Stowarzyszenie Association Interwencji For Legal Prawnej Intervention

Implementation of the Employers` Sanctions Directive in Poland

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1.General overview of the domestic migration policy

Due to the historical and geopolitical conditions, it took it long for Poland to develop a comprehensive migration policy based on reliable studies and prognoses. The activities undertaken by governments after 1989 were of the *ad hoc* type, responding to current migratory flows. Solutions and decisions proposed by competent government institutions were made and implemented without public debates and political discussions. They aimed at stabilising the migratory situation of the country, creating the fundamental legislative basis and reducing illegal migration, ensuring the basic human rights to the foreigners at the same time and organising the institutional system (administrative structures organisation, creation of refugee camps, detention sites for undocumented migrants etc.). This need was not so urgent as despite the accession to the European Union in 2004 and joining the Schengen Area in 2007, the rate of migration to Poland has remained small, if not negligible. The data collected during the General Census in 2011 revealed that there were about 63 thousand foreigners being the permanent residents of Poland, which accounted for as little as about 0.2% of all the permanent residents. It should also be kept in mind that till the end of the 90' 21st century (and for regulations concerning the policy related to foreigners seeking international protection, even since the very start of the transformation period), the Polish migration policy was co-shaped by the international regulations, including but not limited to the solutions of the Community law.

The document developed in 2012, called MIGRATION POLICY OF POLAND – the Current State of Play and the Further Actions[1] by the Migration Team (an advisory body of the Prime Ministry of Poland) and approved finally by the Council of Ministers in July 2012, was the first attempt at delineating the framework of a cutting edge migration policy, responding to the current migration situation of Poland but also drawing from the prognoses for the future.

The priorities of the Polish migration policy as indicated in the document include:

- **introduction of preferential legal solutions with respect to stay and work in the territory of the Republic of Poland for selected groups of third-country nationals,** e.g. people of Polish origin, students, scientists, graduates of Polish universities, third-country nationals running business activity, labour immigrants with required qualifications, citizens from the EU member states and their families, families of Polish citizens and third-country nationals residing in Poland, third-country nationals displaying interest in the integration process in Poland (e.g. by learning Polish, social activity etc.), people protected in the territory of Poland, people subject to humanitarian and medical protection as well as human trafficking victims;

[1] The document available in electronic format at: *http://bip.msw.gov.pl /portal/bip/227/19529/Polityka_migracyjna_Polski.html*

- **adapting the migration policy to the labour market priorities, taking into consideration the need to ensure competitive advantage of the Polish economy** by means of**:**
  - introducing the mechanisms for systematic monitoring of demand and supply on the labour market to enable flexible reactions to the demand for employees with specific qualifications;
  - ensuring complementary nature of labour immigrants employment with respect to local workers (restrictions in the scope of employing third-country nationals , applying the system of subject and object exemptions at the same time);
  - opening the access to the labour market for third-country nationals staying in Poland legally;
  - facilitating access to the labour market for the graduates of Polish universities, highly-qualified employees and third-country nationals possessing the required professional qualifications;
  - offering simplified procedures for investors;
  - promoting circulatory migrations, including for the purpose of seasonal work;
  - developing the mechanism of simplified job commencement in Poland;
  - creating the active system of hiring migrant workers (e.g. under the bilateral international agreements);
  - simplifying regulations on the working opportunities for third-country nationals in Poland;
- **counteracting illegal migration e.g.** by efficient use of visa policy instruments, aggravation of the regulations concerning control in the course of administrative procedures related to legalizing the stay of third-country nationals, limiting the channels of illegal immigration, reducing time to enforce expulsion decisions, executing new agreements on readmission and improving enforcement thereof, as well as promoting voluntary returns of illegal immigrants.

The rate of employment of the third-party citizens staying illegally is naturally difficult to assess. In the Republic of Poland, due to the overall lower share of immigrants in the labour market - when compared to other EU member states - this phenomenon does not take a significant form in the absolute values.

The Poland has the lowest share of third-country nationals in the labour market of all the OECD countries, amounting to 0.3% (the average value for OECD countries is 12%). In recent years the number of third-country nationals employed in Poland has been growing steadily. This growth can be attributed to the liberalisation of Polish regulations concerning the employment of third-country nationals which came in force in 2009. Moreover, since 2007 the continuous growth of employment rate for the third-country nationals basing on the employers' statement on their intent to delegate work, registered in the *poviat* labour offices, has been reported (this is true for the citizens of the Ukraine, Belarus, Moldavia, Georgia and Russia).

The outcomes of the inspections carried out by the National Labour Inspectorate (Polish *PIP*) in 2012 indicate that the work performed by a third-country national without the residence documents required does not belong to the most frequent infringements[2]. Much more frequent violation was the absence of the required work permit for the third-country national, absence of the registration with the social insurance institution or delayed registration with it. In 2012 it was found out that 59 third-country nationals whose illegal work was detected worked during their illegal stay in the Republic of Poland. The work performed by the third-country nationals contrary to the Polish regulations (that is taken more broadly than the sole employment without the legal residence right, covering also performance of work without the work permit and paying the social insurance contributions), focuses primarily in certain sections that is industrial processing, construction, trade and repairs, transport and warehousing, and agriculture and hunting.

