

# WORK PERMITS AND LABOUR INSPECTION

CASES OF THE NETHERLANDS, GERMANY AND POLAND

GYLA & CIPDD 2014



The project is funded  
by the European Union



**WORK PERMITS  
AND LABOUR INSPECTION:  
CASES OF THE NETHERLANDS,  
GERMANY AND POLAND**

**Piotr Kaźmierkiewicz**

*Institute of Public Affairs, Warsaw*

Tbilisi

2014

This report is published in the framework of the Caucasus Institute for Peace, Democracy and Development and the Georgian Young Lawyers' Association joint project "Promoting well managed migration between the EU and Georgia" funded by the EU.

The content of the report is sole responsibility of the author and does not necessarily reflect the views of the European Union.



Project funded by the  
European Union



**ISBN 978-99928-37-42-9**

© The Caucasus Institute for Peace, Democracy and Development, 2014

72, Tsereteli Ave, 2nd floor 0154 Tbilisi, Georgia  
Tel.: 2355154, Fax: 2355754  
[www.cipdd.org](http://www.cipdd.org)

# Content

<b>Executive Summary .....</b>	<b>5</b>
<b>1. Netherlands .....</b>	<b>7</b>
Overview .....	7
1.1. Migration trends and policy in the Netherlands .....	8
1.1.1. Migration trends .....	8
1.1.2. Migration policy .....	10
1.2. Dutch procedure for access to the labour market .....	12
1.2.1. Work permit procedure .....	12
1.2.2. Residence permits and other requirements .....	14
1.2.3. Recent changes .....	15
1.3. Organization of the Labour Inspectorate in the Netherlands .....	16
1.4. Labour inspection process in the Netherlands .....	18
1.4.1. Institutions in charge of inspections .....	18
1.4.2. Inspection process .....	20
1.4.3. Inspectors' competencies .....	21
1.4.4. Penalties .....	21
1.5. Assessment of the Dutch system .....	22
1.5.1. Activity planning through risk analysis .....	22
1.5.2. Prioritization through risk matrix .....	23
1.5.3. Assessment of control activities .....	24
1.5.4. Evaluation of general approach .....	26
<b>2. Germany .....</b>	<b>27</b>
Overview .....	27
2.1. Migration trends and policy in Germany .....	28
2.1.1. Migration trends .....	28
2.1.2. Migration policy developments .....	29
2.2. German labour migration regime and work permit procedure .....	31
2.2.1. Foreigners subject to and exempt from work permit procedure .....	31
2.2.2. Procedure of consent for workers from third countries .....	33
2.2.3. Terms of consent for employment .....	34
2.3. Institutions responsible for labour inspections .....	35
2.3.1. Occupational safety and health .....	36

2.3.2. Federal Customs Administration .....	37
2.3.3. Joint control operations .....	38
2.4. Labour inspection process in Germany .....	40
2.4.1. Inspections by regional Labour Inspectorates .....	40
2.4.2. Inspections by the Federal Customs Administration .....	41
2.4.3. Sanctions .....	42
2.4.4. Number and effectiveness of inspections .....	44
<b>3. Poland .....</b>	<b>45</b>
Overview .....	45
3.1. Migration trends and policy in Poland .....	47
3.1.1. Migration statistics .....	47
3.1.2. Migration policy developments .....	50
3.2. Polish labour migration legislation and work permit procedure .....	52
3.2.1. Conditions of foreigners' access to the Polish labour market ....	52
3.2.2. Types and conditions of work permits .....	53
3.2.3. Work permit procedure .....	55
3.3. Institutions controlling legality of employment .....	57
3.3.1. National Labour Inspectorate .....	58
3.3.2. Cooperation with the Border Guard .....	59
3.4. Labour inspection process in Poland .....	60
3.4.1. Inspections by the Labour Inspectorate .....	60
3.4.2. Inspections by the Border Guard .....	63
3.4.3. Sanctions .....	64
3.5. Statistics of controlling measures .....	66

## Executive Summary

Labour immigration is essential to the smooth functioning of European economies, helping to improve their competitiveness, address skill shortages and support vital sectors. At the same time, the enforcement of wage standards, occupational health and safety rules and legal contracts is necessary to ensure that the influx of foreign workers does not lead to unfair competition, the lowering of labour standards and discrimination in the workplace. This paper reviews the varying methods of conducting labour inspections in three EU Member States as well as their function. The paper also gives an overview of the institutions that oversee foreign workers' conditions of employment in these three countries.

The three cases of the Netherlands, Germany and Poland present different approaches to regulating access of third-country nationals to the labour market and to the detection and sanctioning of violations of regulations governing the employment of workers from outside the European Economic Area (EEA). Each case study opens with a survey of recent trends in immigration, highlighting the main countries of origin of migrants and their presence in the labour market. This is followed by a general review of recent legal migration policy initiatives and a detailed presentation of the current conditions for foreigners' access to the labour market, in particular the work permit procedure. The second part of each national study identifies the institutions responsible for detecting, investigating and prosecuting violations of regulations governing the employment of foreigners. Particular attention is given to the scope and procedures of labour inspections and the applicable sanctions imposed in cases of violations. Finally, the effectiveness of the applied measures is considered with reference to statistical evidence.

All three investigated countries have managed to attract economic immigrants—the Netherlands and Germany drawing workers at different skill levels primarily from other EU Member States while Poland is a traditional destination for seasonal workers from the EU's eastern neighbourhood. The majority of foreign labour is exempt from the work permit requirement but the employer applying for a permit for a non-preferential employee needs to demonstrate that no suitable candidate was found among the EEA nationals. At the same time, all three countries have recently reduced the bureaucratic barriers to foreign employment through such measures as elimination of separate work permit procedures (already in place in Germany and soon to be adopted in Poland), the waiver of the labour market needs test for some

professions or nationalities (Germany and Poland) or the shortening of decision time for trustworthy applicants (Netherlands).

Employers are ultimately responsible for ensuring that the foreigner has a valid identity document, necessary authorization for work, a properly constructed written contract and enjoys all the standard labour rights with regard to the salary level, working time and safe working environment. A tendency can be observed toward applying more severe sanctions against non-complying employers although the severity of applied measures and national policies on the use of sanctions differ from country to country.

Nevertheless, significant differences may be observed among these countries with regard to the organization of the institutions controlling the legality and conditions of foreigners' work as well as sanctions applied for violations. The German system separates the enforcement of laws governing the employment of foreigners and combating fraud from matters of occupational health and safety. The former area is a federal competence and a uniform nationwide system of detecting and investigating violations has been put into place following the reorganization of the Customs Administration in the wake of EU and Schengen enlargement. Through application of some of the highest administrative fines and concentration on repeat offenders, the German authorities report significant successes in reducing economic damage caused by the violation of laws governing the employment of foreigners. In contrast, the Dutch and the Polish systems concentrate the responsibility for enforcing all labour laws into the hands of the Labour Inspectorates. Their approach is to issue orders to remove irregularities first and only in cases of wilful and regular non-compliance or grave breaches of regulations impose administrative sanctions. The Dutch service has managed to maintain the level of inspections while reducing the number of inspectors while, in Poland, increasing the severity of sanctions helped reduce the scale of irregular employment.

Regardless of the division of responsibilities, in all three systems, the enforcing institutions are adopting similar approaches to planning and executing their actions. Throughout the EU, inspections are preceded by analysis of risk, helping concentrate limited resources on the investigation and inspection of those sectors, categories of foreigners and localities where irregularities are largest in scope or most serious. In these circumstances, coordination of the activities of various law enforcement agencies (labour inspectorates, border guards, customs and tax authorities) through exchange of data, joint risk analyses and inspections as well as parallel investigations is becoming all the more important.

# 1. Netherlands

## Overview

Netherlands is a country where immigration has become a politically sensitive issue yet given the relatively small size, traditional openness to foreigners and central location within the EU it remains a vital component of the country's labour market. Thus, although relatively later than in other EU Member States, the government has gradually introduced more stringent controls on employment and instruments to combat salary underpayment and social benefit fraud. Nonetheless, such standard instruments as criminal responsibility for illegal residence in the country or employment quotas for non-nationals are only being contemplated and introduced now.

As with other “old” EU Member States, the catalyst for a closer supervision of the conditions of employment of foreigners was the opening of the labour market to citizens of newly acceding states—mainly newcomers from Poland and then from Bulgaria and Romania. As these categories of labour migrants gradually became exempt from the requirement to apply for work permits, it became necessary to ensure that their free entry into the Dutch labour market would not compromise high standards with regard to salaries, benefits, occupational health and safety. For this reason, the government reorganized the labour inspection, combining the responsibilities for monitoring of workplace conditions, detection of labour market fraud and investigation of criminal cases in one agency. Also, over the course of 2013 measures against non-complying employers and temporary work agencies were made more restrictive with fines raised by 50% and the threat of closure introduced for non-compliance. Thanks to the combination of widely available information to employers and employees and self-regulation of sectors of employment, it was possible to focus inspections, investigations and punitive measures on a small group of persistent offenders, which enabled the government to maintain or increase the amount of administrative fines and criminal sanctions while reducing slightly the level of staffing at the labour inspection office.

This chapter opens with an overview of the most recent tendencies in immigration to the Netherlands, most notably the influx of nationals from new EU Member States to its labour market. It then highlights the policy response: a selective approach to economic immigration of third-country



nationals with increasing incentives for the entry of high-skilled workers and rising barriers against the employment of foreigners below minimum wage and the underpayment of benefits. The Dutch approach to the control of access to the labour market is also targeted: on the one hand, it facilitates hiring of legal workers by trustworthy employers (so-called recognized sponsors) while raising the level of sanctions against companies that are found to violate the regime repeatedly.

The second half of the chapter demonstrates how these changes towards more stringent policies against labour market fraud have been implemented. A key element is the work of the Inspectorate SZW of the Ministry of Social Affairs and Employment, which has been recently reorganized so that it now forms a single controlling authority, responsible for supervision of both legality of employment, payment of wages and benefits and occupational health and safety. Its approach toward employers is differentiated: resorting first to more lenient measures such as warnings, and moving to stricter sanctions such as administrative fines only when necessary and finishing with criminal investigations against repeated offenders. The effectiveness of the Inspectorate's activities (a rise in the value of penalties on the basis of a stable number of inspections, carried out by fewer inspectors) can be attributed to a developed system of risk assessment, which enables the agency to concentrate on high-risk entities.

## **1.1. Migration trends and policy in the Netherlands**

### **1.1.1. Migration trends**

The Netherlands is home to a significant group of immigrants. At the beginning of 2012, in this country with the population of nearly 17 million, there were 1.9 million of foreign-born residents out of which close to 700 thousand did not have the Dutch citizenship (nearly half of which came from outside the EU).<sup>1</sup> The country saw an upsurge in immigration in recent years: the inflow reached a peak of 163,000 persons in 2011, representing a rise of over 10% compared to 2008 and marking the highest figure in thirty years. In 2012 immigration dropped by 4% to 155,700, a

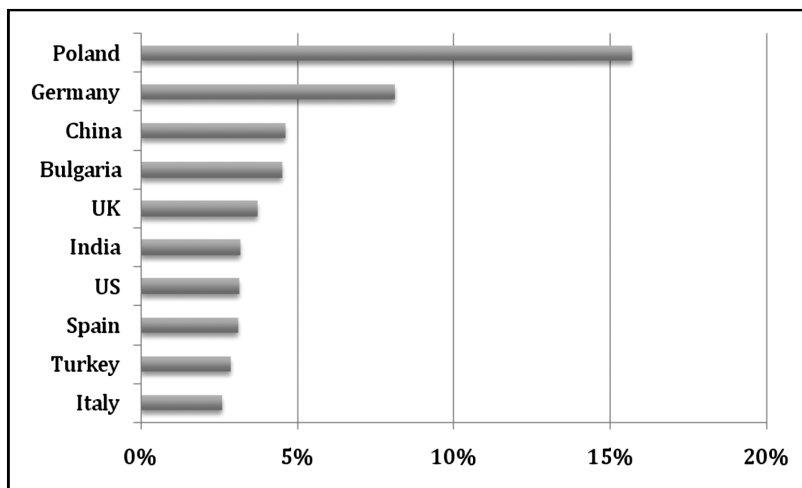
---

<sup>1</sup> Table 11 "Foreign and foreign-born population by group of citizenship and country of birth, 1 January 2012" in: *EU Employment and Social Situation Quarterly Review, March 2013*", European Commission: Brussels 2013, p. 13.

level slightly above that of 2010.<sup>2</sup> At the same time, the country continues to witness significant emigration—133,000 in 2011 (out of which 47% were the Dutch nationals). The new influx of migrants helped the country turn around the migration balance from the deficit observed in 2003 and the following years to a small net migration surplus recorded in 2008 and growing until 2011.

As a relatively small country located centrally within the EU, the migration flow into the Netherlands consists primarily of other EU nationals—in 2011 out of the total of 163,000 incoming persons, citizens of the EU26 countries made up around 43%, followed by non-EU nationals (33% or around 50,000) and Dutch returnees (27%). Immigration has been on the rise since 2005, following the accession of several new EU Member States in 2004 and 2007. Inflows from these countries rose most dynamically: from around 24,000 in 2009 to almost 33,600 in 2011 when they accounted for 22% of all immigration. The main categories of foreign immigrants include: the Poles (18,700), Germans (9,600) and the Chinese (5,400) (see chart below).

**Chart. Top 10 countries of origin of immigrants to the Netherlands, 2011**



Source: OECD, *International Migration Outlook 2013*, p. 279.

<sup>2</sup> OECD, *International Migration Outlook 2013*, p. 278.

Employment is the top reason for immigrating to the Netherlands (40% of the inflow in 2011), followed by family (32%) and study (15%). The number of foreign workers who received work permits was relatively low in 1998 (15,200) but climbed gradually to reach 44,100 in 2005 and peak at 74,100 in 2006. The exemption in May 2007 of nationals of new EU Member States from the requirement to apply for work permits brought about a rapid decline in the number of issued permits from 50,000 in 2007 to 15,000 in the following year and dropping to 13,600 in 2010. Nationals of those EU Member States that are still required to apply for work permits (Bulgaria and Romania) constituted a significant group: 4,000 in 2008, 4,200 in 2009 and 3,600 in 2010.<sup>3</sup>

### **1.1.2. Migration policy**

Until the 1990s, the Netherlands maintained a relatively liberal policy with regard to regulation of labour immigration, which continued for four decades, filling the gaps in low-skilled jobs with migrants from the Mediterranean region. The first restrictive set of measures in the 1990s made it impossible for irregular migrants to receive a tax and social security number, and as a result, illegal residents from non-EU countries became ineligible for welfare benefits. However, by 2003 it became clear that despite the entry into force of the new Aliens Act in 2001, which aimed to reduce the number of persons staying in the Netherlands without authorization (for instance, following a final negative asylum decision or upon expiry of a visa or residence permit), few irregular migrants had returned home. Thus, in 2004, the government submitted a Policy Document on Illegal Aliens to the parliament, arguing for a more effective return policy, sanctions against hosts of irregular migrants and provision of education and health care to migrants regardless of their status. This was followed in 2007 by a regularization, which provided a way out of illegality for about 30,000 third-country nationals.<sup>4</sup>

In June 2008, the government submitted the “Blueprint for Modern Migration Policy” to the parliament which simultaneously established mecha-

---

<sup>3</sup> OECD, International Migration Outlook, country note for „Netherlands”, editions for years 2010-2013.

