



Implementation of the Employers` Sanctions Directive in Slovakia



Košice 2014

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1. INTRODUCTION

1.1. Migration policy incorporated in the legislation of the Slovak Republic

The concept of the migration policy has been encompassed in the migration policy document adopted on 31st August 2011 by the Resolution of the Slovak Government N. 574 under its official title **“Migration Policy of the Slovak Republic with the Outlook to 2020”** (*Migračná politika Slovenskej republiky s výhľadom do roku 2020*). This is an essential document and underlying basis for building up a modern and confident policy of the Slovak Government in the field of migration.

In line with national interests of the Slovak Republic, the aim of the migration policy is to create adequate conditions, particularly in the field of legal migration with regards to the priority, necessity and ability to host migrants and enable their integration in the society, raise effectiveness of the custom controls of people crossing the border and **the fight against illegal migration**, contribute to the adoption of the common European asylum system, take part in the creation of global partnerships with countries of origin and transit in order to improve interactivity between migration and development, hence contribute to improved quality of living of the Slovak population.

Migration policy of the Slovak Republic has been divided in several spheres and priorities:

1. **Legal migration**
2. **Integration**
3. **Emigration of qualified workforce**
4. **Illegal migration, returns and human trafficking**
5. **Protection of borders**
6. **International protection, migration and development**
7. **Institutional facilitation**

Within the migration policy of the SR, the issue of illegal work and illegal employment has been incorporated in the “Legal migration” priority and partly in the priority of “Illegal migration, returns and human trafficking”.

Legal migration

Legal migration as part of the migration policy is focused primarily on the “conducted economic migration” which means that the Slovak Republic shall adopt policies to actively promote hosting of economic migrants and employment of migrants from third countries in accordance with the situation of the Slovak economy and its labour market.

Several objectives have been set in this field as well as the objective concerning the issue of fighting against illegal employment defined as:

„carrying out more thorough controls of migrants in order to prevent their illegal stay, employment or business activities and in order to ensure the same working conditions including wages and social security and their protection“.

Within the migration policy priority, the Slovak legislation has incorporated the Directive 2009/52/EC of 18th June 2009.

Illegal migration, returns and human trafficking

Complying with its international obligations, the Slovak Republic has managed to successfully fight against all forms of illegal migration taking into account the aspects of human rights related to this phenomenon. Dealing with issues of illegal migration is a coherent part of the migration policy which consists of a number of preventive and repressive measures.

The key objective within the migration policy in this field is to develop cooperation with other EU countries in order to fight illegal migration, **adopt legislative, organizational and administrative measures in order to prevent illegal migration in the sphere of control and sanctions for illegal employment of migrants. This part of the migration policy involves the incorporation of the Directive of the European Parliament and the Council 2009/52/EC of 18th June 2009.**

1.2 Basic legal framework regarding migrants

The legal framework consists of a great number of legal regulations which partly provide for the issue of migration, employment relationships of foreign nationals, rights and obligations of migrants regarding their employment relationships, rights and obligations of employers regarding migrants, rights and obligations of public bodies acting in this field and so forth. The most important legal standards in this field include:

1. **The Constitution of the Slovak Republic** which is the fundamental law of the country. The Slovak Constitution contains fundamental principles of the rule of law which is an essential prerequisite enabling migration. This mainly concerns provisions establishing basic rights and freedoms, such as the right to free movement and stay and so forth.
2. **EU legal regulations concerning migration** which have been incorporated in the Slovak legislation, directives and regulations of the Council and so forth.
3. **Act N. 404/2011 Coll. on the stay of foreign nationals** which constitutes the fundamental legal regulation governing the issue of migration. It governs in particular conditions for foreign nationals to enter the territory of the SR, conditions for foreign nationals to obtain permits of stay in the territory of the SR, forced expatriation of foreign nationals, detection of foreign nationals and the rights and obligations of foreign nationals in Slovakia and the rights and obligations of the police immigration department and so forth.
4. **Act N. 5/2004 Coll. on employment services** which defines in particular the term “work permit” and stipulates conditions for different categories of foreign nationals to enter the labour market.
5. **Act N. 82/2005 Coll. on illegal work and employment** which has already incorporated a majority of provisions of the Directive. It defines in particular the term of “illegal employment” in terms of the Directive, obligations of employers, criminal liability of employers, sanctions for illegal employment.
6. **Act N. 480/2002 Coll. providing for asylum.** The act governs the institution of asylum and subsidiary protection as well as procedures which need to be carried out before the asylum or the subsidiary protection, respectively, is granted. It also defines the rights and obligations of asylum seekers and persons with subsidiary protection.
7. **Act N. 125/2006 Coll. on labour inspections** which incorporated the competence of labour inspection authorities as bodies authorised to control illegal employment, impose sanctions for illegal employment and procedural provisions concerning the performance of illegal employment inspections.

8. **Act N. 300/2005 Coll. Criminal Code**, as amended by act 262/2011 Coll. which governs the new criminal offence of “illegal employment”
9. **Act N. 311/2001 Coll. Labour Code** providing for employment relationships, rights and obligations of their parts, control within the field of employment relationships and so forth.

1.3. Transposition of the Directive 2009/52/ EC into the legislation of the SR

The Directive 2009/52/EC of 18th June 2009 providing for minimum standards for sanctions and measures against employers of illegally staying third-country nationals has been incorporated in the legislation of the SR by Act N. 223/2011 Coll. which came into force on the 20th July 2011 in accordance with Article 17 section 1 of the Directive. The same act equally brought into force the Directive 2009/50/EC of 25th May 2009 providing for the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.

The Directive’s provisions have been transposed through the aforementioned act in particular in Act N. 82/2005 Coll. providing for illegal work and employment. However, due to the application of provisions of the Directive, the following legal regulations had to be changed:

1. Act. N. 48/2002 Coll. On stay of foreigners (this act is no more valid and has been replaced by Act N. 404/2011 Coll. On stay of foreigners which incorporated the same legal regulation as stipulated by the Directive’s provisions),
2. Act N. 231/1999 Coll. on State Aid
3. Act N. 523/2004 Coll. on Budgetary Rules for Public Administration
4. Act N. 461/2003 Coll. on Social Insurance
5. Act N. 453/2003 Coll. on State Administration Organisation in the area of Social Affairs, Family and Employment Services,
6. Act N. 5/2004 Coll. on Employment Services
7. Act N. 125/2006 Coll. on Labour Inspection

In compliance with the Directive, the Criminal Code (Act N. 300/2005 Coll.), through Act N. 262/2011 Coll., incorporated a new factual background of the criminal offence of “illegal employment” which became effective on 1st September 2011.

2. LEGAL SITUATION OF MIGRANT WORKERS

2.1. Access of third-country nationals to the labour market

Access to labour market for nationals is governed by Act N. 5/2004 Coll. on employment services. The Act defines cases when a third-country national needs a work permit and cases when the work permit is not necessary.

As the central focus of this analysis is illegal employment of third-country nationals, the issue of access to labour market is only commented in brief and mainly outlines the basic legal regulations.

In legal relationships when employment services are delivered, third-country nationals enjoy the same legal position as Slovak nationals. This is the case of those third-country nationals who:

- a. were granted a work permit and a temporary residence permit for the purposes of employment. They are supposed to apply for the work permit in written and submit their application to a competent authority before their arrival in the Slovak Republic. They can apply by themselves or via their future employer. Work permit is granted by the competent authority whose competence is within the same territory as the place of work of the third-country national.
- b. are holders of the EU Blue Card
- c. at the same time apply for asylum and whose access to labour market is allowed by the Act on asylum. The Act on asylum stipulates that a third-country national applying for asylum has the right to enter the labour market, however, on condition that his/her asylum procedure has not been terminated within the period of 1 year from lodging the application for asylum. After this period has passed, the applicant can be employed after the Migration Office of the Ministry of Interior of the SR has confirmed this fact.

