Enforcement of open, sustainability-oriented CSDDD standards: lessons from administrative law*

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1. Introduction

1.1. Public enforcement in the CSDD Directive[1]

Harm-Jan de Kluiver has already discussed the material content of the open standards of the Corporate Sustainability Due Diligence Directive (CSDDD).[2] We will therefore not address it in this contribution. We will discuss what we believe are the lessons from administrative law for the enforcement of the open CSDDD standards.

Public enforcement is assigned an important position in the CSDDD Directive. The draft directive includes regulations in Articles 17-21.[3]

Article 17(1) requires Member States to designate a public supervisory authority and stipulates which authority is competent. It must be independent and must not have market or conflicting interests with the supervised firms or in other sectors. Article 18(1) requires supervisory authorities to have adequate powers, including requesting information and conducting investigations, as well as sufficient financial and other resources to carry out the supervision. Article 18(2), in conjunction with Article 19, provides that a supervisory authority may investigate not only on its own initiative, but also on the basis of substantiated concerns of any natural or legal person that reasonably suspects that a company is committing an offence. When supervisory authorities in other Member States wish to investigate, they must request assistance from the supervisor in that Member State under Article 21(2).

Article 18(5) sets out the options that a supervisory authority must in any event have to address violations. These include (a) an order to cease the infringement; (b) an order to prevent the infringement in the future; (c) ordering remediation to the extent proportionate to the infringement and necessary to

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[1] This contribution draws on the European Council version, available at eur-lex.europa.eu/legal-content/NL/TXT/PDF/?uri=CONSIL:ST_15024_2022_REV_1.

[2] H.J. de Kluiver's contribution, 'Open standards, supervision and sustainability. An overview' in Koninklijke Vereeniging 'Commercial Law' preliminary opinions 2023, par. 1.

[3] Compare: M.W. Scheltema, 'Administrative supervision on corporate sustainability due diligence' (*Bestuursrechtelijk toezicht op corporate sustainability due diligence*), *NTBR* 2022/44; M. Baks & K. Lieverse, 'Supervision and Enforcement under the CSDD', *Ondernemingsrecht* 2023/34; M.W. Scheltema, Administrative due diligence review (outside the EU) (*Toezicht op gepaste zorgvuldigheid (buiten de EU)*), *NTB* 2023/171.

end the infringement; (d) imposing (monetary) sanctions pursuant to Article 20; and (e) imposing interim measures to prevent serious and irreparable harm.

Article 20 concerns the sanctions that supervisory authorities must be able to impose. These must be proportionate, effective and dissuasive. Under paragraph 2, these sanctions may take into account how the company (a) attempted to implement the measures required by the supervisory authority; (b) provided targeted support to the (smaller) supplier where the impairment occurred in order to prevent or mitigate such impairments; (c) made investments in contractual warranties, auditing and monitoring supplier compliance; or (d) cooperated with other entities to address those impairments. It further follows from paragraphs 3 and 4 that monetary sanctions should be based on turnover and that Member States should ensure that sanctions imposed on companies are published.

Article 21 provides for the establishment of a European Network of Supervisory Authorities. According to paragraph 1, this network should promote cooperation between national supervisory authorities and also the coordination and alignment of supervisory practices, as well as investigation and sanctioning practices and the application of supervisory powers. Knibbeler's contribution shows that (formal or informal) coordination will have to be significantly strengthened if the CSDDD practice effectively aims at a level playing field.[4]

1.2. Reason, question and outline of this contribution: open standards as a challenge for public law enforcement

It is likely that the directive yet to be adopted will contain many open, vague standards when it comes to obligations for companies.[5] This raises the question of how to deal with this in the context of public-law supervision and enforcement, because adequate supervision and enforcement ultimately require that both companies and supervisory authorities know what obligations apply. However, the latter is not evident, looking at the draft directive. For instance, what are the 'appropriate measures to identify actual and potential impacts on human rights and environment' referred to in Article 6 of the directive? This is not clear from the outset, especially since this obligation also covers human rights and environmental violations throughout a company's value chain, thus including its suppliers.

So how to give substance to public law supervision and enforcement? This contribution looks to administrative law in order to answer that question, since there is extensive experience in that field with open standards and shaping supervision and enforcement in this area.