<sup>4</sup> D. Diepenhorst, *Practical Measures for Reducing Irregular Migration in the Netherlands*, European Migration Network, Rijswijk, April 2012, pp. 13-14.

nisms for more effective supervision of the labour market and reduced some bureaucratic burdens to stimulate desirable economic immigration. On the one hand, controlling measures were to be made more effective through the use of risk assessment (described in greater length in section 1.5 below). Ultimately, more responsibility would rest with the inviting entity, which as the employee's sponsor would be solely accountable for meeting all the procedural requirements attached to work and residence permits. On the other hand, procedures were shortened in justified cases (procedures for residence and work permits were combined and review times were reduced). Companies or persons hiring foreigners could from then on apply for residence and work permits on behalf of employees (acting as sponsors) and after passing a test could, as so-called recognized sponsors, be exempt from the requirement to attach documentation to the application as well as to enjoy a shorter, two-week-long, accelerated procedure.<sup>5</sup>

Moreover, further opportunities were created for skilled foreign employees (for whom a dedicated scheme had been developed five years earlier) in January 2009 when the Admission Scheme for Highly Educated Migrants, was launched. A points-based system, it offers a year-long permit for graduates of internationally recognized universities, enabling them to search for a job or start an innovative company. The system for highly-skilled migrants was the subject of ministerial inquiry in 2010 due to concerns over possible abuse of the scheme through payment of salaries below minimum wage. While the system was maintained, certain restrictions were introduced: payment of salaries could only be made to Dutch bank accounts, and no allowance or benefits (e.g. housing) would be included in the salary for purpose of calculating the minimum wage.<sup>6</sup>

The selective approach to labour immigration—favouring the inflow of low-skilled and low-wage workers from the EEA while opening the labour market to third-country nationals with higher qualifications—continued in the following years. Thanks to the transposition of the EU Blue Card Directive, qualifying workers earning above 60,000 euros a year may bring family members who are then able to take up any job freely in the Netherlands.<sup>7</sup> At the same time, in 2013, the fines for unauthorized employ-

---

<sup>5</sup> OECD, *International Migration Outlook: Sopemi 2010*, p. 226.

<sup>6</sup> OECD, *International Migration Outlook 2012*, p. 254.

<sup>7</sup> OECD, *International Migration Outlook 2013*, p. 278.

ment, social benefit fraud and underpayment of wages were significantly increased (see section 1.2 for details).

## **1.2. Dutch procedure for access to the labour market**

### **1.2.1. Work permit procedure**

The general rule, set forth by the Foreign Nationals Employment Act (*Wet Arbeid Vreemdelingen*) is that jobs in the Netherlands should be first of all filled by Dutch nationals or citizens of the European Economic Area (EEA).<sup>8</sup> Citizens of two EU Member States (Bulgaria and Romania) and all non-EEA nationals may take up jobs in the Netherlands only with a valid work permit or with a residence permit or a passport sticker authorizing employment.<sup>9</sup>

Obtaining a work permit for all employees who need it is the responsibility of the employer.<sup>10</sup> The procedure starts with an attempt to search for a suitable candidate in the Netherlands or in the EEA for at least five weeks. The vacancy must be thus registered with the local Work Procurement Office (*Werkbedrijf*) for at least five weeks before an application for work permit may be submitted. Employers are encouraged to use the labour office's website as well as the EU-wide EURES online network of job placement centres for search of suitable workforce in Europe. In addition, in cases where there are positions that cannot be easily filled, the employer must show that in the course of three months prior to submission of the application all efforts have been made to locate the necessary workforce (including the use of employment agencies, placing ads online or in specialist press). Moreover, the prospective employer should offer a position to a Dutch or EEA national who "within a reasonable period of time" could meet the requirements if given proper training in the workplace.

An application may be then placed for a work permit with the Work Permit Division of the local Work Procurement Office. The applicant may

---

<sup>8</sup> European Union, Liechtenstein, Norway, Iceland and Switzerland.

<sup>9</sup> Such authorization is granted to foreigners residing for purposes of family reunification, refugees or those with legal residence in the country of over three years.

<sup>10</sup> The description is based on the Work Procurement Office's brochure: „Work permits for foreign personel. Information for employers”, UWV Zoetermeer 2010, available at: <https://www.werk.nl/pucs/groups/public/documents/document/ptl132363.pdf>.

determine what kind of permit is needed for his prospective worker by consulting the online Labour Migration Digital Desk website. There are three types of work permits: (1) a permit for a specified period of up to three years, (2) a temporary non-renewable short-term permit valid up to 24 weeks that may not be extended, and (3) a conditional permit. In the last case, the employer may only employ foreign workers if he or she makes further efforts to improve conditions in the workplace.

Applications must be submitted in writing, using a special form, available at the Work Procurement Office.<sup>11</sup> Other relevant documents, such as copies of certificates or diplomas (translated into Dutch) should be attached to demonstrate that the candidate has the unique skills to fill the job. Missing information may be provided within a set deadline, usually 10 working days, after which if the application is still not complete it is not considered. Once the application is complete, the Office has five weeks for review under standard procedure. During this period the Office investigates whether there are no Dutch or European candidates that would meet the job requirements. This test is waived in cases of asylum seekers, interns, trainees and international corporate personnel. Under the simplified procedure the Office needs two weeks to take the decision in such instances.

Once the Office finds grounds for rejecting the application, it notifies the applicant, providing grounds for denial. These are limited to the following instances:

- Dutch or European candidates are found available for the requested position,
- The employer has not taken sufficient measures to locate a qualifying candidate not requiring a work permit,
- The job offer has not been registered or the registration was made too late,
- The applicant did not comply with the terms of a permit issued in the past,
- The employer has been found to have broken the regulations in the past by employing foreigners without the required permit.

If a permit is not issued, the applicant may file an appeal to the Legal Employment Services Division at the Office within six weeks. Rejected

---

<sup>11</sup> Application forms, divided by types of employment, can be found online at: <https://ind.nl/EN/business/forms-brochures/>

appeals may be taken to the Aliens Division or the Administrative Law Division of the court of the Hague. Further appeal is possible to the Administrative Law Division of the Council of State.

### **1.2.2. Residence permits and other requirements**

In addition to applying for a work permit, the employer is obliged to secure an appropriate residence permit (either applying for it directly or having the employee apply for it while still abroad).<sup>12</sup> When applying for a residence permit, the employer will act as a sponsor on behalf of a foreign employee and will be responsible for ensuring that the migrant will meet all the requirements for the permit. The institution in charge of residence legalization, the Immigration and Naturalisation Service (IND), may grant an employer the recognized sponsor status. Gaining this status shortens the application procedure and is a precondition for obtaining some types of permits (e.g. for highly-skilled migrants).

All potential foreign employees must have a valid passport and must not represent a risk to public order or national security. They must have Dutch healthcare insurance and undergo a tuberculosis test within three months of the permit being issued.<sup>13</sup> In most types of employment (regular paid work, seasonal jobs, highly skilled jobs under the European blue card), conclusion of a written employment contract with a Dutch employer is required. Work permits are required for non-EEA nationals wishing to undertake regular or seasonal employment, the terms of which must comply with Dutch legislation. In particular, under the conditions of fair competition, the IND mandates that foreign employees earn at least the minimum wage (or a percentage of it depending on the number of worked hours per week), which is listed in the income requirements section on the agency's website. Since 1 July 2013, the minimum gross monthly salary must not be lower than 1,117.22 euros for a single person or 1,596.02 euros for a couple (married or unmarried).<sup>14</sup> Seasonal employment is lim-

---

<sup>12</sup> The description is based on the Immigration and Naturalisation Service's brochures, „Coming to work in the Netherlands”, June 2013, and „Bringing a foreign employee to the Netherlands”, March 2013.

<sup>13</sup> The test is not required from nationals of Australia, Canada, Israel, Japan, New Zealand, the United States and several other states.

<sup>14</sup> „Costs and income requirements”, available at IND's website: <https://ind.nl/EN/individuals/employee/costs-income-requirements/Pages/default.aspx>

ited to an uninterrupted period of 24 weeks, prior to which the foreign worker must reside outside the Netherlands for 14 weeks.

Employment-related residence permits are issued for the duration of the employment contract and are granted for the same period as the corresponding work permit. In case of a change of job within a company a transfer to a job at a different company, the employer will need to apply for a new work permit, although the original residence permit will remain valid. The length of the application procedure is maximum 90 days. In case the employer is a “recognized sponsor”, it is limited to 7 weeks when a work permit is required and only 2 weeks in other cases. All decisions are given in writing, and if IND needs further information from the employer to make a decision, it will detail its requirements in a letter. Negative decisions are accompanied by an explanation of the ruling, and are subject to appeal.

At the same time, steps have been taken to reduce the bureaucratic burden for Dutch employers. To limit the number of rejections, the IND offers potential employers an opportunity to file first a request for advice prior to lodging the actual application. The employers are explicitly warned that a residence permit will not be issued unless a work permit has been granted by the Work Procurement Office. Considering this, an opportunity exists for employers to apply for the two permits at the same time, using the Digital Labour Migration Desk on IND’s website. Also, once an employee receives a work permit and already resides in the Netherlands, he or she may receive a special sticker in their passport, authorizing residence (and work, in some cases) for the period until the decision is made on the issuing of a work-related residence permit.

### **1.2.3. Recent changes**

As the labour market is going to open up to a significant group of foreigners—the citizens of Bulgaria and Romania—as of 1 January 2014, the government took some further measures to restrict employment of non-EU nationals. Recent amendments to the Foreign Nationals Employment Act introduced stricter sanctions for illegal employment and raised the requirements for the work permit procedure. Effective 1 January 2013, the standard penalty for unauthorized work was increased by 50% to 12,000 euros. Repeated offenders would be punished even more severely, paying up



to 36,000 euros for each illegally employed foreign worker. In addition, other penalties were raised by 50%: employers who do not ascertain the identity of their employee and do not keep copies of their identity documents are fined 2,250 euros for each worker in question. Finally, repeated violations of the Law would result in the “preventive” closure of the company at fault for three months. It is important to note that the responsibility for establishing the identity of foreign employees and for the maintenance of records on them extends to contractors who hire non-resident workers through their sub-contractors.<sup>15</sup>

Further restrictions were introduced, effective from 1 October 2013, concerning the work permit procedure itself. The maximum validity of a work permit for a non-EU employee will be reduced from three years to only one year, and the permit will not be renewable. In effect, the new procedure requires employers to file an application for a work permit every year as well as to investigate that there are no suitable employees available in the country or the EU at large. The period after which the foreign employee is free to take up work in the Netherlands without requiring a permit was also extended. If previously, the non-resident worker could be freely employed once their three-year-long permit expired if he or she met all other criteria (most notably, residence), now this freedom will be granted only after five applications for annual work permits.

This law has, for the first time, brought about the possibility of introducing annual quotas in certain sectors. These could be enforced if it was established that Dutch employers failed to make sufficient efforts to locate employees within the Netherlands or the EU.<sup>16</sup>

### **1.3. Organization of the Labour Inspectorate in the Netherlands**

The verification of the legality and conditions of foreign labour is the responsibility of the Ministry of Social Affairs and Employment (*Ministerie*

---

<sup>15</sup> Information provided by Everaert Advocaten immigration lawyers on their website, „Employers, pay attention! Sanctions Foreign Nationals Employment Act increased”, available at: <http://www.everaert.nl/en/news/13-bedrijven/163-wav-boete>

<sup>16</sup> Information provided by Fraukje Panis, immigration lawyer in: „Adapted Foreign Nationals Employment Act”, 24 September 2013, at: <http://www.iamexpat.nl/read-and-discuss/expat-page/news/adapted-foreign-nationals-employment-act-netherlands>

*van Sociale Zaken en Werkgelegenheid*, SZW).<sup>17</sup> Until the end of 2011, three separate units of the Ministry conducted inspections: the Social Intelligence and Investigation Service (SIOD), the Inspection Work and Income (IWI) and the Labour Inspectorate (*Arbeidsinspectie*). Their functions have been taken over since 1 January 2012 by the single Inspectorate of the Ministry of Social Affairs and Employment (in short Inspectorate SZW), which not only carries out the tasks of the units it superseded but also enjoys wider controlling competencies.

Within the unified structure of the Inspectorate SZW there are two groups of departments: those dealing with violations of labour rights and conditions, and those verifying legality of employment and combating employment fraud. The first group includes three departments: Working Conditions, Major Hazard Control and Work and Income. The Working Conditions department verifies that workers are granted appropriate working conditions and hours, the Major Hazard Control evaluates safety and health conditions in the workplace, including those involving work with hazardous substances, and the Work and Income Department supervises the enforcement of wages and social security policies.

The other group of departments is concerned with the detection, investigation and prosecution of criminal cases involving illegal labour, dishonest job intermediation by employment agencies, workplace exploitation, evasion of responsibilities or fraud with regard to minimum wage, benefits or subsidies. The Investigations Department carries out the responsibilities of SIOD, and under the authority of the Public Prosecutor detects cases of systematic benefit fraud, major cases of illegal employment or large-scale violations of the fiscal obligations of employers. However, the central unit responsible for the enforcement of labour market control measures is the newly-established Department Labour Market Fraud, which supervises the execution of the following legal regulations: the Alien Employment Act, which bans the employment of foreigners who do not enjoy free access to the Dutch labour market without a valid work permit; the Minimum Wage and Minimum Holiday Allowance Act, which provides for sanctions for failure to secure appropriate wage and benefits levels, and the Allocation of Labour through Intermediaries Act, which regulates the operation of intermediary employment agencies.

---

<sup>17</sup> Information drawn from the website of the Inspectorate.

**Table. Staffing of directorates of Inspectorate SZW (full-time equivalents)**

<b>At the end of the year</b>	<b>2009</b>	<b>2010</b>	<b>2011</b>	<b>2012</b>
Labour (Working Conditions)	230	218	203	221
Work and Income	78	40	39	43
Major Hazard Control	40	42	35	39
Labour Market Fraud	188	171	176	187
Investigation	206	202	204	174
<b>TOTAL</b>	<b>742</b>	<b>673</b>	<b>657</b>	<b>664</b>

*Source: Annual reports of the Inspectorate SZW 2011, 2012.*

The table above shows the changes in the allocation of Inspectorate SZW staff to various departments. Traditionally, the largest number of inspectors (around one-third of the total personnel) supervises conditions in the work-place. Since 2010, thanks to reorganization of the Inspectorate, the total staff level has dropped by one-tenth and the largest cut was made in the Work and Income Directorate, where staffing was almost halved. By 2012, on the basis of ongoing risk assessment, the staff numbers in the Labour Market Fraud Department nearly returned to the 2009 levels while the Investigation Directorate recorded a loss of 30 staff members compared to the year before.

## **1.4. Labour inspection process in the Netherlands**

### **1.4.1. Institutions in charge of inspections**

Inspections are carried out by the Inspectorate SZW at employers' premises (this applies to both companies and individuals), ships and construction sites.<sup>18</sup> Only employers are subject to inspections – employees are only briefed as witnesses. They concern ascertaining the legality of foreigners' employment (under the Foreign Nationals Employment Act) and the elimination of cases of unfair competition with regard to the payment of at least the minimum wage and due social security benefits (enforcing the Wages and Minimum Holiday Allowance Act). Other agencies that may

---

<sup>18</sup> Information in this section drawn from: P. Renooy, *Labour inspection strategies for combating undeclared work in Europe: the Netherlands*, Regioplan: Amsterdam, May 2013, pp. 29-30.

accompany the Inspectorate are: the Aliens police, the Military Constabulary, the customs and tax authorities, the Institute for Employee Benefit Schemes and municipalities.

Other Dutch authorities authorized to inspect whether cases of unauthorized employment or other employment-related violations occur include:

(1) The *Tax Authority* monitors instances of tax evasion, and may visit companies to verify whether self-employed persons meet the criteria for this type of employment as well as to supervise the payment of housing and care benefits for employees. However, tax inspectors are not authorized to enter the private residential accommodation of the subject of the inspection without his or her consent while they may enter company premises jointly with the Inspectorate SZW. Since 2010, on the basis of an inter-agency agreement, the two institutions may exchange data, run joint risk analyses and collaborate in inspections.

(2) The *Employee Insurance Agency* annually runs 5,000 inspections in the workplace in addition to 15,000 home visits to detect cases of fraud in unemployment and disability benefits.

