

The new common standards for employers sanctions versus the role of the State.

Stakes, paradoxes and perspectives in the EU and in Switzerland



Prof. Cesla Amarelle, 24th June 2011, www.ius-migration.ch

Introduction

Tampere European Council (1999)

The Hague Program (2004)

European Pact on Immigration and Asylum (2008)



Fighting irregular migration -> Two legal key instruments

- Directive 2008/115/EC, « Return Directive ». Implementation deadline passed on 24 December 2010
- Directive 2009/52/EC, « Employer Sanctions' Directive ». Member States must fully transpose ESD by July 2011

Introduction

Directive 2009/52/EC

To eliminate one of the pull factors of irregular immigration
-> the possibility of finding employment without a regular
residence authorisation

Introduction

**Inefficiency of the
State framework**

≠

**Lack of
« raison d'être »
of the directive
2009/52/EC**

Introduction

In 2009, the number of irregularly staying TCN apprehended in the EU-27 was about 570'000 (7% less than in 2008)

Member States returned about 253 000 TCN (4,7% more than in 2008)

Introduction

Inefficiency of the States:

- Lack of coordination and cooperation
- Absence of a structural and/or legislative framework that governs such coordination and cooperation
- Insufficient human resources
- Inadequate financial resources to undertake monitoring and act on violations observed
- Obstacles to field operations
- Lack of information
- Lack of data
- Insufficient international cooperation

For EU:

- > **New level playing field**
- > **Publicity effect**

Introduction

Resistances of the States:

Sweden, Finland, Hungary, Poland

« The EU is competent to adopt criminal law provisions only if it satisfies the criteria set out by the Court of Justice in its decisions in the cases C-176/03 and C-440/05 »

« It is not established that this condition has been met with regard to the directive and that is therefore is not certain that the EU is competent to draft criminal law provisions in the area of illegal immigration and illegal »
residence

Introduction

Questions:

Interests -> Does the directive establish a transfer of control from the State in favour of private players? In whose interest is this transformation being made?

Efficiency -> Does the directive exclusively concern the security aspect or does it also extend to employment and social policies in a concrete manner? Is the directive really efficient and sufficient to pursue the objective of defending migrants' rights in the area of the right to lodge complaints against employers?

PLAN

1. General introduction
2. Employer Sanctions' Directive 2009/52/EC
 - a) The political and legal context
 - b) The general principles of the directive
 - c) The scope of application of the directive
 - d) Rights of workers
3. The Employer Sanctions' Directive and Swiss law
 - a) Applicable Swiss law
 - b) The relative conformity of Swiss law with the directive
4. Final remarks

2. a) ESD: The political and legal context

A new concept which integrates **private players**:

Carriers



Directive 2001/51/EC
« Carriers Sanctions »

Employers



Directive 2009/52/EC
« Employer Sanctions »

2. a) ESD: The political and legal context

Principles:

A new threshold towards a policy of *gouvernance*

A transfer of responsibility of migration control over to the employers or to private individuals?

Such transfers alter the achievement of *public interest objectives*? Such a transformation « create disgregation between the state and society »?

2. b) ESD: The general principles

Critics:

Weaknesses of the goals and of the impact studies (art. 1 ESD)

Lack of an analysis of the implementation of national law

Rampant communitarisation favourable to national law

2. c) ESD: The scope of application

Critics:

The essential criteria is the legality of residence

Lack of regard given to the heterogeneity of the situations of illegally staying migrants

2. c) ESD: The scope of application

The conditions set forth at **Article 5 CFS** are not met:

- Migrants who entered legally but no longer meet the conditions of art. 5 CFS during their short stay
- Migrants holding a residence card delivered by a Schengen State when they go to another Schengen State for a short stay and if, they do not or no longer meet the conditions

.....

TCN in illegal residence

Migrants whose stay is illegal under **national law**:

- Migrants who have a national visa when the visa is revoked
- Migrants who previously had a residence card through marriage (« overstayers ») but no longer do
- Former seasonal workers who took up residence from one year to the next and stayed after their status was abrogated
- Asylum seekers whose asylum application has been refused and who decide to stay
- The special cases of TCN children who are born in the EU and stay there illegally without ever crossing a border

2. c) ESD: The scope of application

Critics:

Particular regard should be had for second and third generation of TCN without papers (« *sans-papiers* ») who could become legal instead of being subject to a return procedure

In such cases, one should therefore endeavour to give the worker the possibility of obtaining a legal status



