



# Employees Beyond Borders

**Research results:**

**Employment of the foreigners – impact of the  
Employers Sanctions Directive in practice**

Czech Republic



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## **1. Initial Information**<sup>1</sup>

### **(a) A Brief History of Migration into CR**

The political and economic transformation after 1989 had a significant influence on foreign migration. The Czech Republic (the Czech and Slovak Federal Republic before 1992) has relatively quickly become an immigration and transit country (Drbohlav 2008). The newly created state adopted, with relevant amendments, the 1965 *Residence Act*<sup>2</sup>, which on the one hand allowed for a stay of foreign nationals in CR subject to the respective permit and its prolonging, but on the other hand provided no possibility to gain the citizenship (Jelínková 2006). A similar approach was taken by Act No. 123/1992 Sb., on the Residence of Foreign Nationals in the Territory of the Czech and Slovak Federal Republic, which focused primarily on a limitation of undocumented migration and illegal acts, without imposing strict restrictions on migration in general. At the end of the nineties of the twentieth century, the Czech immigration policy was aimed at providing assistance to returning compatriots, and in 1990 the Government adopted Act No. 498/1990 Sb., the *Refugees Act*<sup>3</sup>. Baršová and Barša (2005) characterize this period (approximately until 1996) as significantly liberal, stating, nevertheless, that the liberalism was a "liberalism of tolerance, rather than acceptance: any foreign national could come, but there was no legal way (except for the marriage with a Czech citizen) how they could settle in this country permanently and naturalize" [Barša, Baršová 2005, p. 222]. A liberal migration policy, but in fact one with an absolute lack of an immigration concept, was thus typical of the given period (Drbohlav, Horáková, Jánková 2005).

A coherent national migration strategy was not created until 1999; in this period, the Czech Republic witnessed tightening of regulations and practice concerning foreign nationals (Baršová, Barša 2005), along with a harmonization with EU law. As Drbohlav concludes [1998, not paginated], "it can be stated that the migration policy of the Czech Republic was created on its own, thanks to the gradual (planned and implemented) integration into West European structures" (cf. Baršová, Barša 2005, p. 223). The migration policy experienced a substantial shift in its development upon adoption of Act No. 326/1999 Sb. on the Residence of Foreign Nationals in the Territory of the Czech Republic<sup>4</sup> (*zákon č. 326/1999 Sb. o pobytu cizinců na území České republiky, FORA*). While on the one hand, these acts have considerably tightened the conditions for the entry and residence of foreign nationals in the CR, on the other hand the Act on the Residence of Foreign Nationals provided an opportunity for the foreign nationals to apply for a permanent residence permit after ten years of

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<sup>1</sup> The summary of the Czech migration policy until 2009 is taken over from: Jelínková. M. *Czech Migration and Integration Policy in the Perspective of Mongolian Migration. (Česká migrační a integrační politika v perspektivě mongolské migrace)*. Doctoral thesis. Charles University, Prague, 2011.

<sup>2</sup> Act No.68/1965 Sb. on the residence of foreign nationals within the territory of the Czechoslovak Socialist Republic

<sup>3</sup> As I state elsewhere (Jelínková 2006), after the split of the CSFR, the Czech Republic, too, confirmed its accession to the 1951 Refugee Convention and the 1967 Protocol, and confirmed the validity of the *Refugees Act (zákon O uprchlících)*.

<sup>4</sup> Act No. 326/1999 Sb. on the Residence of Foreign Nationals in the Territory of the Czech Republic and on amendments to some Acts, as amended (*zákon č. 326/1999 Sb., o pobytu cizinců na území České republiky, ve znění pozdějších předpisů*)

their uninterrupted stay, allowing for at least a theoretical possibility of their staying in this country. Since then (i.e., since the turn of the millenium), more attention has been paid to the migration policy in the CR; still, the migration policy was mostly outside the scope of interest of political parties. The Act on the Residence of Foreign Nationals has been amended from time to time (approximately once every six months) - due to a necessary implementation of European directives, and as a result of ever-changing rules and an increase in restrictiveness.

In January 2003 the Czech Republic adopted the Czech Government Migration Policy Principles (*Zásady politiky vlády České republiky v oblasti migrace cizinců*)<sup>5</sup>, which are, nevertheless, exceptionally vague and cannot therefore follow the necessary direction or targets desired or sought by the CR in the area of migration (cf. Baršová, Barša 2005, p. 225). The effort to create a migration policy concept and to provoke a public discussion over the situation of (in particular, work) migrants mostly originated from below during that period. The main deficiencies in the concept of the migration policy (along with other factors such as lack of public discussion or lack of political interest etc.) caused many problems in subsequent years. From 2000 to 2008, the number of foreign nationals legally residing in the CR doubled, reaching nearly 450,000 people<sup>6</sup>, but the structural assistance with their integration into the society was considerably far from perfect on the part of the state. This is reflected by the Foreign Nationals' Integration Concept in 2005 and its Further Development (*Koncepce integrace cizinců v roce 2005 a její další rozvoj*), [2006, p. 12]: "When drafting the integration measures within the Foreign Nationals' Migration Concept, the absence of a coherent Czech migration strategy becomes obvious. Migration and integration are closely interconnected areas, and a successful solution of one area determines the success of the other one". In this context, it should be mentioned that around 2008 expert estimates declared that the number of migrants without the residential permit during this period could amount to 400,000 people (cf. Drbohlav, 2008); the unknown but definitely high number of migrants without a residence permit was, among other factors, cause also by a relatively easy (compared to West European countries) arrival into the country and, at the same time, by the low possibility of maintaining the legal status (cf. Jelínková, 2011).

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<sup>5</sup> Resolution of the Government of the Czech Republic No. 55 of 13 January 2003. The vagueness of these principles is very alarming; migration policy itself is more affected by Principles No. 3 and 4, which read as follows: **Principle 3:** The state migration policy is aimed at eliminating all forms of illegal migration and other illegal activities by means of measures applied in the area of international cooperation as well as by national measures." Principle 4: "The state migration policy does not put any obstacles to legal migration and supports immigration that is beneficial to the state and to the society in a long term perspective.."

<sup>6</sup> The number includes foreign nationals from third countries as well as citizens of other EU countries..

The migration policy was thereafter most powerfully influenced by the economic crisis. When it began (in the second half of 2008), the main role in the migration and integration policy was played by the Ministry of the Interior (Moi) (*ministerstvo vnitra (MV)*)<sup>7</sup>, in particular by the Department of Migration and Asylum Policy (*odbor migrační a azylové politiky*) (hereinafter the OAMP MV). It was the beginning of economic crisis that to a considerable extent showed the main weaknesses of Czech migration and integration policy: in particular, the almost uncontrollable increase in the number of issued permits (both work and residence ones), a markedly limited protection of foreign workers at Czech labour market, a vast network of exploitative work mediators and many others. A key document of this period was the Czech Government Resolution of 9 February 2009 No. 171 regulating the security situation in the Czech Republic in relation to the dismissals of foreign workers due to the economic crisis (*Usnesení vlády ČR ze dne 9. února 2009 č. 171 k zajištění bezpečnostní situace České republiky v souvislosti s propouštěním zahraničních pracovníků v důsledku hospodářské krize*). Based on this Resolution, the Government adopted the document Solution of Impacts of Economic Crisis on the Residence of Foreign Nationals in the Czech Republic to Minimize the Risks for the Security Situation of the Czech Republic *Řešení dopadů hospodářské krize na pobyt cizinců v České republice s cílem minimalizovat rizika pro bezpečnostní situaci České republiky* (ref. no. 147/09). This document brought the implementation of the so-called return programme (entitled: Project of Assistance to Foreign Nationals who have Lost Money and Employment due to Crisis (*Projekt pomoci cizincům, kteří se v důsledku krize ocitli bez finančních prostředků a možnosti pracovního uplatnění*)<sup>8</sup>, and a decision to temporarily stop accepting applications for long-term visa at selected embassies.

During<sup>9</sup> 2010 the protection measures in the area of labour market continued when the Ministry of Labour and Social Affairs (MoLSA) (*Ministerstvo práce a sociálních věcí, MPSV*) issued on 12 March 2010 an instruction to the labour offices to prioritise Czech and EU/ES nationals over third country nationals irrespective of the length of their stay at the territory when filling vacant jobs as well as to issue work permit to third country nationals only in exceptional cases.<sup>10</sup> This restrictive approach was

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<sup>7</sup> Moi has become the administrator in the area of foreign nationals integration with effect from 1 August 2008 upon Resolution of the Government of the CR of 23 July 2008 No. 979.