(3) *Municipalities* enforce the Employment and Assistance Act, distributing welfare benefits to the unemployed and organizing labour market activation schemes targeting job-seekers. The municipal Work and Income departments combat fraud when it concerns benefits and allowances paid out of independent local budgets. Department inspectors carry out inspections, conduct investigations and administer fines.

In October 2003, the Labour Inspectorate, the Tax Authority, the Employee Insurance Agency and six towns signed an agreement to launch inter-agency intervention teams. Since then, the teams were joined by the Social Insurance Bank,<sup>19</sup> the Public Prosecutor's Office, the police and other partners (depending on sector and topic of investigation). Intervention teams involve various agencies, which carry out their duties jointly to deal with serious fraud or violation of regulations in areas of unauthorized employment, tax evasion or social benefit abuse. The focus of operations of the teams in a given year is determined by the National Steering Group, which is chaired by the Ministry of Social Affairs and Employment. Once the theme of activity is chosen, the relevant agency takes the lead for a project that may run for a number of

---

<sup>19</sup> Social Insurance Bank implements several social insurance schemes, including child and old age benefits.

years. Intervention teams deal with abuse either in a specific sector, geographical region or issue. The inspection by an intervention team is carried out in a comprehensive manner, including all the legal obligations of the company in the fields of competence of the agencies, cooperating as part of a team.

#### **1.4.2. Inspection process**

No prior notice is given to the employer, who is only informed by one of the inspectors upon entry to the company's premises. Inspectors are required to identify themselves and provide a reason for the visit with reference to an appropriate legal act. Employers (as well as employees, if involved) will always be notified of the results of the inspection as well as of any follow-up activities to be taken in cases of suspected violations.

At the beginning of the inspection, supervisors will require all foreign workers to produce their original identity documents. Standard procedure for visual checks of documents include: ascertaining if the documents are genuine, checking that the photographs match the alleged holders and comparing IDs against the company ID register to make sure that the workers are in compliance with the residence and employment regime. The Labour Market Fraud division inspectors will seek to detect and follow up any signals of unauthorized employment and tax and social security fraud. As a follow up to the inspection of the workplace, the inspectors will review the internal administrative registers of the company (including the data on personnel and wages). In particular, they will verify whether the employers' data in the company's wage register correspond to those found in civil and municipal registers and the central database of work and income as well as with the registers of the Tax Authority and social security.

Then they may proceed to interview employees to verify that the employer is not in breach of either of the laws in question. A list of questions is used to ascertain if the employer pays statutory minimum wage and other allowances. Another set of questions concerns the use of temporary work agencies and the record of their commerce and trade registration. To minimize disruption to the work of the organization being inspected, each employee may return to work once he or she undergoes the required identity check and interview. If the inspection covers a larger number of employees, interviews will be carried out at one location within the company premises (e.g. a canteen).

### **1.4.3. Inspectors' competencies**

Inspectors have the following powers, provided for in the two laws in question as well as in the General Administrative Law Act:

- to enter any place except living quarters if the resident refuses entry;
- to be accompanied by other persons, and be aided by the police in order to enter by force, if necessary;
- to require that everyone present cooperates, and in particular that they answer questions;
- to demand access to business documents and other company information;
- to ask all persons of 14 years or older to produce their identity documents;
- to seize objects.

Moreover, additional competencies are granted in cases of inspections carried out with regard to those employers who have been found to violate the regulations repeatedly. In those cases, the inspection includes a criminal investigation, as regulated by the Code of Criminal Procedure as well as the Economic Offences Act.

### **1.4.4. Penalties**

As a result of inspections, Inspectorate SZW may resort to the following measures (in order of severity):

- verbal and/or written warnings
- prohibition notices
- administrative fines
- criminal prosecution.

The general principle is to apply the more lenient measures, reserving the criminal proceedings for more serious or repeated offences. Administrative penalties may be imposed in detected cases of unauthorized employment, underpayment and incorrect registration by the temporary work agency. As part of cooperation with social partners, the Inspectorate reports compa-

nies that were given administrative fines to the trade union agency in charge of monitoring collective agreements as well as to the certification organization. In turn, Labour Market Fraud inspectors may refer (or signal) instances of contraventions of other legislation to the respective enforcement authorities. Thus, suspected instances of criminal fraud or exploitation of workers need to be signalled to the investigation unit of the Inspectorate.

## **1.5. Assessment of the Dutch system**

### **1.5.1. Activity planning through risk analysis**

Inspectorate SZW supervises the extent to which employers comply with objectives set by the Ministry of Social Affairs and Employment. These range from fair competition and effective social security to appropriate working conditions and occupational health and safety. To focus its activities, the agency seeks to periodically identify the main threats to these goals by carrying out a risk analysis on three levels: strategic, tactical and operational.<sup>20</sup>

Every two years, certain themes are identified on the strategic level, which are the subject of greater attention within the broader policy framework. These themes provide orientation for various departments of the Inspectorate as to their priorities, and lead to the analysis of what problems require urgent actions in the following months. Finally, the identification of specific problems is the basis for the analysis of operational risks, in which the subjects and objects of inspections and other controlling measures are chosen so that they are properly targeted. For instance, if the operation of intermediary agencies is identified as the strategic theme of the Inspectorate's activities, the problem analysis on the tactical level should help answer the question: which agencies or groups require attention (e.g. which economic sector or which group of migrants). Finally, once the target of inspections is defined, appropriate supervision instruments will be chosen: these can be either broad inspections covering the entire target group or sector or spot checks on only a few agencies, chosen because they constitute a higher-than-average risk of engaging in illegal practices.

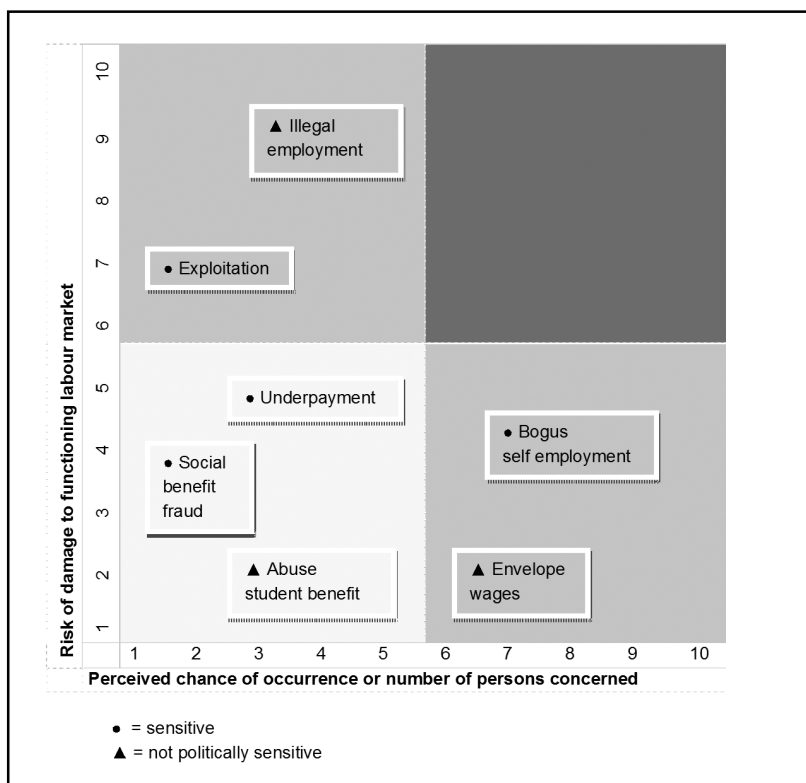
---

<sup>20</sup> Description based on: *P. Renooy*, Labour inspection strategies for combating undeclared work in Europe: the Netherlands, *Regioplan: Amsterdam*, May 2013, p. 23-25.

### 1.5.2. Prioritization through risk matrix

To weigh the risks identified across the entire range of the Inspectorate's area of responsibility, a risk matrix is drawn up by each department. The matrix is built along two axes: (1) the likelihood that a violation occurs or the number of persons that it could affect, and (2) the damage to the functioning of the labour market. The following diagram presents a possible matrix, drawn up for the problem area of labour market fraud.

**Diagram. Risk matrix in the area of labour market fraud**



Source: Fig. 4 in P. Renooy, Labour inspection strategies for combating undeclared work in Europe: the Netherlands, *Regioplan: Amsterdam*, May 2013.



In the example, presented above, none of the issues have been placed in the top right „red” quadrant, combining high threat to the basic principles of labour market regulation and high incidence. In that case, the two “orange” quadrants would be the object of attention for the Labour Market Fraud division of the Inspectorate. Out of the four problems, identified as either highly damaging or widespread, two (exploitation and bogus self-employment) are indicated as politically more sensitive, and in this case would be high on the priority list of the unit.

Inspectorate SZW reported that risk analyses and reports led the agency to concentrate its 2011 activities in the area of labour market fraud on “companies with a high risk of illegal employment and/or underpayment”. These were identified as enterprises characterized by “peak labour periods, low, labour-intensive, unskilled and heavy physical work”. Inspections concentrated on sectors which share some of these characteristics: cleaning, catering, agriculture, gardening, construction and retail as well as all temporary employment. Pilot projects were also carried out in the healthcare and transportation sectors.

### **1.5.3. Assessment of control activities**

The effectiveness of these measures may be illustrated with the data on the number of operations undertaken by the Inspectorate SZW in recent years. Labour market fraud inspections represent the second largest area of operations, trailing only the occupational health and safety checks. The numbers of inspections in this area, covering illegal employment, underpayment of wages and temporary agencies, were stable between 2009 and 2011: 9,723 in 2009, 9,629 in 2010 and 9,655 in 2011. In 2012, it was decided to focus on repeat offenders and high-risk companies so the planned number of inspections in this area dropped to 7,500. While fewer inspections were carried out in 2012 compared to previous years (7,160), a larger proportion of them led to interventions (warnings, fines, official reports): the figure stood at 18% in 2010 and 2011, rising to 21% of cases in 2012.<sup>21</sup>

In its annual report for 2012, the Inspectorate SZW stressed the growing role of criminal proceedings to deal with “persistent” and “notorious” of-

---

<sup>21</sup> Table 2, „Inspection SZW: key figures for 2012” in: *2012 Annual Report of the Inspectorate SZW. Summary*, p. 5.

fenders. The following logic explains the Inspectorate's increased reliance on investigations and punitive measures in justified cases: "When the administrative law approach towards stopping abuse achieves insufficient results then the Inspectorate deploys its criminal law investigation instruments, in particular to combat labour exploitation, organised benefit fraud and mala fide temporary employment agencies".<sup>22</sup> Although the number of inspectors responsible for criminal cases dropped from 204 to 174, the number of conducted investigations remained roughly the same (62 in 2011 and 61 in 2012). In 2011, out of the total of 62 investigations, 14 cases concerned illegal employment, 15 dealt with social benefit fraud while 11 involved labour exploitation or human trafficking.

The annual report for 2012 lists successful activities carried out by the Inspectorate, both on its own and through intervention teams. As a result of a joint investigation with the Work Procurement Agency, a company that had overcharged for its job coaching services was forced to return 1.5 million euros and lost recognition as a partner of the Agency.<sup>23</sup> However, the most impressive success story was the campaign against fraudulent temporary work agencies, which have enjoyed strong growth since the enlargement of the EU. By 2012, about 19,000 agencies had been registered with the Chamber of Commerce. Some estimates indicate that up to 6,000 agencies employing 100,000 workers could have been involved in some kind of fraud. In mid-2012, an intervention team was set up to deal with fraudulent temp agencies. The team started by inspecting 15 sites and on the basis of a conducted risk analysis, they named a list of 100 agencies under suspicion of fraud. By March 2013, 42 administrative investigations and nine criminal cases were launched against 66 temp agencies and 116 hiring companies. These joint activities were supplemented by inspections of temp agencies, carried out in 2012 by the Tax Authority (953 inspections, bringing in 2.6 million euros in fines and 5 million euros in tax corrections)<sup>24</sup> and by the Inspectorate SZW, which reported more than 1300 inspections within that sector, bringing in fines of over 5 million euros against mala fide temporary employment agencies.

---

<sup>22</sup> 2012 *Annual Report of the Inspectorate SZW Summary*, p. 3.

<sup>23</sup> 2012 *Annual Report of the Inspectorate SZW Summary*, p. 3.

<sup>24</sup> P. Renooy, *Labour inspection strategies for combating undeclared work in Europe: the Netherlands*, Regioplan: Amsterdam, May 2013, p. 35.

#### **1.5.4. Evaluation of general approach**

Overall, the Inspectorate considers that in the first year of operation since the merger (2012), most of its objectives were accomplished. The annual report states that:

“The percentage of enforcement interventions relating to all legislation initiated after inspections increased and was higher than planned. The amount of administrative fines imposed on offenders also increased and was significantly higher than planned. This was largely due to the imposition of several fines relating to a large number of illegally-employed employees in which per case more legal persons than one were involved.”<sup>25</sup>

Hope is also expressed that greater awareness among employers and employees, the introduction of heavier fines and self-regulation in several sectors of the labour market should all help concentrate the efforts of the Inspectorate on closer supervision of repeated offenders and thus yield greater compliance with the regulations. In other words, the Inspectorate applies only “targeted” pressure where regulatory or awareness-raising activities do not achieve a satisfactory outcome.

---

<sup>25</sup> 2012 *Annual Report of the Inspectorate SZW Summary*, p. 3.

## 2. Germany

### Overview

Germany is facing the dilemma of how to use its migration policy to achieve the twin objectives of stimulating economic growth (particularly relevant at the time of continent-wide recession) and continuing its model of a social market economy. Thus, on the one hand, the adopted measures aim at helping the national economy stay competitive through supplementing its labour market with a desirable highly-qualified workforce, allowing more flexible working time arrangements and increasing opportunities for various categories of foreigners to take up employment. At the same time, the government seeks to maintain high standards of protection for workers' rights, including social security and working time as well as occupational health and safety. This dilemma is evident in the parallel trends of liberalization of employment regulations for selected categories of foreigners while imposing the strict enforcement of tough employment sanctions towards non-complying employers and employees.

The German system of labour inspection is unique as it institutionally separates the monitoring of occupational health and safety issues from the institutional structures focused on combating unlawful employment and benefit fraud (these areas lie within the remit of the Ministry of Labour and Social Affairs and the Ministry of Finance respectively). Another challenge to the effective work of state inspection bodies is the fact that responsibilities are divided between the federal government (which sets legislative standards as well as enforcing the rules governing registration, wages, benefits and tax payments) and bodies, established at the level of self-governing federated states (*Länder*), which are responsible for ensuring adequate workplace conditions and administering social security and welfare benefits. In addition, the new challenges, which have arisen as a result of the removal of border controls in 2007 and the waiver of work permit requirements for nationals of eight Central and Eastern European states in 2011, required fundamental restructuring of the system of control of legality of employment. This happened through the reorganization of the Federal Customs Administration, a reform that aimed to ensure the uniform application of regulations throughout Germany and the elaboration of mechanisms of joint control with the federal and local police.

The first section of this chapter discusses recent tendencies in immigration to Germany and highlights the fact that the German labour market is particularly vulnerable to legal changes in the scope of free movement of labour and to changes in the EU labour market. Next, initiatives designed to attract foreign workers are briefly outlined with particular attention paid to preferred categories of migrants and measures implemented to facilitate their presence. Conditions of entry into the German labour market are further elaborated in the second section, which focuses on the procedure of gaining authorization for foreign employees.

The organization and work of the institutions responsible for the enforcement of labour standards is featured at length in the second half of the chapter. Considering that labour inspections are carried out by two independent structures, covering different issues, the institutional setup, the procedures applied during inspections and the resulting sanctions are discussed separately. Particular attention is paid to the control measures adopted by the Federal Customs Administration, the body responsible for combating unlawful employment. It is worth noting that, operating in a country without external EU borders, customs officials are the primary law enforcement agency in charge of detecting and investigating illegal employment (ranging from foreigners working without permission and the unregistered payment of wages to benefit fraud and people trafficking). This situation is quite unique in Europe as these tasks are often in the competence of national labour inspections.