What lessons can be learnt from administrative law for adequate enforcement of open CSDDD standards? To answer that question, we will start by considering what open standards are, why they are used, and how they should be valued (paragraph 2). We will then examine the possibilities and limitations of monitoring of and enforcing compliance with open standards by both the courts and the supervisory authorities (paragraph 3). Next, we will outline the administrative law practice of dealing with open standards using a number of illustrative examples (paragraph 4) in order to, partly on that basis, arrive at lessons for the adequate enforcement of open CSDDD standards and a conclusion (paragraph 5). It should be borne in mind in this respect that this contribution does not aim to arrive at concrete recommendations specifically directed at CSDDD standards. The ambition of this contribution is to feed

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[4] W. Knibbeler, 'ACM oversight of responsible and sustainable international business' in Koninklijke Vereeniging 'Commercial Law' preliminary opinions 2023, par 4.1.

[5] See also: H.J. de Kluiver, 'Business and sustainability. On business, human rights, environment and climate, also in a European perspective' (*Onderneming en duurzaamheid. Over ondernemen, mensenrechten, milieu en klimaat, mede in Europees perspectief*), WPNR 2023, no. 7407, pp. 299-318.

into the CSDDD enforcement discussion with insights from administrative law. This may at least avoid reinventing the wheel: the CSDDD project is too urgent for that.

This preliminary advice relates to open standards. Standards that are vague are also open. We will therefore use those terms interchangeably.

2. Open standards: what, why and how to be valued?

2.1. Introduction: What are open standards?

Open or vague standards are standards that textually do not yet have directly applicable normative content and need further substantiation in order to be concretely applied. Examples include legal standards that include vague concepts such as general interest, public order, the interests of the international legal order, fire hazard, efficiency, danger or health. In addition to a textual definition of an open standard, an approach from a responsibility perspective is also possible. The use of open standards involves a transfer of a (further) regulatory power from the legislature to other actors. Finally, open standards can also be considered from the perspective of the regulatory scope that the legislature offers to the party to which the standard applies, since it is conceivable that by using open standards the legislature intends to give leeway to that party for further regulation.[6]

Open standards come in different shapes and sizes, but an important distinction can be made between an objective and a subjective variant. Objective vague standards pertain to rules containing vague linguistic concepts. Within administrative law there are a large number of such concepts and, as an example, Schlössels and Zijlstra mention the concepts of construction, demolition, danger, damage and health. In common parlance, these concepts have a clear meaning, but in a legal context they still give rise to questions.[7] Subjective vague standards are standards containing concepts that often require a value judgement by the competent authority, such as the concepts of purposeful, just and necessary. The legislature often uses subjectively vague concepts to standardise administrative powers in order to make it clear that it expects the competent authority to use its specific expertise and knowledge.[8] This distinction also affects the extent to which a court can review the chosen interpretation of a vague concept, as will be discussed in more detail in paragraph 3.1 below.

2.2. Why are open standards used?

Administrative law makes extensive use of open or vague standards. Generally binding regulations and decisions of general application often cannot be drafted in such a way that it can be made clear beforehand exactly what is and what is not prohibited for each case, and therefore by necessity contain rather vague standards.[9] This creates flexibility. Bröring and Van Vorselen cite the Financial Supervision

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[6] J.Ph. van Lochem, Open standards in rental law. Space versus legal certainty (*Open normen in het huurrecht. Ruimte versus rechtszekerheid*) (Law and Practice no. VG11) (diss. Utrecht), Deventer: Wolters Kluwer 2019, pp. 27-29. See also: A. Klap, Vague standards in administrative law (*Vage normen in het bestuursrecht)*, Zwolle: W.E.J. Tjeenk Willink 1994, pp. 1-9.

[7] R.J.N. Schlössels & S.E. Zijlstra, Administrative law in the social rule of law (*Bestuursrecht in de sociale rechtsstaat*), Deventer: Wolters Kluwer 2017, pp. 122-123.

[8] Schlössels & Zijlstra 2017, p. 124.

[9] F.C.M.A. Michiels e.a., Main matters of administrative law (*Hoofdzaken van het bestuursrecht)*, Deventer: Wolters Kluwer 2021, pp. 138-139.