<sup>8</sup> Although this programme was presented to the public as very positive for the foreign nationals (the foreigners were motivated by 500 euro to leave the country), it could not in fact be used in practice by most (often in their country of origin heavily indebted) of the unemployed foreign nationals. 500 euro may seem to be motivating, but it must be realized that foreigners with a long-term residence permit who lost their jobs did not, in spite of paying all the required social security contributions, qualify for any unemployment benefits. 500 euro was thus for many of them much less than the amount they have paid for the unemployment insurance.

<sup>9</sup> The following text until the end of chapter is with the author's permission **taken over from Faltová M.: Legal Report on the Situation of Undocumented Migrants in the Czech Republic**. 2014. EPIM Report.

<sup>10</sup> Faltová M.: Study MIPEX III in the Context of the Amendment to the Residence of Foreign Nationals, in State Policy of Integration of migrants into the Society. (*Státní politika integrace migrantů do společnosti*, MKC, 2011

further developed in the new amendment of the FORA that came into force on 1 January 2011. New FORA introduced a number of important changes at the institutional level as well as in relation to the conditions for entry and stay of foreigners within the Czech territory such as personal attendance requirements, forthcoming biometric residence permits and more stringent housing and health insurance requirements. The legislation implements several EU directives, including the Employers Sanctions Directive.

As far as the institutional development is concerned, on 1 January 2011, the Ministry of the Interior (Moi) (*Ministerstvo vnitra, MV*) took over the responsibility for the management of long-term residence permits and long-stay visas, which pertained previously to the Foreign Police Service (FPS) (*Služba cizinecké policie, SCP*). The Ministry of the Interior followed the trend of 2009 when it extended its influence over the migrant integration, permanent residence and green cards<sup>11</sup> agendas, earlier administered by other state authorities. Since the transfer of agendas, the decision-making process about residency permits has been substantially delayed in the violation of procedural rights of migrants. Legislative changes effective as of 2011 have not significantly reduced the bureaucratic formalism of the Czech immigration law, which remains, similarly to the recent years, considerably restrictive, putting an immense burden of proof on the migrant. Furthermore, in the residence permits granting, values such as state sovereignty, national security, public order and strict formal legality applied to the detriment of foreigners, strongly prevail to the character of the state administration as a public-friendly and transparent service under the Administrative Code (*správní řád*).<sup>12</sup>

At the policy level, the Government reacted to the changing situation at the labour market and adopted a proposal of the *New System of Economic Migration to the Czech Republic* (NSEM), a baseline for the future immigration law.<sup>13</sup> The proposal set up new rules for labour migration to the Czech Republic promoting an active approach to economic benefits of high qualified migration. The material focused on the responsibility of employers for irregular residence of their former migrant workers. The Moi also aimed to hinder the status of self-employed workers in order to circumvent restrictions to labour migration. In particular, the proposal defined new models of circular migration, which should be preferred to the permanent migration, especially for low-skilled migrants and could (as claimed) help in fighting irregular migration. Since then, the migration policy has been completely

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<sup>11</sup> Green cards are national single permits for highly qualified workers from certain third countries.

<sup>12</sup> Act No. 500/2004 Sb., the Administrative Code, as amended (*zákon č. 500/2004 Sb., správní řád, ve znění pozdějších předpisů*).

<sup>13</sup> Government Resolution No. 48, 19 January 2011: *New System of Economic Migration (Nový systém ekonomické migrace)*, available at: <http://migration4media.net/wp-content/uploads/2011/03/NSEM-vlada.pdf>

subordinated to the “purpose of stay”, in most of the cases the economic one whereas employment policy or social rights of migrants have not been taken into account.

During 2012 the restrictive approach and protective measures of the Czech labour market continued to be a serious hindrance for migrants to enter and even stay at the legal labour market. On 25 January 2012, the Ministry of Labour and Social Affairs issued a directive limiting access of third country nationals to the labour market introducing several new measures – requirement of recognition of education, non-issuance and non-prolongation of work permits to low-skilled migrants and limited duration of these permits to migrants with secondary education.<sup>14</sup> The directive was amended on 8 March 2012<sup>15</sup> after public criticism from employers, migrants and NGOs. On 17 August 2012, the directives were amended again by the directive of the director general of the Labour Office providing more detailed guidelines concerning employment of migrants.<sup>16</sup> The directives are considered unlawful by professionals and this opinion was supported by the Committee for the Rights of Foreigners, a governmental consultative body.<sup>17</sup> These measures have been pushing migrants more than ever into shadow economy and irregular employment resulting into irregular stay in the territory. It was only after criticism by the Ombudsman and upon a proposal of the Council of the Government of the Czech Republic for Human Rights to the Government that these rules were abolished.

The Mol has worked since 2011 on the most important draft of the new act for entry and residence of foreigners in the CR (FORA), which was approved by the Government on 29 February 2012,<sup>18</sup> implying recodification of the Czech immigration law. After a two year long process, the Mol submitted the draft package to other relevant bodies for interdepartmental consultations in May 2013. However, the majority of consulted bodies, incl. ombudsman, presented substantial objections to number of extensive restrictions imposed on further entry, residence and rights of migrants, incl. EU nationals in the Czech Republic while granting too much of discretionary power to decision

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<sup>14</sup> Ministry of Labour and Social Affairs: *Methodology Instructions regarding the Implementation of the Foreign Nationals' Employment Policy. (Metodické pokyny k realizaci politiky zahraniční zaměstnanosti)*, 25 January 2012 (unpublished).

<sup>15</sup> Ministry of Labour and Social Affairs: *Methodology Instructions regarding the Implementation of the Foreign Nationals' Employment Policy. (Metodické pokyny k realizaci politiky zahraniční zaměstnanosti)*, 8 March 2012 (unpublished).

<sup>16</sup> Labour Office of the Czech Republic: *Guide No. 19/2012 Procedure and Instructions regarding the Implementation of the Employment Policy (Postup a pokyny k realizaci politiky zaměstnanosti)*, 17 August 2012.

<sup>17</sup> Resolution of the Committee for the Rights of Foreigners of 22 October 2012, available at <http://www.vlada.cz/cz/ppov/rlp/vybory/pro-prava-cizincu/ze-zasedani-vyboru/zasedani-vyboru-dne-22--rijna-2012-100160/>

<sup>18</sup> Ministry of the Interior: Legislative intent of the new legal regulation of entry to and residence within the territory of the Czech Republic, free movement of EU citizens and their family member and of state frontier protection. (*Věcný záměr nové právní úpravy vstupu a pobytu na území České republiky, volného pohybu občanů Unie a jejich rodinných příslušníků a ochrany státních hranic*), 2/12, 28 July 2011.

makers. As a result, this crucial material could not advance to the Parliament and expects redrafting by the Mol in 2014 at the earliest.

### (b) Main Source Countries of Migration

According to official statistics, 10.5 million people lived in the CR in 2013, of which 441,000 were foreigners with a residence permit, which amounts to 4.2 % of the total population. 238,000 foreign nationals had a permanent residence permit, while 203,000 had other residence permits (especially long-term stays over 90 days). The total number of foreigners is supplemented by foreign nationals without a residence permit (whose number is unknown, but according to various estimates it is several tens of thousands of people) and EU citizens who have not fulfilled the registration duty and whose number is certainly significant.

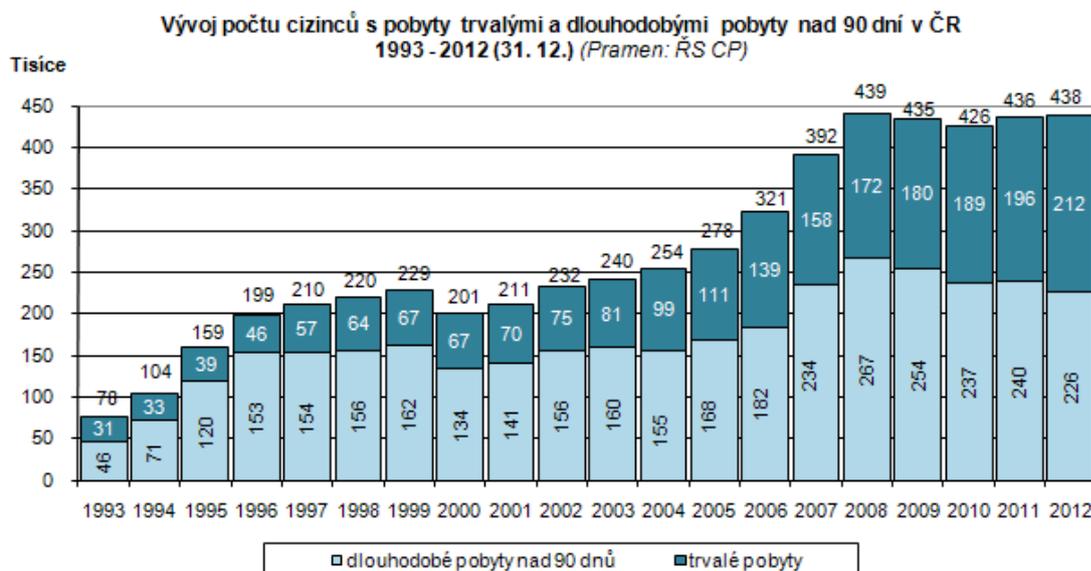


Chart No. 1: Development of the number of foreign nationals with residential and long-stay permits over 90 days in the CR, light blue means long term stays over 90 days, dark blue means permanent residences. Source: [www.czso.cz](http://www.czso.cz) (Czech Statistical Office, Český statistický úřad).

