Weeks Ago', *New York Times*, 10 October 1986.

the Bill was then subject of a successful compromise conference.¹³ In relation to employer sanctions, the compromise text largely favoured the House's approach, in that it again included the paperwork offence, the anti-discrimination rules and the Office of Special Counsel. Having been approved by both houses, the Immigration Reform and Control Act was signed into law on 6 November 1986.

The 1986 legislation

The tangled political history of the 1986 legislation led to a complex set of provisions on employer sanctions, the body of which remains in force.¹⁴ Under the legislation, an employer is required to check work eligibility documents and to attest that they have done so (the 'I-9' form). An employer is not however required to do other than check that the document "reasonably appears on its face to be genuine". Equally, there is no obligation on the worker to produce other documents, where those they have produced "reasonably appear[] ... to be genuine". Employers must retain a copy of the I-9 for at least three years and in any event until at least one year after the individual has ceased employment.

The Act makes it an offence to fail to check the status of all new hires. For this paperwork offence, there is a civil penalty of between \$100 and \$1,000 for each individual. The legislation also sets out certain factors to be taken into account in setting the penalty: the size of the business, employer good faith, the seriousness of the violation, whether the worker was in fact unauthorised, and previous violations.

The core of the system is the possibility of civil penalties for an employer who knowingly hires an alien who lacks permission to do that work. It is also an offence to continue to employ a worker when the employer knows that they lack permission to work. Implementing regulations provide that knowledge can be constructive, and that concept is defined to mean "knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition."¹⁵ An employer who complies in good faith with the requirement to check status has a defence to these civil penalties, however. The penalties are also gradual: between \$250 and \$2,000 per unauthorised worker for a first violation, between \$2,000 and \$5,000 per unauthorised worker for a second violation, and between \$3,000 and \$10,000 per unauthorised worker thereafter.

In addition, *criminal* penalties may be imposed in cases where a person engages in a "pattern or practice" of violations of the knowledge offence. The potential penalties are a sentence of imprisonment for up to six months and a fine of not more than \$3,000 per

¹³ The information on the compromise is drawn from the following: *Conference Report on Immigration Reform and Control Act of 1986* (132 Cong Rec H 10068, 14 October 1986) and 'Conferees Agree on Vast Revisions in Laws on Aliens', *New York Times*, 15 October 1986.

¹⁴ The 1986 Act inserted the employer sanction system as section 274A of the Immigration and Nationality Act 1952 (henceforth, 'INA 1952').

¹⁵ 8 CFR section 274a.1(l).

unauthorised worker. For these purposes, the concept of “pattern or practice” is defined by implementing regulations to require “regular, repeated and intentional activities.”¹⁶

As we have seen, the 1986 Act contains specific provisions against discrimination. Specifically, it defined discrimination on grounds of national origin or citizenship as an “unfair immigration-related employment practice”, and established an Office of Special Counsel to investigate and prosecute alleged violations.¹⁷ There are at the same time some important limitations to the discrimination guarantee. Protection on grounds of citizenship applies only to those who are US citizens or who have applied to become so. It is also stated that in any case employers are entitled to give priority in hiring decisions to a US citizen over an equally qualified foreign national. There is no protection at all against discrimination for persons who are not authorised to work. The new protection covers hiring and discharge decisions, but not discriminatory conditions of employment.¹⁸ Finally, the protection does not apply at all to employers of three or fewer employees.

Problems with enforcement

The period since employer sanctions were introduced in November 1986 has seen a steady rise in the irregular migrant population in the United States, with a recent study estimating 11.1 million persons in the category in March 2005 (roughly 3.7% of the population).¹⁹ This phenomenon is bound up with the complex contemporary situation of the United States as regards migration. Irregular migration and employment reflect the combination of demand for low-skilled labour and legislative inertia at the federal level in relation to legal migration. They also reflect the geographical fact of proximity to Mexico and Central America, and the social fact that significant communities from various parts of the world are established in the US which are able to accommodate irregular migrants.

It is to be presumed that the existence of employer sanctions since 1986 has made *some* difference to the level of irregular work in the US. The US employer sanction system has however had several significant weaknesses since that time. A first issue concerns the *agents of enforcement*. The US approach is to treat employer sanctions as essentially an immigration matter, which falls to be addressed by the federal immigration authorities - previously, the Immigration and Naturalization Service (INS), and now Immigration and Customs Enforcement (ICE). These agencies alone have the power to investigate the paperwork and knowledge offences within the Act. Officials of the federal Department of Labor have only a limited role: they can examine I-9 forms in the course of enforcement

¹⁶ 8 CFR s 274a.1(k).

¹⁷ The 1986 Act inserted these as section 274B of INA 1952. For a detailed discussion, see Maurice Roberts and Stephen Yale-Loehr, ‘Employers as Junior Immigration Inspectors: The Impact of the 1986 Immigration Reform and Control Act’ (1987) 21(4) *International Lawyer* 1013, pp 1033-1052.

¹⁸ Note that where an employer has fifteen or more employees, it may also be possible to bring a claim of ‘national origin’ discrimination under Title VII of the Civil Rights Act 1964. This possibility covers discriminatory conditions of employment.

¹⁹ Jeffrey Passel, *The Size and Characteristics of the Unauthorized Migrant Population in the US: Estimates Based on the March 2005 Current Population Survey* (Pew Hispanic Center, 2006).

of federal labor standards, but must refer possible violations to ICE for investigation. Meanwhile other agencies which might have an interest in irregular work - such as the Social Security Administration (SSA), the Internal Revenue Service or state labour market inspectors – are not formally involved in ensuring compliance with employer obligations.

A second weakness of the US approach has been the *low degree of priority* attached to employer sanctions by the immigration authorities. Brownell's research into the enforcement of employer sanctions has shown that enforcement activity peaked around 1990 and then went into a sharp decline.²⁰ Specifically, the number of audits declined from nearly 10,000 in 1990 to 2,200 in 2003; the number of warnings fell from 1,300 in 1990 to less than 500 in 2003; and, the number of 'notices of intention to fine' was down from 1000 in 1991 to 124 in 2003. The limited enforcement of employer sanctions was not substantially affected by the attacks of September 2001, with immigration enforcement activity at workplaces instead becoming focused on 'critical infrastructure'.²¹ There is some evidence that, since its establishment in 2003, ICE has given greater attention to enforcement at the workplace. Nevertheless, its increased activity has prioritised large-scale operations which lead to the arrest of many irregular workers at once, or which identify serious criminal offences committed by employers, such as harbouring of illegal aliens and money laundering.²² While this approach makes sense from ICE's perspective, it means that it is less concerned to ensure employers in general carry out adequate checks of worker status, or with individual cases of irregular employment.