Act as an example.[10] This act gives the supervisory authorities (De Nederlandsche Bank and the Netherlands Authority for the Financial Markets) a lot of room in the form of open standards, allowing them to respond to the dynamic and unpredictable developments in the financial markets.[11]

In his thesis, Klap also indicates that vague standards are essential. He links the need for open standards to the development of the social rule of law and assumes that the setting of vague standards is desirable and, to some extent, necessary for the government's tasks in the social rule of law.[12] Klap points out that this is due to the increased scope of the public task ever since the development of the social rule of law. Because the government's intervention in social life has increased so much, Klap argues that exhaustive and detailed standardisation is unrealistic. This increase prevents the legislature from delving into all hypothetical cases, and using open standards also prevents unforeseen or unforeseeable cases from falling outside the scope of the legal standard. Furthermore, the technical nature of the tasks performed by the government in the social rule of law also plays a role, as the legislature sometimes lacks the necessary expertise to set more than general standards, according to Klap. Klap says, however, that an argument for setting vague standards lies mainly in the nature and function of the tasks that the government performs in the social rule of law. According to Klap, the change from the classical rule of law with traditional duties to a social rule of law has created a greater need for standards that do not predetermine the decision to be taken in all its details.[13]

Similar to these three developments mentioned by Klap, Barendrecht gives the following three causes for the emergence of systems with vague standards: the increasing complexity of society, the increase in government tasks, and the mentality that characterises people in general in the present time.[14]

Klap further states that open standards are essential for the functioning of government, because they leave room for a concrete balancing of interests and provide more flexibility and differentiation.[15] By setting vague standards, the legislature can achieve that the development of law is not unnecessarily set in stone without completely taking it out of the hands of the government, while at the same time allowing the government to react quickly to diverse and changing economic circumstances. In addition, Klap argues, strict or exhaustive standards do not sufficiently reflect the element of weighing interests.[16] Vague standards often provide the government with the discretionary leeway that is required for effective task performance.[17]

For the legal practice, according to Van Lochem, open standards mean more flexibility which, also given increasing complexity, can be functional. Furthermore, open standards can provide the necessary room

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[10] H.E. Bröring & E.M. van Vorselen, Lex certa and administrative financial law (*Lex certa en het financieel bestuursrecht*), *JBplus* 2013, Part 3, p. 102.

[11] Bröring & Van Vorselen 2013, p. 102-103. Klap 1994, p. 25.

[12] Klap 1994, p. 25.

[13] Klap 1994, p. 25.

[14] J.M. Barendrecht, Law as a model of justice. Reflections on vague and sharp standards, binding on law and law-making (*Recht als model van rechtvaardigheid. Beschouwingen over vage en scherpe normen, over binding aan het recht en over rechtsvorming),* (diss. Tilburg), Deventer: Kluwer 1992, pp. 4-5.

[15] Klap 1994, pp. 27-28.

[16] Klap 1994, p. 30.

[17] Klap 1994, p. 31.

for justice in individual cases.[18] First of all, this means room for government bodies: due to the scope and complexity of government tasks, a vaguer, more general description of these tasks creates some leeway.[19] It also means room for the courts: open standards in legislation offer the courts room to judge according to the circumstances of the case at hand.[20]

For the legislature, open standards can be a means of limiting the scope of legislation (deregulation) and can be of functional use when the legislature considers standardisation desirable, but wants or needs to leave it to organisations and experts in the relevant field (promoting communicative legislation).[21]

2.3. Pros and cons of using open standards

An instructive overview of the advantages and disadvantages associated with the use of open standards from three different viewpoints follows from the 'Target-oriented Legislation' report – since goals-based regulations often imply open standards. [22]

A first viewpoint concerns the advantages and disadvantages of open standards with regard to the quality of legislation. The following advantages are mentioned: reduction of regulation, flexibility and stability of the rule, the safety net function (less chance of omissions) and the fact that customisation is possible. These advantages regarding the quality of legislation are set off by as many disadvantages: more regulations are needed at other levels to elaborate the open standards and there is greater legal uncertainty, combined with the risk that the substantiation of the open standards takes place at another (lower) level with fewer democratic and other guarantees. A further disadvantage is that open standards may not be clear or may be difficult to interpret for the party to which the standard applies, but also for the enforcer (legal uncertainty). Finally, attention is drawn to the risk of legal inequality.