EU citizens shown in the statistics equal 37 % of all foreign nationals legally staying in the CR. According to the data provided by the Czech Statistical Office (Český statistický úřad)<sup>19</sup>, the main source countries include especially the Ukraine (105,000 people), Slovakia (91,000 people), Vietnam (57,000 people), Russian Federation (33,000 people), Poland (19,000 people) and Germany (18,000 people). There are also citizens of Bulgaria (9,000 people) and Romania (nearly 7,000 people).

<sup>19</sup> The numbers are based on the statistics as of 31. December 2013, according to the data of the Czech Statistical Office ([www.czso.cz](http://www.czso.cz))

37 % of all the foreign nationals legally residing in the CR live in the capital city of Prague, and, in addition, some of the foreign nationals who live in the Central Bohemian region<sup>20</sup>, which surrounds Prague, commute to Prague to work. The most populous groups of foreign nationals in Prague are the Russians (50 % of the total number of Russians) and Ukrainians (nearly 50 % of the total number of Ukrainians). As far as Slovaks are concerned, one third of the Slovak population in the CR lives in Prague. A significantly lower percentage is that of the Vietnamese: only 19 % of the total number of Vietnamese in the CR live in Prague.

### **(c) Reasons of Arrival and Residence in the CR**

The most frequent reasons for the arrival of foreign nationals from third countries to the CR is business or work, followed by family reasons and residence due to studies; other reasons for a residence seem to be a rather minor category (e.g. scientific stays etc.). The so-called blue and green cards, which are a special category of work residence are issued only less often.

As far as employment is concerned, 310,921 foreign nationals, which is 71 % of all legally residing foreign nationals, were employed in the CR as of 31 December 2011<sup>21</sup>. 34 % of the employed foreign nationals were women. As far as the position is concerned, 30 % of all working foreign nationals were self-employed and 70 % were employed. When comparing the employment positions, a significant difference can be traced between the job positions among EU citizens and third country citizens. Only 11 % of EU citizens are self-employed, which is almost the same proportion as that of the majority population (11.5 % self-employed).

Since 2008 the ratio of foreign nationals working at low-qualified positions has decreased; still, their proportion is higher than that of the total population. At the same time, the sectors in which foreign nationals are employed is changing, too: the number of foreign nationals working in the building industry is decreasing due to the drop caused by the economic crisis, while the data related to industry is relatively stable since 2010 and the data related to trade and services is increasing.

### **(d) Brief Overview of the Procedure of Employment of Foreign Nationals<sup>22</sup>**

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<sup>20</sup> The Czech Republic is divided into 14 administrative units - regions; one of the regions, though rather specific, because it is the capital and not a whole region including the country, is the capital city of Prague.

<sup>21</sup> Newer numbers are not available due to problems with the statistical system or they are not sufficiently reliable. All data are taken over from the data kept by the Ministry of Labour and Social Affairs or of the Czech Statistical Office.

<sup>22</sup> This part (chapter) of the text is with the author's consent **taken over from Faltová M. *Legal Report on the Situation of Undocumented Migrants in the Czech Republic*. 2014. EPIM Report.**

The Employment Act in Section 3 states that individuals who are not citizens of the Czech Republic are entitled to access the labour market under the specific conditions set by this Act. There are two categories of foreigners:

1. Foreigners with unrestricted access to the labour market in compliance with the EU legislation - EU nationals and their family members together with holders of permanent residence permits.
2. Foreigners with limited access to labour market – other categories of third country nationals.

Ad 1. These migrants have unrestricted access to labour market, i. e. they can work without work permit. Under the Act on Employment, the employer is obliged to report an employment of these migrants to the Regional Labour Office (Section 87) and to keep records of the employed migrants with unrestricted access to labour market – copies of their residence permit or any other documents proving that they fall under the category of migrants with unrestricted access to labour market (Section 107).

Ad. 2. Migrants with restricted access to the labour market are third country nationals who need a work permit. The system of employment of third country nationals in the Czech Republic is based on the dual permit – permit to stay and work permit, where the latter is used as a tool of protection of the labour market. A work permit can be issued only if an employer had registered a vacancy at the Labour Office and this vacancy cannot be filled by a worker without restricted access to the labour market (Czech national, EU national, permanent residence holder etc.). When issuing a work permit, the Labour Office is obliged to assess the situation at the labour market.<sup>23</sup>

A work permit can be issued to a foreigner for a maximum of two years. It is issued to a specific vacancy at the specific employer and for a specific place of work and type of work. When changing the employer, type of work or work position, an employee has to apply for a new work permit. A work permit has to be issued for all activities performed under one of the types of contracts specified in the Labour Code, including short-term contracts, part-time contracts or seasonal workers. Several exemptions apply for some categories of the third country nationals who do not need work permit,<sup>24</sup> such as spouses of holders of permanent residence, students, or those to whom a work permit is

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<sup>23</sup> The Highest Administrative Court ruled in the case 6 Ads 139/2011 that there is an obligation of the Labour Office to issue a work permit if both conditions are fulfilled – an employer registered vacancy at the Labour Office and it is not possible to fill the vacancy otherwise.

<sup>24</sup> Section 98 of the Employment Act

issued without the labour market test<sup>25</sup>, i.e. international protection seekers after 12 months of residence in the Czech Republic.

The requirement of having the permit to stay means that migrants in an irregular situation do not have access to the labour market at all. Only migrants with any form of regular (legal) residence permit can apply for a work permit, unless the Act on Employment stipulates otherwise. There are several types of visas and permits with a purpose of employment that can be issued to labour migrants according to the Act on the Residence of Foreign Nationals (FORA). The most frequent and accessible residence permit for the purpose of employment in any profession irrespective of qualification or country of origin is incorporated in the visa over 90 days issued for maximum of six months followed by the long-term residence permit for the purpose of employment that can be issued for a maximum of two years. An applicant has to apply for the work permit in a different administrative procedure at the Labour Office. The permit of stay is issued for the same length as the work permit. There are two single permits, the green card<sup>26</sup> and the blue card<sup>27</sup>, which combine the permit to stay and the work permit in one document within the common procedure. These permits allow employment of highly qualified workers and key personnel requiring specific level of qualification and income under the work contract. In general, any foreigner holding a permit to stay can apply for a work permit and thus to work legally; however, he/she must fulfil the purpose of the stay stated in his/her permit to stay, i.e. to study if he/she holds a student visa or permit.

#### **(e) Labour market controls<sup>28</sup>**

Migrants performing illegal work can be sanctioned under the Act on Employment as well as under the first Act on the Residence of Foreign Nationals in the Territory of the Czech Republic<sup>29</sup> (FORA). Therefore, there are several state authorities involved in labour controls.

According to Section 125 and subsequent of the Act on Employment, the State Labour Inspection Office and Labour Office have the authority to perform controls within the scope of the Act on Employment. The State Labour Inspection Office has eight regional branches. Its main purpose is to control obligations resulting from labour law including safety regulations or illegal work. Labour inspection offices perform controls based on yearly plans and on individual complaints or

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<sup>25</sup> Section 97 of the Employment Act

<sup>26</sup> Section 42g of the FORA.

<sup>27</sup> Section 42i of the FORA.

<sup>28</sup> This part (chapter) of the text is with the author's consent **taken over from Faltová M. *Legal Report on the Situation of Undocumented Migrants in the Czech Republic* Legal Report on the Situation of Undocumented Migrants in the Czech Republic**. 2014. EPIM Report.