Employers having their registered office in the territory of the Slovak Republic may only employ those third-country nationals who fall in one of the above mentioned categories, unless otherwise stated by law.

Work permit can only be granted by a competent authority to third-country nationals, if the vacancy cannot be occupied by job-seekers registered in the list of job applicants. As a rule, when granting work permits, Labour Office takes into consideration the situation on the labour market first.

In specific cases exhaustively defined by the law, the Labour Office can grant work permit to a third-country national even without taking into consideration the situation on the labour market. This is the case of persons who have been granted subsidiary protection in accordance with the Act on asylum, persons with extended tolerated residence who have become the victims of human trafficking, persons who have been granted tolerated stay due to respecting their private and family life, and so forth.

The law specifically defines categories of third-country nationals who are not required to obtain a work permit. This is the case of persons who have been granted a permanent residence permit or persons with a temporary residence permit for the purposes of employment pursuant to specific legal regulation; persons who have been granted a temporary residence permit for the purposes of a family reunification or entering employment relationships or similar employment relationship which is allowed by the Act on stay of foreign nationals; persons who have been granted a temporary residence permit for the purposes of their studies and whose employment in the territory of the Slovak Republic does not exceed 10 hours per week or a corresponding number of days or months per year; persons who are applying for asylum and their entry to the labour market is allowed by the Act on asylum; persons who have been granted asylum; others.

It follows that the current legal regulation allows the access to labour market of third-country nationals who have been granted a permit of tolerated stay on the grounds of an application submitted to the competent law enforcement authority associated with criminal proceedings against illegal employer, however, to a limited extent, as the work permit can be granted to such a third-country national with regards to the situation on the labour market which is extremely unlikely due to the currently high unemployment rate.

2.2 Limitations of the labour market leading to the loss of legal position

In current situation of the SR these limitations affect particularly third-country nationals who have been granted a temporary residence permit for the purposes of employment. The conditions and procedures of granting temporary residence permit for the purposes of employment are set out by the Act on stay of foreign nationals together with Act on employment services.

A Police Department shall grant temporary residence permit for the purposes of employment on the basis of employment permit issued by the competent Labour Office which is granted for a specific job as indicated in the application which states the name of the employer, job description, place of work and expected length of employment. This application also includes the promise of the employer to recruit the third-country national.

By termination of employment and regardless of the cause of termination, the work permit pursuant to law becomes invalid as well as the purpose of the temporary residence. Due to the expiration of the purpose for which temporary residence permit had been granted, the temporary residence shall be cancelled.

2.3 Liability of illegally employed third-country nationals

Illegal work is defined by the Slovak legislation as follows:

- 1 work carried out without temporary residence permit granted for the purposes of employment and without work permit if this is required for a third-country national
- 2 dependent work carried out for a legal or natural person (entrepreneur) without a contract of employment establishing employment relationship in accordance with the valid provisions of the Labour Code

Carrying out illegal work is unlawful and considered as **misdemeanour**. Misdemeanours in the field of illegal work are processed by: The Central Office of Labour, Social Affairs and Family and Labour Inspectorates. Legal proceedings are regulated by specific legislation – Act N. 372/1990 Coll. on misdemeanours. Illegal work as an misdemeanour can be sanctioned by a penalty amounting to a sum of up to 331 euros. However, its final amount is determined by the administrative authority during the misdemeanour procedure taking into account individual circumstances of the case.

2.4 Legal position of undocumented migrants

Access to health care

Article 40 of the Constitution of the SR declares: *“Everyone has a right to the protection of health. Based on public insurance, citizens have the right to free health care and to medical supplies under conditions which shall be laid down by law.”*

Access to health care is regulated by several laws; the most significant are Act no. 576/2004 Coll. on healthcare as amended by Act no. 580/2004 Coll. on health insurance as amended, by Act no. 577/2004 Coll. on range of health care covered on the basis of public health insurance and on payments for services associated with providing a health care, by Act no. 578/2004 Coll. on health care providers, etc. These laws

apply to all persons on the territory of the SR and clearly define under what conditions and in what range the different categories of persons are entitled to receive health care.

Free health care for foreigners on the territory of the SR is provided on the basis of public health insurance. In this case the insurance payer is employee, self-employed person, employer or state (according to the status of a person).

Obligatory public health insurance applies to all natural persons with permanent address on the territory of the SR (therefore also to foreigners with permanent address on the territory of the SR), as well as to all persons who do not have permanent address on the territory of the SR but are employed by employer with registered office in the SR, or have trading certificate in the SR, etc. Compulsory public health insured person is also a foreigner who is secured and in his case the insurance payer is the state. When the foreigner is policyholder of the public health insurance, he/she is guaranteed the same rights and obligations associated with the providing and payment for health care as a Slovak citizen and policyholder.

In the matter of foreigners who are not subject to public health insurance, foreigners are able to conclude a commercial insurance contract with an insurance company under the provisions of the Civil Code under which they are provided health care to the extent set in the insurance contract. However, undocumented migrants, who are on the territory of the SR in conflict with applicable legislation, do not have this option because the insurance company requires a valid proof of residence at the conclusion of the insurance contract.

However, based on the Constitution of the SR, Act no. 576/2004 Coll. on healthcare states in § 11:

"1) Each person is entitled to the healthcare provision.

(2) The right for the healthcare provision is guaranteed equally to everybody in accordance with the principle of the equal treatment in healthcare set out by a separate regulation. In line with the principle of equal treatment, the following is forbidden: discrimination due to gender, religion or faith, marital and family status, colour of skin, language, political and other opinions, activities in the trade unions, national or social origin, health disability, age, property, family line or another status."

This provision guarantees the providing a health care to everyone (regardless of the legal status) but applies only to providing emergency health care. For emergency health care is considered: *"healthcare provided to a person in case of a sudden change of the health condition directly endangering life or any vital functions, potentially seriously endangering his/her health if not provided fast, causing a sudden and intolerable pain or provoking sudden changes of behaviour and action under influence of which the person directly endangers themselves or surroundings. Emergency care is healthcare provided in the case of a birth as well. Emergency care is also the examination of person identified as a possible source of rapidly spreading and life-threatening infection, diagnosis and treatment of person with rapidly spreading and life-threatening infection. Emergency care includes emergency transportation of a person to a medical facility, emergency transportation from one medical facility to another and emergency transportation of donors of organs, tissues and cells for the purposes of transplantation performed by medical rescue services providers."*

However, the legislation does not state which entities are obligated to bear the payment for the provided health care. Therefore, health care providers require from undocumented migrants a direct payment for services rendered or they contact the authorities in order to determine who is liable to bear the payment. The legislation does not state a duty for health care provider, or its employees, to report such an undocumented migrant to relevant authorities – police authorities, labour inspectorate etc., ergo it is entirely their decision. Anyway, such a migrant runs a risk of detection by visiting health care facility.

Access to legal protection

The right to judicial and other legal protection is a constitutional right granted to all people regardless their nationality or form of residence. The Constitution provides that foreign nationals in the Slovak Republic enjoy fundamental human rights and freedoms guaranteed by the Constitution, unless these are explicitly granted to national citizens.