A third weakness of the 1986 Act system is the nature of the *employer checks* on that are required on documents which give evidence of permission to work.²³ The 1986 legislation is generally thought to have permitted too broad a range of documents to be relied upon. Even after a rule change in 1997, the number of possible documents was reduced only to 27.²⁴ From an enforcement perspective, one difficulty is that some of the documents that can be relied upon do not have a photograph (e.g. the social security card). Other documents do not necessarily require lawful status (e.g. drivers' licenses), or else are easy to forge.

A fourth issue is the lack of *external verification* and, in particular, the lack of linkage to the social security system. When an employer makes contributions in relation to a non-existent social security account, the Social Security Administration issues a 'no-match letter' to the employer. There has however been no requirement hitherto for such a letter

²⁰ Peter Brownell, *The Declining Enforcement of Employer Sanctions* (Migration Policy Institute, September 2005), available at <http://www.migrationinformation.org/Feature/display.cfm?id=332>.

²¹ General Accounting Office, *DHS Has Incorporated Immigration Enforcement Objectives and Is Addressing Future Planning Requirements* (GAO-05-66, October 2004), pp 11-12

²² See ICE, *Worksite Enforcement Fact Sheet* (17 April 2007), available at <http://www.ice.gov/pi/news/factsheets/worksite.htm>.

²³ See the summary in General Accounting Office, *Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts* (GAO-05-813, August 2005), pp 14-17.

²⁴ *Ibid*, p 16.

to trigger a further investigation of an individual's status by the employer. Such a requirement was proposed in June 2006 by the Department of Homeland Security, and was to be achieved by amending the concept of constructive knowledge in the implementing regulations, so as to include a failure to act upon a no-match letter.²⁵ The proposal has not been implemented to date.

The introduction of a stronger external dimension has long been the focus of proposals for reform of the employer sanction system. In 1994, the Commission for Immigration Reform concluded that an effective system of verification required employers to check worker information against a central registry.²⁶ Its preferred option was a system that drew upon data provided by both the SSA and the INS. That proposal was the background to the mandating by the Illegal Immigration Reform and Immigrant Responsibility Act 1996 of three pilot projects for testing immigration status. Of these, only the so-called 'Basic Pilot' has proven viable. Under the Basic Pilot, employers provide the employee's name and social security number within a short period after hiring. The information is checked against both SSA and Department of Homeland Security databases. The system then issues first a provisional and then a definitive determination of eligibility for employment.

The introduction of an 'electronic eligibility verification system' (EEVS), modeled on the Basic Pilot, is now one of the central elements in the immigration reform legislation under consideration in Congress. In the 2005-06 Congress, provision for an EEVS was included in the 'enforcement-only' Bill passed by the House in December 2005,²⁷ and then in the Comprehensive Immigration Reform Bill passed by the Senate in May 2006.²⁸ At that time, it was the differences between the two Houses on other issues – in particular the proposal in the Senate Bill for a regularisation programme and for an expansion of legal migration – which prevented compromise legislation. Provision for an EEVS was also included in the unsuccessful attempts at immigration reform early in the 2007-08 Congress.²⁹ Nevertheless, the high degree of political consensus in favour of an EEVS suggests that it will eventually be come to be introduced, once Congress passes either enforcement-oriented or comprehensive immigration legislation.

2. The United Kingdom

Emergence

In comparing the British experience of employer sanctions with that of the United States, its very different immigration context should firstly be recognised. While Britain has a

²⁵ 'Safe Harbor Procedures for Employers who receive a No-Match Letter', *Federal Register*, 14 June 2006.

²⁶ US Commission for Immigration Reform, *US Immigration Policy: Restoring Credibility* (1994).

²⁷ Bill HR 4437 of 2005-06, section 701.

²⁸ Bill S 2611 of 2005-06, section 301.

²⁹ See in particular the STRIVE Bill of 22 March 2007 (Bill HR 1645), section 301 and the Comprehensive Immigration Reform Bill of 9 May 2007 (Bill S 1348), section 301.

historical immigrant population, its geographic location means that it does not face a substantial problem of irregular entry. Instead, its irregular population is made up primarily of overstayers, those who enter on false documents, and failed asylum applicants. The result is that the estimated irregular population in Britain is far lower than in the United States. A 2005 Home Office study estimated that there were 430,000 irregularly resident persons in the United Kingdom in April 2001.³⁰ This amounted to 0.7% of the UK population, and was compared by the authors to an equivalent estimate for the United States, using the same (residual) method, of 2.5% of the population in 2000.³¹

Notwithstanding that difference in context, it is striking that the history of employer sanctions in Britain has had many parallels to that in the United States. In the first place, Britain delayed even longer before introducing employer sanctions, and did so only with the Asylum and Immigration Act 1996. The pre-enactment debate also saw similar arguments to that in the United States, with businesses seeking to avoid regulatory burdens, and a fear of discrimination against minorities. The result was a system which was weak in several respects, and which has been the subject of significant reform attempts in recent years.

Prior to their introduction in 1996, the main discussion of employer sanctions in the UK had followed European Commission proposals in 1976 and 1978 for an EU directive on illegal migration and illegal employment. The Labour Government of the time refused to endorse employer sanctions, and was the main opponent of the proposal within the EU.³² Its reluctance to accept employer sanctions reflected a belief that immigration controls at ports of entry meant that unauthorised work was less common in the UK than elsewhere.³³ Employer organisations argued that they should not have to make checks in the absence of a satisfactory method for determining immigration status.³⁴ It was also argued that employer sanctions would lead to discrimination against ethnic minorities, the vast majority of whom were British citizens or legal residents.³⁵

After the 1970s, employer sanctions were not the subject of significant political debate until proposed by the Conservative Government in November 1995.³⁶ Its main

³⁰ Jo Woodbridge, *Sizing the Unauthorised (Illegal) Migrant Population in the United Kingdom in 2001* (Home Office Online Report 29/05, 2005).

³¹ *Ibid.*, p 1.

³² See Bernard Ryan, 'The Evolving Legal Regime on Unauthorized Work by Migrants in Britain' (2005) 27 *Comparative Labor Law and Policy Journal* 27, pp 35-36.

³³ See the evidence given by the Home Office and Department of Employment to the House of Lords Select Committee on the European Communities: *Illegal Immigration (1976-1977 House of Lords Papers 91)*, pp 10-19.

³⁴ A summary of the Confederation of British Industry's views is to be found in Commission for Racial Equality, *Workplace Controls Does Britain Really Need Them? The EEC Draft Directive (Revised) on Illegal Employment* (1979), para 19. I am grateful to Kees Groenendijk of the Centre for Migration Law, Radboud University Nijmegen, for a copy of this document.