<sup>29</sup> Act No. 326/1999 Coll. on the Residence of Foreign Nationals in the Territory of the Czech Republic and on amendments to some Acts, as amended (*zákon č. 326/1999 Sb., o pobytu cizinců na území České republiky, ve znění pozdějších předpisů*)

information from the fieldwork. Labour inspections also provide free consultation services concerning labour law, employees' rights etc. The scope of the authority of Labour Inspection is regulated by Act no. 251/2005 Sb., the Labour Inspection Act. In case of illegal work of migrants the Customs Administration also has the authority to act. Compared to the Labour inspection, the Customs Administration is not authorized to impose sanctions under the Act on Employment, and it therefore only prepares evidence and facts, and if it finds out any breach of law, the case is referred to the Labour Inspections Office.

The Labour Inspections Office imposes sanctions on employers and migrant workers in the administrative procedure. Labour inspectors, Customs Administration and Immigration Police perform complex controls focused on illegal work of migrant workers. The cooperation is based on the formal agreement on cooperation between the State Labour Inspection Office and Custom Administration containing obligation of mutual cooperation in performing controls in the area of employment of migrants to increase effectiveness of administrative procedures and provide feedback. It focuses mainly on the following activities: performing regular controls, coordination of controls, exchange of experience concerning application of relevant legal provisions, its interpretation and unification of procedures during controls, education and training of employees, providing feedback on finished procedures and on collecting financial sanctions. The cooperation with the immigration police is not formalised and it is based on the need of Labour inspectors and capacity of the Police. However, complex controls engaging all the control authorities present are often carried out.

Since both the Act on Employment and FORA impose harsh sanctions on irregular migrant workers for illegal work, irregular workers do not report violations of their rights to authorities. Labour inspections have the statutory duty to start the procedure of sanctioning illegal work and to report such situation to immigration authorities. This practice is based on Section 58, Subsection 1 of the Offences Act that states: "The police, governmental and local authorities should report the offences they learned about to the respective administrative authority, if they are not competent to tackle the offences themselves. The report must contain the description of the type of offence that has been committed, as well as evidence which the authorities have gathered proving that the offence has been committed by a particular person." Act no. 552/1991 Sb., the State Control Act, contains a similar provision. Irregular migrants then in practice do not have access to the protection provided by the Labour Inspection.

## **2. Methodology and Respondents**

The main research method of this work was questioning relevant persons based on a structured interview using questionnaires prepared in advance. This questioning was carried out in four researched countries: Poland, the Czech Republic, Hungary and Slovakia according to a prepared scenario. Key respondents were identified from among state administration workers, employers, experts and the non-governmental sector. The questionnaires for the interviews slightly varied according to the aforementioned categories of respondents. The aim was to address all relevant persons who had participated in transposing the so-called Sanction Directive (Directive 2009/52/EC)<sup>30</sup>. In the CR, in particular, the interviewed persons recruited from among the employees of: the Labour Office, the Labour Inspection Office, the Ministry of Labour and Social Affairs, the Ministry of the Interior, the Foreign Nationals Police, trade unions, as well as employers of foreign nationals from third countries, workers of non-governmental organizations working with migrants and experts.

Respondents were chosen with regard to their professional activities and knowledge. The aim was to recognize the approach from (2) the state administration, as well as (2) from non-governmental organizations that work with the migrants or follow them and try to influence the foreign nationals legislation, and (3) the employers themselves. A significant advantage on the part of the researcher was her insight into the situation of migration in the CR along with the social capital that enabled the researcher to know most of the interviewed persons and the scope of their work. This knowledge and the researcher's credibility probably contributed to the relatively uncomplicated negotiations and easy performance of the meetings, and to the comfortable atmosphere that was the venue of most of the interviews. Exceptions to this were, naturally, employers and respondents from the second researched region – the Ústí nad Labem Region, in which the researcher did not have any contacts. The selection of respondents was performed in such a way that the research would include all main persons who (a) in any way participated in commenting the Sanction Directive's transposition (i.e. especially the ministries and some NGOs), those (b) who are affected by the implemented Sanction Directive in their regular work (i.e. labour offices, labour inspection offices, customs administration), those (c) who may be directly affected by the transposed Sanction Directive (i.e. employers), (d) those who have followed the entire process of the Sanction Directive transposition as experts and (e) last but not least those who are in an everyday contact with the migrants (i.e. NGOs' workers). In total, 20 interviews (7 civil servants, 5 NGO employees, 5

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<sup>30</sup> Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals

employers, 1 trade union, 2 experts); some state administration employees or non-governmental sector workers could also be included under the heading “experts”.

In order to find out the regional differences, the author had chosen two regions in which the research would take place. One of them was the capital city of Prague, the other one was the Ústí nad Labem region. The latter region was chosen because there is, like in Prague, a relatively high number of foreign nationals, but the foreign nationals are not (as for instance in the Pilsen Region) concentrated around a few large factories, but reside all over the region. One of the colleagues of the researcher, who rendered her assistance in making the interviews and contacting the persons from the Ústí nad Labem Region, had been a resident in this region for a long time and therefore has valuable contacts and expert knowledge on which workers come into contact with the Sanction Directives implementation. Seven respondents were from the Ústí nad Labem Region in total.

The most difficult task was contacting respondents from among employers. The most successful strategy was to use contacts of acquaintances who employ foreign nationals, or to contact employers who somehow got into contact with a consultancy non-governmental organization etc. It must be pointed out that many employers refused to be interviewed, saying that they had not employed third country citizens since 2009, because they had been facing so many bureaucratic changes and problems that they decided to employ EU citizens only (especially Romanians and Bulgarians). The selection of respondents from among employees was performed purposefully so as to include employers employing different types of foreign employees, that is those who employ foreign nationals for seasonal works, those looking for foreigners for low-qualified or high-qualified jobs or those who employ otherwise specific groups of foreign nationals.

The respondents were in most cases initially contacted via e-mail and later over the telephone. With the exception of certain schedule difficulties of some civil servants, the appointments were agreed within several days or weeks. All interviews took place at respondents' workplaces, and one was given during a journey in a car. No conflict moments occurred during the interviews and the atmosphere of the interviews can on average be evaluated as positive.

Most respondents were in their middle ages with many years of experience in the area of foreign migration. There were slightly more women among the respondents. Approximately one fourth of the respondents had a legal education. Before the interview, the purpose of the interview was always explained and the respondent was assured that their name would not be stated anywhere. It

was, however, pointed out that precise citations would be used from the interview, together with a reference to the sector in which the individual respondent worked.

Most of the interviews were recorded, transcribed, partially coded and analyzed for the needs of this report. A fifth of the respondents refused the recording. Employers who refused claimed that they did so because they “do not wish to be recorded”. The refusal of recording was partially caused by a certain distrust to providing information on employing foreign workers to an unknown person and by perceiving the topic of illegal employment as rather sensitive. Another group of respondents who refused the recording were state servants, who described their unwillingness to be recorded as an “opportunity to speak more freely without being recorded”. In one case a respondent even asked whether there was an interest to be provided with information to be recorded, or to acquire a real description of the situation. In this case, the second option was selected. An exception was made in receiving information from trade unions, where the interview was made, due to the respondent’s lack of time, partially over the telephone and partially by sending some selected questions for a response in writing.

It needs to be pointed out that the position of trade unions is mentioned relatively rarely in this text. Unlike other states, in the CR trade unions have a rather weak position despite their long history, and their significance is rather declining. They cannot be considered proactive in the area of foreign migration and foreign workers' rights. Their attitude towards foreign workers is rather reserved, and they very often claim that they care in the first place for the protection of *home* workers. This specification (despite the existence of isolated activities aimed at foreign workers) distinctly contrasts with the role of European trade unions or with the trade unions' role towards foreign workers in the neighbouring Germany.

Furthermore, the interview with a representative of the Ministry of the Interior did not have the standard form and took place during a debate with several persons on the implementation of the Sanction Directive; due to the fact that the information acquired was assessed as sufficient, no other interview was arranged<sup>31</sup>.

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<sup>31</sup> A partially specific interview was that with the representatives of the Ministry of Labour and Social Affairs, in that the respondent (as well as her colleague who was present and participated during the interview) did not work at the ministry during the transposition and could thus not comment on all questions. During the detailed interview, however, they explained the ministry's opinion on the discussed matter and described the ministry's proposals for the Directive's transposition.

Interviews were also performed with the representatives of mediation agencies, but due to the fact that these mediation agencies may not legally employ the third country citizens at present, these interviews were not used in this report.

The interviews were performed from December 2013 to March 2014 inclusive. Their average duration was between 30 and 40 minutes<sup>32</sup>. More sensitive questions concerning the illegal employment were asked at the end of the interviews.