Everyone may claim his right in an independent and impartial court and, in cases laid down by law, at another body of the Slovak Republic. Anyone who claims to have been deprived of his rights by a decision of a public administration body may turn to the court to have the lawfulness of such decision re-examined, unless laid down otherwise by law. Everyone is entitled to compensation for damage incurred as a result of an unlawful decision by a court, or another state or public administration body, or as a result of an incorrect official procedure. Everyone has the right to legal assistance in court proceedings, or proceedings before other state or public administration bodies from the start of the proceedings, under conditions laid down by law.

Anyone who declares that he does not have a command of the language in which the proceedings are conducted has the right to an interpreter.

Access to education

As a rule, undocumented migrants do not have access to education as one may only be admitted for studies after having presented valid identity documents, valid residence documents and all necessary documentation proving previously obtained education. As a matter of course, pursuant to the School Act, compulsory school attendance is applied to minors under 16 years of age which is highly unlikely to work in practice as undocumented migrants would be exposed to a significant risk of detection and related consequences.

3. DIRECTIVE 2009/52/EC

3.1. The scope of provisions

The Directive 2009/52/EC was adopted on the 18th June 2009 as part of the conceptual fight of the European Union against illegal migration and illegal stay which is closely related to illegal employment. The Directive is to be considered as a complementary measure to fight illegal employment and exploitation. As indicated in its title, the Directive only stipulates minimum standards which all EU member states shall guarantee. Hence, the member states have the right to decide whether they shall adopt or maintain tougher sanctions and measures and impose tougher obligations on employers than those provided by the Directive.

The Directive 2009/52/EC prohibits employment of illegally staying third-country nationals (Article 3 of the Directive).

It does not apply to:

- a) Third-country nationals staying legally in a Member State regardless of whether they are allowed to work in its territory
- b) Persons enjoying the right of free movement as defined in Article 2(5) of the Schengen Borders Code
- c) Third-country nationals who are in a situation covered by Community law, such as those who are lawfully employed in a Member State and who are posted by a service provider to another Member State in the context of the provision of services.

This Directive should apply without prejudice to national law prohibiting the employment of legally staying third-country nationals who work in breach of their residence status.

In accordance with the Directive's provisions, § 2 (5) of the Act on illegal work and illegal employment has incorporated in the definition of the term "illegal employment" the employment of those third-country nationals who are staying in the Slovak Republic in breach of the legislation of the SR (Act N. 404/2011 Coll. on residence of foreign nationals and Act 480/2002 Coll. on asylum) while being in dependent work.

3.2. Obligations of employers (Article 4 of the Directive)

Obligations of employers defined in Article 4 of the Directive have been transposed into a new provision § 23a of the Act on employment services. Section 1 of this provision established the obligation of employers to ask third-country nationals to present their valid residence document or their valid permit of stay before employment of third-country nationals and to keep the copy of the residence document (or another permit of stay) as minimum until the end of employment of the third-country national. The employer is also obliged to inform in written the competent Office of Labour, Social Affairs and Family about the date of commencement and the date of termination of employment of the third-country national within 7 working days since the start of employment or termination of employment, respectively.

The requirement of Article 4(3) of the Directive has been incorporated in the new provisions of § 7b of the Act on illegal work and illegal employment: A legal or natural person shall not be held liable for illegal employment of a third-country national without valid permission to stay in the SR provided that all of employer's obligations have been fulfilled, unless the employer knew that the document presented as a valid residence permit or another authorisation for stay was a forgery.

3.3. Sanctions imposed on employers

Article 5 of the Directive stipulates the obligation of Member States to take the necessary measures to ensure that infringements of the prohibition referred to in Article 3 are subject to effective, proportionate and dissuasive sanctions against the employer. These sanctions shall include:

- a) financial sanctions which shall increase in amount according to the number of illegally employed third-country nationals
- b) further sanctions - payments of the costs of return of illegally employed third-country nationals

Financial sanctions

Imposition of financial sanctions within the Slovak legislation is governed by several legal regulations which are directly referred to in Amendment of Act 223/2011 Coll.

Control of illegal work and illegal employment is carried out by competent Labour Inspectorates. Sanctions for illegal employment in terms of Act on illegal work and illegal employment can be imposed on legal and natural persons amounting to 2 000 euros minimum up to 200 000 euros maximum. The amount of sanction shall depend on the gravity of defects found out and the gravity of their consequences, repeated detection of the same defect and if the sanction is imposed for illegal employment, its amount shall also depend on the number of illegally employed individuals.

Control of the compliance with provisions of Act on employment services is carried out by Central Offices of Labour, Social Affairs and Family as well as local competent Labour Offices of Labour, Social Affairs and Family. Provided that a sanction has been imposed on the controlled entity for the same infringement by another inspecting body in accordance with another legal regulation, the penalty for illegal employment cannot be imposed to avoid duplication. The Act on employment services allows to impose sanctions on an employer in breach of his/her obligations stipulated in Act on employment services up to the amount of 33 193, 91 euros. It is possible to impose this penalty in a one-year subjective period (i.e. within one year since the day on which the Central Offices of Labour, Social Affairs and Family detected the breach of obligations). However, also a three-year objective period has been stipulated (within three years since the day on which the breach was committed). In case of infringement of prohibition of illegal work or illegal employment has been detected by the Office of Labour or the Central Office of Labour, they must inform the competent Labour Inspectorate, Social Insurance Institution and the Police Department if the person illegally employed is a third-country national. These authorities shall then act accordingly and within their competence.

Further sanctions

Specific legislation provides that costs of administrative return of illegally employed foreign national shall be paid by:

- a) those who illegally employed a foreign national,
- b) those who mediated illegal employment,
- c) those who contractually delivered work, goods or services for the person who illegally employed a foreign national,
- d) those who contractually participated in the delivery of work, goods or services as referred to in c).

The responsibility to pay the hereinabove mentioned costs of administrative return of a foreign national shall apply in the order mentioned above.

However, in case of subjects mentioned in c) and d) above, obligation to pay costs of administrative return may only be applied if the breach of illegal employment prohibition was known by the person who concluded the contract on behalf of the person mentioned in c) or d) above.

3.4. Further measures against employers
The Directive also regulates the so called back payments analysed in more detail in part 3.8. of this analysis.

These measures are established in Article 7 of the Directive:

Member States shall take the necessary measures to ensure that employers shall also, if appropriate, be subject to the following measures:

- a) exclusion from entitlement to some or all public benefits, aid or subsidies, including EU funding managed by Member States, for up to five years;**
 - b) exclusion from participation in a public contract as defined in Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts for up to five years;**
 - c) recovery of some or all public benefits, aid, or subsidies, including EU funding managed by Member States, granted to the employer for up to 12 months preceding the detection of illegal employment;**
 - d) temporary or permanent closure of the establishments that have been used to commit the infringement, or temporary or permanent withdrawal of a licence to conduct the business activity in question, if justified by the gravity of the infringement.**
- 2. Member States may decide not to apply paragraph 1 where the employers are natural persons and the employment is for their private purposes.**

These measures against employers are subject to legal regulation through several legal standards:

- Act N. 523/2004 Coll. on budgetary rules for public administration
- Act N. 25/2006 Coll. on public procurement

Act on budgetary rules for public administration establishes conditions for granting subsidies from the state budget (as a rule EU funding is included in the revenues to national budget), as well as fundamental obligations of subsidy recipient when drawing the subsidy or its financial resources. One of the conditions which the applicant for a subsidy has to fulfil is that he/she has not acted in breach of prohibition of illegal employment over the past three years. Fulfilment of this condition has to be proved by the confirmation of a competent Labour Inspectorate which cannot be older than three months and proves that the applicant has not breached in the before mentioned prohibition.