POSITIVE ACTION MEASURES OF THE STATE

2. c) ESD: The scope of application

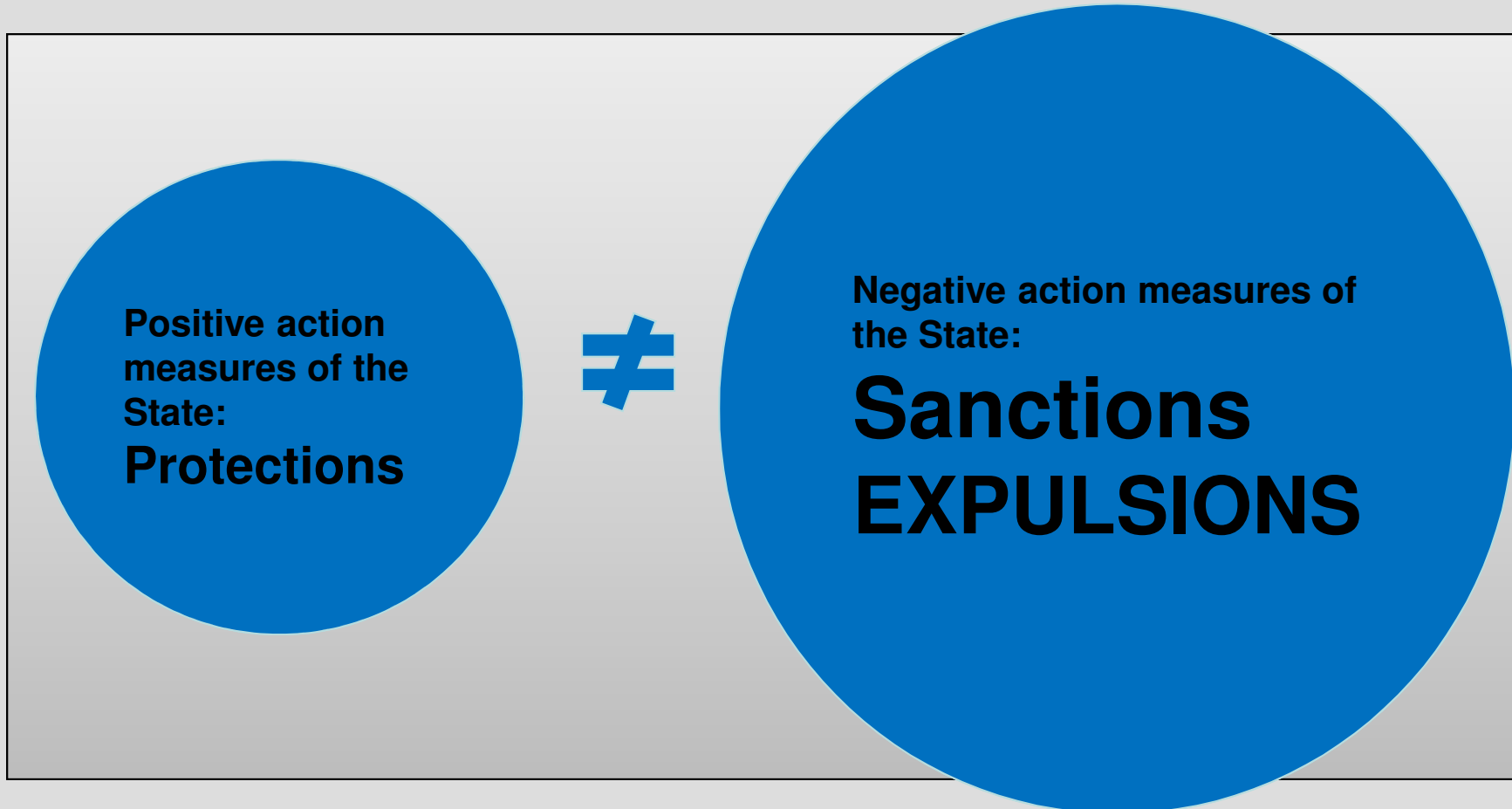
Direct sub-contractors (art. 8 ESD):

-Difficult to prove that the employer was aware of the fact that a sub-contractor was in an illegal situation and did not fulfil its obligations of care