Another source of data for this research report was the expert group that meets at present (spring of 2014) in the CR to evaluate the implementation of the Sanction Directive from different angles. This is an activity of members of the Committee for Foreigners' Rights (*Výbor pro práva cizinců*, i.e. an advisory body of the Governmental Council for Human Rights, which is an advisory body of the Government of the CR). In this group there are experts from the non-governmental sector, as well as experts from state institutions. These meetings will result in a preparation of a comprehensive assessment report, which according to the conclusions will propose (to the Committee for Foreigners' Rights and upon approval through the Governmental Council for Human Rights to the Government of the CR) the recommended legislative and/or practical changes in this area.

Last but not least, this report was based, among others, on studying relevant documents; it must be pointed out that several expert articles have been written about the Sanction Directive implementation. In addition, the time of amendment to the Employment Act, in which the Sanction Directive was transposed into Czech law, and which became effective on 1 January 2012, collided with the effort of the then Government to restrict the relatively common work in grey economy. The Sanction Directive transposition thus enter into force when the then Government declared "fight against illegal work" in general in the effort to restrict the relatively common work in "grey economy". This makes the fact that the CR has applied the Sanction Directive in the area of sanctioning illegal work on illegally residing and illegally working third country citizens only, even more paradoxical.

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<sup>32</sup> With the exception of the aforementioned interviews with the representatives of the Ministry of the Interior and trade unions.

### 3. Research results: Employment of Foreigners

**The reasons for employing foreigners** were mainly of two kinds. First, it was the situation when the **proper workforce is not** available in the labour market. These cases can be divided into the situations when a worker with specialized knowledge and skills is demanded and into the situations when the domestic workforce is not interested in the offered job.

*These professionals, in addition those with the knowledge of the Russian environment, are not available here. (employer, 4)*

*Czech people do not want to work at the assembly line... it's a too challenging work (employer, 3)*

Second, it was the situation where the workforce is considered to be significantly **cheaper** and, in a sense, even less demanding. In the discussions about the lower financial demands, two positions interfered, whether and to what extent this approach is legitimate and how the state should react to it in terms of the migration policy.

*The foreigners are dependable and motivated, willing to work all the time, regardless of the weather; I do not deal with their children, they came primarily to earn money. My company could not be running with Czech people. (...) They are flexible and cheap, but I have to deal with the official barriers. (employer, 2)*

*Probably a lot of profit, he is looking for a cheap workforce that is more dependent on him and, it can be said, even more liable to be extorted in the final. (NGO, 5)*

Other, though less frequently mentioned, reasons for the employment of foreign workers, were the previous **positive experience** of the employers (or their relatives/acquaintances) with the employment of foreigners or the fact that the employer is a foreigner himself and prefers his countrymen. Marginally, it is possible to mention the attitude of some employers who see the foreigners as more diligent and, compared with the domestic workforce, more adaptable. Likewise, the reluctance of Czech people to accept a more demanding and less paid job was mentioned (perhaps also due to the functional social system).

*[The employers tell us] that foreigners seem to work more, they do not have such requirements as the Czechs, they do not complain so much. (NGO, 4)*

*The Czechs are lazy; there is a generous social welfare system which does not force them to work. (employer, 2)*

**The knowledge of employers** regarding the procedure of employing the foreigners was considered relatively good, but only on the main issues. Among the respondents, there was a consensus on the

need for a fundamental **distinction between the large companies** that can afford to have a specialized department or at least a personnel manager for the employment of foreigners and **between the small employers** who cannot afford such workforce. Employing foreigners is much more difficult for the small employers. By the large companies, the specialized knowledge was referred, thanks to the specialized department/employee, as trouble-free.

*There is a lot of information: have a look at the portal of the Ministry of Labour and Social Affairs. People can also contact us with questions. And they do so. (...) We are trying to upload there the frequently asked questions and answers as well. (...) even the changes, but in this section we have (...) reserves. (civil servant, 6)*

It was generally referred to as absolutely **the most difficult task to start** employing the foreign workers and to become oriented in the relevant legislation and necessary administration. **The knowledge** of the employers was described as good, but **only in basic matters**; it is natural that the employer often does not even come upon what all the limitations from the settings of work permits are.

*But I think that for someone who starts it is a disaster. He does not know and obviously cannot know, sometimes I myself struggle with it as well, and I have been employing them for nearly 20 years. (employer, 1)*

*The employers have no idea how fixed the work permit is to the job - that they cannot, for example, promote the person, because they need a new work permit for that which they might not get. (NGO, 1)*

However, **discrepancy between the formal settings and practice** were mentioned by both groups, but more so by employers than by NGOs. Mostly the changing conditions were mentioned, even though there was no amendment to the law itself, but only to its different interpretations. Overall, the need for practical information about how the process *really* works than the formal information was emphasized. The failure of the administrative limits of the Ministry of Interior was often mentioned as well as the situation when in one case the handed documents were found in order and in another case, from the perspective of the employer, the same documents were to be completed.

*It never works as a whole as it should; there will always be some difficulties, no matter how hard you have worked to be prepared. We do not have a problem finding any formal information, but you have to experience how it works. And that is where I need help. (employer, 4)*

The solving strategies were mostly to contact the assisting NGOs and the labour offices, to attend various courses or to ask a specialized institution (an intermediary or consulting company). Almost all respondents mentioned that the employers often ask them the same questions repeatedly. Also, a partial difference between Prague and the Ústí nad Labem region occurred, in that the employers

from the region drew much more information from the local labour office: they, for example, sent the information on changes in legislation by e-mail to them, and compared with Prague, it was a little more service organization for them. In the region of Ústí, the counselling days of the offices, the personal contacts with the labour office, the prioritization of personal communication and usage to obtain information during ongoing inspections in the field of employment were also mentioned more frequently.

*Once something is not working, we call them [a consulting company], they handle it all, we could not handle it and they already know the institutions and officials, they always handle it. (employer, 5)*

*I study it permanently; it takes plenty of time - I cannot imagine how small firms do it. (employer, 4)*

*(...) either they go to ask the labour office or they ask us even in the days of consultancy, during inspections and similar occasions. I think that they have the information, another thing is with the notification duty: when they employ a European Union citizen or a foreigner who does not need a work permit, they often do not know about the notification duty. (state administration, 2)*

The employers had **fairly good knowledge of what the rights of foreign workers are and what institutions protect the foreigners in the labour market; however, it must be taken into account that the employers who agreed to be interviewed are probably among the conscious and law abiding.** To a certain extent, this is due to the fact that during the procedure of processing the work permit, the employers are in contact with the local labour office, and maybe also due to the fact that there was a widely publicized "campaign" and there were controls by the labour inspectorates in an effort to restrict the illegal employment in the Czech Republic in the past two years. When there was a breach of law, it was a new or a specific case. The employers occasionally encountered controls by the labour inspectorate, but they consider them quite formal, only with one exception, when they were perceived with a great indignation by the employer. Compared to Prague employers, employers in the region of Ústí were more complaining about the controls<sup>33</sup> and they perceived them as more frequent<sup>34</sup>.

The situation of the employers is also complicated because of the fact that the Aliens Act and also the Act on Employment are quite often amended in the Czech Republic. Also the opinion of the other respondents on the awareness of employers was largely positive and they thought that, except for the possible difficulties caused by the aforementioned reasons, the employers might have more problems with specific cases or a simple omission (often absolutely unintentional) of a certain obligation (eg. reporting an employee).

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<sup>33</sup> The controls itself, not the specific aspects of controls.

<sup>34</sup> The general validity of this statement cannot be concluded on the basis of this small sample.

*...the fundamental information is well accessible, but for example the notification duties are quite complicated and there are lots of them; in that case, I would understand if some is forgotten. (civil servant, 1).*

There is a relatively good **awareness** of the procedure of employing foreigners and well-processed information, for example at the portal of the Ministry of Labour and Social Affairs, on the website of the Ministry of the Interior, the Ministry of Foreign Affairs, on the websites of consulates or some non-governmental organizations, but it shows no information about **the actual procedure of employing foreigners**. It was mostly described **as complicated and lengthy** by almost all the participants (The entire process of engaging a new worker from a third country usually takes about 6-9 months).

*We can plan ahead for almost a year, so we can count with the length, but what about other employers? (employer, 4)*

*We always solve it somehow; they might be here with a short-term visa or likewise. It is possible. (employer, 5)*

*... It is terrible how many things you have to do for that: I started in autumn, sometime in October, and only now [March], I finally know I have them arranged. (employer, 1)*

The opinion that it is just this **complexity which reflects the lack of the state interest in employment of foreigners** was not infrequent. Even some of the state employees felt this complexity as an intention to protect the domestic labour market.