## **2.1. Migration trends and policy in Germany**

### **2.1.1. Migration trends<sup>26</sup>**

Germany, due to its large competitive economy and central location within the continent, has been lately experiencing a strong inflow of migrants, among which foreign workers constitute the largest group. Following large inflows in the 1990s (largely due to the return of ethnic Germans from eastern Europe and the CIS) the rate of net immigration declined, reaching a low of 55,000 in 2004. Gradually the figure rose to 75,000 in 2006, peaking at nearly 100,000 in 2008. After a

---

<sup>26</sup> This section is based on the data, presented in OECD's *International Migration Outlook*, section „Germany” for years 2006-2013.

sharp decline to 25,000 in 2009, net immigration rate rose fivefold in 2010, approaching 154,000. As the total inflow of foreigners into Germany rose from 683,500 in 2010 to 841,700 in 2011, the positive migratory balance grew to 302,900.

Non-EEA labour immigration is restricted and targeted: in 2011, the Federal Employment Agency approved 66,000 workers requiring permits from outside the EU and EFTA, which marked an 8% rise over the preceding year. In line with Germany's adopted policy of favouring high-skilled labour immigration, the overwhelming majority of permit holders were university graduates, and half of those had graduated from German universities. However, the majority of permanent immigrants came from the EU and half of EU nationals residing in Germany have come for the purpose of employment. Thus, much of the growth in immigration may be attributed to the enlargement of the EU to countries east of Germany: in 2010, new EU Member States accounted for as many as two-thirds of all immigrants from the EU with Poland and Romania leading the statistics. With the waiver of the work permit requirement for Poles and nationals of other Central and Eastern European states that acceded to the EU in 2004, the number of permits dropped to 167,600, these were issued mainly to nationals of Romania and Bulgaria.

The major factors contributing to the rapid increase in the rate of economic immigration observed recently are the rise of unemployment in several south European countries and the opening of the German labour market to nationals of eight new EU Member States in May 2011. In the first three quarters of 2012, the sharpest increases in immigration over the previous year were observed from southern Europe: citizens of Greece (64% increase), Portugal (49% increase), Spain (48% increase) and Italy (38% increase). The dynamics of immigration are likely to be maintained in the foreseeable future as the German economy records consistent growth and nationals of Romania, Bulgaria and Croatia are granted right to employment on equal terms with other EEA nationals in 2014-2015.

### **2.1.2. Migration policy developments**

The further growth and competitiveness of the German economy (second biggest exporter globally) has been recognized to depend on the contin-

ued supply of skilled labour. On 1 January 2009 the Labour Migration Act came into force, making it easier for highly qualified workers to enter the German labour market (*inter alia*, lowering the income limit for specialists and managers in short supply and eliminating the priority check for all qualified graduates of foreign universities).<sup>27</sup> In addition, the Act extended the period of employment of seasonal workers from four to six months—this represents the largest group of foreign employees in Germany (as many as 293,711 in 2010, mainly Poles and Romanians). In line with the broader Action Programme on Securing the Skilled Labour Base of July 2008, a labour-market monitoring programme was set up to assess the medium and long-term need for foreign labour and by 2013 a long-term forecast was expected to be prepared for the period up to 2030. In 2009, Welcome Centres advising incoming qualified workers on a range of integration issues were established in Hamburg and Dresden.

Further measures facilitating the access of foreign workers to certain sectors where labour shortages had been observed were undertaken in 2011 when the federal government adopted the Global Concept to Secure Skilled Labour. While priority is still given to the utilising and raising the level of qualifications of the domestic workforce, the strategic document recognizes the need for skilled foreign immigration to supplement national labour resources. Thus, since 22 June 2011, priority check was eliminated for a number of professions, including physicians, mechanical, automotive and electrical engineers. This was complemented by the introduction on 1 April 2012 of uniform criteria of recognition of foreign qualifications in about 500 professions, regardless of the holder's citizenship (notably physicians and nurses).<sup>28</sup> According to estimates by the Federal Ministry of Education and Research, as many as 285,000 people (or one-tenth of all residents with qualifications obtained abroad) could gain recognition under the new Act.

---

<sup>27</sup> During a priority check, it is verified whether no suitable candidate from Germany or EEA is available for the position. See: J. Schneider, B. Parusel, *Policy Report 2008 of the National Contact Point for Germany in the European Migration Network*, Federal Office for Migration and Refugees, Migration and Integration Research Department, Nuremberg, 2009, pp. 20-21.

<sup>28</sup> Under the terms of the Act to Improve the Assessment and Recognition of Professional Qualifications (so-called Recognition Act).

On 1 August 2012, amendments to the Residence Act entered into force, extending the period during which foreign graduates of German universities could look for a job from 12 to 18 months and granting a settlement permit two years after finding employment. Moreover the Act authorized 120 days of full-time employment or 240 days of part-time work for foreign students. The new regulations also transposed the EU Blue Card directive,<sup>29</sup> exempting its holders from the priority check and setting a minimum salary limit in 2013 at 46,400 euros and only 36,200 euros for workers in short-supply professions.<sup>30</sup>

## **2.2. German labour migration regime and work permit procedure**

### **2.2.1. Foreigners subject to and exempt from work permit procedure**

As a general rule, unless exempt, third-country nationals who are not family members of EU citizens and who wish to be employed legally in Germany need to meet the requirements laid down in the Residence Act<sup>31</sup> and two basic executive acts regulating employment of foreigners.<sup>32</sup> In line with this Act, with the exception of nationals of Australia, Canada, Israel, Japan, the Republic of Korea, New Zealand and the USA, all non-EEA nationals must apply for a visa, issued typically for three months, which explicitly states the purpose of stay to be employment. In case of a longer stay, foreigners have to apply for a resident permit for purpose of employment while their visa is still valid.<sup>33</sup> Visas are issued by German diplo-

---

<sup>29</sup> Council 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.

<sup>30</sup> Federal Office for Migration and Refugees, *Annual Policy Report 2012 by the German National Contact Point for the European Migration Network (EMN)*, Nuremberg 2013, pp. 5, 22-24.

<sup>31</sup> In full: German Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory.

<sup>32</sup> These are: the Ordinance on the Admission of Foreigners for the Purpose of Taking Up Employment (Employment Regulation) and the Ordinance on Official Procedures Enabling Resident Foreigners to Take Up Employment.

<sup>33</sup> Section 18 of the Residence Act.



matic missions abroad while residence permits are granted by regional immigration offices in the place of applicant's residence or in the place of domicile of the hiring company. The employment contract and records of qualifications must be attached to the application for an employment-related residence permit.

Temporary provisions apply with regard to nationals of Bulgaria, Romania and Croatia, which recently acceded to the EU. While they are not required to obtain a visa or residence permit, they will need to apply for EU work permits (either temporary or unlimited)<sup>34</sup> until 31 May 2014 (citizens of Bulgaria and Romania) or 30 June 2015 (nationals of Croatia) when they gain unlimited access to the German labour market on equal terms with other EEA nationals. Until 1 May 2011, such transitional arrangements were in force towards nationals of the eight Central and East European states that joined the EU in 2004.<sup>35</sup>

With the introduction of a one-stop government procedure, a separate work permit is no longer needed. However, depending on the type of job, a residence permit for the purpose of employment may need to be approved by the International Placement Service (ZAV), a branch of the Federal Employment Office, responsible for the admission of non-nationals to the German labour market. The consent of the ZAV is in general not needed with regard to the following categories of foreign workers:<sup>36</sup>

- highly qualified workers holding a settlement permit or EU Blue Card (in the latter case after three years of residence or two years of employment or if their salary exceeds 46,400 euros annually),
- graduates of German universities in their area of specialization,
- lecturers, journalists, professional sportspersons, interpreters,
- interns, volunteers, students working during holidays,
- business travellers

---

<sup>34</sup> Subject to the transitional regime, the EU nationals may receive an unlimited right to work in Germany only after a year since obtaining a temporary EU work permit from the Employment Agency.

<sup>35</sup> Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia.

<sup>36</sup> The detailed list is found in the Employment Regulation.

- contract and guest workers under international agreements,<sup>37</sup>
- asylum seekers and refugees.<sup>38</sup>

### **2.2.2. Procedure of consent for workers from third countries<sup>39</sup>**

If an application for an employment-related visa or residence permit is received from a foreigner, the competent diplomatic mission or immigration office verifies whether consent from the ZAV is needed for the particular position. ZAV is organized into local work-permit (AE) teams with territorial jurisdiction over a given employer's registered office, branch or factory or with special jurisdiction covering occupational groups (including artists, nurses, seasonal workers). It is important to note that in the German system, decisions on the admission of foreigners who require authorization for work are the unique responsibility of the Employment Agency (and not of immigration authorities, which decide on issues of residence alone).

The consent procedure for third-country nationals consists of verification that such employment would meet three basic conditions, stated in Section 39 of the Residence Act. Firstly, the competent AE team of the Employment Agency must ensure that the foreigner passes the so-called priority check—his or her employment can only be authorized if no workers may be found for this position from among the German or EEA nationals. Secondly, it must be established that offering the job to a foreigner would not produce “negative consequences for the labour market” (in particular, leading to loss

---

<sup>37</sup> Currently residence is offered for employees without required two-year vocational training only „in exceptional cases”. These require placement arrangements between the Federal Employment Agency and public employment services in the sending country. An agreement currently in force is one with Croatia (which will expire in 2015 once the country gains unlimited access to the EU labour market).

<sup>38</sup> Detailed description of categories subject to and exempt from the consent procedure can be found in the Federal Agency for Employment's leaflet *Employment of Foreign Workers in Germany: Questions, answers and tips*, July 2013, pp. 8-18, available at: <http://www.arbeitsagentur.de/EN/zentraler-Content/Arbeiten/MB7-Beschaeftigung-ausl-AN-EN.pdf>

<sup>39</sup> Information based on the leaflets, *Employment of Foreign Workers in Germany: Questions, answers and tips*, Federal Agency for Employment, July 2013 and *Questions and Answers on the Employment of Foreign Workers in Germany*, Federal Ministry of Labour and Social Affairs, available at: <http://www.bmas.de/SharedDocs/Downloads/DE/faq-beschaeftigung-auslaendischer-englisch.pdf>

of jobs). Finally, conditions offered to foreigners for a given position must be at least as good as those for comparable German employees.

Considering demand for certain professions, the federal government may decide to waive the requirement of the priority check. This is done every six months when the government draws up and amends a so-called “positive list” of “bottleneck professions” in light of developments in the domestic labour market. The review procedure consists of two stages. Firstly, an analysis is made as to how difficult it is to fill a vacancy in a given profession by collecting information on the number of unemployed jobseekers as well as on the period during which posts remain vacant on average. Secondly, this preliminary survey is complemented by more structured research, consisting of an analysis of regional and national statistics as well as of opinions of experts on the labour market. In the second stage, consideration is given to such indicators as: the national employment rate, the aggregate volume of job offers, the structure of hired employees by age and education, the share of employees working in temporary positions and the proportion of the workforce that is self-employed.

The Employment Agency requires up to two weeks to decide a case, and the process may be significantly shortened if the employer submits all the required information early enough. This information includes the original vacancy announcement as well as information on salary, working hours and other conditions of the job. The Agency may even communicate the decision “immediately” if it is clear from the review of the intended conditions of employment, and from the check of the regional and EEA labour market that the offer meets the criteria stated in the law. Another facilitating measure is the prior check procedure in which the employer may inquire with the Agency about whether a prospective worker meets the labour market criteria. To make such a request, the employer needs to provide a detailed description of the vacancy, including the required qualifications and work conditions.

### **2.2.3. Terms of consent for employment**

Consent for employment is given for the period of employment but for not longer than three years. In principle, the ZAV’s consent granted for purpose of issuing a short-term visa is valid for the period of validity of the residence permit as well. Further restrictions may be introduced by the

Employment Agency, limiting the validity to a certain territory, or a maximum number or schedule of working hours, or to a type of professional activity. All these conditions are specified in the residence permit, issued by the diplomatic establishment or immigration authority. Foreign nationals are advised to apply for residence permits for the purpose of taking up employment “as early as possible prior to the intended date of taking up employment, as processing often takes a long time”.<sup>40</sup>

Under Section 40 of the Residence Act, consent may be refused in cases when either (1) the prospective employee or his or her employer has “culpably violated applicable legislative provisions”, and has been found to have engaged in illegal employment, or (2) there exist “important reasons” with regard to the employee. Thus, the Agency is required to investigate the past record of employment and residence of the applicant, and deny consent in case of any valid doubt as to the intent to comply with the rule of legal employment. No consent shall be granted for third-country nationals seeking employment as temporary agency workers, according to the position of the Ministry of Labour

“it is impossible to specifically regulate immigration in the case of temporary agency worker activities as it is unclear from the outset what activities will be assigned to the worker in the future. The legal grounds for specific labour market access cannot therefore be assessed, nor can a priority examination be carried out in relation to a specific job.”<sup>41</sup>

Moreover, in line with Section 41 of the Residence Act, once issued, the consent may still be revoked if the above grounds are established or if the worker is found to be paid lower wages or has otherwise been employed in worse conditions than those offered to comparable German or EEA employees.

### **2.3. Institutions responsible for labour inspections**

The German system differs from the arrangements found in many other European states, which combine various controlling functions in one central institution of a labour inspectorate. Germany is a federal state, in which the “soft”

---

<sup>40</sup> *Employment of Foreign Workers in Germany: Questions, answers and tips*, Federal Agency for Employment, July 2013, p. 22, available at: <http://www.arbeitsagentur.de/EN/zentraler-Content/Arbeiten/MB7-Beschaeftigung-ausl-AN-EN.pdf>.

<sup>41</sup> *Questions and Answers on the Employment of Foreign Workers in Germany*, Federal Ministry of Labour and Social Affairs, p. 32.

issues of labour standards are left to the self-governing *Länder* (federated states) while certain “hard” issues, such as the enforcement of the residence, tax, social security regimes are matters dealt with by agencies of the central (federal) government. Thus, inspections in the workplace are divided into two main kinds, depending on their focus, and are accordingly carried out by different agencies. Occupational health and safety matters are the preoccupation of federal (regional) labour inspection services typically supervised by a regional ministry of labour and social affairs. In turn, combating illegal employment and social security fraud is the duty of the Federal Customs Administration, which cooperates with immigration authorities in cases of detected illegal residence. Since the scope of competence of the two structures is clearly differentiated, they will be discussed separately below.

### **2.3.1. Occupational safety and health**

Under the German Constitution, there is a two-tiered system of governance in the area of labour and social policy. Legislative and strategic initiatives are dealt with at the federal level.<sup>42</sup> The elaboration of laws in the area of occupational safety and health as well as the collection and analysis of labour statistics are the responsibility of the Department of Labour Law and Labour Protection at the Federal Ministry of Labour and Social Affairs. On the other hand, sixteen *Länder* (federated states) are entrusted with the implementation of federal laws, including supervision of labour inspection services.<sup>43</sup>

Labour inspectorates have a limited scope of operation. They do not cover public administration offices, for which a separate inspection service is in place. Moreover, they do not supervise payment of wages and social security benefits or the enforcement of terms of employment contracts (including terms of severance) or of collective agreements. Inspection services enforce the following items of legislation: working time, protection of working women and adolescents, combating child labour, investigation of safety and health conditions in the workplace (including equipment and installation checks). In some states, inspectorates are also responsible for environmental protection and hazard protection.<sup>44</sup>

---

<sup>42</sup> Article 74, paragraph 1 of the German Constitution.

<sup>43</sup> Article 83 of the German Constitution.