In recent years the shift has been observed with respect to the tendencies related to the inflow of immigrants to Poland. In future the increase in the number of labour immigrants can be expected, which will be related to the needs of the Polish labour market. The increased demand for third-country nationals ' work may be connected with the increase in the problem being the subject of Directive 2009/52 that is employment of third-country nationals staying in Poland in violation of the regulations.

2.Current legal framework concerning migrant workers

The basic legal act governing the conditions of the foreigners' entry and stay in the Republic of Poland is the Act on Aliens of June 13, 2003 (hereinafter "Aliens Act")[3]. The rules of the foreigner's work in the Republic of Poland and sanctions for illegal employment are specified in the Act of April 20, 2004 on Employment Promotion and Labour Market Institutions (hereinafter "Employment Promotion Act")[4] as well as the Regulation of the Minister of Labour and Social Policy, basing thereon, of July 20, 2011[5] on the cases when it is permissible to employ a foreigner in the territory of Poland without the need to obtain a work permit. This regulation introduces an easier access to the Polish labour market for the citizens of Russia, Ukraine, Belarus, Moldavia and Georgia.

The foreigner's work performance basing on the employment contract is governed – in the scope equivalent to the one for the citizens of Poland – by the statutory provisions of the Labour Code of June 26, 1974[6]. This

[2]National Labour Inspectorate Report 2012, available in an electronic format at: http://www.pip.gov.pl/html/pl/ sprawozd/12/pdf /sprawozdanie_pip_2012.pdf

[3]Polish text available at: http://isap.sejm.gov.pl/DetailsServlet?id=WDU20031281175

[4]Polish text available at: http://isap.sejm.gov.pl/DetailsServlet?id=WDU20040991001

[5]Polish text available at: http://isap.sejm.gov.pl/DetailsServlet?id=WDU20111550919

[6]Polish text available at: http://isap.sejm.gov.pl/DetailsServlet?id=WDU19740240141

Code specifies obligations of the employee and employer, rules for remuneration payment, methods of terminating the employment relationship, right to leave or rules of the occupational health and safety. With respect to the employment under the civil law contract, such as the contract for specific work or the mandate contract, the obligations of the parties, that is the employee and employer, are governed by the very contract between them and partially also the provisions of the Civil Code of April 23, 1964[7].

3.Details on the transposition of the Directive

The provisions of the Directive of the European Parliament and the Council of June 18, 2008, providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals (hereinafter referred to as the Directive), published on June 30, 2009 (Official Journal EU L 168/24) should have been introduced into the national legislative systems of Member States till July 20, 2011. The Polish legislators transposed this act into the internal law by means of the Act of June 15, 2012 on the Consequences of Hiring Employees Staying Illegally in the Territory of Poland (hereinafter "Consequences of Employment Act ") which came in force on July 29, 2012[8], that is over 12 months after the final deadline for the Directive transposition.

4.Legal situation of the migrant workers in Poland

a.Access to the labour market

Third-country nationals are in principle allowed to carry out paid work in Poland only after obtaining a work permit or after the employer has submitted a statement on their intent to employ a given foreigner to the labour office. The statement on the intent to employ a foreigner in the territory of Poland is an instrument facilitating the access to the Polish labour market for the citizens of Russia, Belarus, Ukraine, Moldavia and Georgia. This makes it possible to employ a foreigner legally in any sector of economy, for the period of 6 months out of 12 months without the need to meet the additional conditions by the foreigner or by the employer. If the employer applies for the work permit (for unchanged job as well as terms and conditions of employment) in the case of the foreigner who works at least three months basing on the statement on the intent to employ, the procedure to obtain the permit shall be less formalized.

[7]Polish text available at: http://isap.sejm.gov.pl/DetailsServlet?id=WDU19640160093
[8]Polish text available at: http://isap.sejm.gov.pl/DetailsServlet?id=WDU20120000769

The work permit is applied for by the employer who has to contact competent voivode. The prerequisite for obtaining the permit is the indication that it is impossible to meet the personnel needs, basing on the records of the unemployed and work seekers, or that the organized recruitment process (the so-called labour market test) was negative. The permits are issued for the period of one to three years and can be extended. The issued permit entitles the foreigner to work for a specific employer and under the terms and conditions specified therein (position, half- or part-time, remuneration). The employer cannot, for example, reduce the remuneration, as this would render the work incompliant with the permit, that is illegal. The remuneration can be increased, however, as the employer discloses the amount not lower than the specific value. The work permit may also remain valid if the foreigner, in agreement with the employer, fails to start work within 3 months starting from the initial work permit validity date or suspends it for the period exceeding 3 months, provided the reason for delay or suspension in work performance is justified and the employer delegating the work to the foreigner notifies the voivode who issued the permit immediately in writing. The work permit can be annulled if the foreigners fails to start work within 3 months of the permit validity date, suspends it for over 3 months or ends it earlier than 3 months before the expiry of the permit validity date unless it took place for justified reasons. It is annulled also if the foreigner is included in the list of foreigners whose stay in the territory of Poland is considered undesirable.

b.Liability of the employee when undocumented and/ or employed contrary to the binding provisions

In accordance with Article 120 of the Employment Promotion Act, any foreigner performing the work illegally shall be subject to the penalty of 240 EUR to 1,200 EUR. Illegal work performance by the foreigner shall mean both the work performance by the foreigner who does not possess a valid visa or another document entitling them to stay in the territory of Poland, and the work performance by the foreigner whose grounds for staying in the territory of Poland do not entitle them to perform work or who performs work without the permit, wherever it is required, or under the terms and conditions or in a position different than the one specified in the work permit, or without the required employment contract or civil law contract.