*Those things are made lengthy on purpose. After all, a foreigner comes here on a short-term visa, he finds a job here, but he cannot submit an application here, although the clerk who shall be dealing with it is sitting at Praha Letná; instead, the foreigner he must go back to Kiev, or to Hanoi and submit it there. This is done intentionally in a way that it would be hard to make it work. (expert, 1)*

*[The Trade Union], but they want this procedure not to be quite simple. (trade union, 1)*

*From the perspective of the foreigners I would not (...) it is certainly not simple (...), but on the other hand it is the policy of the state, so as to protect both the market and the system of the third-country nationals. (civil servant, 1)*

In some interviews, it was mentioned that if the employers do not have the information about the rights of foreign workers, such behaviour can be intentional: they are, in fact, not interested in knowing their rights or in observing them. Some respondents talked about the fact that **the foreigners themselves were in reality unable to enforce their rights**, even the most common ones, such as the eight-hour working time.

*We believe that some employers do not even want to study the law and they ignore the related legislation including the Labour Code. (trade unions, 1)*

*Anyone who wants can find the information. But the question whether the workers are able to enforce their rights, is a different thing. In fact, they are quite often not. (civil servant, 3)*

#### **4. Research results: Legal and Illegal Employment**

In all groups of respondents, the opinion predominated that the main reason why the employers employ the workers illegally in the Czech Republic is that **legal employment** (especially if it is a direct employment relationship) **is too expensive**. In general, the respondents did not have a problem with differentiated levies for the direct employees and the levies for self-employed persons; however, the disproportionate favouritism of self-employed persons at present was felt as one of the main reasons for the existence of the so-called Schwarz system in the country. The negative social perception of illegal work was mentioned as well, concluding that **illegal work is not necessarily denounced in principle** by the Czech society, and for many Czech people it is acceptable or tolerable. The cost reduction were among other suggested reasons leading for the illegal employment that means situations when there is an employment relationship, but only such that the worker is not subject to the Labour Code and the resulting requirements. It is the Labour Code which is often perceived ambivalently: on the one hand, the respondents did not cast doubts that it is needed and has a protective function, while on the other hand (with the exception of some state institutions) they had the impression that compliance therewith is too difficult for the employers and prevents the necessary flexibility of the labour market.

*To tell the truth, illegal employment is maybe caused by ... the legal employment is quite expensive. That would be probably the main reason for the illegal employment of Czech workers. (civil servant, 2)*

In particular, the employers often stated that even though they themselves comply with everything, they can understand if other employers look for less legal procedures. The **complexity of the procedure** and sometimes **the lack of interest** on the part of employers to comply with the law or possibly their **incompetence** were stated as the main reasons for that. From the point of view of the labour market settings, a lot of respondents spoke about the inflexible labour market, and such views were not mostly presented by respondents from the civil servants.

*No wonder such cases arise. It's expensive and administratively burdensome. (employer, 3)*

*I think that much of this problem is caused by the inflexibility of the labour market. Unfortunately. (NGO, 1)*

The impossibility or **difficulties in obtaining a work permit or the financial advantage of illegal workers** were stated among the **main reasons for the illegal employment of foreign nationals**. It was mentioned very often that it is usually impossible (for reasons of protection of the labour market) to obtain a work permit for the foreigner from the third countries from the labour office, and this makes foreigners recur to work in a disguised employment relationship. In practice, it is quite difficult to prove that an individual case was one of a dependent work. It should be noted that this problem (the demand for foreign workforce which is usually not able to obtain a work permit, and a foreign national is therefore hired as a self-employed person) has been discussed for quite some time without any change in the Czech Republic<sup>35</sup>. The civil servants and the NGOs also spoke about the paradoxical situation where the foreigner is being employed, for example, at one position for four years, each year he is being granted a work permit and in the fifth year, after which he could apply for a permanent residence, he does not obtain the work permit. Even this was felt by the respondents as one of the reasons for the increase in the so-called disguised employment. The paradoxes, when it is allowed to employ a several tens of foreigners for a company in a region, but then, for the reasons of the labour market protection, individual applications of the small business owners are rejected, were mentioned as well. The fact that in these cases the illegal employment or disguised employment relationships occur was considered understandable by the respondents.

*(...) well, they are for example the people who have already been here for a couple of years and they would like to apply for a permanent residence, for a residence permit, and suddenly they are not granted the permit and they have to deal with it somehow. (civil servant, 2)*

*It's worth it. The procedure for the legal employment of the citizens from third countries is complicated, slow and expensive. (employer 2)*

The existence of the **barriers** for the foreigners to entry the labour market was also mentioned by the respondents from among the civil servants, but it is usually perceived as a protection of domestic workers. There was an interesting identical attitude of the officials from the labour inspectorates and NGO workers (which was also often repeated in other issues). Both groups of the respondents explicitly expressed an understanding why the illegal employment occurs, and that it can also be / is due to the impact of the structural adjustment of the Czech migration policy.

*They would not obtain a work permit, they have no money, but they are forced to procure it, thus they are pushed into the gray zone. (civil servant, 5)*

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<sup>35</sup> This practice has expanded massively since 2009, when the authorities began issuing considerably less work permits. This explains the significantly higher proportion of self-employed persons from the third countries compared to the majority population which is mentioned in the first part of the text.

Among other reasons, the respondents have mentioned the **easier abuse of foreigners which is linked to their greater vulnerability**, whether from the point of view of the necessary residence permit or the limited knowledge, and also their poor knowledge of the Czech language, lack of information about their rights and less probability to denounce the employer by the foreigners. In this context, the well-known and frequent reluctance of the foreigners to sue their employers was mentioned, mainly due to the low probability of success (related to the small chance of proving that the employment relationship actually existed), due to the urgent need of these foreign nationals to continue earning money and even their precarious position in respect to the residence permit during any legal proceedings.

*A Czech person is more risky, he "peaches" on you more easily because there is no language barrier. The foreigners are simple and gullible; they are not well versed in the system and have no chance to get the information. (employer, 2)*

*[It does not get to the courts] one of the parties always withdraws; it is my experience that in most cases it is the foreigner who withdraws (...) they are afraid of the dispute. (...) They prefer to accept the compromise which is not very convenient for them, but a compromise leaves them in peace. (...) Of course, there are cases that the success rate would be very small and so I do not push them - it's always on the client if he wants to go for it or not. (NGO, 4)*

Sometimes, they mentioned even **the reasons of the foreigners themselves** who are looking for the ways how to maximize their profits and pay the least levies.

*Regarding the "Schwarz" system, it is mainly about the cost reduction, the fiscal ones; it means to pay lower taxes. This can often be the interest of the stranger as well. (expert, 1)*

Nevertheless, the reasons of the foreigners themselves were not perceived as something common. In the area of illegal employment, it was possible to hear the reason in the counselling professions that it is primarily a **strategy of the employers** who decide whether a foreigner is to work legally or not and under what conditions. On the contrary, the opinion that foreigners should not accept the illegal employment was held by civil servants.

*They know it. They do not want to be illegal, but mostly it is not them who decide about it for real. They often have no other option. (NGO, 2)*

It was mentioned repeatedly that **the controls in the labour market** which are being held are little discouraging and **little effective**, and the fines are often too low and not enforceable well etc. and do not therefore have such a significant discouraging effect. The doubts as to some limits of these controls (concerning legal regulations rather than the practice) were heard from among the civil servants, too.

*... it is simply more convenient for employers, because they tend to rely excessively on the fact that the sanction for those employers is not applied so much, or is not applied at all ... (NGO, 3).*

There was also a consensus among the respondents, regardless of their region, about the reasons why **the foreigners agree to be employed illegally**. The main reason given was **poverty and the need to make living for themselves and for their loved ones**. In particular, the NGO workers have seen many cases in their practice when the foreigners were in distress, and so they have had no choice in reality but to accept any offer under almost any conditions. The attitude to the foreigners who work illegally can be described as benevolent by the employers. They often considered the situation quite complex as a mixture of difficult requirements for employers, the interest of the foreigner to earn as much as possible and also the fact of a rather imperfect control of the Czech labour market.

*It is an economic necessity for many of them - a matter of survival (especially if they find themselves in a position of illegal residents). Furthermore, they do not pay the deductions from wages, and thus they may have a slightly higher wage. To work without permissions pays back, it's worth the risk. The system of the legal employment is complex, it lacks transparency. (employer, 2)*

*They have the wrong personal data, so they have no other choice. You know, it is really not easy. (employer, 4)*

**The inability to switch from one mode of residence** without the opportunity to work to the residence mode with the opportunity to work was among common, but still relatively frequently mentioned reasons. As an example, the Ukrainians from Kiev were mentioned, who find a job during their stay upon the short-stay visa (90 days); pursuant to the legislation in force they have to go back to their country and only from there they can send their application. The expectations of such behaviour were identified as unrealistic by several respondents.