Legal and natural persons – entrepreneurs who breached in the prohibition of illegal employment of third-country nationals illegally staying in the territory of the SR are obliged to return the subsidy granted from the national budget during the period of 12 months prior to the day when the decision on penalty imposition for infringement of prohibition of illegal employment came into force and return the subsidy within 30 days from the date on which the decision came into force.

Act on public procurement

The amendment of Act extended the background which is considered a severe infringement in qualified obligations for the purposes of public procurement. Breach in the prohibition of illegal employment is also considered to be severe infringement in qualified obligations; however, only in the case that a legally valid penalty has been imposed for it. The legal consequence of severe infringement in qualified obligations is the exclusion from public procurement procedures. In order to evaluate the admissibility of participation in public procurement, the period of three years prior to the commencement of public procurement must be evaluated and the public procurer is obliged to prove this fact.

Closure of establishment or withdrawal of a licence to conduct business activities

The measure in line with Article 7 d) of the Directive can be applied in terms of the Slovak legislation only in case of repeated infringement in the prohibition of illegal employment as this is considered to be severe infringement of Act on illegal work and illegal employment. If an entrepreneur conducting business activities acts in breach of the conditions and obligations set out by the law in a particularly serious manner, the Licensing Office with competence in the area of registered office of the legal person or the area of permanent residence of the natural person shall withdraw his/her business licence.

The Directive provides for criminal liability of employers in Article 9 which is based on the findings that the existing system of sanctions to ensure the compliance with the prohibition of illegal employment of third-country nationals illegally staying in the territory of Member States and current administrative penalties imposed in individual cases do not have sufficiently dissuasive impact on employers.

Article 9 of the Directive:

„1. Member States shall ensure that the infringement of the prohibition referred to in Article 3 constitutes a criminal offence when committed intentionally, in each of the following circumstances as defined by national law:

- a) the infringement continues or is persistently repeated;**
- b) the infringement is in respect of the simultaneous employment of a significant number of illegally staying third-country nationals;**
- c) the infringement is accompanied by particularly exploitative working conditions;**
- d) the infringement is committed by an employer who, while not having been charged with or convicted of an offence established pursuant to Framework Decision 2002/629/JHA, uses work or services exacted from an illegally staying third-country national with the knowledge that he or she is a victim of trafficking in human beings;**
- e) the infringement relates to the illegal employment of a minor.**

2. Member States shall ensure that inciting, aiding and abetting the intentional conduct referred to in paragraph 1 is punishable as a criminal offence.“

Provisions of this article have been transposed into the Slovak legislation through the Amendment of Act N. 300/2005 Coll. Criminal Code. A new factual background has been incorporated in the Criminal Code – criminal offence defined as **“unlawful employment“**. **This legal classification of offence has been integrated in CHAPTER V. of the Criminal Code - “Economic Criminal Offences“**

Provision § 251a of the Criminal Code provides:

“Unlawful employment“

(1) Any person who unlawfully employs a person staying in the territory of the Slovak Republic in breach of any generally binding legal regulation in spite of having been already held responsible for similar offence within the prior period of 24 months, shall be liable to a term of imprisonment of up to two years.

(2) The offender shall be liable to a term of imprisonment from six months to three years if he committed offence referred to in section 1 regardless of previous punishment for similar offence

- a) on a protected person,
- b) acting in a more serious manner,

- c) *under extremely exploiting working conditions including working conditions based on discrimination significantly disproportionate as compared to working conditions of legally employed persons and which affect human health and security and is in conflict with human dignity, or*
- d) *on a person who has become the victim of human trafficking.*

Hence, the Criminal Code defines two cases in which the force of res judicata establishes the criminal offence of unlawful employment.

In the first case, offence of unlawful employment has been committed if an employer has repeatedly employed illegally staying third-country national. Repeatedly means, that the employer has been convicted for similar offence during the last 24 months in administrative or judicial procedure. Thus, the conceptual element of the criminal offence in this case is a **repeated** action.

In the second case, unlawful employment is considered a criminal offence regardless of whether the employer has been previously convicted for similar offence or not. The Criminal Code distinguishes four cases of offence.

1. If the act has been committed on a **“protected person”**.

Protected person is defined by § 139 of the Criminal Code:

Protected person is considered

- a) **a child**, (a minor under 18 years)
- b) **a pregnant woman**,
- c) **a close person** (a person related in the first degree, adoptive parent, adopted child, sibling and spouse; other persons related by family or otherwise are considered to be close persons only if the harm caused to one of them is reasonable perceived by the other person as its own harm)
- d) **a dependent person**, (a person who depends on the offender for his nutrition, education, material or other care or charge)
- e) **an elderly person**, (a person over sixty years of age)
- f) **a sick person** (a person who suffers from a physical or a mental illness, even if temporary, at the time of the commission of the offence, regardless of whether such a person is temporary unfit for work, his fitness for work has been altered, is disabled or heavily disabled, while an intensity of such a sickness or handicap corresponds to grievous bodily harm)
- g) **a person enjoying special protection under international law**,
- h) **a public figure** or a person who fulfils his obligations prescribed by law, or
- i) **a witness, an expert, an interpreter or a translator.**

This is a general specification of a protected person associated with all form of criminal offence. In case of the factual background of unlawful employment it is of course necessary to identify, within the definition of the term “protected person”, those persons to whom it may apply as it is unlikely in practice to illegally employ an expert or a public figure.

2. If the offence has been committed **„in a more serious manner“**

“A more serious manner of committing an offence” is defined by § 138 of the Criminal Code:

„A more serious manner of committing a crime is commission of offence

- a) *with the use of a weapon except for the criminal offence of first degree murder pursuant to § 144, murder pursuant to § 145, killing pursuant to § 147 and § 148, homicide pursuant to § 149, bodily harm pursuant to § 155, § 156 and § 157,*
- b) *for a longer period of time*
- c) ***in a brutal and agonising manner,***
- d) ***with the use of violence, by threat of imminent violence or the threat of other grievous harm,***
- e) *by housebreaking,*
- f) ***by deception,***
- g) ***by taking advantage of another person's helplessness, inexperience, dependency or subordination,***
- h) *by breaching an important duty prescribed by law and connected with his employment, position or function,*
- i) ***by an organised group, or***
- j) ***against several persons. "***

This is also a general specification of a more serious manner of commission and to assess the criminal liability of the offender it is necessary to take into account only circumstances with practical possibility.

3. *If the offence has been committed **under extremely exploiting working conditions including working conditions based on discrimination significantly disproportionate as compared to working conditions of legally employed persons and which affect human health and security and is in conflict with human dignity, or***

4. *If the offence has been committed **on a person who has become the victim of human trafficking.***

A substantial element of every criminal offence is the so called subjective aspect of the criminal offence, i.e. **causation**. The Directive, as well as the Criminal Code, stipulates that the factual background does not establish the commission of a criminal offence unless the causation has been intentional. Hence, in order to evaluate offender's criminal liability, it is necessary to prove that the employer employed an illegally staying third-country national **intentionally**. Thus, if the employer acted by negligence, he would not be held liable in criminal procedure. The Directive explicitly indicates "intention" as inevitable element of the said offence: *"Member States shall ensure that the infringement of the prohibition referred to in Article 3 constitutes a criminal offence when committed **intentionally**, in each of the circumstances defined by national law..."*

The Slovak legislation does not state this condition explicitly, however, it flows from the fundamental principle of the Criminal Code encompassed in § 17 of the Criminal Code:

*„An act committed by a natural person shall carry criminal liability only in case of **intentional causation**, unless it is explicitly stated in this Act that causation by negligence is sufficient."*

The legal regulation of "unlawful employment" does not explicitly state that acting by negligence is sufficient, therefore criminal liability for such an offence can only be based on intentional causation.