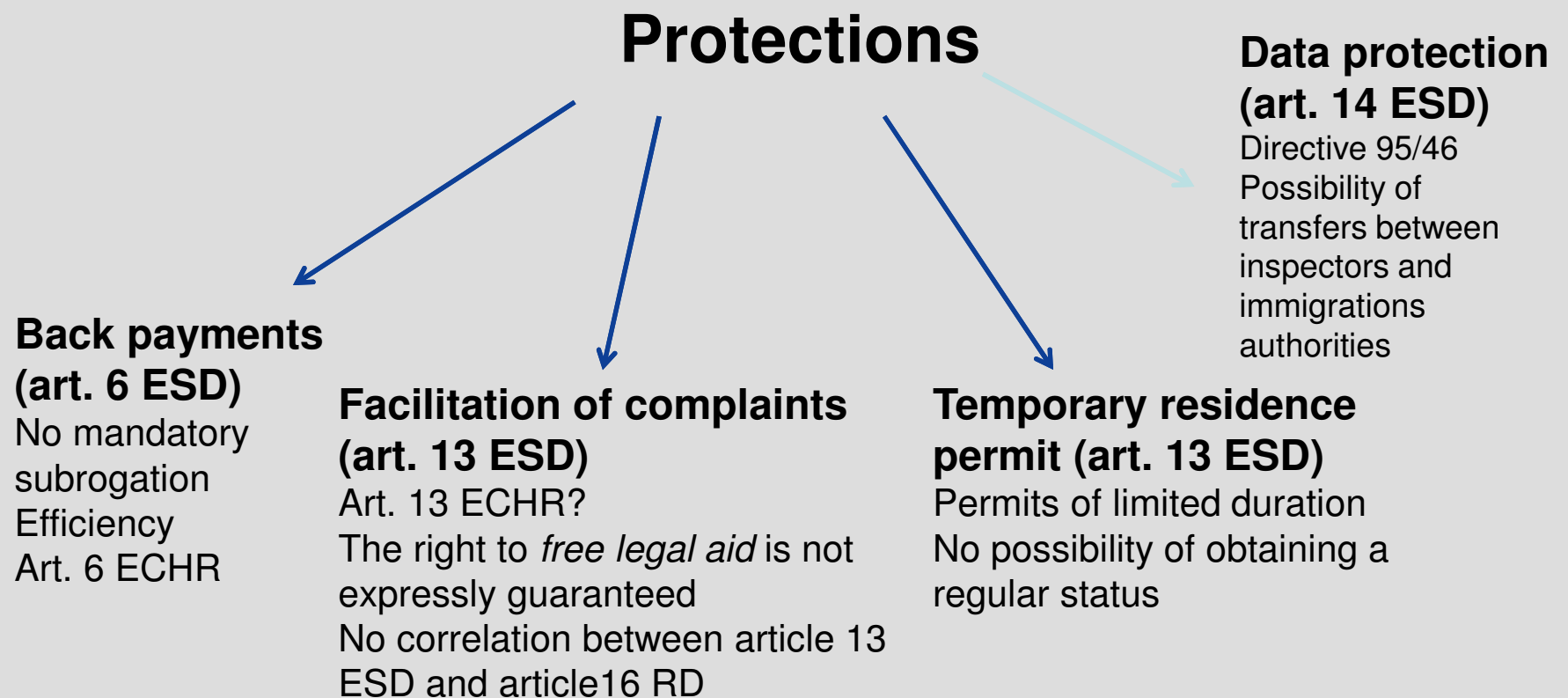
-The provision introduces a chain responsibility which irregular workers do not benefit from given the current state of national laws

-The provisions on falsely self-employed are lacking

2. d) ESD: Rights of workers



2. d) ESD: Rights of workers



3. a) ESD and Swiss Law: Applicable Swiss law

Federal Act concerning measures for combating undeclared work = Loi sur le travail au noir (LTN)

Personal scope of application -> TCN + Swiss

19

Material scope of application -> undeclared work consists of engaging in gainful employment without paying the mandatory social security contributions or income taxes (wages and social dumping)

-> Policy against labour exploitation and not a migration policy

3. a) ESD and Swiss Law: Applicable Swiss law

Loi sur le travail au noir (art. 13 LTN)

Sanctions:

- The LTN merely refers the authorities to the applicable provisions in the area concerned
- The LTN provides for specific sanctions when an employer is convicted for serious or repeated infringement of its disclosure or authorization obligations under social security or immigration laws
 - > exclusion from future public procurement processes at the communal, cantonal and federal levels for a maximum of five years (list)
 - > reduction as appropriate for a maximum of five years the financial aids