<sup>44</sup> ILO, *Labour Inspection Structure and Organization*, „Germany”, available at: [http://www.ilo.org/labadmin/info/WCMS\\_209470/lang-en/index.htm](http://www.ilo.org/labadmin/info/WCMS_209470/lang-en/index.htm)

The *Länder* (federated states) are free to organize their labour inspection services either as part of their administration or as independent structures. In an attempt to cut staff and operating costs, many regional governments have decided to reintegrate their once separate agencies into the state administration. Whether separate or integrated, labour inspection units are under the supervision of the regional ministries in charge of labour and social affairs, which make decisions on allocation of personnel. The sixteen *Länder* have around 3,600 labour inspection workers at their disposal.<sup>45</sup>

### 2.3.2. Federal Customs Administration

Out of the total staff of 39,000 customs officers, one-sixth (6,500) are involved in combating undeclared work and unauthorized employment “to stabilize the social systems and labour market”.<sup>46</sup> The responsibility for countering labour fraud is one of a wide range of duties of this modern federal service, along with the collection of taxes, the fight against product piracy, the smuggling of drugs, cigarettes, weapons and dangerous substances as well as the control of licensed or prohibited goods and endangered species. Although customs officials have the same powers as other law enforcement authorities (local and federal police), they concentrate on employment status in their investigations, and when detecting instances of unlawful residence, they hand foreigners over to the local police.<sup>47</sup>

EU enlargement in 2004 and 2007 and the removal of border controls on Germany’s eastern frontier in December 2007 necessitated a restructuring of customs to deal with new challenges. Since 2008, a new structure reduced the number of layers of administration and introduced specialized

---

<sup>45</sup> *Ibidem*.

<sup>46</sup> Information in the section based on the Federal Ministry of Finance’s leaflet, *Federal Customs Administration*, Bonn, October 2009.

<sup>47</sup> Section 87 of the Residence Act requires that all authorities must notify immigration authorities (either directly or via the police) of the residence status of foreigners with whom they come into contact. The mandatory notification by the courts, employment and welfare offices, educational institutions or population registers is so effective that it practically means that „whenever irregular migrants come into contact with a public authority they must expect the discovery of their illegal residence which will forthwith lead to their arrest and removal.” J. Schneider, *Practical Measures for Reducing Irregular Migration*, Working Paper 41, Federal Office for Migration and Refugees: Nuremberg 2012, p. 47.

departments focusing on various parts of the agency's remit. Customs issues are overseen by the Third Directorate-General of the Federal Ministry of Finance and managed by five federal finance offices<sup>48</sup>. To ensure uniform application of the regulations throughout all states of Germany, each office is responsible for a specific field of operations.<sup>49</sup>

Combating undeclared work and unlawful employment throughout Germany is the responsibility of the federal finance office in Cologne. The Financial Control Section on Illegal Labour (*Finanzkontrolle Schwarzarbeit*, FKS) is an executive unit of the Customs Administration, combating undeclared and illegal employment.<sup>50</sup> Inspections are planned and coordinated by sections within 43 main customs offices throughout Germany, and are executed by inspectors, who are distributed among 277 territorial offices.

### 2.3.3. Joint control operations

Given the clear delineation of responsibilities and separation of tasks, FKS undertakes joint activities with the Federal Police on a case-by-case basis. Decisions to carry out joint operations can be made formally, based on regional situation reports and risk analyses, which identify where there is a higher probability of criminal activity.<sup>51</sup> Alternatively, joint activities may be launched informally "if one of the two agencies deems such cooperation necessary".<sup>52</sup> A typical *modus operandi* is deciding to carry out statu-

---

<sup>48</sup> Hamburg in the north, Potsdam in the east, Cologne in the west, Neustadt an der Weinstrasse in the southwest and Nuremberg in the southeast. Four other regional offices were disbanded as part of cost-cutting.

<sup>49</sup> In addition, the federal Customs Criminological Office maintains the electronic databases, monitoring operations and compliance across all issues, and coordinates criminal investigations, carried out by its eight regional offices, and in particularly grave cases (e.g. fighting organized or transnational crime) it launches its own investigation.

<sup>50</sup> Comprehensive overview of institutions combating irregular migration in Germany can be found in Section 2.2. „Stakeholders and institutional framework” of: J. Schneider, *Practical Measures for Reducing Irregular Migration*, Working Paper 41, Federal Office for Migration and Refugees: Nuremberg 2012, pp. 29-33.

<sup>51</sup> Risk analyses are typically conducted in such fields as: general risk analysis on flows of persons, irregular migration and trafficking of people, See „Germany” in: Ph. Gounev et al. *Better Management of EU Borders through Cooperation*, Center for Study of Democracy: Sofia, 2011, p. 254, available at: [http://www.csd.bg/fileadmin/user\\_upload/EU%20Study%20on%20Customs-BG%20Cooperation.pdf](http://www.csd.bg/fileadmin/user_upload/EU%20Study%20on%20Customs-BG%20Cooperation.pdf).

<sup>52</sup> *Ibid.*, p. 259.

tory checks within the competence of each agency (e.g. detection of unlawful employment by the FKS and of illegal residence by the Federal Police) in the same location at the same time.<sup>53</sup> Joint activities are relatively infrequent, but are considered to represent added value for the participating agencies.

During a joint search, each agency finances its own operational costs, and may additionally provide its own inspection staff as well as specialized personnel and equipment. The agencies may also share their intelligence data. According to a study on the cooperation between German Customs and police, the benefits of joint cooperation are “the pooling of personnel and relevant technical equipment,” allowing the most optimal allocation. This procedure also reduces the time needed to launch investigations by helping eliminate the “time-consuming initial documentation of criminal cases”. In effect “the responsible authority is on site, and can immediately take over the processing of the case”.<sup>54</sup> Each joint activity is concluded with a post-operational evaluation, covering in particular “the overall output/results of the operations, the allocation of personnel and technical resources and the choice of time and place of control”.<sup>55</sup>

Joint operations are facilitated by the establishment of more permanent and formal cooperation mechanisms. Joint search and investigation teams of police officers and customs inspectors (*Gemeinsame Fahndungsgruppen*) have been formed in several regions, patrolling high-risk locations, such as highways and border areas.<sup>56</sup> A notable form of cooperation, specialized in the field of combating illegal movement and work is the Working Group for Human Trafficking, Migration and Illegal Employment (ASMIB), set up in the region of Schleswig-Holstein, adjacent to the border of the Schengen area with Denmark. The ASMIB Working Group combines three law enforcement bodies: the Federal Police, the State Criminal Police Office and the Federal Customs Administration. The involved agencies carry out detection operations on the basis of jointly conducted risk and situation assessments.<sup>57</sup>

---

<sup>53</sup> For instance, the two agencies would run joint search and investigation days (*gemeinsame Fahndungstage*) in the Kiel harbour . See Ph. Gouniev, *op. cit.*, p. 258.

<sup>54</sup> *Ibid.*, p. 259.

<sup>55</sup> *Ibidem*.

<sup>56</sup> *Ibid.*, p. 251.

<sup>57</sup> *Ibidem*, p. 258.



## 2.4. Labour inspection process in Germany

### 2.4.1. Inspections by regional Labour Inspectorates<sup>58</sup>

Labour inspectors are authorized to undertake the following actions during inspections to verify compliance with occupational safety and health regulations<sup>59</sup>:

- enter any workplace without prior notice and at any time,
- ask questions relating to the applicable legislation and standards of either the employer and employees, with or without witnesses,
- collect samples of company products or materials for examination,
- conduct technical tests of the equipment in the workplace.

If a breach of the law is detected during a visit, labour inspectors may take the following measures:

- n issue a warning with a deadline by which the violation must be rectified,<sup>60</sup>
- n issue a warning and give notification to another department of the company, advising help in addressing the breach of standards,
- n prohibit the use of certain equipment or materials,
- n impose administrative fines and penalties.

Moreover, whenever inspectors establish the existence of a grave and immediate threat to workers' safety and health, they may issue a shutdown notice.

---

<sup>58</sup> The information is taken from: *A mapping report on Labour Inspection Services in 15 European countries: A SYNDEX report for the European Federation of Public Service Unions (EPSU)*, EPSU: Brussels, 2012, pp. 43-44.

<sup>59</sup> Labour Protection Act (*Arbeitsschutzgesetz*) of 7 August 1996 and related executive regulations, Social Code, Seventh Book – Accident Insurance (*Sozialgesetzbuch VII*)

<sup>60</sup> Similarly to the Austrian and Scandinavian systems, the German labour inspectors set a time limit to bring the conditions in compliance with the law. If it is established that the breach has not been remedied after the deadline has passed, the inspectorate initiates an administrative case to the competent review body, which issues a decision within a specified time. If the labour inspectorate is not satisfied with the severity of the sanction, it may appeal the ruling of the administrative body. See: M. L. Vega, R. Robert, *Labour Inspection Sanctions: Law and practice of national labour inspection systems*, Working Document No. 26, ILO: Geneva, 2013, p. 18.

### 2.4.2. Inspections by the Federal Customs Administration

Under the Social Code, employers of workers (including temporary workers) in several industrial sectors have the obligation to supply the state pension fund with information on the full name of the employee, their company and insurance number and the day they started work.<sup>61</sup> In addition, the Act to Combat Clandestine Employment makes it obligatory for all workers (domestic or foreign) and self-employed persons in these industries to carry (i.e. maintain in the workplace) their original and valid identity documents during working hours and be ready to present them if requested by authorized state bodies. Employers have a duty to inform their workers of this responsibility, and may be fined for not instructing their staff or displaying this instruction in the workplace.<sup>62</sup>

Employees present in the workplace during a customs inspection are legally bound to “allow such inspections to be conducted and to cooperate fully”. If they fail to cooperate with the inspection, they may be subject to an administrative fine. In particular, the inspected employees’ obligations are:

- providing true and current information in response to inspectors’ questions, relating to their identity and terms of employment (including the type of employment contract, wages and form of payment, working hours, etc.),
- producing upon request original documents confirming their identity and evidence of the “scope, type and duration of the employment relationship”.<sup>63</sup>

---

<sup>61</sup> Under Art. 28a para. 4 of the Social Code Volume IV, employers need to report this data not later than on the worker’s first day at work in the following sectors of employment: construction, transportation, shipping, hotels and catering, trade fairs, fair-ground amusement, industrial cleaning, meat processing and forestry.

<sup>62</sup> Federal Customs Administration, „Information on the ‘fast-track registration obligation’ (*Sofortmeldenpflicht*) and on the „obligation to carry and present identity documents” (*Mitfuehrungs- und Vorlagepflicht von Ausweispapieren*)”, available at: [http://www1.zoll.de/e1\\_downloads\\_fks/informationsblatt\\_fks.pdf](http://www1.zoll.de/e1_downloads_fks/informationsblatt_fks.pdf)

<sup>63</sup> Federal Customs Administration, „Employees’ obligations in the case of inspections”, available at: [http://www1.zoll.de/english\\_version/f0\\_minimum\\_conditions\\_of\\_employment/c0\\_summary\\_of\\_technical\\_information/i0\\_employees\\_obligations/index.html](http://www1.zoll.de/english_version/f0_minimum_conditions_of_employment/c0_summary_of_technical_information/i0_employees_obligations/index.html)

In turn, employers are compelled by law to keep and make ready for inspection the following documents as evidence of compliance with the relevant employment legislation:

- employment contracts, stating the wages, benefits, method of payment and working hours (with an additional agreement in case of a flexible schedule)
- proof of payment of wages and pay slips (demonstrating that at least the required minimum wage is paid)
- time sheets.<sup>64</sup>

### 2.4.3. Sanctions

Customs officials may apply sanctions towards both employers and employees. As a comparative study of labour inspection sanctions concludes, the German system is similar to the Dutch one (but different to, for instance, the French system, where criminal sanctions are more prominent) and to several national systems in that it mainly relies on administrative sanctions.<sup>65</sup> When it comes to using undeclared workforce, however, German legislation envisions severe penalties for employers, including not only very heavy fines but also (as in France) a prison sentence.<sup>66</sup>

Violations are of two kinds—firstly, concerning conduct during the inspection itself, and secondly, compliance with legal obligations prior to the inspection. In the first instance, employees are subject to a fine of **5,000 euros** if they do not keep their identity documents in the workplace or if they fail to produce them upon an inspector's request. In addition, the employer is liable to a fine of up to **1,000 euros** for not properly informing their employees of this duty. Moreover, both employers (whether domiciled in Germany or foreign) and employees (whether German or foreign) may be fined up to **30,000 euros** if they:

---

<sup>64</sup> Federal Customs Administration, „Other obligations on employers”, available at: [http://www1.zoll.de/english\\_version/f0\\_minimum\\_conditions\\_of\\_employment/c0\\_summary\\_of\\_technical\\_information/h0\\_other\\_obligations\\_on\\_employers/index.html](http://www1.zoll.de/english_version/f0_minimum_conditions_of_employment/c0_summary_of_technical_information/h0_other_obligations_on_employers/index.html)

<sup>65</sup> Other systems favouring administrative sanctions include: Austria, Denmark, Italy, Lithuania, Netherlands, Portugal, Slovakia and Spain. See: M. L. Vega, R. Robert, *Labour Inspection Sanctions: Law and practice of national labour inspection systems*, Working Document No. 26, ILO: Geneva, 2013, p. 8.

<sup>66</sup> *Ibid.*, p. 11.

- do not allow an inspection or fail to cooperate during the visit,
- refuse access to the company premises during an inspection.<sup>67</sup>

Possible penalties for non-compliance with labour legislation can be even more severe. The following sanctions are applicable to employers:<sup>68</sup>

- Up to **25,000 euros** for (a) the use of a hired out workforce (from an individual or agency) without the necessary permit, (b) failure to register an employee immediately.
- Up to **30,000 euros** for failure to maintain accurate and complete records of the working time of their employees for the required period of two years.
- Up to **500,000 euros** for employing a foreign worker who does not have an EU work permit or residence permit
- n Up to **three years of prison** for “intentional employment of a foreigner without the necessary EU work permit/corresponding residence permit on less favourable working conditions than comparable German employees.
- Up to **five years of prison** for (a) particularly serious cases of employing foreign workers without authorization (e.g. a large number of them or as a repeat offence), (b) non-payment of social security contributions, i.e. “withholding of social security contributions (employee and employer share) by supplying incorrect, incomplete or no information to the agency responsible for collecting them”,

In turn, employees may receive a sentence of up to **five years of prison** for benefit fraud, e.g. for taking up employment while continuing to receive an unemployment benefit and not reporting this fact to the authority disbursing the benefit.

---

<sup>67</sup> Federal Customs Administration, „The consequences of non-compliance”, available at: [http://www1.zoll.de/english\\_version/f0\\_minimum\\_conditions\\_of\\_employment/c0\\_summary\\_of\\_technical\\_information/n0\\_the\\_consequences\\_of\\_non-compliance/index.html](http://www1.zoll.de/english_version/f0_minimum_conditions_of_employment/c0_summary_of_technical_information/n0_the_consequences_of_non-compliance/index.html)

<sup>68</sup> „Acting together against clandestine employment and illegal work”, leaflet on the inspections carried out by the Illegal Work Financial Investigation Units of the Customs Administration in the hotel and restaurant trade, available at: [http://www.dehoga-bundesverband.de/fileadmin/Inhaltsbilder/Branchenthemen/Arbeitsmarkt\\_und\\_Tarifpolitik/zoll\\_hotel\\_flyer\\_a4\\_230108\\_englisch\\_internet.pdf](http://www.dehoga-bundesverband.de/fileadmin/Inhaltsbilder/Branchenthemen/Arbeitsmarkt_und_Tarifpolitik/zoll_hotel_flyer_a4_230108_englisch_internet.pdf)

#### **2.4.4. Number and effectiveness of inspections**

As of 2010, about 3,000 occupational safety and health labour inspectors carried out around 300,000 visits to 120,000 companies.