³⁵ See the written evidence of the Community Relations Commission to the House of Lords Select Committee on the European Communities, published in 1976-1977 *House of Lords Papers 91*, pp 27-30, and Commission for Racial Equality, *Workplace Controls*, para 10.

³⁶ Home Office, *Prevention of Illegal Working: Consultation Document* (November 1995).

justification for making the proposals at that time was that the number of persons detected working without permission had increased, from 4,000 in 1988 to 10,000 in 1994. It also argued that the UK was seen as a 'soft target' in Europe, given that all continental EU states had a system of employer sanctions in place.

Given its neo-liberal outlook, the Conservative Government was particularly concerned that the new sanctions should not be excessively burdensome for employers. The main business and employer organisations had initially opposed the employer sanctions when these were under discussion at cabinet level in October 1995.³⁷ It was because of this criticism that employers were given a defence that they had checked certain documents. It was also for that reason that a range of official documents with a national insurance number were made sufficient for the employer defence, even though it was recognised that the list of documents was over-inclusive as a result.³⁸ Faced with such a limited system, the organisations representing large employers felt able to accept it.³⁹

The employer sanctions system of 1996 also sought to meet the argument that employer sanctions would have a discriminatory effect upon ethnic minorities. In particular, the Commission for Racial Equality opposed employer sanctions for this reason.⁴⁰ The main response was to seek to ensure that employer checks were applied to all workers. Unlike in the United States, however, this was not made an express legal requirement. Instead, the Government published guidance on the subject in tandem with the legislation.⁴¹ According to the guidance, "the best way to ensure that you do not discriminate is to treat all applicants in the same way at each stage of the recruitment process."⁴² It should be noted however that the Race Relations Act 1976 does not necessarily require equal checks upon all applicants. Even before employer sanctions were introduced, the Court of Appeal had held that differential checks of persons born in the UK and elsewhere could be justified under the 1976 Act, because of the need to respect immigration law.⁴³

The Government proposals were enacted as section 8 of the Asylum and Immigration Act 1996 Act. Section 8 makes it a criminal offence to hire someone who was ineligible for employment at the time of hiring, for which the maximum fine is £5000. The fact that the employer had checked and copied one of a defined list of documents gave rise to a statutory defence to any prosecution. This defence is not however available where it can be proven that the employer nevertheless *knew* that the worker in question was not entitled to work.

³⁷ 'Howard "Racist" Plans Alarms Industry' *Guardian*, 6 October 1995.

³⁸ *Prevention of Illegal Working*, para 31.

³⁹ See the speech of Lord McIntosh, *House of Lords Debates*, 2 May 1996, col 1809.

⁴⁰ Commission for Racial Equality, *Response to the Government Consultation Paper on Proposals for Prevention of Illegal Working* (1996).

⁴¹ Home Office, *Prevention of Illegal Working: Guidance for Employers* (December 1996).

⁴² *Ibid*, p 3. This statement is now to be found in a statutory code of practice, which came into force on 2 May 2001, on 'the avoidance of race discrimination in recruitment practice while seeking to prevent illegal working'.

⁴³ *Dhatt v McDonalds* [1991] IRLR 130. See Bernard Ryan, 'Employer Enforcement of Immigration Law After Section Eight of the Asylum and Immigration Act 1996' (1997) 26 *Industrial Law Journal* 136, p 141-144.

It may be added that two special schemes of employer sanctions have been adopted in recent years for the nationals of states acceding to the EU – the eight Central and Eastern European states (the ‘A8’, 1 May 2004) and Bulgaria and Romania (‘the A2’, 1 January 2007). In EU law, the nationals of these states may be denied full access to the labour market of other states for up to seven years. The UK’s approach has been to permit A8 nationals to work, provide they register their employment within a month, while allowing A2 nationals to work only if they obtain prior authorisation. In either case, there is an employer penalty if a worker is hired who does not comply with their obligations.⁴⁴

Evolution

As in the United States, the introduction of employer sanctions in Britain was followed by a period when unauthorised work by migrants became more widespread in low-wage sectors. For example, two government-funded qualitative studies found evidence that unauthorised working is common in specific sectors – restaurants and clothing in one study and agriculture, construction and hotels and catering in another.⁴⁵ That conclusion is confirmed by other sources, including a TUC report on Ukrainian workers published in 2004,⁴⁶ and the accounts of investigative journalists.⁴⁷

An initial response to this rise in irregular work was to narrow the range of documents taken as evidence of entitlement to work. The list set out in 1996 had been deliberately broad.⁴⁸ It included passports and identity cards from member states of the European Economic Area, and other states’ passports bearing a stamp showing that the individual had permission to work in the United Kingdom. A key weakness was the inclusion of official documents bearing a national insurance number – i.e. national insurance cards, employer payslips or tax documents issued by an employer. These documents did not necessarily prove entitlement to work, since an individual could have obtained the number in a previous period of lawful employment. A further weakness was the inclusion of documents which did not bear a photograph, and which were therefore vulnerable to fraudulent use. In addition to the national insurance documents already mentioned, this

⁴⁴ Accession (Immigration and Worker Registration) Regulations 2004, SI 2004 No 1219, Regulation 9 and Accession (Immigration and Worker Authorisation) Regulations 2006, SI 2006 No 3317, Regulation 12. Note that in the case of A2 nationals, it is an offence of working without authorisation (SI 2006 No 3317, Regulation 13). This is a novelty in UK law, and reflects the peculiar legal position of this category, that they are free to enter the UK without having a right to work. Persons who are not protected by EU law who work without permission commit immigration offences under the Immigration Act 1971.

⁴⁵ Monder Ram, Paul Edwards and Trevor Jones, *Employers and Illegal Migrant Workers in the Clothing and Restaurant Sectors* (Department of Trade and Industry, 2002) and Sally Dench, Jennifer Hurstfield, Darcy Hill and Karen Akroyd, *Employers’ Use of Migrant Labour: Main Report* (Home Office Online Report 04/06, 2006), especially pp 57-64.

⁴⁶ Trades Union Congress, *Gone West: Ukrainians at Work in the UK* (March 2004), pp 22-24.

⁴⁷ See in particular the special reports in the *Guardian* ‘Inside the grim world of the gangmasters’ (Hsiao-Hung Pai, 17 March 2004) and ‘Migrant workers: The precarious existence of the thousands in Britain’s underclass’ (Felicity Lawrence, 10 January 2005).