Article 9 paragraph 2 of the Directive: “Member States shall ensure that inciting, aiding and abetting the intentional conduct referred to in paragraph 1 is punishable as a criminal offence.”

The above mentioned provision binds Member States to hold liable the employer who employs third-country nationals illegally staying in the territory of the SR, as well as the person, who instigated or incited the employer to commit the offence or assisted in the commission of the offence.

In this context it was not necessary to incorporate this provision in the Criminal Code individually, as it has already been encompassed in the fundamental principles of the Criminal Code, specifically in § 21 of the Criminal Code which defines the term “**abettor to a criminal offence**”

“ (1) An abettor to a completed or attempted criminal offence is any person who intentionally

- a) masterminded or directed the commission of the criminal offence (organiser),**
- b) instigated another person to commit a criminal offence (instigator),**
- c) asked another person to commit a criminal offence (hirer), or**
- d) assisted another person in committing a criminal offence, in particular by procuring the means, removing the obstacles, providing advice, strengthening the determination, making a promise of post crime assistance (aider).**

(2) Unless this Act provides otherwise, the criminal liability of an abettor shall be governed by the same provisions as the criminal liability of an offender. “

The said provision therefore indicates that not only criminal offender but also the organiser, instigator and aider shall be held liable, unless excluded by specific parts of the Criminal Code applicable for individual offences. The provisions of the Criminal Code providing for unlawful employment do not exclude criminal liability of organiser, instigator and aider to a criminal offence. Hence, the mentioned persons shall be held liable in the same manner as the person who committed the offence of unlawful employment.

In the light of the above mentioned facts it can be concluded that the legal regulation of the SR has transposed Article 9 of the Directive in full and in some aspects, the Slovak regulation goes beyond the framework of the Directive. This applies particularly to criminal protection of specific groups of persons, e.g. pregnant women, elderly persons, sick persons and so forth.

Criminal penalties

Article 10 of the Directive specifically provides for criminal penalties for criminal offences mentioned therein.

Article 10 of the Directive:

- 1. Member States shall take the necessary measures to ensure that natural persons who commit the criminal offence referred to in Article 9 are punishable by effective, proportionate and dissuasive criminal penalties.**
- 2. Unless prohibited by general principles of law, the criminal penalties provided for in this Article may be applied under national law without prejudice to other sanctions or measures of a non-**

criminal nature, and they may be accompanied by the publication of the judicial decision relevant to the case.

The Slovak legislation has transposed the above mentioned provisions to the Criminal Code as well as the Act on illegal work and illegal employment.

In the territory of the Slovak Republic, a criminal penalty of imprisonment of up to two years may be imposed for the criminal offence of illegal employment. The penalty can be increased or decreased proportionally in relation to aggravating or mitigating circumstances.

In accordance with Article 10 (2) of the Directive, the Slovak legislation equally provides that criminal penalties are applied without prejudice to other sanctions or measures which do not exempt the offender from his/her obligations based on other legal regulations. The rule is that even if the employer was convinced of the criminal offence of illegal employment and performed imposed punishment, this would not exempt him/her from obligations laid down by the Act on illegal work and illegal employment, Act on misdemeanors, Act on labour inspection and so forth (penalties, outstanding remunerations and social security contributions, withdrawal of licence and other).

3.6. Liability of legal persons

The Directive established the liability of legal persons in Articles 11 and 12

Article 11

1. Member States shall ensure that legal persons may be held liable for the offence referred to in Article 9 where such an offence has been committed for their benefit by any person who has a leading position within the legal person, acting either individually or as part of an organ of the legal person, on the basis of:

- a) a power of representation of the legal person;***
- b) an authority to take decisions on behalf of the legal person; or***
- c) an authority to exercise control within the legal person.***

2. Member States shall also ensure that a legal person may be held liable where the lack of supervision or control, by a person referred to in paragraph 1, has made possible the commission of the criminal offence referred to in Article 9 for the benefit of that legal person by a person under its authority.

3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, inciters or accessories in the offence referred to in Article 9.

Article 12

Penalties for legal persons

Member States shall take the necessary measures to ensure that a legal person held liable pursuant to Article 11 is punishable by effective, proportionate and dissuasive penalties, which may include measures such as those referred to in Article 7.

Member States may decide that a list of employers who are legal persons and who have been held liable for the criminal offence referred to in Article 9 is made public.

Relevant legislation of the Slovak Republic does not recognize criminal liability of legal persons. Only natural persons authorised to act on behalf of a legal person pursuant to law may be held liable for criminal offence. However, the absence of criminal liability does not exclude other forms of liabilities of legal persons who have committed acts which are defined as criminal offences in Article 9 of the Directive. Hence, the Slovak legislation includes other forms of liability which are encompassed in several legal regulations.

Similarly, sanctions applied for unlawful acts are equally encompassed in several legal instruments. For said unlawful acts financial sanctions – penalties are laid down by several legal regulations.

This is the case of Act N. 5/2004 Coll. on employment services which stipulates a **penalty** for infringement of illegal employment prohibition or Act N. 125/2006 Coll. on labour inspection which also allows **penalty** to be imposed for infringement of illegal employment prohibition. In both cases illegal employment is considered administrative offence, i.e. a specific form of unlawful act. The said penalties can be imposed in the amount from 2000 to 200 000 €.

Besides the above mentioned sanctions for illegal employment, the Act N. 82/2005 Coll. on illegal work and illegal employment states obligations of employers, including legal persons, to pay **back payments** as defined in Article 6 of the Directive (§ 7a of Act N. 82/2005 Coll.).

The Slovak legislation also incorporated sanctions against employers, including legal persons, encompassed in Article 7 of the Directive. The said sanctions have been enshrined in several legal regulations, e.g.:

- Exclusion from entitlement to state aid pursuant the Act N. 231/1999 Coll. on state aid for persons in breach of illegal employment prohibition,
- Exclusion from entitlement to subsidies pursuant the Act N. 523/2004 Coll. on budgetary rules for public administration,
- Exclusion from participation in public contracts pursuant the Act N. 25/2006 Coll. on public procurement and other.

At the same time, provisions of Article 12 of the Directive have been transposed which provide Member States with the option, not an obligation, to publish a list of employers who are legal persons liable for criminal offence defined in Article 9 of the Directive.

The said provision has been enshrined in Slovak legislation through Act N. 125/2006 Coll. on labour inspection. In accordance with § 6 (1) (r) of the Act:

“The National labour inspectorate keeps a central public registry of natural and legal persons who during the past five years acted in breach of illegal employment prohibition with details of their business name, place of business activities of natural persons and registered office of legal persons.”

3.7. Facilitation of complaints against employers

Complaints of illegally staying third-country nationals are regulated by Article 13 of the Directive. Article 13 (1):

„Member States shall ensure that there are effective mechanisms through which third-country nationals in illegal employment may lodge complaints against their employers, directly or through third parties designated by Member States such as trade unions or other associations or a competent authority of the Member State when provided for by national legislation. “

In the Slovak legislation the said mechanism is regulated by Act N. 311/2001 Coll. Labour Code where § 150 provides:

„Employees damaged in consequence of violation of obligations derived from employment relations, as well as employees’ representatives who are employed with the health-care institution and who detected infringement of regulations governing employment relationships through their control procedure pursuant to § 239, may lodge a complaint at the competent labour inspection body.”

In terms of this provision, the violation of obligations **deriving from employment** includes failure to pay remuneration and social security contributions and other outstanding payments to third-country nationals illegally staying in the territory of the SR.