A second viewpoint concerns the advantages and disadvantages of open standards from the perspective of supervision and enforcement. The advantages mentioned are the greater freedom and flexibility for supervisory authorities and enforcers and the reduced enforcement burden. Another advantage mentioned is that, depending on the exact wording of the open standards, the burden of proof may be heavier on the party to which the standard applies, which may make supervision and enforcement easier. But this is also set off by just as many disadvantages. For instance, supervisory authorities and enforcers have less control over open standards and can also result in an increased burden of enforcement because the standard has to be operationalised. There is also a risk of more discussion, legal proceedings and differences in interpretation. Finally, the way the open standards are formulated may also increase the burden of proof on supervisory authorities and enforcers.

And the third and final angle for analysing the advantages and disadvantages of open standards concerns the perspective of the party to which the standard applies. There, the advantages mentioned are increased freedom, stimulating a sense of responsibility, and promoting innovation. Other advantages are the promotion of flexibility in business operations, the reduction of costs through the possibility of choosing cheaper implementation methods, and the reduction of administrative burdens.

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[18] Van Lochem 2019, p. 30.

[19] Van Lochem 2019, p. 39.

[20] Van Lochem 2019, p. 40.

[21] Van Lochem 2019, p. 30.

[22] S.J.A. ter Borg *et al.*, Purposeful legislature, Purpose regulations in literature and practice (*Doelgericht wetgeven, Doelvoorschriften in literatuur en praktijk*), Report October 2009, pp. 35-36.

Looking at the Instructions for Regulations,[23] we see that they provide guidance on whether or not to use open standards that are in line with the above-mentioned advantages and disadvantages. When it comes to the standardisation of administrative competences, the basic principle is that powers with vague application criteria are not granted unless there are good reasons for doing so (Instructions 2.1.4). Furthermore, the general aim should be that regulations are as clear, simple and enduring as possible (Directions 2.6, 2.8 and 3.3). In the case of offences threatened with sanctions, it is prescribed that the relevant rules should be formulated as precisely as possible in order to ensure legal certainty, which is of additional importance there (Guideline 5.44).

3. Judicial review and supervision and enforcement by authorities: possibilities and limits

3.1. Judicial review compliance

In the case of objective, vague concepts (in which case the administration has a certain room for manoeuvre (*beoordelingsruimte*)), the court may choose its own interpretation and check whether it is met, while in the case of subjectively vague concepts (in which case the administration has discretionary powers (*beoordelingsvrijheid*)), it can only check whether the party to which the standard applies could reasonably have arrived at the intended interpretation. In other words: objective vague concepts require full assessment; subjective, vague concepts call for a more or less marginal, cautious review. This will be explained in more detail below.

It can be argued that there is nearly always room for manoeuvre in the application of vague standards.[24] However, the presence of room for manoeuvre says little about the freedom that the administration may have in relation to the courts, the discretionary powers of judgment. There is room for discretionary powers if legislative bodies expressly grant this freedom by means of clauses along the lines of 'in the opinion of', or if it must be inferred from the nature of the power or the possible consequences of decisions to be taken.[25] If there is room for discretionary powers, the court tests marginally and restricts itself to answering the question whether the competent authority could reasonably have come to its decision. If there are no discretionary powers, there is (objective) room for manoeuvre. In that case, the court must subject the administrative judgment to an integral review, which means that it makes a final judgment of its own.[26]

The general rule is that the court independently interprets and applies all legal standards to the specific case: discretionary powers for the board is the exception.[27] However, vague standards that are open to multiple interpretations make it difficult to assess what constitutes a good interpretation. The Student Finance Act 2000 provides an example of this. Although the minister must assess whether a student is living at home or away from home when determining the amount of student finance, he has no discretionary powers in doing so. In practice, this means that the administrative court first leaves the assessment to the administration and often intervenes only if it cannot properly follow why the competent

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[23] *Stcrt.* 2022, 5649.

[24] A.P. Klap, F.T. Groenewegen & J.R. van Angeren, Review of vague standards by administrative courts in Dutch, German, English and French law (*Toetsing aan vage normen door de bestuursrechter in het Nederlandse, Duitse, Engelse en Franse recht*), Oisterwijk: Wolf Legal Publishers 2014, p. 7.

[25] Klap, Groenewegen & Van Angeren 2014, p. 33.

[26] Klap, Groenewegen & Van Angeren 2014, p. 33.