⁴⁸ The list of documents was set out in the Immigration (Restrictions on Employment) Order 1996, SI 1996 No 3325.

category included British and Irish birth certificates and authorisation letters from the immigration services.⁴⁹

The range of documents which could be relied upon was tightened with effect from 1 May 2004.⁵⁰ Under the new system, only certain identity documents are sufficient on their own. These are: European Economic Area or Swiss passports or identity cards, UK residence documents issued under EU law, and certain other passports which show that the individual has leave to be in the UK and permission to take the employment. In other cases, a specific combination of an employment-related document and an immigration-related document is required. One permitted combination is a work permit and either a suitably endorsed passport or a Home Office letter confirming the individual's status. The alternative combination is a document bearing a national insurance number, and either a British or Irish birth certificate or a Home Office document which gives evidence of the individual's status. This second alternative was mainly inserted in order to cater for UK and Irish citizens, who do not necessarily have passports, and whose states do not have identity cards. The documents covered by the second alternative do not contain photographs, so that the system as a whole continues to be susceptible to fraud.

A second development saw the strengthening of the criminal law framework. The Asylum and Immigration (Treatment of Claimants etc) Act 2004 then made the section 8 offence triable upon indictment, as an alternative to trial as a summary offence.⁵¹ The point of this change was the possible fine was unlimited in the case of a conviction upon indictment, whereas there continued to be a £5000 limit for a summary conviction.

A third development in recent years is the planned introduction of what are termed 'on the spot fines', or 'civil penalties', for those found to be employing unauthorised workers.⁵² The legislative basis for these penalties was put in place by the Immigration, Asylum and Nationality Act 2006. The Government consulted on some details of the system in a May 2007 consultation paper⁵³, although it has not as yet indicated a date for their introduction.

Section 15 of the 2006 Act gives the Home Secretary, through immigration officers, the power to serve 'penalty notices' upon the employers of unauthorised workers. Employers will be able to avoid the penalty through compliance with "prescribed requirements" to be set out in secondary legislation. These are to include requirements that employers

⁴⁹ For a discussion of the imperfect relationship between the listed documents and entitlement to work, see Ryan 1997, pp 139-141.

⁵⁰ The change was made by the Immigration (Restrictions on Employment) Order 2004, SI 2004 No 755. 1 May 2004 was also the date on which the nationals of then new EU member states obtained access to the UK labour market.

⁵¹ Asylum and Immigration Act 1996, s 8(4), substituted by Asylum and Immigration (Treatment of Claimants etc) Act 2004, s 6.

⁵² For the term 'on the spot' fines, and the initial proposal, see Home Office, *Controlling our Borders: Making Migration Work for Britain* (February 2005), p 26. For the term 'civil penalty', see Home Office, *Prevention of Illegal Working: Civil Penalty for Employers: Draft Code of Practice* (May 2007).

⁵³ Home Office, *Prevention of Illegal Working: Consultation on the Implementation of New Powers to Prevent Illegal Migrant Working in the UK* (May 2007).

check and copy documents which give evidence of entitlement to work.⁵⁴ In a May 2007 consultation paper, the Government indicated that the maximum penalty will probably be £5,000 per worker, which, as we have seen, is currently the amount for a summary offence under the 1996 Act.⁵⁵ However, it left open the possibility of a fine of £10,000 per worker, as that is estimated to be the approximate average cost of immigration removals from the UK. The amount of the penalty in an individual case is to be determined in accordance with a code of practice.⁵⁶ It will reflect the number of distinct occasions an employer has been found in breach, and the extent of the checks that an employer has actually made. It is proposed too that the penalty will be reduced for employers who report concerns about their workers' status to the immigration authorities, or who co-operate with enforcement action taken against their workers.

A key innovation of the new penalty system is that the obligation to check a worker's status is to be a continuing one for some categories of worker. The old position was that the requirements for the establishment of the employer defence only concerned the period "before the employment began." The 2006 Act instead allows checks to be required "at specified intervals or on specified occasions during the course of employment."⁵⁷ The Government's intention is that employers will be required to re-examine the position of persons who do not have indefinite leave to remain (that is, long-term resident status) at intervals to be set at 12 months or longer.⁵⁸

Employers will have the right to object to the penalty to the Secretary of State within a period to be defined.⁵⁹ Employers will also have the right to appeal to a court within 28 days of the penalty notice, or, if they have objected, of any final decision taken by the Secretary of State.⁶⁰ At the objection and the appeal stages, the employer will be free to argue that they are not liable (e.g. because the employee was entitled to work), that they had complied with "prescribed requirements", or that the amount of the penalty is too high. If a penalty notice is not quashed, the penalty will be enforceable by the Secretary of State as a debt in the ordinary courts.⁶¹

The 2006 Act created a new criminal offence of *knowingly* employing a person who lacks immigration permission, which is to come into force together with the civil penalties. Technically, the requirement of knowledge distinguishes the new criminal offence from the old one. We have already seen, however, that employer knowledge negates the defence to a section 8 prosecution that documents had been checked and copied. Unlike section 8, however, the new offence will be subject to the possibility of a prison sentence, in addition to the same fines as before. If an employer is convicted on indictment, up to two years' imprisonment will be possible, while for a summary conviction the maximum will

⁵⁴ *Draft Code of Practice*, p 5.

⁵⁵ *Prevention of Illegal Working*, p 12.

⁵⁶ See the *Draft Code of Practice*, above.

⁵⁷ Immigration Asylum and Nationality Act 2006, section 15(7)(e).

⁵⁸ *Prevention of Illegal Working*, pp 15-16.

⁵⁹ Immigration Asylum and Nationality Act 2006, s 16.

⁶⁰ Immigration Asylum and Nationality Act 2006, s 17.

⁶¹ Immigration Asylum and Nationality Act 2006, s 18.

be 12 months' imprisonment in England and Wales, and six months' imprisonment in Scotland and Northern Ireland.

The new system based on civil penalties is in part a response to the rarity of criminal prosecutions and convictions under section 8 of the 1996 Act. Official immigration statistics show that in the years 1998-2005, there were only 58 prosecutions and 20 convictions in total.⁶² The expectation is that a civil penalty system will lead to more penalties being imposed, particularly as the onus will be on the employer to avoid liability, and any legal proceedings will be subject to the civil standard of proof (the balance of probabilities) rather than the criminal standard (beyond reasonable doubt). The new penalties are also linked to the introduction in the UK of a new approach for managing economic migration, known as the 'points-based system'.⁶³ Within the points-based system, employers are to act as the sponsors of skilled migrant workers, and the role of the immigration authorities will change from scrutiny of individual applications to ensuring employer compliance with their obligations. The civil penalties are to be part of the new system for controlling employers, as one of the sanctions will be that their access to *legal* migrant workers will be reduced or denied altogether.⁶⁴

Reform of institutional arrangements?