The competent labour inspection body is the Labour Inspectorate with territorial competence which is obliged to examine complaints of employees and carry out supervision and inspection pursuant to Act N. 126/2005 Coll. on labour inspection.

In accordance with § 7 of Act 126/2005 Coll. on labour inspection the Labour Inspectorate is obliged to carry out labour inspection within 30 days after the delivery of a proposal (complaint) and immediately inform the person who lodged the proposal (complaint) about the results of its labour inspection.

In case the Labour Inspectorate detects during its inspection infringement of prohibition of illegal employment, it can impose a penalty, order back payments and notify competent authorities (Social Security Institution, Tax Office, and Police Department) about the infringement of prohibition of illegal employment. If repeated infringement of illegal employment prohibition was detected, the Labour Inspectorate can file an initiative to start criminal procedure against the employer or propose the Licensing Office to withdraw employer’s licence or prohibit the exercise of employer’s trade or profession.

Article 13 (2) of the Directive:

„Member States shall ensure that third parties which have, in accordance with the criteria laid down in their national law, a legitimate interest in ensuring compliance with this Directive, may engage either on behalf of or in support of an illegally employed third-country national, with his or her approval, in any administrative or civil proceedings provided for with the objective of implementing this Directive. “

The said provision has been enshrined in the Slovak legislation through § 7c (2) of Act N. 82/2005 Coll. on illegal work and employment:

„A legal person established in accordance with special legislation and whose subject of activity is the protection of rights and interests of third-country nationals, can, on the basis of a power of attorney (mandate), represent the third-country national in civil proceedings with the objective to protect his/her rights in compliance with this Act. If the legal person assumes the role to represent a third-country national

as defined in the first sentence above, he or she shall authorize his or her member or employee to act on behalf of the represented national.

The legal persons established in accordance with special legislation may include, as defined in the above mentioned provision:

- Civil associations
- Non-profit associations
- Foundations
- Non-investment funds

However, the precondition is that the subject of the body's activities is the protection of rights and interests of third-country nationals.

Article 13 (3) of the Directive:

„Providing assistance to third-country nationals to lodge complaints shall not be considered as facilitation of unauthorised residence under Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence.“

The said provision is not included in any national legal regulation. However, as the Directive is to be transposed into the Slovak legislation by 20th July 2011, this provision is directly applicable even without its transposition into the national legislation of the SR.

3.8 Recovery of back payments

Back payments to be made by employers are regulated by Article 6 of the Directive:

1. In respect of each infringement of the prohibition referred to in Article 3, Member States shall ensure that the employer shall be liable to pay:

a) any outstanding remuneration to the illegally employed third-country national. The agreed level of remuneration shall be presumed to have been at least as high as the wage provided for by the applicable laws on minimum wages, by collective agreements or in accordance with established practice in the relevant occupational branches, unless either the employer or the employee can prove otherwise, while respecting, where appropriate, the mandatory national provisions on wages;

b) an amount equal to any taxes and social security contributions that the employer would have paid had the third-country national been legally employed, including penalty payments for delays and relevant administrative fines;

c) where appropriate, any cost arising from sending back payments to the country to which the third-country national has returned or has been returned.

The said provision has been incorporated in the Slovak legislation through Act N. 82/2005 Coll. on illegal work and employment, in particular § 7a:

(1) A legal or natural person who has been sanctioned for illegal employment of a third-country national is obliged to pay

a) an agreed outstanding remuneration to the natural person who was illegally employed by the sanctioned employer,

b) an outstanding payment equal to an advanced payment for income tax, income tax in arrears, social security contribution in accordance with specific legislation, contribution to the pension scheme in accordance with specific legislation, contribution to complementary pension scheme in accordance with specific legislation and health-care insurance premium in accordance with specific legislation which the sanctioned employer would have paid, if he had employed the illegally employed national duly, including all associated sanctions and penalties in accordance with specific legislation,

c) costs incurred when outstanding payments defined in a) were delivered to the country where illegally employed natural person returned or was administratively expelled.

(2) If otherwise determined by the legal or natural person sanctioned for illegal employment of a third-country national or by the illegally employed natural person, for the purposes of section 1 above, the agreed remuneration is a monthly pay in accordance with specific legislation or a pay agreed in the collective agreement for a comparable employee, if the collective contract regulates the pay in a more favourable manner and above the amount of the minimum monthly pay.

It flows from the above provision that in the SR any illegally employed third-country national is entitled to remuneration either agreed on with the employer or remuneration indicated in the collective agreement. If it is not possible to determine the amount of the remuneration, it is a rule that the amount must equal the minimum monthly pay. The amount of the minimum monthly pay is laid down by the Act on minimum wage.

Apart from the outstanding wage, the employer is obliged to pay back all compulsory social and other security contributions which the employer would have paid if he had employed the illegally employed national duly as well as all costs incurred when outstanding payments were delivered to the country where illegally employed natural person returned or was administratively expelled.

The precondition of all the said obligations of an employer is that he or she has been sanctioned pursuant to law for illegal employment. Hence, first the misdemeanor procedures must be carried out against the employer on the grounds of which a competent body can conclude that the prohibition of illegal employment has been breached and subsequently order to impose a penalty. As a result, the fined employer is bound by obligations defined in § 7a of Act on illegal work and employment.

Therefore it can be concluded that the provision of Article 6 (1) of the Directive has been fully transposed into the Slovak legislation.

Article 6 (2) of the Directive:

2. In order to ensure the availability of effective procedures to apply paragraph 1(a) and (c), and having due regard to Article 13, Member States shall enact mechanisms to ensure that illegally employed third-country nationals:

a) may introduce a claim, subject to a limitation period defined in national law, against their employer and eventually enforce a judgment against the employer for any outstanding remuneration, including in cases in which they have, or have been, returned; or

b) when provided for by national legislation, may call on the competent authority of the Member State to start procedures to recover outstanding remuneration without the need for them to introduce a claim in that case.

Illegally employed third-country nationals shall be systematically and objectively informed about their rights under this paragraph and under Article 13 before the enforcement of any return decision.

The Slovak legislation allows illegally employed third-country nationals to access their rights laid down by the Directive in civil proceedings.

In terms of § 14 of the Labour Code:

„Disputes between an employee and employer over claims deriving from labour-law relations shall be heard and decided by courts. “

According to § 3 of Act N. 99/1963 Coll. of the Code of Civil Procedure:

„Every person has the right to seek judicial protection of his right that has been threatened or violated. “

In case of illegal employment of third-country nationals their rights have been violated, hence they can address the competent court. In the above mentioned procedure foreign nationals can choose to be represented by an advocate or another natural or legal person. If a foreign national qualifies, he or she also has the right to free legal assistance provided by an advocate determined by the court or by the Centre of Legal Assistance. The conditions are laid down by the Code of Civil Procedure as well as by Act N. 327/2005 Coll. on providing legal assistance to persons in material need. Furthermore, a provision on legal assistance for illegally employed third-country nationals has been incorporated in the Act on illegal work and employment.

§ 7c (2) of Act on illegal work and employment:

„A legal person established in accordance with special legislation and whose subject of activity is the protection of rights and interests of third-country nationals, can, on the basis of a power of attorney (mandate), represent the third-country national in civil proceedings with the objective to protect his rights in compliance with this Act. If a legal person assumes the role to represent a third-country national as defined in the first sentence above, he or she shall authorize his or her member or employee to act on behalf of the represented national.“

Thus, the legislation encourages the creation of organisations which shall deal with the issue of employment of third-country nationals and help them access their rights. These legal persons may only include civil associations, foundations, non-investment funds and non-profit organisations. Although not stated explicitly in this provision, the legislation supposes, in accordance with the character of the said associations that said assistance shall be provided to third-country nationals free of charge as long as this is possible for the above mentioned organisations.