3. a) ESD and Swiss Law: Applicable Swiss law

Loi sur le travail au noir (art. 14 and 15 LTN)

Rights of the TCN:

- Duty of information of the authorities as part of the procedure for returns or expulsion to enable the TCN to claim its economic and social rights and to find a representative or advisor

- Right of complaint of trade unions which interrupts the limitation period (5 years)

3. a) ESD and Swiss Law: Applicable Swiss law

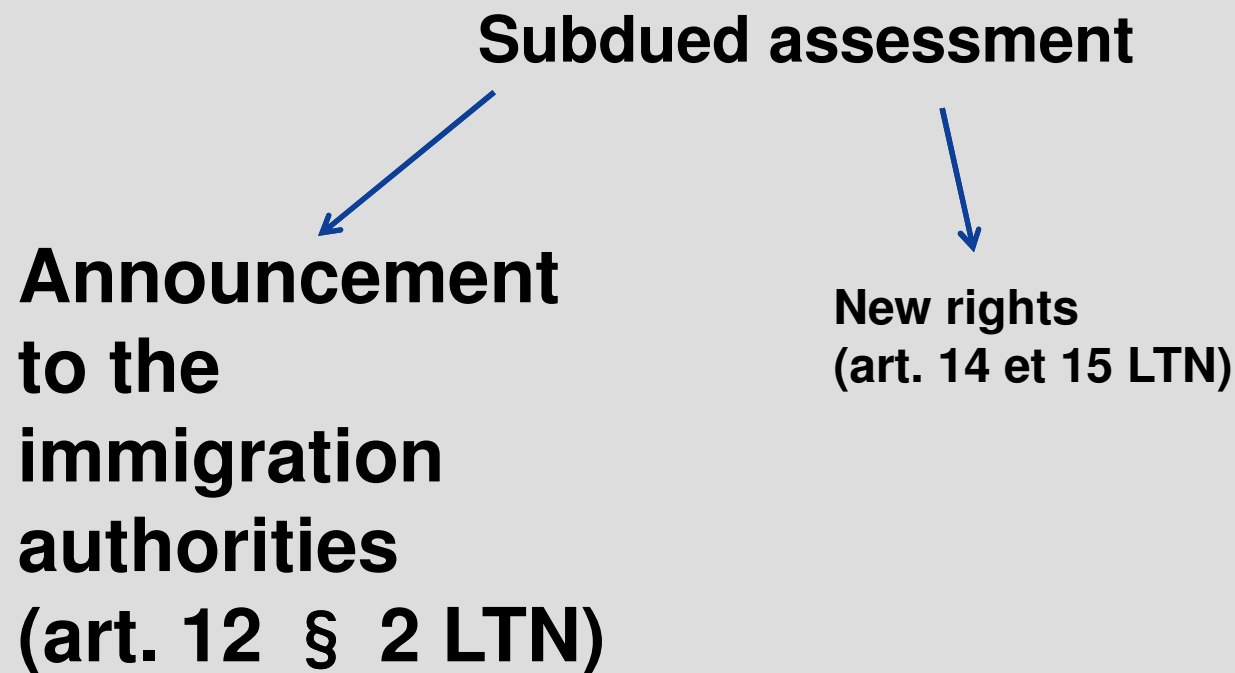
Loi sur le travail au noir (LTN)

Critics:

The *right of information and of communication* between the authorities (art. 12 LTN) obliges the cantonal and federal services or any other body tasked with applying social security legislation to disclose the results of their controls **to the immigration authorities.**

Such a disclosure may result in the initiation of proceedings to execute a return

3. a) ESD and Swiss Law: Applicable Swiss law



3. b) The relative conformity of Swiss law with the ESD

Conceptual difference

Sanctions: the LTN does not contain any provisions applicable to sub-contracting. The directive does not contain provisions applicable to a mechanism where the announcement to the immigration authorities of an infringement to social security laws can automatically result in the instigation of proceedings for the execution of a return

Rights of workers: in LTN, the right of complaint interrupts the 5 years limitation period

4. Final remarks

- **Efficiency:**

- Difficult to interpret the effects of the directive and of the LTN in a global perspective. The failures of the national laws have not been fully taken into consideration

- The delegation of control to employers (private players) constitutes a relative transfer of control . But its efficiency is necessarily accompanied by a reinforcement of public control (inspections)

- **Interests:**

- The *statu quo* seems to be the dominant note. Negative social impacts are to be feared

4. Final remarks

***The proof of the pudding
is in the eating....***