A final question to consider is the prospects for change in the institutional arrangements governing employer sanctions in the UK. One issue here concerns the potential role of agencies other than the immigration service in connections with employer sanctions. The UK starting-point is similar to that in the United States, in that the enforcement of employer sanctions is essentially left to the immigration authorities. Since the abolition of the wages inspectorate in 1993, the UK has not had a system of labour inspection upon which reliance could be placed for this purpose. Nor is there any immediate prospect of such a role being given to other enforcement bodies agencies, such as the Health and Safety Executive (HSE) or Her Majesty's Revenue and Customs (HRMC, responsible for compliance with tax and national insurance obligations and the minimum wage).

There are however some signs of a change of approach in relation to irregular work. Firstly, under the Gangmasters Licensing Act 2005, a system of licensing and supervision for labour market intermediaries ('gangmasters') was introduced in agriculture and related sectors with effect from 2 March 2006.⁶⁵ This system provides a mechanism for ensuring compliance by labour market intermediaries with the full range of their legal obligations, and can be expected to reduce the extent of irregular work by migrants in those sectors. A second development of a similar character has been the emergence of strategy of inter-agency co-operation in relation to work in breach of legal obligations. In

⁶² Home Office, *Control of Immigration: Statistics: United Kingdom* for various years. The report for 2005 was published as Cm 6904 (August 2006). Of the 58 prosecutions, 23 were brought in 2005 alone.

⁶³ For an outline of the new system, see Home Office, *Selective Admission: Making Migration Work for Britain* (September 2005) and *A Points-Based System: Making Migration Work for Britain* (March 2006).

⁶⁴ *Prevention of Illegal Working*, pp 8-9.

⁶⁵ For a discussion, see Ryan 2005, pp 49-57.

September 2005, a ‘Joint Workplace Employment Pilot’ was put in place in the West Midlands area, involving inspectors from the HSE, HRMC, Department for Trade and Industry (which regulates agencies), the Department for Work and Pensions (benefit fraud), and the immigration service.⁶⁶ Subsequently, the Government announced that, based on the earlier experience, the immigration authorities will put in place “new partnerships with workplace enforcement teams” in the other agencies, now including the Gangmasters Licensing Authority.⁶⁷ Government policy now clearly recognises that the enforcement of immigration laws in the workplace is less effective if it is carried out in isolation from the enforcement of other legal obligations upon employers.

A second point in relation to institutional arrangements concerns the planned introduction of identity cards for UK lawful residents, together with a national identity register.⁶⁸ The current policy is that biometric identity documents and entry on the national register will commence in 2009 for non-EEA nationals who obtain documents, and in 2010 for British citizens who apply for passports.⁶⁹ In addition, if there is a positive vote in the next Parliament (i.e. the successor to that which commenced in 2005), identity cards and registration will become compulsory for all lawful residents. It has long been an explicit Government objective that identity cards should be used a method for proving entitlement to work.⁷⁰ While the details have not been elaborated upon, two phases can be anticipated. In the initial phase, when identity cards are not yet compulsory, it will be possible to add identity documents to the list of documents which could be relied upon as evidence of entitlement to work. In the second phase, if the cards and registration became compulsory, it would be possible *both* to make identity cards the primary documents evidencing entitlement to work *and* to require a cross-check by employers with the national identity register. Overall, there is therefore a clear possibility that the UK will move to a form of external verification of immigration status which is similar in substance to the EEVS contemplated in the United States.

3. Continental Europe

Continental European states of migration have generally operated a quite different model of employer sanctions to that in the United States and UK. That general approach is

⁶⁶ See the Home Office written evidence published in Joint Committee on Human Rights, *Human Trafficking* (26th Report, 2005-2006), vol II, para 35.

⁶⁷ Home Office, *Enforcing the Rules: A Strategy to Ensure and Enforce Compliance with Our Immigration Laws* (March 2007), p 21.

⁶⁸ The Identity Cards Act 2006 provides the legislative basis for an identity card system to be developed, but does not in itself make participation compulsory for individuals. A recent statement of the Government’s intentions is to be found in Home Office, *Strategic Action Plan for the National Identity Scheme Safeguarding Your Identity* (December 2006).

⁶⁹ Note that there is a lack of clarity in the December 2006 document as to when identity cards will start being issued to European Economic Area nationals.

⁷⁰ *Entitlement Cards and Identity Fraud: A Consultation Paper*, Cm 5557 (Home Office, July 2002), pp 31-33.

initially illustrated in this section through an outline of the position in France and the Netherlands. Within that approach, the principle of sanctions upon employers who hire irregular workers is treated as part of an effectively regulated labour market. This has significant practical consequences, including reliance upon labour inspectors to enforce employer obligations, and close co-operation between immigration enforcement agencies on the one hand and labour, social security and tax inspectors on the other. We will see at the same time that there is evidence of innovation on the subject among continental states. This includes in particular the European Commission's proposal in May 2007 for a European Union directive requiring member states to have an effective system of employer sanctions. We will see that this proposal is far closer to model of continental European states, linking employer sanctions to other labour market enforcement, than the Anglo-American approach based on immigration enforcement.

France

A legal prohibition on the hiring of irregular workers was first introduced in France in 1972, two years prior to the decision in 1974 to officially close the labour market to non-EU nationals. This prohibition is to be found in Article L341-6 of the *Code du Travail* (labour law code).⁷¹ The Article sets out an obligation which is significant for its breadth, in that it applies both to cases of direct employment and to cases of hiring by means of intermediaries (*‘personne interposée’*). It covers both the hiring of new employees and also keeping someone in employment when they do not have permission to work.

Initially, the only penalty for breach of the obligation was an administrative one. Since 1976, the administrative penalty has consisted of a ‘special contribution’ of a multiple of the hourly legal minimum wage, payable to the state's immigration office – currently the *Agence Nationale de l'Accueil des Etrangers et des Migrations Office* (ANAEM).⁷² After various changes to the level, since 2006, the fines have been set at a minimum of 500 times the statutory minimum wage (€1.17 as of 1 July 2006), and a maximum of 5,000 times in cases of repeat offences.⁷³ Two extensions of the administrative penalties may also be highlighted. The first of these, introduced in 1997, made a contractor liable for a sub-contractor's hiring of irregular workers.⁷⁴ The second, introduced in 2005, is an employer fine to cover the average costs of return of an irregular worker.⁷⁵ From December 2006, the amount of this fine varies from €124 for Maghreb counties to €266 for the Americas.⁷⁶

⁷¹ The text is that as amended by Law 89-488 of 10 July 1989.

⁷² Article L 341-7 of the *Code du Travail*, as inserted by Law 76-621 of 10 July 1976. The sum was previously paid to the *Office National d'Immigration* and, from 1988 to 2005, to the *Office des Migrations Internationales*.

⁷³ See Article L 341-7 of the *Code du Travail*, as amended by Law 2006-911 of 24 July 2006.

⁷⁴ Article L-341-6-4 of the *Code du Travail*, inserted by Law 97-210 of 11 March 1997.