[27] T. Barkhuysen *et al.,* Administrative law in the *GALA* era (*Bestuursrecht in het Awb-tijdperk*), Deventer: Wolters Kluwer 2022, pp. 102-103.

authority has reached that judgement. Ultimately, however, it is up to the court to decide whether the competent authority has discretionary powers.[28]

How compliance with open standards is reviewed also depends on the context in which they are used. For instance, it makes a difference whether a best-efforts obligation or an obligation of result applies. According to Stijnen, culpability (which is a condition for imposing a punitive sanction) is more likely to be assumed in this context in the case of an obligation of result.[29] He puts it like this (rough translation from Dutch):

> "(...) In a general sense, I tend to be more inclined to apply the 'fault exclusion valve' to an obligation of result. An example was the standard for the employer to take such measures as to enable employees to perform their work without experiencing hindrance or nuisance from smoking by others (Article 11a Tobacco Act (old)). Because the obligation of result amounted to the effective enforcement of a smoking ban, every cigarette secretly lit by a pub-goer could constitute a penalty-worthy omission on the part of the hospitality business. Because this would lead to undesirable strict liability, the NVWA and the administrative courts assumed culpable conduct only if the proprietor or bar staff could have intervened but failed to do so. Force majeure then constitutes a limitation. What matters then is that the company exercised maximum care to comply with the obligation of result. (...) However, if a best-efforts obligation applies, the economic operator is expected to do its best to prevent violations and to treat customers with care, using company protocols and the like. Reliance on lack of culpability seems difficult, if not impossible, in the event of non-compliance with such an open standard, because the open standards refer to an obligation to take the necessary measures and not to guarantee a result.'[30] [31]

3.2. Supervision and enforcement by authorities

Clear, enforceable and compliable standards are important for good enforcement by supervisory authorities.[32] And yet, as discussed above, administrative law has many open standards. A 1998 study by

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[28] Barkhuysen 2022, pp. 102-105.

[29] R. Stijnen, Duty of care in financial services (*Zorgplichten bij financiële diensten*), in M.H. Ippel, M. Scheltema *et al.*, Duty of care in administrative law (*Zorgplichten in het bestuursrecht*) (Prelimary opinions VAR series 170), The Hague: Boom Juridisch 2023, p. 252.

[30] Stijnen 2023, pp. 252-253

[31] Original quote: '(…) In algemene zin ben ik geneigd om het ventiel van schulduitsluiting eerder te hanteren bij een resultaatsverplichting. Een voorbeeld daarvan vormde de norm voor de werkgever zodanige maatregelen te treffen dat werknemers in staat worden gesteld hun werkzaamheden te verrichten zonder daarbij hinder of overlast van roken door anderen te ondervinden (artikel 11a Tabakswet (oud)). Omdat de resultaatsplicht neerkwam op het effectief handhaven van een rookverbod, zou elke peuk die een cafébezoeker stiekem opsteekt een boetewaardig nalaten van de horecaondernemer kunnen opleveren. Omdat dit tot een onwenselijke risicoaansprakelijkheid zou leiden, hebben de NVWA en de bestuursrechter pas een verwijtbare gedraging aangenomen indien de uitbater of het barpersoneel had kunnen ingrijpen, maar dit heeft nagelaten. Overmacht vormt dan een begrenzing. Het gaat er dan om dat de onderneming de maximale zorg heeft betracht om aan de resultaatsverplichting te voldoen. (…) Indien echter sprake is van een inspanningsverplichting, dan wordt van de marktdeelnemer verwacht dat die met bedrijfsprotocollen en dergelijke zijn best doet om overtredingen te voorkomen en klanten zorgvuldig te behandelen. Een beroep op het ontbreken van verwijtbaarheid lijkt me bij het niet naleven van zo'n open norm moeilijk, zo niet onmogelijk. De open norm ziet immers op een verplichting de nodige maatregelen te treffen en niet om een resultaat te garanderen.'