Moreover, the foreigner who performed work in violation of the applicable provisions (regardless of the nature of this violation and employment period) is issued an **obligatory decision on their expulsion from the territory of Poland** (Article 88(1)(2) Aliens Act)**.**

c.General overview of the undocumented migrant workers` situation as regards access to healthcare, education, and judicial protection

The access of the undocumented migrants to the free health care is limited solely to the aid offered by rescue teams outside the healthcare facility in the case of any health hazard or the obligatory treatment of specific infectious diseases threatening larger groups of people, such as e.g. tuberculosis, typhoid fever, SARS, as well as therapy against HIV in the case of the post-exposure treatment. Also certain obligatory vaccines against some of these diseases are financed from the public budget. The other medical services, including hospital care in the case of health hazard as well as the perinatal care, are fully charged for the undocumented migrants.

Every migrant child below 18 is entitled to free schooling in a public school.

The resident status does not affect the migrant's access to court protection and is identical to the one for Polish citizens. There are no cases of the court denouncing the undocumented migrants which does not change the fact that these migrants only very rarely go to court to claim their rights.

5.Directive 2009/52/WE – the details of transposition

a.Employer`s obligations (Article 4 of the Directive)

The employer , regardless of the entity's organizational and legal status, is obliged to require that a third-country national before taking up the employment holds and presents to the employer a valid residence permit or other authorisation for his or her stay to keep a copy of such a document throughout the entire period of employment (Articles 2 and 3 Consequences of Employment Act). This way the provisions or Article 4 (1) a-b of the Directive have been very precisely transposed into national law.

The obligation to notify competent authorities of the employment start for third–country nationals, as specified in Article 4 (1) c of the Directive, in the period specified by every Member State, is transposed only partially into the Polish law. The legislators used the existing measure of the employers' obligation to report the employment of any worker to the social insurance institution which must be done right after hiring a new employee. The forms include also the "nationality" field and this information is to indicate that the

foreigner is being employed. The assumption that the obligation to notify in accordance with the Directive is fulfilled by the employee registration with the Social Insurance Institution means that this obligation does not apply to the people performing work under the contract for specific work as in the case of such contracts the employer does not pay the social insurance contributions and does not register the employee.

b. Financial sanctions against employers (Article 5 of the Directive)

Prior to the Directive transposition, the Polish legislators punished the employer delegating work to the foreigner not possessing the work permit whenever it is required or delegating work in accordance with the terms and conditions, or in the position different than the one specified in the work permit, with the fine ranging from 720 to 1,200 EUR (Article 120(1) Promotion of Employment Act). The employer who had the foreigner perform work illegally due to deceiving them, taking advantage of the error, of the hierarchical dependency or of the inability to undertake the actions started, was punished with a fine of up to 2,500 EUR. In the process of adapting law to the terms and conditions of the new Directive these provisions were not amended but the employer can be now released from the liability for this offence if they satisfy two conditions jointly, that is if they have met the obligation to keep the valid residence document throughout the entire period of the foreigner's employment (unless they knew the presented document was forged) and if they have registered the foreigner with the social insurance institution, provided such an obligation stemmed from the applicable regulations (Aricle 120a Promotion of Employment Act).

There were also additional sanctions introduced for the employers infringing the prohibition to employ foreigners without the legal residence permit, taking the form of the employer's inability to include the remunerations due, paid or made available, as well as benefits and other sums due to the foreigner, who did not hold a valid document entitling them to stay in the territory of Poland in the period of performing work or carrying out activity in the territory of Poland, into the tax deductible expenses (Article 16-17 Consequences of Employment Act) .

Although Article 5 (2)a of the Directive specifies that the fines should increase in accordance with the number of foreigners employed illegally, the legislator, without introducing a separate provision, refers to the general principles of the penalty for the offence which stipulate that the type and size of the damage caused by the offence, as well as the social harm degree, must be taken into consideration while determining the penalty amount (Article 53 of the Criminal Code).

Additionally, the employer shall bear the costs of the foreigner's expulsion if this expulsion is related to the foreigner's performance of work in violation of the applicable laws which means that the employee not only does not possess the residence permit but also works without the permit.
There are no provisions reducing the financial penalties if the employer is a natural person employing a foreigner for their individual purposes and if the employment does not take place under the terms and conditions of particular exploitation (Article 5(3) of the Directive) but it is necessary to mention that the transposition of this provision was not obligatory for the Member States.

c. Further sanctions against employers (Article 7 of the Directive)

If the employer was convicted for an offence related to the illegal employment (see below), they may be encumbered with additional sanctions. The court, while imposing the sentence on them, may adjudicate a measure in the form of prohibited access to the public aid or subsidies for the period ranging from one to 5 years or the need to return the amounts obtained from such funds for the period of the previous 12 months. If further business activity by the convicted employer threatens the material legally-protected welfare, the court may also adjudicate a prohibition to carry out a specific business activity (Article 12 Consequences of Employment Act). The above-mentioned measures need not be imposed on an obligatory basis regardless of the violation significance. Under the applicable law, the convicted employer is excluded from the participation in the public procurement procedures for one year after the sentence has come in force.