2012 marked a rise in the activities of the Federal Customs Administration in combating unlawful employment. The staff of 6,500 officials investigated the total of 543,000 workers (or 84 inspected employees per one inspector), which represented a 3.6% growth over 2011 when 524,000 employees were checked. At the same time, a smaller number of employers were investigated: 66,000 in 2012 down from 68,000 the year before. The measure of effectiveness was the value of economic damage detected in the process, which rose by 13.6% from 660 million euros in 2011 to over 750 million euros in 2012.<sup>69</sup>

---

<sup>69</sup> Federal Ministry of Finance's press release, „Minister unveils impressive customs results for 2012”, 22 March 2013, available at: <http://www.bundesfinanzministerium.de/Content/EN/Pressemitteilungen/2013/2013-03-22-customs-results-2012.html>

### **3. Poland**

#### **Overview**

Poland, still predominantly a country of net emigration, has only recently begun to attract economic immigration. Although since EU accession the dynamics of labour immigration has picked up speed, the outflow of a large portion of working-age Poles has put the issue of attracting and retaining foreign labour on the government agenda. However, state migration policy has been defined only recently, and the effectiveness of measures such as waiving work permits for selected third-country nationals for seasonal labour, the regularization of the stay of illegal residents and the proposed combination of work permits and residence permits remains to be seen. These measures aim to reduce the bureaucratic burden of the residence and employment authorization process, which was for a long time a matter of concern for Polish employers. Small and medium business plays a crucial role in lobbying for liberalization of access to the national labour market as they are the primary agents in recruiting the foreign workforce, venturing beyond the traditional pool of workforce in Belarus and Ukraine to new locations, such as China, Vietnam, India, Nepal or Turkey.

Unlike the countries of Western Europe where immigration became a strongly politicized and socially-sensitive issue and a selective approach to influx of foreign workforce has been adopted, Poland is welcoming economic migrants, viewing them as necessary for fast growth. Since 2006, opportunities have been widened for the acquisition of low-skilled seasonal labour from several countries of the Eastern Partnership and from Russia. With the waiver of work permit requirement for the majority of labour migrants and relative ease of entry thanks to a liberal visa system, the violations of legality of residence or of employment are relatively rare or declining. Therefore labour inspectors come to pay more attention to problems that foreign workers share with their Polish colleagues: the absence of a proper written employment contract, delayed payment of wages and evasion of employer's obligations to pay due benefits and respect working hours. As in other European states, the Polish system of labour inspection is increasingly placing the burden of sanctions on employers while relying on the cooperation of employees. The entry into force of the Act on the Consequences of Employing Illegally

Resident Foreigners in 2012 reinforces this tendency, introducing prison sentences for non-compliant employers while offering protection to illegally employed foreigners.

The chapter opens with a brief survey of the dynamics and composition of immigration to Poland, noting the recent fast growth and diversification of the immigrant population. This is followed by analysis of the changing structure of the foreign workforce. Particular attention is paid to the inflow of Asian immigrants, responding to the needs of the Polish labour market, and the popularity of measures facilitating access to employment for Poland's eastern neighbours. The following part considers factors, which led to the elaboration of the strategic concept of the national migration policy and to the adoption of measures, easing foreigners' access to residence and employment. The second part of the chapter presents in detail the conditions under which non-nationals may be employed in Poland, listing categories of foreigners exempt from the requirement to apply for work permits as well as the criteria that need to be met for a successful application for a permit. Finally, the procedures with regard to processing applications for work permits and registering employers' declarations of intent to hire seasonal workers are described.

The structure and responsibilities of the National Labour Inspectorate is the subject of the third section, which also features an overview of the different competences of this agency and opportunities for cooperation with the Border Guard – a law enforcement agency, responsible for detecting the illegal employment of foreigners. The similarities and differences between the two institutions are further elaborated in the fourth section, which covers the procedure of inspections with regard to the employment of foreigners. It covers the scope of inspections, as well as the powers of inspectors, the different stages of the process and an overview of sanctions (with attention paid to the introduction of stricter penalties in 2012). The chapter closes with an assessment of the frequency of inspections, the incidence of detected violations and applied sanctions in the period of 2010-2012, considering the impact of the more severe penalties on the trends in detected unauthorized employment of foreigners.

### **3.1. Migration trends and policy in Poland**

### 3.1.1. Migration statistics

Poland hosts a relatively small number of foreigners, a mere 0.3% of the total population. The low resident population reflects the fact that majority of immigration to Poland has a temporary and circular character. However, this population is growing steadily—the current population of over 117,000 foreign residents is over 50% larger than it was five years earlier. It is becoming more diverse, too. Among the top five nationalities of foreigners residing in Poland, three represent Poland's eastern neighbours (Ukraine, Russia and Belarus), but the two others are new diasporas of Asian countries—the Vietnamese and the Chinese. These groups of migrants are likely to become more prominent over time given their higher-than-average growth rates: if in 2008, there were 8,773 Vietnamese and Chinese residents overall, this number doubled to 17,569 five years later (Table 1). Notable is also the steady growth of qualified immigrants from countries, such as United States and South Korea (managers) and Turkey and India (engineers and specialists).

**Table 1. Top nationalities of foreigners holding residence permits, 2008-2013**

	2008	2009	2010	2011	2012	2013 (1st half)	Rate of growth, 2008-13
<b>Ukraine</b>	22,801	26,571	28,450	29,746	34,303	<b>36,170</b>	<b>59%</b>
<b>Vietnam</b>	7,206	8,207	8,567	9,257	11,696	<b>12,764</b>	<b>77%</b>
<b>Russia</b>	9,720	12,961	12,550	11,675	12,363	<b>12,393</b>	<b>27%</b>
<b>Belarus</b>	6,984	8,447	8,995	9,249	10,310	<b>10,807</b>	<b>55%</b>
<b>China</b>	1,567	2,600	3,016	3,821	4,489	<b>4,805</b>	<b>307%</b>
<b>Armenia</b>	3,258	3,649	3,858	3,964	4,587	<b>4,706</b>	<b>44%</b>
<b>Turkey</b>	1,439	1,768	2,082	2,281	2,482	<b>2,682</b>	<b>86%</b>
<b>India</b>	1,530	1,970	2,094	2,170	2,389	<b>2,481</b>	<b>62%</b>
<b>USA</b>	1,931	2,058	2,108	2,167	2,286	<b>2,456</b>	<b>27%</b>
<b>S. Korea</b>	1,119	1,292	1,445	1,702	1,736	<b>1,755</b>	<b>57%</b>
<b>Other</b>	20,211	23,051	23,915	24,266	25,330	<b>26,295</b>	<b>30%</b>
<b>TOTAL</b>	77,766	92,574	97,080	100,298	111,971	<b>117,314</b>	<b>51%</b>

Source: Author's calculations, based on annual statistics of the Office for Foreigners, available at: <http://www.udsc.gov.pl/Zestawienia,roczne,233.html>



If the statistics of residence holders demonstrates the steady growth of a few immigrant groups, the analysis of issued work permits indicates that labour immigration to Poland is still a very dynamic phenomenon. The number of all issued work permits doubled between 2008 and 2010 and then stabilized at around 40,000 annually as the Polish economy slowed down. The national composition of work permit holders reveals consistent leaders but also a number of new countries of origin. On the one hand, the Polish labour market consistently attracts several nationalities. These are primarily the nationals of Ukraine, who lead the statistics every year, overall accounting for 41% of all work permits, issued between 2008 and 2013. They are followed by the Chinese, the Vietnamese and nationals of Belarus, who received 12.7, 6.4% and 5.2% of the work permits in that period.

**Table 2. Top nationalities of work permit holders, 2008-2013**

	2008	2009	2010	2011	2012	2013 (1st half)	2008-2013
<b>Ukraine</b>	5,400	9,504	12,894	18,669	20,295	9,464	<b>76,226</b>
<b>China</b>	2,040	4,536	6,209	5,854	3,247	1,435	<b>23,321</b>
<b>Vietnam</b>	1,200	2,577	2,245	2,504	2,302	880	<b>11,708</b>
<b>Belarus</b>	1,325	1,669	1,937	1,725	1,949	884	<b>9,489</b>
<b>Turkey</b>	941	1,422	1,468	1,187	1,063	496	<b>6,577</b>
<b>India</b>	733	1,164	1,189	1,055	1,090	753	<b>5,984</b>
<b>Nepal</b>	181	838	2,110	1,202	486	306	<b>5,123</b>
<b>Moldova</b>	1,218	601	675	1,017	616	269	<b>4,396</b>
<b>S. Korea</b>	596	624	635	550	508	281	<b>3,194</b>
<b>Uzbekistan</b>	356	295	434	619	958	486	<b>3,148</b>
<b>Russia</b>	420	540	491	549	719	386	<b>3,105</b>
<b>Armenia</b>	441	619	448	457	457	223	<b>2,645</b>
<b>USA</b>	365	407	442	484	481	215	<b>2,394</b>
<b>Japan</b>	512	551	384	282	308	169	<b>2,206</b>
<b>Bangladesh</b>	54	213	676	680	293	155	<b>2,071</b>
<b>Thailand</b>	210	561	286	284	258	147	<b>1,746</b>
<b>N. Korea</b>	90	104	518	335	509	113	<b>1,669</b>
<b>Philippines</b>	197	413	349	277	181	118	<b>1,535</b>
<b>Egypt</b>	44	153	290	314	238	74	<b>1,113</b>
<b>Pakistan</b>	39	171	119	184	366	109	<b>988</b>
<b>Mongolia</b>	218	271	136	122	108	36	<b>891</b>
<b>Other</b>	1,442	2,107	2,687	2,458	2,712	1,307	<b>12,713</b>
<b>TOTAL</b>	<b>18,022</b>	<b>29,340</b>	<b>36,622</b>	<b>40,808</b>	<b>39,144</b>	<b>18,306</b>	<b>182,242</b>

*Source: Author's calculations, based on annual statistics of the Ministry of Labour and Social Affairs, available at: <http://www.mpips.gov.pl/analizy-i-raporty/cudzoziemcy-pracujacy-w-polsce-statystyki/>*

The distribution of foreign workers by nationality shows substantial dispersion, which reflects the absence of an active state policy of attracting foreign workforce from regions other than that of Russia and the Eastern Partnership (see below). Thus, the presence of certain national groups of labour migrants on the Polish market is an interplay of the existing foreign diasporas, which serve as a “safety net” for the newcomers (in the cases of the Vietnamese and the Chinese) and of the search by Polish entrepreneurs of low-cost qualified labour (which explains the popularity of the Nepalese furniture and upholstery workers). These statistics only partly cover the important segment of managers and highly-qualified specialists, arriving not only from the United States, Japan and South Korea but also from other EU countries, as the latter immigrants are free to take up employment in Poland under the Union rule of free movement of labour.

**Table 3. Employers’ declarations for employees from Eastern Partnership states and Russia, 2008-2013**

	2008	2009	2010	2011	2012	2013 (1st half)
Ukraine	142,960	180,133	169,490	239,646	223,671	137,328
Belarus	12,606	4,860	3,623	4,370	7,636	2,859
Russia	1,147	674	595	963	1,624	690
Moldova	-	2,747	5,912	13,024	9,421	4,354
Georgia	-	-	453	1,774	1,384	1,022
<b>TOTAL</b>	<b>156,713</b>	<b>188,414</b>	<b>180,073</b>	<b>259,777</b>	<b>243,736</b>	<b>146,253</b>

*Source: Author’s calculations, based on annual statistics of the Ministry of Labour and Social Affairs, available at: <http://www.mpips.gov.pl/analizy-i-raporty/cudzoziemcy-pracujacy-w-polsce-statystyki/>*

Work permit holders represent, however, only a small share of the total foreign workforce in Poland. The country’s EU accession has meant that nationals of the EEA (including Romania, Bulgaria and Croatia) are free to take up employment in Poland. Moreover, in light of significant outflow of the Polish workforce to other EU countries, labour shortages have emerged in several sectors, most notably in agriculture, construction and household care (child care, house cleaning). Since 2006, nationals of Ukraine, Belarus and Russia, followed in 2008-2009 by citizens of Moldova and Georgia have been exempt from the need to apply for work permits, and currently are free to take up seasonal employment for six months every year (for details of the scheme, see section 3.2.3 below). The scheme has been most popular with nationals of Ukraine, who represent around 90 per cent of all

the workers (see Table 3 above). However, the relatively easy conditions of access through this procedure has meant that the scheme has become the most popular form of employment for nationals of Moldova and Georgia interested in working in Poland (for these categories of labour migrants, work for more than six months still requires a work permit, though).

### **3.1.2. Migration policy developments**

Poland's accession to the European Union in May 2004 and full integration into the Schengen area in December 2007 marked a turning point for the development of national migration policy. Until then, the country had been busy harmonizing its laws, adapting its institutions and practices to the best European standards. This had several positive consequences: adoption and successive amendments to the aliens act, comprehensively regulating the conditions of the entry, stay and departure of foreigners; the transformation of the Border Guard into a policing and investigative service with new competences in the areas of verification of legality of residence and employment and the elaboration of mechanisms of inter-agency coordination both on the central and operational level (a good example is the procedure of joint inspections, data sharing and shared risk analyses between the Labour Inspectorate and the Border Guard, described in section 3.4).<sup>70</sup>

However, as one analyst noted, until 2004 “Poland had neither the time nor the opportunity to create a migration policy in a natural multi-annual cycle, typical for other destination countries”.<sup>71</sup> The catalyst for working out the foundations of a national migration doctrine was the realization within the state administration of the necessity to address pressing social problems through the facilitation of immigration. Two phenomena were crucial: the large outflow of Polish migrants since 2004, which created a demand for immigrant labour to address the emerging shortages, and the deteriorating demographic situation, an answer to which could be an increase in permanent immigration. Thus in 2007, an inter-ministerial Team

---

<sup>70</sup> More detailed discussion of the reforms of the Polish system of migration management along with recommendations for Georgia can be found in: P. Kaźmierkiewicz, T. Pataia, *Developing Georgia's Migration Policy*, Institute of Public Affairs, Warsaw, 2011.

<sup>71</sup> A. Weinar, *Polityka migracyjna Polski w latach 1990-2003 – próba podsumowania* [Polish migration policy 1990-2003—attempt at summary], Reports and Analyses No. 10. Centre for International Relations, Warsaw, 2005, p. 1.

for Migration Issues was set up as an advisory body to the Prime Minister with six working groups, covering all the priority components of migration policy: labour immigration and emigration, return migration, countering illegal migration, integration of foreigners and the collection and sharing of statistical data. The most notable outcome of the Team's reflection was the strategic document "Polish migration policy—the status quo and proposed activities", adopted in 2012, which diagnosed and offered recommendations for state actions in the areas of legal and illegal migration, access to citizenship as well as integration programs.

Amendments to the Aliens Act were instrumental in introducing mechanisms for managing migration. Amnesties were declared in 2003, 2007 and 2012, regularizing the stay of illegal migrants. The first two programs attracted relatively few migrants (4,500 in total) primarily due to the highly restrictive criteria. Candidates for legalization of residence had to demonstrate a stay in Poland of at least six years as well as source of stable income and proof of ownership of a house or an apartment or a rental contract. The third amnesty, running for the first six months of 2012, dropped the income and accommodation requirements and reduced the required residence period to four years (two years for asylum-seekers). The amnesty was offered ahead of a major overhaul of the Aliens Act, which was adopted on 8 November 2013 by the lower house of the Parliament and will come into force on 1 May 2014.