The widespread system in the Czech Republic, of so-called agents or clients who arrange everything (from finding a job to the extension of the stay and so on) on a non-formalized basis for a substantial fee for some of the foreigners, was mentioned quite often. In the event that the agent keeps the agreement and arranges everything, it may be a functional system, but in the event that the foreigner is cheated or the agent does not manage to arrange the permit extension for any reason, the foreigner has no other choice (if leaving the Czech Republic is not an acceptable option for him) than to accept an illegal job.

*The foreigners are often directly dependent on the agents, they are much more vulnerable than the Czechs and they are not able to defend themselves. (civil servants, 5)*

The respondents (especially from the NGO) pointed out that there is a large groups of foreigners living in the Czech Republic who cannot access the labour market at all, but who have to make their

living somehow. They were in particular the asylum seekers during the first twelve months of residence and the category of the foreigners whose residence permit does not entitle them to work. As a separate category, the foreigners without a residence permit were presented; they, of course, cannot obtain a work permit and no other job than an illegal one comes in question. The respondents also asked the question, to what extent it was legitimate for the state to restrict employment opportunities for certain categories of migrants, for whom it is sometimes quite obvious that they cannot have the funds and of whom no other way of earning a living than illegal work can be simply expected.

*Is it actually normal that someone is legally here and does not work? What do they live on? I'm here, but I do not live on the air. It just does not work like that. (expert, 1)*

## **5. Research results: The Importance of Directive 2009/52/EC**

The employers mostly knew about the implementation of the so called Sanction Directive or they knew about the amendment to the Employment Act which transposed the Sanction Directive, but they did not ascribe it much importance. In some cases, the doubt appeared that an inadvertent omission of some duty might be punished too harshly. **The effect of the implementation was perceived as short-term, deterrent with possible unpleasant consequences.** But generally, they shared the opinion that it **did not contribute to the elimination of illegal employment in the long term.** The opinions that (especially for some types of work such as seasonal work or construction one) the illegal employment is still very worthwhile appeared repeatedly. Also the tolerance to illegal employment was mentioned. In two cases, the employers proposed as an effective a public condemnation of an employer who employed someone illegally; this proposal is also interesting from the point of view that in one case it was made by a man who hires mostly low-skilled workers and he works in agriculture, and in the second case it was made by a worker who, on the contrary, focuses on the employment of highly-skilled workforce.

*I think the meaning is primarily intimidating. In practice, I cannot see any difference, we are just more afraid that we can make a mistake, but we have an experienced personnel department. (employer, 3)*

*I study everything very carefully, so no, this does not mean anything to us. (...) The fines are dissuasive, but mainly, it should be necessary to give the public know who illegally employed, I do not know, to put it out somewhere, that would be effective. (employer, 4)*

*To make something work, such an employer would have to be publicly humiliated, his professional death would have to set in (whether real or moral), he would, for example, have to lose his business. Unfortunately, the overall social climate tolerates all kinds of*

*circumvention of the law. The fines are not a sufficiently functional tool and it is still worth risking [to employ people illegally]. (employer, 2)*

The complaint was often heard from the employers that the minimum limit of the fine for employing the citizens of third countries is set for CZK 250,000, because in practice, an unintentional mistake may occur, for example in the case of the notification duty for which the amount of fine may be entirely inadequate. Even the civil servants warned about a certain complexity regarding this issue. It should be noted that the Czech Republic is currently discussing a proposal that would reduce the minimum amount of the fine to CZK 50,000. This reduction, perhaps surprisingly, was acknowledged very positively by all the respondents who knew about it, regardless of the sector in which they worked. Although the amount of the fine was perceived as being the most deterrent component, reducing the minimum limit of the fine would leave the authorities the opportunity to give higher fines, while in cases of an omission (probably unintentional) of certain directives, the fine would not be so overwhelming for the employer.

**The mere existence of the Sanction Directive was perceived very positively.** The respondents<sup>36</sup> agreed **that the aim was primarily not to punish the illegally employed foreigners, but their employers who benefit from their illegal work.** The prevention from the illegal migration was mentioned among other reasons. In describing this meaning, **the doubts whether this purpose was also accepted by the state** were repeatedly remarked especially by the non-governmental organizations, experts and authorities and the labour inspectorates.

*(...) the directive was, in my opinion, an attempt for a smarter repression, to make the foreigners an accomplice of the state against the employer. But of course, all state authorities denied it brutally because they are set up in a completely different way and they do not know any different way than just to tread hard on everybody. (expert, 1)*

*... the purpose of the Sanction Directive is to punish the dishonest employers who profit from the illegal employment of the foreign workers. (...) The Czech transposition, unlike the German or Austrian ones, aimed not to hurt, if possible, even the employers who either directly or through one or more intermediate bodies (in the chain of subcontracting) employ the foreigners without a work permit or without a residence permit. The obligation to transposition was just satisfied, but very carefully so that it would not help the exploited foreigners and at the same time affect the exploitative employers. (NGO, 3)*

Regarding the importance of the implementation, the **importance of the directive** was perceived mainly as **deterrent**, especially at the time when its transposition came into force. The deterrent effect was thus felt as discouraging, but only in the short term. Among respondents, the opinion

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<sup>36</sup> With the exception of the employers who did not comment on this issue.

prevailed that the impact may rest in the amount of the fines and in the fact that, for this reason, the employers would have a greater respect for the controls of the labour inspectorate. The significance of this impact was often associated with the fact that at the same time, there was a campaign conducted by the Ministry of Labour and Social Affairs against the illegal employment as mentioned above.

**In assessing the implementation** of the Sanction Directive, some addressed experts, NGOs, but even some office workers or workers from the labour inspectorate were **utterly negative**. They perceived particularly negatively the minimum extent of the implementation, in particular, that the transposition of the directive does not apply to the citizens of the third countries / foreigners / workers<sup>37</sup> on the whole, but only to those who both work and reside illegally.

*(...) I perceive it negatively, because there is a clear discrimination [higher penalties for the illegal employment of the undocumented citizens of the third countries], and the powers of, for example, the labour offices are not given clearly or they are very vague, so I think that there are huge reserves. (NGO, 3)*

*A totally missed opportunity, I think. And unnecessarily. (NGO, 2)*

*We had to transpose it the way we transposed it. (civil servant, 6)*

*It is implemented, I would even say, rudely so that it would not affect the employers if possible. (...) In fact, it is made so that it [a lot of provisions] could not be applied at all. (expert, 1)*

As it is mentioned partially above, **even the employers themselves did not notice any significant change**. Especially in some sectors, the illegal employment was still considered normal. If anyone was talking about a change / decrease of the number of foreigners without a residence permit, they related to the different situation around the year 2008 and the present (2014), when the significant decline in the number of foreigners without a residence or a work permit was observed, but this decrease was not assessed as significant in the past two years (i.e. from the coming of the penalty transposition into force).

*Yes. It is [illegal work] relatively common, it cannot be quantified, but nothing has changed compared to the past. It is a common practice especially for small firms; it is most widely used in construction and agriculture. (employer, 2)*

Especially from the point of view of two respondents - lawyers representing the foreigners in the legal proceedings, it was independently pointed out that about 200 foreigners were deported on grounds of illegal employment from the Czech Republic every year which clearly refers to the fact that there are illegally employed foreigners in the Czech Republic. However, the administrative and

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<sup>37</sup> The target group, which the Sanction Directive should apply to, differs according to the individual respondents.

criminal proceedings with the employer of such a foreigner are often not even commenced. These lawyers then described in detail a few specific cases where the foreigner was deported for working illegally, but the name of the employer was not even properly identified and it was not stated in the preamble to expulsion as well. In the Czech Republic, this leads to a paradoxical situation where the illegally employed foreigners are expelled, but their employers, who are from a position of power in the majority, are neither punished nor even identified; this is obviously contrary to the spirit of the Sanction Directive.

In the interviews, it was also repeatedly heard that the directive was implemented in compliance with the wording of the directive, but since it was implemented in the lowest possible extent, **it does not bring the change that it should have brought, because there is no space for its practical use.**

The notification duty about the possibility to extort the wage that is stated in the Sanction Directive was evaluated very negatively, as in the Czech Republic it only proceeds in a way of handing over a written instruction on a single page. But some civil servants disagreed with the negative assessment in this area.