[32] Michiels *et al.* 2021, p. 156.

the Administrative Law and Private Law Enforcement Committee shows that vagueness can cause problems in supervision and enforcement.[33] The following problems are cited in legal literature:[34]

- If a standard does not clearly state what is required, people may not see the point of a rule and may not take compliance seriously. This makes enforcement more difficult, as it is unrealistic to respond to every violation.[35]

- When open/vague standards mean that enforcement is carried out in some cases but not in others, this can violate the principle of equality. This also complicates enforcement.[36]

- Enforcement of vague standards may be further complicated by the fact that the enforcing body was not involved in drafting the standard. This may lead to incorrect application of the vague rule.[37]

- Monitoring compliance with vague standards can be more complicated and time-consuming than checking whether a large number of extremely concrete regulations are being complied with.[38] On the other hand, Michiels indicates that from the enforcement perspective of the administrative authorities and the Public Prosecution Office, open standards seem favourable because they reduce the pressure on the public enforcement apparatus by replacing hundreds of detailed safety regulations with an open standard on the care for security, which actually gives rise to less intensive monitoring.[39] The question then becomes, in what way compliance is monitored. This could be done, for example, through the policy rules discussed in paragraph 4, which state how a standard can be met.

- In addition to the problems of open standards for enforcement discussed above, legal literature often mentions legal certainty, which can come into play and stand in the way of adequate enforcement. This is discussed further below.

The enforcement of open standards is made more difficult as it may not affect legal certainty:[40] enforcement of an open standard may not violate the *lex certa* principle/determinability requirement,

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[33] Committee on Administrative and Private Law Enforcement, Enforcement at Level (*Commissie Bestuursrechtelijke en Privaatrechtelijke Handhaving*, *Handhaven op niveau)*, Deventer: W.E.J. Tjeenk Willink 1998.

[34] Michiels *et al.* 2021, p. 156; Schlössels & Zijlstra 2017, p. 789; T.N. Sanders, Handbook on supervision, enforcement and collection *(Handboek toezicht, handhaving en invordering)*, Den Haag: Boom Juridisch 2022, pp. 34-36; F.C.M.A. Michiels, 'Administrative enforcement and development'(*Bestuurlijke handhaving in ontwikkeling*), in J.T.K. Bos *et al.*, Enforcement of administrative law (*Handhaving van het bestuursrecht)* (VAR series 114), Alphen aan de Rijn: Alfa Base 1995; Van Lochem 2019; Klap 1994.

[35] Michiels *et al.* 2021, p. 157.

[36] Michiels *et al.* 2021, p. 157.

[37] Michiels *et al.* 2021, p. 157.

[38] F.C.M.A. Michiels, A.B. Blomberg & G.T.J.M. Jurgens, Enforcement law *(Handhavingsrecht)*, Deventer: Wolters Kluwer 2016, p. 256.

[39] Michiels 1995, p. 22.

[40] Michiels *et al.* 2021, p. 157.

which is partly contained in Article 49 Charter and Article 7 ECHR.[41] If it is not clear that a certain act violates a standard, the offender cannot be blamed for having acted in violation of that standard. Therefore, the standard must be sufficiently clear, foreseeable and knowable.[42] However, the fact that a statutory provision is not worked out in detail need not detract from its clarity.[43]

Courts assess on a case-by-case basis whether a standard is sufficiently clear, foreseeable and knowable to base enforcement action on it.[44] Incidentally, this does leave room for the application of punitive sanctions for non-compliance with open standards, as will be explained in more detail below.

A case in which the court ruled that a broad definition was nevertheless foreseeable and satisfied the requirements of Article 7(1) ECHR led to a judgment of the European Court of Human Rights (**ECtHR**) of 28 June 2011.[45] Central to this case was the concept of 'employer' laid down in Article 1(b) of the Foreign Nationals (Employment) Act (*Wet arbeid vreemdelingen*; **WAV**), under which employers are prohibited, on penalty of a fine, from having illegal foreign persons work for them. It follows that the term 'employer' is defined as the person who, in the exercise of an office, profession or business, has another person perform work, or the natural person who has another person perform household or personal services. It follows from the history of the establishment of the WAV that the definition of 'employer' was broadly formulated, because, in practice, people were always looking for ways to get out of the permit requirement of Article 2 WAV through shortcuts and complicated arrangements.[46]