If the infringing party was the entity acting as the temporary employment agency, it shall be deleted from the register of agencies which must result in its closure (Article 22(1) Consequences of Employment Act). However, the legislators failed to provide for the administrative measure consisting in closing other worksites not being agencies, believing that for the transposition of Article 7 (1)d of the Directive it is enough to ensure the penal measure in the form of the prohibition to carry out specific business activity, imposed in a facultative way on the natural person convicted with a penal decision. Such a solution gives raise to doubts concerning the implementation correctness of the Directive as it indicates that the *Member States shall take the necessary measures to ensure that employers are also, if appropriate, subject to the following measures: 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 - since it is not envisioned that the worksite shall be closed even if a really grave violation has taken place.

d.Criminal liability of the employer (Article 9-10 of the Directive)

The Polish legislators transposed the provision of Article 9 and 10 of the Directive, stipulating the criminal liability of the employer who (Articles 9-11 Consequences of Employment Act):

- **Simultaneously delegates work to many foreigners** – a fine of 25-260,000 EUR or the custodial sentence of 1-12 months
- Delegates work to a **minor foreigner** – a fine of 25-260,000 EUR or the custodial sentence of 1-12 months;
- **Persists** in delegating work to a foreigner, with the work being related to the business activity carried out by the employer – a fine of 25-260,000 EUR or the custodial sentence of 1-12 months;
- Delegates work to the foreigner in **the conditions of particular exploitation** – the imprisonment of 1 month to 3 years;
- Delegates work to the foreigner being the **victim of human trafficking** - the imprisonment of 1 month to 3 years;
- **Persists** in delegating work to a foreigner, with the work not being related to the business activity carried out by the employer (a misdemeanour) – a fine of 5-2,500 EUR.

The employer can be released from the liability for the above-mentioned crimes and offences if they, while delegating work to the third-country national staying without a valid document entitling them to stay in the territory of Poland, satisfied the following two conditions jointly:

1) if they demanded a valid residence document before delegating the work to them and kept it throughout the entire period of the third-country national 's employment (unless they knew the presented document entitling to stay in the territory of Poland was falsified),

2) and if they have registered the third-country national , to whom the work was delegated, with the social insurance institution, provided such an obligation stemmed from the applicable regulations.

The "particular exploitation" shall mean the working conditions transgressing the human dignity and grossly differing, especially as regards gender, from the working conditions of people being delegated the work performance in accordance with applicable law, affecting primarily the health and safety of workers.

The introduction of a milder responsibility for persistent employment of undocumented foreigner if done not for the purpose related to the business activity carried out gives raise to doubts in the scope of its compliance with the Directive provisions. It provides for the possibility to moderate the sanctions when the employment takes place for the *private benefit* of the employer (Article 5 (2) of the Directive) but the exemption was provided solely for reducing the financial sanctions and not criminal liability. In Polish law the possibility of reducing financial sanctions was not acknowledged but instead a person persistently delegating work to a foreigner, with the work not being related to the business activity is liable of a misdemeanour only and not an offence, as it would be in a case of business activity-related employment.

e.Liability of legal persons (Article 11 - 12)

Under Polish law[9], the collective entities (companies and other legal persons, including those with no legal personality) are held liable for the crimes committed by a natural person acting, to put it simply, in their name and interest, if this behaviour caused benefit or could have caused benefit for the entity. The liability of collective entities is not a criminal liability as such, but due to its repressive nature, it displays certain features of criminal liability. It is ascertained basing on the existence of a specific "fault" on the collective entity's part. The entity is held liable if the crime was committed as a result of the absence of due care while selecting the person acting in the entity's name or if the work organisation in the company failed to prevent the crime committed by this person.

Although the legislators, while transposing the Directive into the local regulations, included all the crimes related to employing an undocumented migrant (employment of a minor, employment in particularly exploitative working conditions etc.) into the crimes for which the collective entities shall be held liable, and also provided for the possibility of adjudicating identical penal measures to the liable entity as in the case of a natural person (e.g. the obligation to reimburse the aid provided or subsidies awarded for the previous 12

[9]Act on the Criminal Liability of Collective Entities of 28 October 2002. Electronic version available at: http://isap.sejm.gov.pl/DetailsServlet? id=WDU20021971661

months, prohibition of applying for the money derived from public funds in the form of aids or subsidies), the Directive does not seem to be implemented correctly in this respect.

In the Polish law, due to a rather peculiar structure of regulations, there are no grounds for adjudicating the liability of the entity whose Management Board member committed the crime (this is the opinion of the Supreme Court), which significantly reduces the ability to apply the entire concept of collective entities' liability. All the same, it cannot be deemed that the provisions of the Directive which in Article 11 orders to prosecute the collective entity for the act committed by the *person acting either individually or as a part of an organ of the legal person – who has a leading position within the legal person* – are implemented correctly.