The obligation to provide information in accordance with the last sentence of Article (2) has been incorporated in § 7c (1) of Act on illegal work and employment:

„During the performance of its duties to carry out controls of illegal work and employment, the control body is obliged to provide information to illegally employed third-country nationals about their right to lodge complaints if their agreed wage has not been paid, claim their right to be paid the outstanding wage and

claim their right to be delivered the outstanding wage into the country where they returned or were administratively expelled at the cost of the legal or natural person who was sanctioned by law for illegal employment.”

Article 6 (3) of the Directive

„3. In order to apply paragraph 1(a) and (b), Member States shall provide that an employment relationship of at least three months duration be presumed unless, among others, the employer or the employee can prove otherwise.

The above mentioned provision has been incorporated in § 7a (3) of Act on illegal work and employment:

„Unless it can be proved otherwise by the legal or natural person sanctioned by law for illegal employment or by the illegally employed natural person, for the purposes of section 1, it shall be presumed that the duration of the employment relationship was three months.”

It flows from the above mentioned provision that unless the employee or the employer can prove the real duration of employment relationship, it is presumed that illegally employed third-country national is entitled to three monthly wages which equal the amount as agreed with the employer or the amount of a minimum wage.

Article 6 (4) of the Directive

„4. Member States shall ensure that the necessary mechanisms are in place to ensure that illegally employed third-country nationals are able to receive any back payment of remuneration referred to in paragraph 1(a) which is recovered as part of the claims referred to in paragraph 2, including in cases in which they have, or have been, returned.”

It was not necessary to incorporate the provision in the legislation specifically as its presumptions flow from the character of the civil proceeding itself in which an illegally employed third-country national may claim his/her rights as a matter of course.

In case the third-country national is represented by an advocate or another person and returns to his/her country or is expelled, his/her advocate or representative shall continue to act in the proceeding as the departure of the illegally employed third-country national is not the reason to suspend the proceeding.

If he/she does not have an advocate or a representative, in case of his/her departure the court shall in accordance with the Code of Civil Procedure appoint a trustee/custodian who shall defend the interests of the third-country national. Hence, although he/she is no longer in the territory of the SR, his/her rights are

3.9 Residence permit

equally exercised.

The Directive provides for cases when under certain conditions residence permit may be granted to a foreign national. This is mainly the case of third country nationals whose presence in the country is inevitable as they are involved in criminal or other proceedings.

Article 13 (4) of the Directive

„In respect of criminal offences covered by Article 9(1) (c) or (e), Member States shall define in national law the conditions under which they may grant, on a case-by-case basis, permits of limited duration, linked to the length of the relevant national proceedings, to the third-country nationals involved, under arrangements comparable to those applicable to third-country nationals who fall within the scope of Directive 2004/81/EC. “

Article 6 (5) of the Directive:

„5. In respect of cases where residence permits of limited duration have been granted under Article 13(4), Member States shall define under national law the conditions under which the duration of these permits may be extended until the third-country national has received any back payment of his or her remuneration recovered under paragraph 1 of this Article.“

The said provisions have been incorporated in § 43 (2) of Act N. 404/2011 Coll. on stay of aliens:

„A police department can, upon the request of a prosecuting authority, grant tolerated residence to a third country national who was illegally employed under particularly exploitative working conditions or to an illegally employed minor person, if the presence of this third country national in the Slovak Republic territory is necessary for the purpose of criminal proceedings. Tolerated residence shall be granted by a police department for 180 days. A police department can extend tolerated residence by 180 days, repeatedly as well, up to the time of valid completion of criminal proceedings or by the time of the payment of the due amount of remuneration for performed work to a third country national. A prosecuting authority or a person authorised by the Ministry of Interior shall inform a third country national about the possibility and conditions of the granting of tolerated residence for this reason and about the rights and duties which follow from this. “

It flows from the above mentioned legislation that the provisions of the Directive have been enshrined in the Slovak legislation in a more specified context. Tolerated stay may be granted to an illegally employed third-country national under the following conditions:

1. The application has been submitted by a prosecuting authority (and not by the third-country national him/herself)
2. The illegally employed third country national has been employed under extremely exploiting conditions or the third country national is a minor.
3. His/her presence is inevitable as he/she is involved in a criminal proceeding.

A tolerated stay is a specific type of residence permit. It is granted for the period of maximum 180 days with the possibility of prolongation. The Slovak legislation goes beyond the framework of the Directive, as according to § 59 (1) of Act on stay of foreigners the Ministry of Interior shall provide the third-country national that was granted a tolerated stay permit accommodation after application was filed by a prosecuting body if the foreign national is not able to arrange accommodation him/herself.

So far such a case has not been registered; therefore it is not possible to evaluate the practical application of this provision.

The said liability is provided by Article 8 of the Directive:

3.10. Liability of subcontractors

„Article 8 of the Directive:

1. Where the employer is a subcontractor and without prejudice to the provisions of national law concerning the rights of contribution or recourse or to the provisions of national law in the field of social security, Member States shall ensure that the contractor of which the employer is a direct subcontractor may, in addition to or in place of the employer, be liable to pay:

a) any financial sanction imposed under Article 5; and

b) any back payments due under Article 6(1) (a) and (c) and Article 6(2) and (3).

2. Where the employer is a subcontractor, Member States shall ensure that the main contractor and any intermediate subcontractor, where they knew that the employing subcontractor employed illegally staying third-country nationals, may be liable to make the payments referred to in paragraph 1 in addition to or in place of the employing subcontractor or the contractor of which the employer is a direct subcontractor.

3. A contractor that has undertaken due diligence obligations as defined by national law shall not be liable under paragraphs 1 and 2.

4. Member States may provide for more stringent liability rules under national law.

The above mentioned article has been enshrined in the national legislation through § 7b of Act on illegal work and employment:

(1) A legal or natural person is not liable for illegal employment of a third-country national if he/she fulfilled his/her obligations laid down by specific legislation and did not know that the residence document or another permit was a forgery.

The mentioned provision protects good-will employers who have fulfilled all their obligations and despite due care could not suppose that the third-country national was staying in the territory of the SR illegally.

(2) The obligation of a legal or natural person to pay, on the grounds of an enforceable decision, a penalty for the misdemeanor of the prohibition of third-country nationals' illegal employment or back payments pursuant to § 7a (1) subparagraphs a) and c) shall fall, if it was not possible to satisfy the claim in an enforcement proceeding in accordance with specific regulation, to:

a) a legal or natural person to whom the legal or natural person sanctioned by law for illegal employment of a third-country national supplied work, goods or services on the basis of a contract, or

b) a legal or natural person who, based on a contract of delivery of work, goods or services, indirectly participated in the delivery of work, goods or services according to subparagraph a).

(3) The procedure according to section 2 shall only apply if it has been proved that the statutory body of the legal person according to section 2 a) or b) or the natural person according to section 2 a) or b), or a person authorised by them to conclude a contract according to section 2 knew that the legal or natural person whose obligation was transferred to pay a penalty for the infringement of the prohibition to illegally employ third-country nationals or back payments in accordance with § 7a (1) subparagraphs a) and c), illegally employed a third-country national.

The above mentioned provisions transfer the obligation to pay sanctions and back payments from an employer to a third person which is the person to whom the original employer supplied work, goods or services on the basis of a contract, or a person, who on the basis of a contract participated in the delivery of such work, goods or services. In this case the legislation excluded good-will persons from the said obligation, i.e. those persons who were not aware of the fact that the employer acted in breach of the prohibition of illegal employment. Moreover, it is not quite clear what methods would be used to prove whether the person knew or could know that the employer employed illegally.