⁷⁵ This is provided within immigration law: see Article L 626-1 of the *Code de l'Entrée et du Séjour des Etrangers et du Droit d'Asile*, inserted by Law 2005-32 of 18 January 2005.

⁷⁶ Arrêté du 5 décembre 2006, *Journal Officiel*, 10 December 2006 p 18719.

The hiring of an irregular worker became subject to criminal sanctions for the first time in 1981.⁷⁷ This meant in particular the possibility of criminal fines and imprisonment, which are currently set at a maximum of €15,000 per worker and five years' imprisonment.⁷⁸ Additional sanctions are also possible, including the confiscation of related assets, the closure of business premises, a ban on exercising professional activity for five years, exclusion from public contracts for five years, and if the employer is a non-national, exclusion from the territory for five years.⁷⁹ Since 1993, these various penalties have also been applicable to companies, including a possible fine of five times the amount specified for natural persons.⁸⁰

Criminal jurisprudence has clarified the nature of the obligations upon employers under Article L 241-6. One finding is that liability requires intention on the part of an employer, including knowledge that the individual is a non-national.⁸¹ Employers cannot however claim a lack of intention or knowledge where they have failed to check the status of individuals through an examination of their documents.⁸² Until recently, the content of the employer's obligation to check on immigration status was not however set out in legislation. That was changed by the immigration law of 2006, which provides for an employer obligation to confirm with the state authorities that a newly hired worker possesses permission to work.⁸³ From 1 July 2007, employers will be required to communicate a copy of the relevant document to the *préfet* of their *département* not later than two days before the start of the employment.⁸⁴ The *préfet* will be expected to reply within two days, after which point the obligation on the employer to confirm will be deemed to have been met.

By comparison with the United States and the United Kingdom, employer sanctions have not been especially controversial in France. Much of the explanation lies in the approach taken to the role of the state within the labour market. Martin and Miller have observed that employer sanctions have historically been supported by trade unions and centre-left political parties, as they ensure that penalties for irregular work do not only fall on workers, but also on employers.⁸⁵ That is shown above all by the fact that the introduction of criminal sanctions in 1981 was part of the early labour market reforms which followed François Mitterrand's election as the first Socialist Party president in May that year, and which included action on working time, the minimum wage and worker representation. This suggests that employer sanctions are related to the wider acceptance of the role of the state as a guarantor of a level playing field (or fair competition) in the

⁷⁷ Law 81-941 of 17 October 1981.

⁷⁸ Article L 364-3 of the *Code du Travail*, as amended by Law 2003-1119 of 26 November 2003.

⁷⁹ Article L 364-8 of the *Code du Travail*, inserted by Law 93-1313 of 20 December 1993.

⁸⁰ Article L 364-10 of the *Code du Travail*, inserted by Law 93-1313 of 20 December 1993.

⁸¹ Cour de Cassation, 1 October 1987 (case of *Gillot*). There, the ruling potentially excused the employer in a case where an out of date French identity card was presented.

⁸² Cour de Cassation, 29 March 1994 (case of *Braca*).

⁸³ Amendment to Article L 341-6 by Law 2006-911 of 24 July 2006.

⁸⁴ Article R 341-6 of the *Code du Travail*, inserted by Decree No 2007-81 of 11 May 2007.

⁸⁵ Martin and Miller, p 16.

labour market. It is characteristic that the same 1981 legislative reform provided for the protection within labour law of irregular workers.⁸⁶

By contrast with the US and UK, the historical lack of focus on discrimination within French public policy is also significant. It is well-known that the French republican model emphasises the unity of citizenship, irrespective of origin. Correspondingly, French political culture has been less concerned than in the US and UK with the treatment of minorities or with policies for the improvement of their social position. That established model has admittedly been called into question in recent times, with new equal opportunity laws – themselves linked to EU developments – and better enforcement.⁸⁷ Nevertheless, the French republican ideal is part of the explanation for the lack of debate in France about the possible effects on minorities of employer obligations to check immigration status.

The general acceptance of employer sanctions in the political sphere has had its counterpart when it comes to enforcement. The hallmark of the French strategy as regards enforcement has been the integration of immigration enforcement with that done by labour inspectors and other state agencies. At the conceptual level, enforcement activity with respect to irregular work by migrants is treated as simply one element of a more general policy of preventing illegal work, in the sense of employment which is carried on in breach of legal obligations.⁸⁸ The enforcement system with respect to illegal work starts from a duty on the part of employers to notify all new hires to the social security authorities, failure to do which is classed as a form of clandestine employment (*travail dissimulé*)⁸⁹. Clandestine employment may be subject to enforcement action by various agencies, including police, tax officials, customs officials, social security officials and labour inspectors. Since 1997, enforcement activity against all aspects of illegal work has been co-ordinated nationally by the *Délégation interministérielle à la lutte contre le travail illégal* (DILTI), and locally (*département*) by the *Comités Opérationnels de Lutte contre le Travail Illégal* (COLTI).

Netherlands

The prohibition of the employment of foreigners without work permits has a long history in the Netherlands. A statutory provision of this kind was first introduced in 1934, and made employers subject to a criminal penalty of up to one month's imprisonment and a fine of up to one hundred guilders.⁹⁰ Legislation passed in 1964 made it an offence for

⁸⁶ See Article L 341-6-1 of the *Code du Travail*, inserted by Law 81-941 of 17 October 1981.

⁸⁷ The legal guarantee against discrimination is in Article L 122-45 of the *Code de Travail*, as amended by Law 2001-1066 of 16 November 2001. Enforcement of this and other rules against discrimination is undertaken by the *Haute Autorité de Lutte contre les Discriminations et pour l'Égalité* (HALDE), established in 2005.

⁸⁸ See generally Claude Valentin-Marie, 'Measures taken to Combat the Employment of Undocumented Foreign Workers in France' in Organisation for Economic Co-operation and Development, *Combating the Illegal Employment of Foreign Workers* (2000).

⁸⁹ Article L 320 of the *Code du Travail*, inserted by Law 91-1383 of 1 December 1981 and Article L 324-10, inserted by Law 97-210 of 11 March 1997.

⁹⁰ Article 2 of Law of 16 May 1934.

both employer and employee where an employment relationship was carried on in breach of a work permit requirement. A further reform in 1978 re-legislated the employer offence while removing that applicable to the employee.⁹¹ In current law, the employer offence is to be found in the Law on the Employment of Foreigners (*Wet Arbeid Vreemdelingen*, WAV) of 1994, Article 2 of which contains a general prohibition on the employment of a foreigner without a work permit.