The liability of the collective entity or the absence of such liability in accordance with the provisions of the above-mentioned act does not exclude third-party liability for the damage, administrative liability or the individual legal liability of the perpetrator.

f. Complaint against the employer (Article 13 of the Directive)

In the process of transposing the Directive no new regulations were provided to it that would facilitate filing a complaint against the employer infringing the third-country national 's employee rights, assuming the existing solutions are sufficient under Article 13 of the Directive. The regulations specify several structures which, according to the initiators of legislative changes implementing the Directive, are to enable the third-country nationals to lodge effective complaints against the employer.

The employer shall be entitled to lodge a complaint to the competent National Labour Inspectorate, notifying the body of the inappropriate behaviour of the employer. It should be kept in mind, however, that this is not a special instrument provided to the harmed employees but solely a measure stemming from the constitutional entitlement of citizens to complain to the government and local government institutions and bodies (Article 63 of the Constitution of Republic of Poland). The complaint may refer solely to the labour law infringement and the complaints concerning the civil law relations will not be effective unless they refer to the occupational health and safety issues. The complaint may not be anonymous though the personal information of the person making the complaint is secret and can be disclosed during the procedure solely on the written request by the complaining person. Once the complaint is made, the labour inspector inspects the work facility and should notify the complaining person of the results thereof within 30 days. The inspector may, by an administrative decision, order the employer to pay the outstanding remuneration or to adjust the working conditions to the OH&S principles.

It must not be forgotten, however, that the labour inspectorate is a body entitled also to control the legality of the third-country nationals ' employment, which means it has the right to punish the third-country national with a fine of EUR 240 to 1,200 for working in violation of the law. Moreover, thanks to a close cooperation of the Labour Inspectorate with the Border Guards and to frequent common inspections carried out by these two bodies (see below), initiating the inspection procedures in the work site due to the complaint lodged by the third-country national may soon result in the third-country national 's expulsion. This is not a procedure in which the employee may take active part but they are solely notified of its effects and in certain cases they may become the beneficiaries of the Inspectorate's decision if the inspector orders the employer to pay to outstanding remuneration. The employee is not a party to the procedure and may not interfere with the decisions issued to the employer by the inspector nor appeal against them.

According to the authors of the legislation transposing the Directive,[10] the function of *the effective facilitation of lodging the complaint* shall be performed also by the regulations governing the proceedings in labour courts, allowing for the ability to file a petition against the employer by the non-government organizations in the scope of their statutory activity (Article 462 of the Civil Procedure Code[11]) . It can be presumed that the protection of the third-country employee's interests will belong to the objects of both the organizations defending the rights of employees and the organizations acting to protect migrants' rights. These organizations may take the case to court or enter the pending proceedings to the benefit of the employee, having obtained their written consent. They may not, however, dispose of the subject of the proceedings freely (e.g. they cannot adjudge a claim or withdraw the action in part). Such a right, however, is enjoyed by the organizations solely for claims directly related to the employment relationship. It does not comprise claims stemming from civil law contracts. It may, as a matter of fact, refer solely to establishing the employment relationship and payment of outstanding remuneration and fringe benefits. It can be imagined that the employment relationship based on particularly exploitative working conditions may give rise to the claims concerning the redress of the harm experienced or infringement of personal rights which may not be subject of the petition filed by the organization.

Another measure facilitating the complaint making process is, according to the legislators developing new regulations, the possibility for the labour inspector to file a petition against the employer for the employee's benefit with respect to the establishment of the employment relationship and any benefits related thereto (Article 63(1) Civil Procedure Code). The limitations of this measure are similar to the ones applicable for non-governmental organizations.

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[10] *Bill no. 120. A summary table of the provisions of European Union law, the implementation of which is the goal of the adjustment bill and draft provisions of Polish law.* Available at: http://sejm.gov.pl/Sejm7.nsf/druk.xsp?nr=120

[11] Civil Procedure Code of 17 November 1964. Available at: http://isap.sejm.gov.pl/DetailsServlet?id=WDU 19640430296

Another help for the employee while asserting their claims in court is provided in the form of the provisions allowing the trade union representative or labour inspector, or employee of the work facility where the third-party employee is or was employed to be the plenipotentiary of the employee in the court proceedings, side by side with the professional attorneys (Article 465 Civil Procedure Code).

The final substitute of the complaint mechanism, implemented *by means of third party designated by Member States such as trade unions or other associations or competent authority of the Member State* (Article 13 (1) of the Directive) are supposed to be the proceedings related to the offences committed by the employer, where the function of the public prosecutor is performed by the labour inspector, apparently the body with the major task being protection of employees' rights.

According to the authors of the legislative changes, the above-mentioned measures make it possible to believe that Article 13 of the Directive ordering that the member states should ensure *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* has been implemented correctly.

The above mechanisms can hardly be considered effective, which is why it is impossible to agree the Directive was implemented correctly in this respect, as the complaint filed to the labour inspectorate will deter the undocumented immigrants due to the function of this body, being not only the institution ensuring that the labour law is complied with by the employers but also controlling the legality of third-country nationals ' employment and residence, with the entitlement to impose a fine on them.