Another condition for the obligation to pay the penalty to be transferred from the original employer is the fact that the penalty or back payments have not been enforced and paid during the enforcement procedure in accordance with Act 233/1995 Coll. on court executors and execution activities (Execution Order). Thus, the purpose of this provision is to preserve the rights of illegally employed third-country nationals even if their original employer became insolvent, ceased to exist, and so forth.

3.11. Controls

Control mechanisms to ensure compliance with the Directive have been laid down in Article 14 of the Directive:

„1. Member States shall ensure that effective and adequate inspections are carried out on their territory to control employment of illegally staying third-country nationals. Such inspections shall be based primarily on a risk assessment to be drawn up by the competent authorities in the Member States.

2. With a view to increasing the effectiveness of inspections, Member States shall, on the basis of a risk assessment, regularly identify the sectors of activity in which the employment of illegally staying third-country nationals is concentrated on their territory.

In respect of each of those sectors, Member States shall, before 1 July of each year, communicate to the Commission the inspections, both in absolute numbers and as a percentage of the employers for each sector, carried out in the previous year as well as their results.”

The above mentioned provisions have been incorporated in the Act on illegal work and illegal employment, in particular § 5 and §5a of the Act.

“(1) Controls of illegal work and employment shall be carried out by the following authorities:

- a) Labour Inspectorate,*
- b) Central Office of Labour, Social Affairs and Family*
- c) Office of Labour, Social Affairs and Family.*

(2) Controls described in section 1 shall be carried out without prejudice to other control authorisations of other competent bodies in accordance with specific legal regulations. Control bodies are obliged to cooperate and provide all necessary information within the scope of their authority. Bodies acting in accordance with specific legal regulations are obliged to cooperate with control bodies and provide them with information within the scope of their authority for the purposes of illegal work and illegal employment inspections and in compliance with obligations laid down by specific legal regulation.”

These control agencies include e.g. Alien Police Department which carries out controls of residence permits in foreign nationals. There is an agreement signed between Ministry of Interior and National Labour Inspectorate that established cooperation focused on conducting joined controls. According to it labour inspectorates (and labour offices as well) and Alien and Border Police are conducting joined controls focused on undocumented migrants; both within the scope of their own competence. The Police is making controls of foreigners 'residence permits and labour inspectorates are making controls of illegal work and illegal employment.

In case when labour inspectorate identifies some foreigners who are not able to prove their identity and the residence permit during their control, it reports this information to Alien and Border Police. The control can be initiated on the base of a complaint or on own initiative of control authority. It is obliged to start the control in case when there is concrete information about the employer in the complaint. In case when there is an information about employment of undocumented migrants labor inspecorate used to report it to Alien and Bprder Police and ty will conduct joined controls as mentioned.

Details regarding control procedures and inspections as well as the rights and obligations of the controlled subjects and controlling subjects are laid down in Act N. 125/2006 Coll. on labour inspection and 5/2004 Coll. on employment services.

§ 5a of Act on illegal work and employment

- (1) The control body evaluates the risks of illegal employment pursuant to § 2 (5) and carries out regular identification of business sectors in which illegal employment is frequent pursuant to § 2 (5) (hereinafter "risk sector").*
- (2) The control body carries out control of illegal employment pursuant to § 2 (5) particularly in risk sectors.*
- (3) The National Labour Inspectorate annually presents the European Commission by 1st July information about the previous year stating the number of controls in different risk sectors, the proportion in percentage of controlled subjects out of the overall number of employers in every risk sector and about the results of such controls carried out in different risk sectors. Control bodies provide the National Labour Inspectorate annually by 31st March with information in the extent defined in the first sentence.*

It can be concluded in this context that the provisions of Article 14 of the Directive have been transposed in the Slovak legislation in full.

Currently it is very difficult to evaluate the practical impact of the provisions of the Directive in the

4. Registration of the Slovak Republic as the statistics of the National Labour Inspectorate have not yet detected a case of illegal employment which is defined by the Directive.

From the point of view of the labour market protection against illegal employment of third-country nationals, the adoption of the above mentioned Directive can be evaluated in a positive way.

From a theoretical point of view we can mark the expected impact of the adoption of the Directive as:

- Preventive
- Protective

Under the preventive impact can be understood the impact of the adoption of the Directive for both the employers and labour market itself.

Into the Directive were incorporated employers' obligations which act as measures aimed at preventing illegal employment of foreigners. First, they are both reporting obligations and responsibilities and sanctions in the event of illegal employment. Obligation to report a foreigner employment itself acts as prevention because once the employer informs relevant authorities about foreigner employment, the employer must be sure that this foreigner is legally on the territory of the SR. Employer's obligation to verify whether potential employee has a valid residence permit, respectively work permit works as well.

As preventing illegal employment can be also understood threat of sanctions to employers imposed for violation of the provisions of the Directive relating to illegal employment. The threat of sanctions is so high that for potential employer, who has an intention to illegally employ a foreigner, has deterrent effect and no meaningful to so illegally employ the foreigner.

However, on the other side some provisions of the Directive may cause that employers lose the interest in the foreigners' employment because in case of its employment (legally) will be increased obligations for employers which they do not have in case of employment of Slovak citizens.

Protection is primarily focused on the rights and interests of illegally employed citizens from third countries, but mainly on labour market protection against illegally employed foreigners.

The Directive provides plenty of tools for protection of rights of citizens from third countries. This is for example the possibility to recover unpaid wages or other demands. The Directive also provides the opportunity for various organisations to help and represent rights of illegally employed citizens from third-countries.

In the SR, possibilities for foreigners are incorporated into the legal system so that foreigners are able to bring a complaint to the competent labour inspectorate who is required on the basis of this complaint make a control the employer and in case of breach of any obligation to initiate an administrative procedure against the employer. However, this procedure does not solve the problem of citizen from third country if for example he/she does not receive the agreed wage for example. In this case the citizen has possibility to

appeal to a general court with accusation. At present it is very difficult to evaluate the effectiveness of such legislation because, as was mentioned above, this kind of case has not occurred in the SR so far. It should be noted that illegally employed citizen from third country has obtained the same status as a citizen of the SR by this legal regulation. If a citizen of the SR does not receive properly and timely paid wage, he has also only possibility to appeal to a general court with accusation. There is, however, necessary to consider the effectiveness of this legal regulation because in practice it is evident that such legal proceeding may take several years in certain extreme cases, what is from foreigner's point of view, who is threaten by deportation, rather inefficient solution. Of course, the legal regulation bears in mind the fact that the one party could be absent and therefore it is possible to deal with legal representative, respectively by court appointed guardian.

In this sense it would be appropriate to consider a legal instrument on the basis of which it would be possible to faster and more effectively enforce an unpaid wage from the employer. (for example, the obligation to pay wages should be directly decided by the labour inspectorate, who made a control, and such a decision would be legally enforceable, thus it would not be needed to precede legal proceeding before an execution.)

In general, it is possible to summarize positive impacts of the adoption of the Directive in the following points:

1. The labour market protection against illegal employment
2. Strengthening the rights of illegally employed third-country nationals
3. Strengthening the position of labour inspectorate in detecting and imposing sanctions for illegal employment
4. Collecting statistics on illegal employment which will have a significant role in evaluation at the European level
5. Introduction of strict sanctions for employers

Finally, it should be noted that the specific effects will appear only after the practical application of the provisions of the Directive, respectively Slovak legislation provisions to which the Directive was transposed.

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