The Aliens Act introduces a number of measures, facilitating the legalization of the residence and employment of foreigners in Poland:

- extending the upper limit of validity of a residence permit for a fixed period from two to three years and introducing the possibility of applying to extend the permit at any time (not later than 45 days before expiry of the original permit),
- the elimination of the requirement to present a legal title to accommodation in order to obtain a residence permit for a fixed period,
- extension of the validity of the first residence permit for foreign students to 15 months (enabling them to undertake summertime employment),
- elimination of a separate procedure of application for a work permit in favour of a single application for both permits.<sup>72</sup>

---

<sup>72</sup> Ministry of Internal Affairs, „Sejm uchwalił nową ustawę o cudzoziemcach” [The Parliament has adopted a new Aliens Act], 12 November 2013, available at: <https://www.msw.gov.pl/pl/aktualnosci/11555,Sejm-uchwalil-nowa-ustawe-o-cudzoziemcach.html>

## **3.2. Polish labour migration legislation and work permit procedure**

### **3.2.1. Conditions of foreigners' access to the Polish labour market**

The following categories of foreigners are free to undertake employment in Poland:<sup>73</sup>

- citizens of countries of the European Economic Area and of states whose nationals enjoy free movement with the EEA, as well as their family members,
- holders of the Polish permit to settle or the European Community long-term resident permit,
- recipients of refugee status, supplementary or temporary protection, granted in Poland.

Moreover, a number of other categories of foreigners are exempt from applying for work permits to take up jobs in Poland:

- holders of residence permits for a fixed period (from three months to two years), issued with purpose of taking up employment or conducting business activity,
- spouses of Polish nationals or of holders of residence permits for a fixed period,
- holders of visas, issued for the period of review of asylum claims (asylum-seekers),
- holders of valid identity cards, confirming Polish ethnicity (*Karta Polaka* or "Polish Card"),
- students, interns and researchers,
- foreigners arriving for purposes of family reunification,
- employees of companies, located in the EEA, delegated temporarily to perform services in Poland.

In addition, employment in several professions does not require work permits. However, these foreigners still need to obtain written declarations

<sup>73</sup> Information available on the website of the Mazovian Governor's Bureau, „Work carried out by foreigners in the territory of Republic of Poland”, available at: <http://www.mazowieckie.pl/en/for-foreigners/work/30,Work-carried-out-by-foreigners-in-the-territory-of-Republic-of-Poland.html>

from their employers and apply for appropriate visas with authorization for work. These professions include, *inter alia*:

- sportspersons performing at sports events,
- artists performing for up to 30 days a year,
- researchers at research institutes,
- full-time students for period of summer vacation,
- nationals of non-EU neighbouring states as well as other countries, with which Poland signed agreements under EU's mobility partnership schemes for six months within a year.<sup>74</sup>

### **3.2.2. Types and conditions of work permits<sup>75</sup>**

There are five types of work permits in Poland, issued depending on the type of employer to the following categories of foreigners:

- (A) who are employed by an entity whose headquarters, branch or factory is located in Poland (valid for up to a year),
- (B) who are members of the company's board, if the company is registered in Poland or is a joint venture, when they work for over six months in a given year (valid for up to five years),
- (C) who are seconded by the foreign employer to do work at a subsidiary's branch or factory located in Poland for over 30 days in a given year (valid for the period of secondment, but not longer than three years),
- (D) who are seconded by a foreign employer that does not have a branch or plant located in Poland to deliver a temporary service for a period exceeding three months (so-called export service) (valid for the period of secondment, but not longer than three years),
- (E) who are employed abroad by a foreign employer, and who are seconded to Poland for not more than three months in a six-month period (valid for the period of secondment, but not longer than three years).

---

<sup>74</sup> The complete list of professions is found in the Ordinance of the Minister of Labour and Social Affairs of 30 August 2006 on employment of foreigners without the need for obtaining a work permit.

<sup>75</sup> Article 88 of the Act on Act on promotion of employment and institutions of the labour market of 20 April 2004.

In order to apply successfully for a work permit, the employer must meet several criteria. Firstly, the applicant must undertake the *labour market needs test* by obtaining a notice stating that his or her demand for labour could not be met locally from the administration of its county of domicile or operations. Such a document is issued if no appropriate candidates are identified in the local register of the unemployed or through local recruitment efforts conducted by the prospective employer. The test needs to be taken only at first application for the employment of a given foreigner, and needs not be repeated at extension (prolongation) of the original permit. Moreover, regional governors may waive the test requirement for professions for which there is unfulfilled demand in the region.

Secondly, the employment offer must meet the *non-discrimination criteria* so that the written contract, included in the application, ensures remuneration at least as high as that offered to local employees at a comparable position or performing comparable duties. Applying for a work permit, the employer confirms that he or she has complied with a range of other contractual obligations towards the prospective employee. In particular, the terms of employment, including the value of remuneration, working time and other conditions of work, must be spelled out in a written contract. Before the employee signs the contract, it needs to be translated into a language that he or she understands. Also, over the course of the application procedure, the employee must be provided with copies of all materials and kept informed of the progress of the application as well as of any decisions.

An application for a work permit may be refused if the employer:

- fails to meet any of the criteria, stipulated in the law, in particular, the labour market needs test,
- submits a forged document, does not disclose truth or provides false identity data on behalf of the employee
- neglects to supply the employee with a copy of their work permit or other documents,
- fails to pay the declared salary, and in particular, does not guarantee a minimum wage,
- was found guilty of illegal employment of a foreigner within two years of previous conviction for this offence,

- has applied for a work permit for a non-qualifying foreigner or one who was placed on the list of undesirable aliens.<sup>76</sup>

Once issued, the work permit may be revoked (terminated) if:

- the grounds for issuing it no longer apply or the circumstances under which it was issued have changed,
- the employer or inspecting authority have notified the governor that the foreign employee did not take up the employment within three months of the permit being issued,
- the employee terminated his employment without giving the employer at least three months' notice,
- the employee has been included in the list of undesirable aliens.

### **3.2.3. Work permit procedure**

All work permits are issued by governor's offices under administrative procedure. The procedure was simplified in February 2009 by reducing the number of documents to be provided by the employer, eliminating the preliminary stage of acquiring a so-called promise of employment from the governor's office, lowering the cost of submitting applications and shortening processing times.<sup>77</sup>

Administrative decisions are taken within a month, and in particularly difficult cases, within two months of commencement of the procedure. Appeals by the employer can be made to the Minister of Labour and Social Affairs within 14 days of receipt of the decision. The costs of issuing work permits are as follows: with regard to permits of type A, B or C — 50 PLN (12 EUR) for employing a foreigner for a period of up to three months, and 100 PLN (24 EUR) for employment exceeding three months. The cost of applying for the performance of an export service (permit D) is 200 PLN (48 EUR) and for seconding a foreign employee to Poland for over three months (permit E) it is 100 PLN (24 EUR). Work permits may be extended by written application, accompanied by the contract for employment which formed the basis of the original permit as well as documents confirming the

---

<sup>76</sup> Art. 88j of the Act on Act on promotion of employment and institutions of the labour market of 20 April 2004.

<sup>77</sup> Amendments to the Act on promotion of employment and institutions of the labour market of 20 April 2004.



change in circumstances since the previous application (thus, there is no need to resubmit the original supporting documents). The fees for extension of the period of employment are half of the basic rates.

The office, which issues the largest number of work permits is the Section on Work Permits of the Department for Foreigners of the Mazovian Governor's Office, which covers the city of Warsaw through its five territorial field offices. In light of the particularly big demand in the capital city, since January 2013, the Warsaw office has allowed applicants to book appointments to submit applications by telephone. A phoneline has also been set up to enable employers to learn about the terms of the work permit procedure and also receive updates on the progress of their application. All the application forms as well as supplementary documents are available online.

Among the conditions for issuing a type A work permit is the notification by the administration of the county where the employer is located that the requested position could not be filled by the local workforce (the so-called labour market test). This requirement is waived towards the nationals of Belarus, Georgia, Moldova, Russia and Ukraine who have worked for at least three months in the period directly preceding the application under the terms of a facilitated regime for seasonal employment.<sup>78</sup> This regime allows the employment of citizens of the five above-mentioned states who hold a valid visa with a work or residence permit for a fixed period (valid for a period of not less than three months and up to two years). Under the terms of this arrangement, the qualifying foreigners may work for up to six months in a 12-month period without the need for a work permit. Instead, work is authorized on the basis of the employer's written declaration of intent to employ the foreign worker, registered with the local employment office. The declaration must state the following:

- the name of the post,
- the place of work,
- the start and finish dates of the contract,
- the type of work contract,

---

<sup>78</sup> Mazovian Governor's Bureau, „Informacja dla obywateli Republiki Białoruś, Republiki Gruzji, Republiki Mołdowy, Federacji Rosyjskiej i Ukrainy”, available at: <http://www.mazowieckie.pl/pl/dla-klienta/cudzoziemcy/zezwozenia-na-prace-dl/informacja-dla-obywate/93,Informacja-dla-obywateli-Republiki-Bialorus-Republiki-GruzjiRepubliki-Moldowy-Fe.html>

- gross salary, not lower than the minimum wage,
- employer's statement that the requested position could not be filled with local labour.<sup>79</sup>

The facilitated regime is the preferred form for seasonal employment of foreigners in Poland. Registration is free of charge, and the procedure takes fewer than seven days. The employer does not need to request a local labour market test from the county administration, instead making their own statement to this effect. Moreover, the foreigner may change employers in the allowed period of a total of six months in a year. However, if any employer wishes to employ a foreigner already working for them for a period exceeding the authorized six months, he or she must request a work permit (though without the need to pass the labour market test).

### 3.3. Institutions controlling legality of employment

Two institutions are charged with the task of verifying the legality of foreigners' employment in Poland: the National Labour Inspectorate (*Państwowa Inspekcja Pracy*, PIP) and the Border Guard (*Straż Graniczna*, SG). The two institutions carry out these tasks as part of their statutory competencies: the PIP since 1 July 2007 as part of their broad mandate to ensure compliance with labour regulations while the SG since 1 January 2009 alongside their powers to control the conditions of entry and stay of foreigners in Poland. While both agencies may run inspections, the scope and methods of their work differ. The Labour Inspectorate inspects all employers in the country (including public offices and agencies), regardless of whether they employ Polish citizens or foreigners. In turn, the Border Guard has additional law enforcement powers, enabling them to apply force, detain offenders or oblige them to leave the country.<sup>80</sup>

---

<sup>79</sup> Application form of the declaration may be filled out and printed from the website of the Warsaw employment office, available at: <https://ssl.up.warszawa.pl/oswiad/> [only in Polish]

<sup>80</sup> J. Leśniewski, „Procedury kontroli legalności zatrudnienia cudzoziemców, prowadzonych przez Państwową Inspekcję Pracy” [Procedures of control of legality of foreigners' employment, conducted by the National Labour Inspectorate], presentation, Warsaw, 9 July 2013.

### **3.3.1. National Labour Inspectorate<sup>81</sup>**

The National Labour Inspectorate is a public authority, responsible to the Polish Parliament, which enforces and supervises labour laws and standards by undertaking the following responsibilities:

- control of compliance with regulations in the areas of occupational safety and health, employment contracts, remuneration and other employee benefits, working time and vacation, maternity leave, employment of underage and disabled persons,
- verification of legality of employment,
- control of products and services on the market,
- measures to prevent violations and promote good practices,
- analysis of causes of occupational illnesses,
- undertaking research and counselling.

The Inspectorate is divided into the headquarters – the Chief Labour Inspectorate (GIP) – and territorial units. The Chief Labour Inspectorate is divided into seven departments: Supervision and Control; Legality of Employment; Planning, Analysis and Statistics; Legal; Prevention and Promotion; Organizational; Budget and Finance. In addition, GIP includes several administrative and support units: the Chief Inspector's Office and the Personnel, Internal Control, Internal Audit, Information Bureau and the Secret Chancellery departments. The total number of Inspectorate staff members is 2758, out of which 1544 are inspectors.

Control activities are the domain of the Labour Inspectorate's territorial units: 16 regional labour inspectorates (OIP) and 43 local divisions. Since 1 July 2007, control of legality of employment has been handed over from regional governors' offices to the Labour Inspectorate. The staff dealing with enforcement of legal employment were moved to a dedicated team working on the area, established at each OIP. This ensured smooth transfer of competence and continuity of methods.

---

<sup>81</sup> J. Leśniewski, „Organizacja i działalność Państwowej Inspekcji Pracy” [Organization and activity of the National Labour Inspectorate], presentation, Warsaw, 9 July 2013.

### 3.3.2. Cooperation with the Border Guard

Within its function of enforcing legal employment regulations, the National Labour Inspectorate is bound by law to cooperate with several state institutions: the Police, the Border Guard, the tax authorities, the Social Security Fund, regional governors and parliaments as well as county administrations. In 2008, the Chief Labour Inspector and the Commander in Chief of the Border Guard concluded a formal agreement, setting rules of cooperation between the two agencies. In particular, labour inspectors will notify the Border Guard without delay if, over the course of an inspection, it is detected that a foreigner lacks legal grounds for residence in Poland or that his or her residence status does not allow employment. In such cases, the two agencies may carry out parallel investigations—the Labour Inspectorate in the area of unauthorized employment while the Border Guard does the same in the field of illegal residence.

The two institutions, which enjoy similar competences in the area of combating unauthorized work, cooperate on a regular basis at both central and operational levels (involving regional labour inspectorates and divisions of the Border Guard). Cooperation takes place in several areas. Firstly, labour inspectors and border guards share information on detected violations and on measures undertaken in this regard. Also the two services exchange more general lessons on the most effective forms of monitoring and detection, and run joint training sessions, sometimes exchanging professional trainers. Finally, the two agencies undertake joint activities, such as public awareness-raising campaigns. On the basis of the inter-agency agreement and the Labour Inspectorate's internal regulations, larger-scale inspections, launched in response to reports of the possible illegal employment of a large group of foreigners at an enterprise, are carried out together with the Border Guard.<sup>82</sup>

---

<sup>82</sup> Information, based on: J. Leśniewski, „Procedury kontroli legalności zatrudnienia cudzoziemców, prowadzonych przez Państwową Inspekcję Pracy” [Procedures of control of legality of employment of foreigners, conducted by the National Labour Inspectorate], presentation, National Labour Inspectorate, Warsaw, 9 July 2013, available at: [http://www.brpo.gov.pl/sites/default/files/Procedury\\_kontroli\\_legalnosci\\_zatrudnienia\\_cudzoziemcow\\_J\\_Lesniewski.pdf](http://www.brpo.gov.pl/sites/default/files/Procedury_kontroli_legalnosci_zatrudnienia_cudzoziemcow_J_Lesniewski.pdf)

### **3.4. Labour inspection process in Poland**

#### **3.4.1. Inspections by the Labour Inspectorate<sup>83</sup>**

##### *Scope of inspections*

Inspectors representing regional Labour Inspectorates undertake control activities, which serve to establish the extent of actual compliance with regulations on labour standards and legality of employment as well as to record the outcomes of inspections. Such inspections can be carried out towards all employers (public or private, including employment agencies), all employees as well as self-employed persons, whether they are subject to or exempt from the requirement to apply for a work permit.

Labour inspections aim to detect whether the following regulations are complied with:

- that the required employment contract corresponds to the actual type of employment has been concluded,
- that the foreign employee has a valid work permit, and is employed according to the conditions and in the post stipulated in the permit,
- that the foreign employee has a valid visa or residence permit, authorizing employment in Poland,
- that the employer registered the employee to the social security fund, and has paid all the due contributions to the work fund,
- that the employer has met all the minimum labour standards.