The remaining measures facilitating the employee in the pursuit of their claims refer primarily to the court proceedings in the field of labour law. It is impossible to believe, however, that the EU legislators, using the term "lodging complaints' in Article 13 wished to regulate the pursuit of claims using civil procedures in this way (even in a separate procedure, from the labour law field) and not the strictly complaint-related proceedings especially as the court-pursued claims are referred to in other provisions of the Directive. In such circumstances it would be reasonable to consider solely the efficiency of lodging the complaint in the National Labour Inspectorate which, as indicated earlier, plays rather the role of a notification and not a complaint.

g.Back payments (Article 6 of the Directive)

In accordance with Article 6 of the Directive, the Member States ensure that the employer is held liable for the payment of:

a) any outstanding remuneration due to the illegally employed third-party national;

b) the amount corresponding to all the taxes and social insurance contributions which the employer would have paid if the third-country national had been employed legally, including the late interest and applicable administrative penalties;

c) in justified cases – any costs related to sending the outstanding payment to the country where the third-party national returned or was expulsed to.

The expression *Member States shall ensure the employer shall be held liable to pay* assumes proactive approach of the state which not only informs the interested parties of their rights, but also actively acts for the employee's benefit and prosecutes the employer violating the provisions, in order to enforce the payment of outstanding amounts for their benefit. The Polish provisions apparently equivalent to this structure stipulate that if any violation of the labour law or of the regulations concerning the legality of employment is detected, the competent bodies of the National Labour Inspectorate shall be entitled to order the employer to pay the due remuneration for work and also any other benefit due to the employee (Article 11(7) of the National Labour Inspection Act[12]) . The orders in such cases are subject to immediate enforcement. Unfortunately there is no clear emphasis that during each of the inspections the inspecting bodies are obliged to establish if the due remuneration was paid and whenever they discover any outstanding sums, are bound to order to pay them and notify the Social Security Institution and the Tax Office of the necessity to initiate procedures against the employer to recover the outstanding social security contributions and taxes which would help to implement Article 6 of the Directive more precisely.

If the inspection has not taken place or if it has not revealed any violations related to the remuneration arrears, the employee is entitled to sue the employer for the remuneration.

Directive 2009/52 introduces the presumption of the employment relationship lasting for three months to facilitate the illegally employed third-country nationals to claim the outstanding remuneration. For third-country nationals employed under the contract of employment, Polish provisions introduce, for the purpose of pursuing the outstanding claims, the presumption of the employment relationship for the period of no less than three months unless the employer or employee proves a different duration of employment (Article 4(2) Consequences of Employment Act). The presumption will also be applied once the employment

[12]Act on the National Labour Inspection of 13 April 2007, available at: http://isap.sejm.gov.pl/DetailsServlet?id=WDU20070890589

relationship was determined e.g. when the civil law contracts were executed to circumvent the labour law provisions. If the work is delegated to third-party nationals under the civil law contracts, the act introduces the presumption of agreed remuneration amounting to three times the minimum pay unless the employer or third-country national proves a different amount of pay (Article 4(4) Consequences of Employment Act). The remuneration can be claimed in labour court by the employee or a non-government organization in their name (provided its charter allows that), or a labour inspector, trade union representative or employee of the work facility, where the mandator is or was employed, representing them as a plenipotentiary. The claims are pursued in separate civil proceedings, dedicated to labour law cases, where the employee takes a privileged position right from the start. Although in principle the Polish courts do not denounce migrants not entitled to stay in Poland (they do not report to the Border Guards etc.), in practice the fear of being detected and expelled will probably be the greatest obstacle preventing use of the above-mentioned facilitations. Another problem is the lengthiness of court proceedings which may be a discouraging factor in the case of mobile migrants, frequently changing the region of abode, depending on the labour market demand.

h. Effectiveness of the claim after the employee has or has been returned (Article 6 of the Directive)

If the court proceedings were not initiated before the employee left the territory of Poland, the case may be pursued in court by the non-government organization taking the case to court for the benefit of the employee. However, a written consent of the employee is required. Also the prosecutor may demand instituting the proceedings in any case if, according to him, this is required to protect the law, citizen rights or social interests. In such circumstances the consent of the claimant is not necessary. If the migrant awarded the power of attorney to a professional representative of labour inspector, trade union representative or employee of the work site where they were employed, before leaving the territory of Poland or during their stay in the country of origin, this representative shall initiate, in the employee's name, the proceedings and represent them in court. In such circumstances the case shall be examined in the employee's absence provided the evidence is strong enough for the court to award the benefit for the claimant. In many cases, however, the interrogation of the claimant in court is the only evidence and it is impossible to win the case without it.

If the employee managed to file a petition before leaving Poland and in the petition mentioned that they request that the case should be examined also in their absence, the proceedings may be carried out without their participation. Otherwise, the proceedings are suspended and then discontinued if the claimant

remains inactive for one year. If an employee is a citizen of the country that is bound with Poland with a bilateral agreement on legal assistance, it is possible to hold their hearing in the court of their residence with the effect that such a hearing shall be considered a valid evidence in front of the Polish court.
In any case, if the court case is resolved in favour of the employee or if there was an order issued by the labour inspector to pay the outstanding remuneration, the employer shall be obliged to pay the costs related to sending the outstanding sums to the third-country national to the country where this person returned or was returned (Article 5 Consequences of Employment Act).

i.The liability of subcontractors (Article 8 of the Directive)