Unlike in France, the historical preference was for the enforcement of employer obligations by means of criminal sanctions. Since 1 January 2005, criminal sanctions arise in two ways. The first possibility is the repeated breach of Article 2 WAV: either two breaches in the previous four years, or one breach in the previous two years. In that case, the criminal penalty is governed by the general law on economic crimes, and is subject to maximum possible penalty of six months' imprisonment and a fine of €16750.⁹² The second criminal sanction arises under the Criminal Law Code.⁹³ That clause makes it an offence to employ a person who has illegally entered or is illegally resident in the Netherlands, provided the employer has knowledge or 'serious reasons to suspect' that that is the case. The maximum penalty is one year's imprisonment and a fine of €67000.

The Dutch system of employer sanctions saw a basic shift in 2004, with the introduction of administrative sanctions under amendments to the WAV that came into force on 1 January 2005. Under this new system, the maximum fine is set at €2000 for a natural person and €4000 for a legal person, and the level of fine can be increased by 50% if two years have not yet expired from a previous breach.⁹⁴

The main anticipated advantage of the new administrative fines from an enforcement perspective is speed.⁹⁵ The fines can be imposed by labour inspectors (the *Arbeidsinspectie*) when a violation of the rules on irregular hiring comes to light. This is by contrast with the previous position whereby the labour inspectorate reported a matter to the criminal authorities, which would then initiate proceedings against the employer, and where the whole process typically took at least a year.⁹⁶ There is also a difference in terms of liability, in that an employer's challenge to a fine is taken to an administrative court, where previously a prosecution would have been subject to the more onerous requirements of the criminal law.

In practice, the new fines appear to have been widely used in the initial period since their introduction. The annual reports of the *Arbeidsinspectie* reports show that 2500 fines were imposed in 2005, for a total amount of €13.2 million, and that in 2006, 3013 fines

⁹¹ Article 4 of the Law on the Employment of Foreign Workers (*Wet Arbeid Buitenlandse Werknemers*).

⁹² See Article 1(4) of the *Wet op de Economische Delicten*.

⁹³ Article 197b of the *Wetboek van Strafrecht*.

⁹⁴ *Beleidsregels Boeteoplegging Wet Arbeid Vreemdelingen 2007* (*Staatscourant* 22 December 2006, no 250 p 40), Arts 1 and 2 and Appendix.

⁹⁵ This was the main explanation for the proposal given to parliament: *Wijziging van de Wet arbeid Vreemdelingen*, Kamerstukken II 2003-04, 29523, nr 3, p 2.

⁹⁶ *Ibid.*

were imposed for a total of €43.7 million.⁹⁷ In the most recent year, these fines made up roughly 60% of all those imposed by the agency, more than the combined total for health and safety violations (1550) and working time law violations (423) combined. The background is increased joint enforcement activity by the *Arbeidsinspectie* with other agencies. The most recent annual report refers to ‘intervention teams’ which also included tax officials, social insurance officials and police, and which focused in particular on construction, hospitality, retail, ports and agriculture/ horticulture.⁹⁸ It is apparent from this information that the successful enforcement of the new administrative fines depends upon their being treated as part of a wider effort by state agencies to enforce labour market rules.

European Union

A further development among continental States which may be considered is the European Commission proposal of 16 May 2007 for a European Union directive requiring member states to have a system of employer sanctions.⁹⁹ The prospect of action in this area at the EU level is not a novelty. We have already seen that in the 1970s, as part of a directive aimed at preventing irregular entry, the Commission unsuccessfully proposed a directive which would have required sanctions upon those who employed irregular migrant workers.¹⁰⁰ In the 1990s, a non-binding recommendation which included provision for employer sanctions was then adopted by the Council of Ministers in each of 1995 and 1996.¹⁰¹ On this occasion, the possibility of legislation on employer sanctions is linked to EU efforts to limit irregular migration.¹⁰² Specifically, the Commission has offered two justifications for a binding EU instrument in relation to employer sanctions: that differences in standards as regards illegal employment are a potential distortion of competition between states, and that low standards encourage secondary movements of irregular migrants between member states.¹⁰³

Article 3 of the Commission proposal would require Member States to “prohibit the employment of illegally staying third-country nationals”. This statement only covers persons who are present on an irregular basis in a state. The omission of persons who are legally present on the territory is necessitated by the terms of the legislative power being relied upon.¹⁰⁴ Article 63(3) of the European Community Treaty allows legislation on “illegal immigration and illegal residence”, but not irregular work. In practice, however,

⁹⁷ *Arbeidsinspectie, Jaarverslag 2005*, p 5 and *Jaarverslag 2006*, p 4.

⁹⁸ *Arbeidsinspectie, Jaarverslag 2006*, p 24.

⁹⁹ COM (2007) 249.

¹⁰⁰ The Commission’s proposals are in COM (76) 331 (4 November 1976) and COM (78) 86 (3 April 1978).

¹⁰¹ Council Recommendation of 22 December 1995 on combating illegal immigration and illegal employment (OJ 1996 C 5/1) and Council Recommendation of 27 September 1996 on combating the illegal employment of third-country nationals (OJ 1996 C 304/1).

¹⁰² European Commission, *Policy Priorities in the Fight against Illegal Immigration of Third-country Nationals*, COM (2006) 402, pp 8-10.

¹⁰³ See COM (2007) 249, pp 6-7 and the European Commission’s *Impact Assessment* for the proposal, SEC (2007) 603, p 5.

¹⁰⁴ *Ibid.*, p 6.

member states are likely to have the same system both for those irregularly present and those who are working in excess of their immigration permission.

Article 4 of the proposal sets out the obligations that member states are to place upon employers. *All* employers are to be obliged to check the status of third country nationals and to “copy or record” the document produced before. It is clear that these procedures are to be undertaken before the employment begins, and the directive does not appear to contemplate a separate requirement to re-check documents at a subsequent point in time. Employers must retain the copy or record of the document for at least the duration of the employment relationship. As regards the documents to be produced, it is significant that the proposal refers only to a residence permit or “another authorisation for stay valid for the period of the employment in question,” and not to documents which separately give evidence of a right to work. This is presumably linked to the focus on illegal presence already referred to, but may cause problems in states where employer checks can be based on work permissions. It is also noteworthy that the proposal provides that employers are to be taken to have complied with their verification obligation unless “the document presented ... is manifestly incorrect.” The implication is that employers will neither be strictly liable for hiring irregular workers nor required to closely scrutinise documents presented to them.