*We give them the instructions [that they have the right to claim their wages] in written form. We have it in many different languages (...) yes, they get a lot of information but they can keep it (...) we tried to be as effective as possible. (expert, 2)*

*Should we go after the foreigner and extort his wages? (civil servant, 8)*

*Strictly speaking, they do not offer anything to them, handing over the information in writing is good for nothing. (...) Thus it has got huge limitations. (NGO, 1)*

Several major areas where the directive brought space for a considerable improvement, but which was not used, were mentioned in reaction **to the specific criticism of the effectiveness of the implementation** (except the neutral view of some civil servants). This confirmed the aforementioned consensus of the employers who expressed themselves in the sense that there had been no visible change except for the information campaign against the illegal work. In particular, the respondents with a legal education and/or working in non-governmental organizations often pointed to the following provisions of the measure, which basically preclude the fulfilling of the purpose of the Sanction Directive. One example may be that according to the Czech transposition **the employer shall pay the owed wages to the foreigners if the employer had been imposed a fine**. Setting the imposition of a fine as a condition for the payment of the wage is perceived as unfair and unnecessary, because in practice, it often does not have to come to fining due to procedural reasons. The provision which states that **it is possible to set the liability of the main contractor or subcontractor only in a period of three months** from the time when the (mostly main) contractor

had been fined was also criticized. The respondents with legal education described this provision mostly as inapplicable, especially because the identification and untangling of the subcontracting chains is very difficult and time-consuming, any defendant company will appeal, there will be a communication with several authorities (particularly the inspectorate and the labour office) and the whole process will take longer than 90 days. The Czech Republic did not take the advantage to make the main implementer of activities liable for the illegal employment and not just "the caught one", i.e. the subcontracting employer who directly employs the foreigner without a residence permit<sup>38</sup>. Furthermore, **the preclusion to access the public contracts and grants, including the access to EU funds** was applied **only to traders** and the **crime** - the illegal employment of foreigners was **conditioned by** the fact that it occurred in an otherwise unspecified "**large scale**".

*The meaning of the Sanction Directive in practice? No foreigner has been given a residence permit in order to claim his right arising from the Sanction Directive, not a single employer has been convicted of illegal employment, no administrative proceedings on the liability of the main implementer has been commenced. (...) Is it necessary to say anything more? (NGO, 2)*

*...very little; if it was used, we would definitely come across it [but we did not], although we work with (...) 1,800 foreigners each year. (NGO, 5)*

*...good ideas but I do not see much impact... (civil servant,4)*

The repeated criticism resounded about the fact that on the one hand the implementation of the Sanction Directive somehow helps the employers and on the other hand it brings unfair and possibly unnecessary sanctions for a formal misconduct. This view was shared by employers, and even all control and consulting institutions.

*It's just, I'd say, too nationalizing, too strong role of authorities on the one hand but the maximum effort not to work. Then, from this point of view, it is paradoxical that the minimum fine is, in this context, in such a high amount as CZK 250 000. (expert, 1)*

**The question of other tools that might help prevent the illegal employment** of foreigners was often conceived in different ways. The respondents were often aware that if there is a group of (potential) migrants who will not be able to find at least partly adequately paid work in their country of origin, there will still be a supply of cheap illegal labour and due to the constant effort of the capitalist market to increase profits and reduce the costs, it will also be utilized. On this issue, they therefore added a need for **the support for a better development of the source countries**.

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<sup>38</sup> To do so, the proceedings with the direct employer concerning the penalty would have to be made final and conclusive and subsequently another administrative proceedings concerning the liability of the main implementer should be conducted, which is almost an impossible situation in the Czech practice (for details see Rozumek, 2013)

In particular, the state servants mentioned the necessary **tools for the prevention and awareness** in terms of awareness-raising events, newsletters, publication of information in the local press in the countries of origin, in media or at embassies.

*We are concerned primarily about prevention. We want to focus on it most. (civil servant, 6)*

The need for awareness was not questioned by any of the respondents, but by the NGOs, labour offices and labour inspectorates, there was a greater tendency to see the awareness as a step A, after which a step B must follow, which is the **enforceability of (labour) rights of the respondents**; otherwise the step A loses its sense. The enforceability of the labour rights of the foreigners was often challenged by the aforementioned spheres, as a matter of fact; they spoke about it as "difficult". Plenty of respondents came across more specific problems in the interviews, among them **the overall adjustment of the labour market** dominated which does not encourage too much for the direct employment and at the same time, especially in recent years, it generates a series of other increasingly used methods of work, for example through the various subcontractor or sub-sub-sub-sub supply chains. In this respect, it was a hint or even explicitly pointed out to the **settings of the control of the labour market** that would need changes in settings, legislation and perhaps even capacities for a greater effectiveness.

*What are their [inspectors] tools to uncover such a chain? None. And I think that there is not even a will on the part of the state. (NGO, 2)*

*We are really not able to uncover these relationships. It's highly time-consuming, the companies have their managing director abroad; it is often not even possible to contact them. (...) then they invoke (...) it takes weeks of work. And what comes of it? (...) some legislative changes would be needed (...) and to our jurisdiction. (civil servants, 3)*

The NGO and even one addressed expert pointed out with disapproval in all cases that work and residence controls are connected in the Czech Republic. To use the controls of the labour market as a protective mechanism for all workers, and also for foreigners, these respondents felt a necessity to separate the controls of the labour market and the controls of residence. The separation of these controls would significantly contribute to the assurance of the foreigners to enforce their labour rights, regardless of their immigration status.

As a vital reminder, also mostly from the NGO, the fact that the residence and work permits are interconnected was mentioned. Any loose or no connections of the residence permit to the work permit would, in principle, contribute to a more equal status of the foreigners, and therefore their lesser vulnerability and to enforce their rights easier. **The most similar position of the foreigners to**

**the level of the majority of the population** (in terms of rights and obligations) was very often mentioned, in particular by the NGOs, but sometimes by the employers, as crucial.

*If they come here one day, they have to be assimilated to Czech citizens to the largest possible extent; only then will they be able to claim their rights. (NGO, 2)*

*If they are allowed to come and work, they should have the same opportunities. The strict policies should happen before they get the work permission or before they come but not later on ... as it is in certain aspects now. (civil servant, 4)*

*But otherwise, those sanctions are generally sufficient. (...) it would be more useful to strengthen the rights of the foreigners to help them to claim their rights by themselves. (expert, 1)*

As a possible solution to the larger impact of the directive, for example, out of more larger and less conditional extent of the transposition of the directive, the proposal for a possible **acquisition of a** (long-term) **residence permit** for those who report an illegal employment and help to prove it was suggested.

## **6. Recommendations**

The opportunity created by the Sanction Directive in respect of the restriction of the illegal employment, was only used with large limits. Its broader and less conditional implementation is among the specific suggestions to improve the situation of illegal employment, and they include in particular the following:

- the expansion of the groups of foreigners to which it applies (at least all citizens of the third countries);
- simplifying the possibility to exclude the main implementer/employer from the public contracts and supports from the EU;
- significant strengthening of the rights of the foreigners who protest against the illegal employment (especially in terms of granting a residence permit);
- not to condition the payment of the owed wages to the foreigner by the employer by the fact that he/she was imposed a fine;
- to eliminate the possibility of determining the liability of the main contractor only within a period of three months from the time the contractor had been fined and at the same time to adopt a provision that makes the main implementer of activities liable for illegal employment;
- the preclusion to access to the public contracts and grants, including the access to the EU funds should apply to all employers.

Among other proposals that would limit the illegal employment of foreigners appeared the following:

- a constant support for the organizations that deal with this issue and provide the necessary legal advice to the migrants (including support for the field work);
- stricter measures for the issue of the trade measures in terms of language skills;
- significant simplification and clarification of the Aliens Act;
- the existence of an institution that would be able to cope and, in the event of a dispute, would be competent to decide and assess the specific cases, whether it is the so-called Schwarz system or not (i.e. a variant of an authorized expert for these cases, who would be taken seriously by the courts and other state institutions);
- a change in the migration policy so that the work permit is not linked to a specific job (inspiration by the Portuguese model of an open labour market was proposed repeatedly);
- according to several respondents from different spheres, the regularization of the foreigners without a residence permit would bring a significant improvement;
- de-liberalization of the labour market from the perspective of restrictions of the various forms of employment relationships and contracts; as a specific example the agreement on work performance was stated, which is limited to the maximum of 300 worked hours for an employer during a calendar year (in practice, however, this agreement allows to legalize the illegal work in case of a possible inspection);
- to create informational cells for the foreigners<sup>39</sup> in every larger town where they could come for any advice; their problems would not have to be solved there directly, but they would get the information what to do, who to contact, etc...

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<sup>39</sup>One respondent suggested an analogy to the Czech "Czech Point" for foreigners. "Czech POINT" is an assisted place for the public administration in the Czech Republic, enabling the communication with the state through one place so that "no citizen has to circulate but just the data"

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