If the entity delegating work to an undocumented migrant is a subcontractor, the law introduces additional protection of claims to which the third-country national is entitled if the subcontractor is insolvent. The third-country national may demand the contractor to pay the adjudicated outstanding remuneration, as well as any benefits related thereto and to cover the costs connected with sending the outstanding sums to the third-country national to the country where this person returned or has been returned, and the costs of the third-country national 's expulsion if: the subcontractor is insolvent, the court enforcement proceedings against this subcontractor are ineffective or the third-country national 's interest of particular significance supports that (Article 6 Consequences of Employment Act).
The contractor may, however, release themselves from this obligation if they prove that they met the requirements of due care, including - but not limited to - informing the subcontractor of the effects of delegating work to a third-country national not having a valid residence document entitling them to stay in the territory of Poland and that they verified that the obligation to register the third-country national with the social insurance institution was met, provided such an obligation stems from the applicable regulations.
The regulations provide also for a joint and several financial liability of other sub-contractors of the main contractor mediating between the main contractor and the entity delegating the work to the third-country nationals staying illegally for the liability of the latter entity, if they were aware that the sub-contractor employed the illegally staying third-country nationals (Article 7 Consequences of employment Act).
In such circumstances there is a joint and several liability of sub-contractors with the main contractor.
They are obliged to pay the adjudicated outstanding remuneration and the costs connected with sending the outstanding sums to the country where the third-country national returned or was returned if they were aware that the contractor delegated work to a third-country national who stayed in Poland in violation of the applicable law, and it is impossible or difficult to enforce payment of the sums from the entity delegating the work to the third-country national or from the main contractor.

The liability may be evaded in the same way as in the case of immediate contractor, provided the due care was exercised.

It is worth emphasizing that the liability of the contractor and intermediate subcontractors is of a subsidiary nature, taking place only when the benefits are awarded to the employee and the liable sub-contractor is found insolvent.

Article 8 of the Directive stipulates also that the main contractor, and in the second case also intermediate subcontractors, should assume liability for the payment of the fine for delegating work to the third-country national staying in Poland without a valid residence document entitling them to stay in Poland in the above-mentioned circumstances and the Directive was not implemented in this respect.

j.The obligation of notification (Article 6, 13 of the Directive)

If the proceedings to expel a foreigner were initiated, the agency leading the proceedings shall be obliged to advise the third-country national , in a language understandable for them, of the possibility of:

1) filing a claim against the employer and enforcing the decision issued against such an entity in connection with the outstanding remuneration also if this person is expelled from Poland;

2) obtaining a residence permit in connection with the participation in the penal proceedings against the employer and of the ability to extend this permit until the outstanding remuneration has been obtained;

3) taking other action against the employer, including but not limited to notifying competent bodies (Article 10 (1a) Aliens Act).

The Act does not impose the same obligation on the agency when issuing the milder form of the return order - an obligation to leave the territory of Poland within 30 days (which is issued to the third-country national in cases identical to the ones in which a decision to expel is issued but when the circumstances indicate they will carry out this obligation voluntarily). It should be considered that the people whose situation is almost analogous to the ones who were awarded the decision of expulsion (as they do not leave Poland of their own accord) are not advised of the possibility to use the instruments stipulated in the Directive and all the same that the Polish legislators failed to implement Article 6 section 2 of the Directive correctly.

k.Residence permits (Article 6(5), Article 13(4) of the Directive)

In the transposition of Article 6 section 5 and Article 13 section 4 of the Directive, the Polish legislator provided for two possibilities of awarding a temporary right to stay in Poland to the third-country national, depending on the degree to which their rights were infringed by the employer and their engagement in pursuing their rights:

1. Residence permit (for up to 2 years) shall be granted to a third-country national possessing the wronged party status in penal proceedings against the employer in a case of a crime:

- of delegating work to an undocumented migrant in particularly exploitative working conditions;
- of employing an undocumented minor

All the same, as stems also from the Directive, the residence permit shall not be awarded to the persons harmed with the infringement of persistent employment of undocumented third-country nationals or of employment of large numbers of them.

The permit shall be awarded depending on whether the competent bodies instituted penal proceedings against the employer and awarded the third-country national with the wronged party status. All the same, the third-country national is required to take at least a minimum part in the penal proceedings, that is making their personal information known to the investigation body, and frequently also undergoing an interrogation.

The circumstance preventing the use of this instrument is, however, primarily the need to prove the legality of stay as at the day of issuing the residence decision. This solution seems to be a mistake of the Polish legislator but it was not removed in the legislation process, rendering these provisions impossible to apply in practice.

6.A person who, in theory, obtained a residence permit as a party wronged by the crime in the above-mentioned cases, may apply for extending the legal stay if they intend to continue staying in Poland until they obtain the outstanding remuneration from the employer, provided this is supported by a particularly significant interest of the third-country national . The maximum period of the residence right awarded in this way is also 2 years. While applying for the residence permit, the third-country national must prove, however, that they possess a health insurance and a stable and regular source of income, sufficient to pay the costs of maintaining themselves and their dependent family members.

I. Inspections (Article 14 of the Directive)

In accordance with Article 14 of the Directive, Member States are obliged to ensure that effective and appropriate inspections are carried out in their territory, basing on the risk assessment prepared by competent bodies, with the aim to control the employment of illegally staying third-country nationals.

The controls of the legality of stay and employment of third-country nationals are the tasks of two agencies, that is the Border Guards and the National Labour Inspectorate.