Employers which are *businesses or companies* are to be subject to an additional obligation to “notify the competent authorities designated by Member States” of both the start and the termination of any employment relationship involving a non-EU national. It is not expressly stated in the proposal which state authorities are to be sufficient for this purpose. Some light is shed on this question by the Commission’s impact assessment accompanying the proposal, which shows that member states that require notification typically direct these to a social security or labour market agency, rather than to immigration authorities.¹⁰⁵

The proposed directive contains detailed provision – apparently drawing on French law - for the penalties available where employers are found to have breached the obligation in Article 3. Article 6 first requires member states in general to provide sanctions that are “effective, proportionate and dissuasive.” It then provides that the sanctions which are to be available for *all employers* are to include financial penalties for each person found to be illegally employed, and payments for return in cases where it is actually carried out. Article 8 then provides for additional sanctions in the case of *employers engaged in business*: exclusion from “public benefits, aid or subsidies” for up to five years; exclusion from public contracts for up to five years; the recovery of public benefits, aid, or subsidies granted in the preceding year; and, “temporary or permanent closure of the establishments” associated with the breach. It is also specified by Article 9 that where the employer is a sub-contractor others in the contracting chain are to be “jointly and severally” liable for any penalties imposed.

¹⁰⁵ The summary of national practices is in SEC (2007) 603, p 100.

In addition to administrative penalties, the proposal also makes provision for criminal sanctions. Article 10 requires member states to impose criminal sanctions where a breach of Article 3 is committed intentionally, and one of four conditions is satisfied:

the employer has two previous infringements within the previous two years
the breach relates to “a significant number” of persons (at least four)
the breach is “accompanied by particularly exploitative working conditions” which are defined to include “a significant difference in working conditions from those enjoyed by legally employed workers”
the breach concerns a person whom the employer know to be a victim of trafficking.

Article 12 of the proposal then provides for the application of the criminal sanctions to legal persons (primarily companies). Legal persons are to be liable where the criminal offence was committed by an individual acting on their behalf, or where a lack of control within the organization made the criminal offence possible. Where a legal person is held liable, they may be subject to either criminal or non-criminal fines, and also to other sanctions “such as” exclusion from entitlement to public benefits or aid, exclusion from public contracts for up to five years, temporary or permanent disqualification from business activities, being placed under judicial supervision and a winding-up order.

A significant aspect of the proposal is that it lays down standards in relation to inspections. Under Article 15, member states are to “ensure that at least 10% of companies established on their territory per year are subject to inspections to control employment of illegally staying third-country nationals.” The selection of companies for this purpose is to be based on a risk assessment, taking into account the sector in question and the record of the company. It should be noted that, as phrased, the obligation concerns companies alone, and not all employers. Nevertheless, it appears quite onerous as a standard, and may well be diluted or removed during negotiations.

For completeness, it may be added that the Commission proposal also contains a number of guarantee provisions for workers and for tax and social security systems. Article 7 requires member states to ensure that employers pay “outstanding remuneration” to the worker and any outstanding taxes and social security contributions. For this purpose, there should be a rebuttable presumption that the relationship was of at least six months’ duration, and the procedure for claiming back payments should be triggered automatically instead of depending upon a worker’s making a claim. Under Article 14, member states are to provide a mechanism for workers in irregular employment to make “complaints” against their employers, including through third parties. While it is not specified what these “complaints” are, it is to be presumed from the proposal as a whole that they include complaints about non-payment of wages. Finally, specific provision is made for the alleged victims of exploitation (as defined). Such persons should not be returned until they have received any back pay owed to them (Article 7(4)) and, where they co-operate in criminal proceedings against the employer, should be eligible for a residence permit for the duration of the proceedings (Article 14(3)). This last provision expressly assimilates the position of these persons to that of alleged victims of

trafficking, who are already entitled to a short-term residence permit for the duration of criminal proceedings under EU Directive 2004/81.¹⁰⁶

The prospects for the adoption of the Commission proposal, with modifications, appear good. The European Council had already expressed support for the principle of the measure at its summit in December 2006. It appears too that all or almost all member states have some form of employer sanctions system in place already.¹⁰⁷ It is also significant that the proposal is subject to the 'co-decision' legislative procedure, which means that its adoption requires the approval of (only) a qualified majority of member states on Council, together with the European Parliament.

If a measure is adopted which is close to that proposed by the Commission, its effect will be to generalise an employer sanction sanctions which emphasizes effective enforcement. A requirement of both administrative and criminal sanctions goes beyond the current approach in many states. So too does the requirement – based on the French model – that a range of severe penalties should be possible against businesses. The attempt to lay down high standards as regards inspections is also significant, since in practice it could not be met other than by reliance upon labour inspectors and/ or social security and tax agencies. By its focus on effective enforcement, and the implicit expectation that enforcement of employer sanctions is not solely an immigration matter, the proposal is squarely within the continental European approach to the subject.¹⁰⁸

Concluding remarks

This paper's examination of the development of employer sanctions has shown a significant divide between an Anglo-American approach on the one hand and a continental European approach on the other. It is striking that, despite their quite different migration contexts, the United States and United Kingdom have had a similar trajectory in relation to employer sanctions. In broad terms, they each were late adopters of employer sanctions due to an underlying concern for employer interests and to avoid discrimination, and then introduced a measure which was open to evasion and dependent upon immigration enforcement alone. Continental European states on the other hand have tended to pursue a different logic, within which employer sanctions are treated as an element of effective supervision of the labour market by state agencies. As things stand,

¹⁰⁶ Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, OJ 2004 L 261/19. Note that none of Denmark, Ireland or the UK is bound by this measure.

¹⁰⁷ The Commission impact assessment refers to "at least" 26 of the 27 member states having employer sanctions already: SEC (2007) 603, p 9. It is unclear from the document which Member State the Commission is uncertain about.

¹⁰⁸ It should be noted that the Treaty arrangements applicable to Denmark mean that it cannot participate in legislation based on this proposal. Ireland and the UK meanwhile have the option to participate in legislation from the negotiation stage, and a further option to agree to be bound later on if a measure is adopted without their participation. At the time of writing, it is not possible to say what approach they will take to the measure.

this leads to an approach to enforcement which links irregular work by migrants with other breaches of legal obligations by employers. This involves the empowerment of labour inspectors to uphold employer sanctions and/or joint enforcement activity by those charged with upholding employer sanctions and agencies responsible for enforcing labour laws, social security and tax obligations.

The paper has also shown a pattern of innovation with respect to employer sanctions across immigration states in the developed world. The focus of this innovation is not on the principle of employer sanctions, but rather on the enhancing their effectiveness in deterring irregular work. This search for effectiveness is the thread which links the proposal for an electronic verification system in the US, the introduction of administrative sanctions and the development of joint enforcement operations in the UK and the Netherlands, and the more modest change in France – which already had a highly developed employer sanction system – of the employer obligation to confirm foreign nationals' permission to work with state authorities. It is also at the heart of the European Commission proposal for a directive to generalise 'best practice' in the area across the EU – in particular, by requiring both administrative and criminal sanctions, and by requiring a minimum level of inspections each year.