In this case, an administrative fine had been imposed on the *Financieele Dagblad* (**FD**) for violation of Article 2 WAV: during labour inspections, 39 newspaper delivery staff were found to be working without a work permit. The FD took the position that it could not be held responsible for the violation because the newspaper delivery staff worked under the responsibility of intermediaries (through outsourcing). Therefore, according to the FD, it was not foreseeable that it would be regarded as an employer within the meaning of the WAV, which is why it considered the fine to be in violation of Article 7 ECHR laying down the *lex certa* principle. First, the ECtHR found that it was clear from the WAV that the definition of 'employer' covers more than just an employer relationship on the basis of an employment contract or instructions.[47] Despite this broad interpretation, the ECtHR found that it was not unforeseeable that 'outsourcing' would also fall under the WAV: the Explanatory Memorandum to the WAV shows that one of the purposes of the Act is to assign the responsibility for obtaining work permits to the ultimate principal, meaning the person for whom the actual work is performed.[48] The FD further argued that the Administrative Judicial Division of the Council of State had introduced a new and unforeseeable criterion without precedent in previous case law, but the ECtHR did not go along with that argument either. According to the ECtHR, judicial interpretation necessarily involves the development of new concepts in

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[41] Schlössels & Zijlstra 2017, p. 789; Stijnen 2023, p. 250; T. Barkhuysen & M.L. van Emmerik, *Europese grondrechten en het Nederlandse bestuursrecht* (European fundamental rights and Dutch administrative law), Deventer: Wolters Kluwer 2023, p. 85.

[42] Stijnen 2023, p. 250.

[43] Sanders 2022, p. 36.

[44] Sanders 2022, pp. 34-36.

[45] EHRM 28 June 2012, ECLI:NL:XX:2011:BT2901, *AB* 2012/15, annotated by R. Stijnen; *NJ* 2012/401, annotated by E. Verhulp (*Het Financieele Dagblad/Netherlands*).

[46] *Parliamentary documents (Kamerstukken) II* 1993/94, 23574, nr. 3, p. 4.

[47] EHRM 28 June 2012, ECLI:NL:XX:2011:BT2901, par. 66-67.

[48] EHRM 28 June 2012, ECLI:NL:XX:2011:BT2901, par. 68.

response to new situations and changing circumstances. The ECtHR therefore found that the FD's complaint of violation of Article 7 ECHR was unfounded.

In his preliminary opinion on administrative enforcement under development, Michiels states that extremely open standards may leave the gate wide open to unrestrained administrative action and may thus violate the principle of legal certainty.[49] On the other hand, Michiels argues that this will not be that bad in practice, if the competent authority precisely explains in the decision imposing an order subject to a penalty what the violator has to do to avoid forfeiting such penalty payments (i.e. a grace period is given to comply with the order and no sanction is imposed if it is complied with within that period). In this way, a very general standard is made concrete and can be enforced.[50] Doorenbos is stricter (also than case law) and also prefers warnings or administrative enforcement to criminal enforcement because of *lex certa*. Where duty-of-care provisions are concerned, criminal enforcement should actually be the last remedy and should therefore really take place only after a prior administrative action in which the party subject to the standard has been told in concrete terms what was expected of it. From this perspective, application of criminal law should be reserved for those who were expressly warned and nevertheless failed to adjust their behaviour. Legal certainty would be served if this principle were recorded in clear terms in the criminal law enforcement policy, in such a way that the court could review it where appropriate.[51]

Verhey and Verheij state that, due to the legal certainty requirement, in practice market authorities (whose task it is to ensure the proper functioning of markets) and other supervisory authorities often determine s what the parties to which those standards apply should or should not do through the interpretation of an open standard.[52] This leads to a considerable concentration of power among these authorities, because it largely places policy and supervision in the hands of one party. This can be problematic. With a view to the principles of democracy, legality and separation of powers, Verhey and Verheij argue that the following is therefore important:

- the aim should be to move towards a situation where the essential choices are made by politicians;
- authorities should consistently and transparently fill the discretionary power that remains by adopting concrete policy rules in that regard where possible; and
- if politicians fail to make policy choices, the presence of checks and balances is important, which the legislature will have to provide.

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[49] Michiels 1995, p. 21.

[50] Michiels 1995, p. 21.

[51] D. Doorenbos, 'Fashionable environmental offences, Criminal sanctioned duty of care provisions and catch-all provisions in environmental law' (*Modieuze milieudelicten, Strafrechtelijk gesanctioneerde zorgplicht- en vangnetbepalingen in de omgevingswetgeving*), *M en R* 2021, Part 9, par. 6.

[52] L.F.M. Verhey & N. Verheij, 'The power of the market master' (*De macht van de marktmeester*), in A.A. van Rossem, L.F.M. Verhey & N. Verheij, 'Supervision' *(Toezicht)* (preliminary opinions NJV 2005), Deventer: Kluwer 2005, p. 223.