The tasks of the Border Guards include controlling the legality of third-country nationals ' stay, the business activity run by them, as well as identifying, preventing and detecting crimes and offences, with prosecuting the perpetrators thereof, within its scope, including the crimes committed by employers in connection with employing undocumented migrants. The new regulations offer the additional rights to the Border Guards in this respect (Article 15 Consequences of Employment Act), that is the ability to carry out, after obtaining consent of competent bodies, the operating inspections, that is inspecting the communication, shipments and even telephone calls and other information transmitted by means of telecommunication networks, including the operating provocation- that is secret purchase, sales or acquisition of any objects obtained through a criminal activity, as well as accepting or giving a material profit (bribery).

Hitherto, these measures were limited to the proceedings in cases of utmost importance, that is crimes committed by organised criminal groups, human trafficking, drug dealing etc.

The National Labour Inspectors, in the scope of inspections carried out by them, are to prosecute offences against the employee rights and also those related to delegating work to third-country nationals with an undocumented stay, as well as to take part in the court proceedings in such cases in the role of a public prosecutor (instead of a professional prosecutor).

If, however, any cases of employing a third-country national in violation of the law (e.g. without a permit) or a migrant without the valid residence permit (in these two cases the third-country national should be expelled from the territory of Poland) are detected, the labour inspector is not the body competent to apply to the provincial governor (Polish *wojewoda)* to have the third-country national expelled. For this reason, the National Labour Inspectorate usually starts the inspection in the work facilities employing the third-country nationals together with the Border Guards who may detain the migrant and file such a motion if required. In 2008 the Chief Commander of Border Guard and the Chief Inspector of the National Labour Inspectorate have signed an agreement on cooperation between the both agencies[13]. The agreement covered the issues of exchange of information about the foreigners infringing regulations governing their

[13]Available at: http://www.pip.gov.pl/html/pl/porozumienia/pdf/gip_straz_graniczna.pdf

stay or work performance on the territory of Poland and the general rule of joint inspections (Border Guard officers and labour inspectors) whenever a third-country national might be involved.

To enhance efficiency of inspecting the legality of third-country nationals ' stay and employment, the employer is obliged to inform the National Labour Inspectorate and the Border Guards of the third-country nationals registered with the social insurance institution within 7 days of these bodies' filing a written application. The database of the Social Security Institution, for obvious reasons, includes solely the personal information of the third-country nationals and employers who carried out the obligation to register the third-country national . The employers oriented towards employing undocumented migrants only rarely comply with this obligation. The above database does not also include the persons employed under civil law contracts (contracts for specific works) and all the same the presented information may be of negligible value for the detection rate of illegal employment.

The novelty in the Polish migrant inspection system is indicating the economy sectors with utmost employment rate of migrants without the valid right to stay.

As mentioned above, the inspections in the scope covered with the Directive 2009/52 are carried out by two institutions, subordinate to different bodies, that is the Border Guards answering to the competent Minister of Internal Affairs and the National Labour Inspectorate answering to the Seym (a Chamber of Parliament). At the same time, the issues related to protecting the country borders, controlling the border traffic and third-country nationals , as well as coordinating activities related to the migration policy of the state belong to the internal affairs department, while the employment issues – to the labour department.

Given the above distribution of competences in the scope covered with Directive 2009/52, the new regulations allocate the following tasks to the ministers competent for labour issues and for internal affairs:

1)Identifying, basing on the risk assessment, the sectors where the employment of the illegally staying third-country nationals is the greatest.

2)Preparing, basing on the information submitted by the Border Guards and the Main Labour Inspector and submitting to the European Commission, information on the number of inspections carried out in the previous year – every year – and the report on implementing the drafted act – every three years.

The Border Guards and the National Labour Inspectorate are obliged to cooperate in the process of identifying the sectors of activity where the illegal employment is the greatest. By 30 April each year, these bodies are obliged to submit collective information on the inspection results to the minister competent for labour issues and the minister of internal affairs.

Moreover, the regulations impose the obligation to cooperate on the ministers competent for: construction, spatial and housing management, public finance, economy, science, agriculture, regional development,

fishery, transport, tourism, social security, foreign affairs and health, while assessing the risk and identifying the economy sectors where the employment of illegally staying third-country nationals is the greatest.

6. Projected impact of the new regulations

The imperfect nature of the above-mentioned protective measures awarded by the Directive to the undocumented migrants may lead to the situation that they will not be used in practice. Surely, the provisions concerning the issuance of residence permit for specific time to the third-country nationals will not apply unless an amendment in the law occurs. Financial sanctions for the employers delegating work to illegally staying third-country nationals may turn out insignificant enough and will not deter the entrepreneurs for whom using the low –paid labour of this group of migrants is the easiest way to increase their profits. It is currently impossible to assess whether the detectability of crimes related to the employment of the undocumented third-country nationals, e.g. in the particularly exploitative working conditions will be a factor deterring employers from such practices. More frequent inspections by the labour inspectorates and Border Guard equipped with increased control powers, as well as the additional obligations imposed on employers, may be, however, the factor deterring some entrepreneurs from employing third-country nationals in general. All in all, one can presume that the new legislation will have a rather minimal impact on the relations between migrant workers and their employers and would probably not be of significant meaning in the state`s combat against illegal migration.

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