Control activities may be launched towards an employer as part of a wider planned action, or in response to a complaint or report or as a reaction to an observed irregularity. Inspectors as a rule should issue a notice to the employer of their intent to carry out an inspection. Such a notice is not handed over to the employer if (1) the inspection is going to be carried out on the basis of directly applicable EU legislation or an international

---

<sup>83</sup> Information, based on: J. Leśniewski, „Procedury kontroli legalności zatrudnienia cudzoziemców, prowadzonych przez Państwową Inspekcję Pracy” [Procedures of control of legality of employment of foreigners, conducted by the National Labour Inspectorate], presentation, National Labour Inspectorate, Warsaw, 9 July 2013, available at: [http://www.brpo.gov.pl/sites/default/files/Procedury\\_kontroli\\_legalnosci\\_zatrudnienia\\_cudzoziemcow\\_J\\_Lesniewski.pdf](http://www.brpo.gov.pl/sites/default/files/Procedury_kontroli_legalnosci_zatrudnienia_cudzoziemcow_J_Lesniewski.pdf)

agreement, (2) carrying out the inspection is necessary for preventing a tax offence or for securing evidence of tax fraud, (3) immediate threat to life, health or natural environment may occur, (4) mail delivery of the notice is not possible (e.g. due to the address of company headquarters being unknown).<sup>84</sup>

### *Stages of inspection process*

Inspections may be carried out without prior notice, at any time of day or night. They are conducted by teams of at least two inspectors, and if done in the evening or at night-time or during periods of limited visibility (rain-fall, snowfall or fog), larger teams are used. Inspectors have the right to freely enter the premises of the entity being inspected as well as to inspect the buildings, workplaces, equipment, machinery and observe the work process. Upon entry, inspectors should present their official identity documents and warrants authorizing the inspection. In cases where circumstances require that the inspection be carried out immediately, the warrant should be delivered without delay but not later than seven days after the beginning of the inspection.

The first stage of an inspection consists of determining how many foreigners are present or perform work on the inspected premises and establishing their identity and grounds for residence in Poland. To do so, inspectors will request that all present employees produce documents confirming their identity (such as their passport, identification card or temporary identity certificate) and the legality of their stay on Polish territory (including a visa, residence permit or other valid documents authorizing legal residence). Such documents should be presented by the inspected employer for all the employees who are not present at the time of inspection.

Next, inspectors interrogate employees as to the status of their presence at the inspected enterprise. For this reason, they may interview all persons present at the time of inspection. An interpreter will attend, if necessary. If the inspectors have valid grounds for believing that an employee or another person might be at risk of harm on account of passing some information on matters under investigation, they may decide to keep confidential the circumstances in which the information was revealed or the identity of the person in question.

---

<sup>84</sup> Art. 79 of the Act on Freedom of Business Activity of 2 July 2004.

Information may be also collected in the form of standard declaration forms, filled out by interrogated foreign workers. The declaration requires that the foreigner gives truthful answers or else face legal responsibility for making false testimony. The declaration asks for the following facts:

- personal identity (name, citizenship, date of birth)
- period of residence and address in Poland,
- identity document and visa or residence permit (with date of expiry),
- declaration of employment in Poland (period, position),
- possession of a work permit or of an employer's declaration of intent to employ,
- possession of a written employment contract (as well as a translation into a language that is understood by the employee),
- number of working days and hours, times of starting and finishing work,
- received wages (for period, date of payment),
- other employers in Poland (for the period of last 12 months),
- confirmation of presence at inspection.

The next stage consists of an inspection of documents, collected from the employer or employee. In particular, inspectors will verify whether the actual situation, established with reference to information obtained in the complaint or report, protocols of interviews with employers and identity checks carried out on the spot, corresponds to the information contained in the documentation. The following documents will be inspected as a rule:

- employment and other contracts with the employee,
- work permit, declaration of intent to employ a foreigner,
- payroll, attendance lists and other human resource documentation.

All conclusions from inspections are recorded in an official protocol, signed by the labour inspector in charge as well as a representative of the inspected entity. Before signing the protocol, the employer subject to inspection may state any reservations they may have about the conclusions.

### **3.4.2. Inspections by the Border Guard**

The procedure for conducting inspections by the Border Guard with regard to the legality of foreigners' employment largely follows that used by the labour inspectors.<sup>85</sup> The key difference is the scope of the inspection, which is limited to the verification of the legal status of foreigners' employment relationship with an employer or of their self-employment. Moreover, unlike labour inspectors, in cases of detected violations border guards do not impose administrative fines but instead bring action to the district court. They are also obliged to notify other competent organs if they detect violations of the law. They notify the Police or Prosecutor's Office whenever a criminal offence is detected, the National Labour Inspectorate in cases of violations of labour regulations, the tax authorities whenever tax regulations are breached, the Social Security Fund in cases of benefit fraud or evasion and the Customs Service whenever customs regulations are violated.

Inspections are conducted by at least two border guards who are obliged to identify themselves and present a warrant, stating the legal grounds, scope and start and finish dates of the inspection to a representative of the inspected entity. If the circumstances require the immediate commencement of inspection, the guards state the grounds of inspection orally and submit the warrant within seven days of starting the inspection. The employer being inspected, his or her legal representative and business partner as well as all present employees are bound by law to enable the guards to proceed with the inspection, in particular by making all the premises available for inspection and attending all stages of the examination of the premises. A representative of an inspected entity is also obliged to submit all relevant documents to the border guards no later than seven days after receiving a request to do so. These documents include a valid work permit, a declaration of intent to employ a foreigner, an employment contract or (in case of self-employment) record of registration in the Business Register.

---

<sup>85</sup> The competence was defined in Art. 1, clause 2, item 13a of the Act on Border Guard of 12 October 1990 (amended) while the manner of conducting the inspection in Art. 10d of the Act and in the ordinance of the Minister of Internal Affairs and Administration of 20 February 2009.



### 3.4.3. Sanctions

The measures that the National Labour Inspectorate can undertake in response to detected irregularities depend on the level of officials. Thus, the Chief Labour Inspector has the right of a legislative initiative and may seek to redress the situation through a request to the relevant unit of central administration (such as a ministry) to issue or amend legislation or regulations. Regional inspectors may order the discontinuation of economic activity in full or in part. The most common measures are those imposed by rank-and-file inspectors. Appropriate measures correspond to certain types of violations.

Whenever a breach of occupational safety and health regulations is detected, an inspector may issue a decision requiring that the employer takes certain actions to reduce the risk to the health and life of its employees. In particular, the decision may mandate that any failure to fulfil obligations be remedied by a certain deadline. Alternatively, they may demand that particular equipment be put out of operation or that employees be reassigned to other duties. Inspectors may decide not to apply more severe measures and instead issue a caution (instruction) orally as well as to have the employer sign a declaration binding him to eliminate the identified shortcomings by a certain date. Such procedures may only be applied if the offence was not wilful and no immediate threat to life or health of the employees was established.

In turn, when inspectors detect non-payment or overdue payment of wages or other benefits, they may issue orders to pay. Inspectors may also bring an action to the labour courts (to establish that the parties have entered into an actual employment relationship) or lay charges in the capacity of a public prosecutor against employers violating labour rights or employing a workforce without required authorization.

Finally, administrative fines may be imposed on violators. Depending on the amount of the fine, it may be issued directly by an inspector or a case may be brought to the court. In general, inspectors administer fines of 1,000 PLN to 2,000 PLN (around 240 to 480 EUR) for first-time offences while repeated violations of the same kind within the period of two years will be punished with fines of up to 5,000 PLN (ca. 1,200 EUR). In particularly grave cases, the court may decide to administer a fine of up to PLN 30,000 (ca. 7,200 EUR).<sup>86</sup>

---

<sup>86</sup> J. Leśniewski, „Organizacja i działalność Państwowej Inspekcji Pracy” [Organization and activity of the National Labour Inspectorate], presentation, Warsaw, 9 July 2013.

Since August 2012, employer sanctions were raised as part of the implementation of EU Directive 2009/52/EC, which set minimum amounts for sanctions towards employers hiring illegal third-country nationals. Under the parliamentary act on the effects of employing aliens illegally resident in Poland, the employer is under additional obligation to verify the legality of a foreign employee's residence prior to the commencement of work. In addition, the employer is financially liable for illegal employment of workers hired by a subcontractor, if the latter is insolvable, the collection of fees cannot be effected or if such measure is necessary in light of the "special interest" of the foreigner (in particular, when the employer owes the foreigner overdue wages).<sup>87</sup> Moreover, a number of new offences have been defined in the field of illegal employment of foreigners, which would be punishable not only by fines but also by prison sentences (see Table 4 below).

**Table 4. Sanctions for unauthorized employment of foreigners in Poland**

Type of violation or offence	Penalty
<i>Offences punished already prior to August 2012</i>	
Employing a foreigner without proper authorization by deception or fraud	Fine of up to 10,000 PLN (2,400 EUR)
Employing a foreigner without proper authorization	Fine of at least 3,000 PLN (720 EUR)
Receipt of financial gain for a promise of arranging a work permit or authorization	Fine of at least 3,000 PLN (720 EUR)
Employing a foreigner in violation of Polish labour regulations	Covering the costs of a foreigner's expulsion from Poland
Getting employed illegally	Fine of at least 1,000 PLN (240 EUR)
<i>Offences punished since August 2012</i>	
Employing a victim of people trafficking or employment of a foreigner in conditions of grave exploitation	Prison sentence of up to 3 years and ban on application for national public funds for a year and for EU funds for 5 years as well as return of any EU funds received in the past 12 months
Repeated illegal employment of a foreigner or illegal employment of more than one foreigner or employing an underage person illegally	Fine or prison sentence and ban on application for national public funds for a year and for EU funds for 5 years as well as return of any EU funds received in the past 12 months

Source: Table, „Obowiązujące kary za zatrudnianie nielegalnie przebywających w Polsce cudzoziemców” [Sanctions in force for employing foreigners illegally resident in Poland], European Migration Network National Contact Point, Warsaw 2012, available at: <http://www.emn.gov.pl/download/74/13435/karytabela.pdf>

<sup>87</sup> European Migration Network National Contact Point, „Wejście w życie ustawy regulującej skutki powierzenia pracy nielegalnie przebywającym w Polsce cudzoziemcom” [Entry into force of the Act regulating effects of employing foreigners illegally resident in Poland], available at: <http://www.emn.gov.pl/esm/aktualnosci/9363.Wejscie-w-zycie-ustawy-regulujacej-skutki-powierzenia-pracy-nielegalnie-przebywa.html>

### 3.5. Statistics of controlling measures<sup>88</sup>

In the period of 2010-2012, the National Labour Inspectorate carried out over 72,000 inspections at over 69,000 enterprises. As many as 2.5 million employees were verified over three years, and one in every five of them was inspected to check legality of employment (see Table 5 below).

**Table 5. Inspections conducted by the National Labour Inspectorate, 2010-2012, Polish citizens**

	<i>2010</i>	<i>2011</i>	<i>2012</i>	<i>2010-2012</i>
Total inspections	24,871	23,757	23,392	<b>72,020</b>
Enterprises inspected	23,763	22,898	22,464	<b>69,125</b>
Employees inspected	938,228	818,497	771,113	<b>2,527,838</b>
Employees checked for legality of employment	211,900	176,386	176,177	<b>564,463</b>

Source: National Labour Inspectorate, *Kontrole legalności zatrudnienia, w tym zatrudnienia obcokrajowców*, Warsaw, May 2013, pp. 10-11.

Even though the number of foreign workers on the Polish labour market is relatively small, between 2010 and 2012 inspections involving foreigners represented 8 per cent of the total with the share rising to 9 per cent in 2012. Irregularities were found in around 40 per cent of the cases, and over half of them concerned the lack of a required work permit. In the investigated period, one in every 12 inspected workers were required to have a work permit but in fact did not have it. One in every 20 workers under obligation to apply for a work permit were not employed according to its terms (e.g. at a different post or with another employer). Even a smaller number of foreigners were found to have been working without a proper employment contract.

Only relatively few cases of abuse of the regime of temporary work for nationals of Russia, Ukraine, Georgia and Moldova were detected, and the number continues to decline: if in 2010, the number of workers who worked without proper registration stood at 375. This figure was cut in half (to

---

<sup>88</sup> The statistics taken from: National Labour Inspectorate, *Kontrole legalności zatrudnienia, w tym zatrudnienia obcokrajowców* [Controls of legality of employment, including employment of foreigners], Warsaw, May 2013, available at: [http://rop.sejm.gov.pl/1\\_0ld/opracowania/pdf/material64.pdf](http://rop.sejm.gov.pl/1_0ld/opracowania/pdf/material64.pdf)

183) two years later. Work undertaken by foreigners who do not have legal residence is very rare, and is declining: there were 59 cases in 2012, down from 78 in 2011 (see Table 6 below).

**Table 6. Inspections conducted by the National Labour Inspectorate, 2010-2012, foreigners**

	<i>2010</i>	<i>2011</i>	<i>2012</i>	<i>2010-2012</i>
Total inspections	1,961	2,199	2,135	<b>6,295</b>
Foreigners inspected	12,354	14,415	12,430	<b>39,199</b>
<i>Out of which</i> foreigners requiring work permits	4,731	6,475	4,834	<b>16,040</b>
<b><i>Detected cases</i></b>				
No required work permit	572	427	376	<b>1,375</b>
Work on a post not stipulated by work permit	286	335	158	<b>779</b>
No proper employment contract	265	166	231	<b>662</b>
No registration of employment at the labour office	181	125	86	<b>392</b>
Work for another employer than registered	196	86	97	<b>379</b>
Irregular residence	76	78	59	<b>213</b>

Source: National Labour Inspectorate, *Kontrole legalności zatrudnienia, w tym zatrudnienia obcokrajowców*, Warsaw, May 2013, pp. 10-11, pp. 26, 30.

The introduction of stricter sanctions for unlawful employment in mid-2012 significantly reduced the number of foreigners charged with employment without proper authorization. Nationals of Ukraine consistently lead the statistics of illegal workers, which reflects the fact that they constitute by far the largest national group of foreign workers in Poland. By 2012 their share in the total number of detected unauthorized workers reached nearly 70 per cent, which was partly attributed to the steep decline in the number of cases among several other nationalities, such as Macedonia (162 cases in 2011, none in 2012), China (59 in 2011 and 34 in 2012), Turkey (18 in 2011 and only 5 in 2012).

The national composition of illegal workers is changing from year to year. If in 2010, seven countries of CIS and Asia (Armenia, Belarus, Moldova, Uzbekistan, North Korea, Nepal and Bangladesh) accounted for the total of 154 cases, only 29 workers were found from these countries in 2012. It

is noteworthy that in 2012 apart from Ukraine, the only significant groups of illegal workers come from three Far Eastern countries (People's Republic of China, Vietnam and South Korea) and from two European states (Moldova and Croatia) (see Table 7 below).

**Table 7. Detected illegally employed foreigners—top nationalities, 2010-2012**

<b>Citizenship</b>	<b>2010</b>	<b>2011</b>	<b>2012</b>	<b>2010-2012</b>
Ukraine	618	513	445	<b>1,576</b>
People's Republic of China	77	59	34	<b>170</b>
Macedonia	0	162	0	<b>162</b>
Vietnam	31	33	25	<b>89</b>
Philippines	64	0	4	<b>68</b>
South Korea	6	28	25	<b>59</b>
Moldova	27	5	11	<b>43</b>
North Korea	30	1	8	<b>39</b>
Croatia	0	0	34	<b>34</b>
Turkey	9	18	5	<b>32</b>
Belarus	17	11	4	<b>32</b>
Uzbekistan	27	1	3	<b>31</b>
Nepal	21	5	1	<b>27</b>
Bangladesh	19	4	1	<b>24</b>
Armenia	13	3	1	<b>17</b>
Russia	7	0	8	<b>15</b>
India	4	2	7	<b>13</b>
Other	41	56	28	<b>125</b>
<b>TOTAL</b>	<b>1,011</b>	<b>901</b>	<b>644</b>	<b>2,556</b>

Source: National Labour Inspectorate, *Kontrola legalności zatrudnienia, w tym zatrudnienia obcokrajowców*, Warsaw, May 2013, p. 27.

As a result of inspections of the legality of employment conducted by the Labour Inspectorate in 2010-2012, 712 work permits were terminated. Moreover, the Border Guard and the police detained 341 foreigners and the Border Guard issued 399 decisions on expulsion or decision obliging foreigners to leave the Polish territory. In the course of cooperation with the Border Guard, labour inspectors carried out 154 checks upon request from the Border Guard and additional 417 inspections with this agency.