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The Czech "fight" against the illegal employment of foreigners

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Abstract:

The commentary focuses on the implications of the fact that in the Czech Republic, foreigners are being crowded out from legal employment by the Ministry of Labour and from legitimate business activities by the Ministry of the Interior. In more detail, the text addresses the failed transposition of the so-called "Sanctions Directive" which should impose sanctions on employers, in particular those benefitting from illegal work done by migrants. Czech public service, however, chose another way to go. This text was published in an abbreviated version on January 4, 2012 in the Lidové noviny newspaper.

In the Czech Republic, the number of employed foreigners has been on a steady decline. At the end of 2008, a total of 128.934 foreigners from third countries held valid employment authorisation. At the end of 2010, only 36.792 foreigners from third countries were authorized to be employed (which is a decrease by 88 thousand). The same period saw an increase in nearly 16 thousand foreign businessmen; the overwhelming majority of whom were people who used to be employees and lost their jobs. According to the 2011 Ministry of the Interior report on migration and integration, in 2011, less than a thousand foreigners returned to their home countries (either voluntarily or involuntarily). Because of the unavailability of more accurate data, we can only guess that the greater part of the 'missing' 65 thousand or so aliens moved into the grey economy, or in other words lost their previously legal status. The estimates are that only a much smaller group of jobless foreigners spontaneously left the Czech Republic.

Since foreigners are being crowded out of legal employment by the Ministry of Labour and of legal business activities by the Ministry of the Interior, this has an unpleasant effect: predominantly young, hardworking and well-integrated foreigners either leave the Czech Republic forever, or they lose their legal residence status. This is wrong either way. The state

budget fails to benefit from the foreigners' illegal work, and the risk rises that foreigners become involved in criminal activities. In turn, such a causation chain gives the policy makers a reason to impose further restrictions. Looking at the jobs that had been held by migrants, Czech citizens do not refill the vacancies; especially since the main "advantage" of employing foreigners from third countries has always been their total dependence on their employers (because of the legal provision that losing a job means losing the residence permit too) and the ensuing willingness to work under any conditions, overtime and for low wages.

The Ministry of Labour and Social Affairs has repeatedly pronounced the fight against illegal employment as its priority. In addition to the disputed campaign against the so-called "švarcsystém" (meaning mostly that the worker acquires a business certificate and becomes a "businessman" but continues to work for his former employer), which is widespread also among foreigners, the Czech authorities' interpretation of the term "illegal work" is remarkably broad: it may be anything from receiving help from relatives, so widespread among the Vietnamese, to being sent on a business trip. All this is now classified as illegal employment.

The slightly absurd "Czech fight" against illegal employment of foreigners has, however, been applied also in the transposition of the so-called "Sanctions Directive"¹. The objective of this EU Directive is to primarily sanction not the illegally employed foreigners, but in particular the employers benefitting from the foreigners' illegal work. This, apparently, is not exactly the direction in which our state administration wants to go. The Sanctions Directive was transposed into the Czech law in particular by an amendment to the employment law, which came into effect at the beginning of January 2012.

Unlike Germany or Austria, the sanctions imposed on employers as addressed in this Directive only apply to the situations when there is a foreigner in the Czech Republic working without a residence permit. They do not apply when a foreigner works illegally but still has a valid visa. And this makes a huge difference; a difference of tens of thousands of people.

Sanctions against employers have been made much stricter, but the administrative proceedings leading up to the imposition of the fine are so long and complex, and the minimum limit to the fine for illegal employment is so high – and for small businesses leading to liquidation (250 thousand Czech crowns, ab. 10 thousand EUR) – that the companies have to file an appeal against the fine and consequently refer to the court, where they often succeed. The Sanctions Directive provides the option to make the main contractor of a building project, or any other activity, responsible for the illegal employment of workers. However, in the Czech Republic, such an option has been thoroughly avoided and the sanctions apply only to the sub-subcontractors – if they directly employ foreigners without a residence permit. Such a regulation

¹ Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009: Providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

would first require a legally effective termination of the proceedings regarding the fine for the direct employer (subcontractor) and subsequent proceedings with the main contractor. In Czech practice, such a situation is almost impossible.

Above that, the Directive foresees the possibility of granting residence permits to foreigners involved in administrative proceedings against their employers or the main contractors and demanding their outstanding wages, which has not been reflected in the Czech law. According to the Directive, the foreigners should have an administrative authority at their disposal assisting them in recovering their entitlements from their employers. Czech legislators, however, did not include such a provision. A third party – a trade union organization or civic association of some kind – has the right to represent foreigners in such proceedings, but in the Czech transposition, only at its own expense. And, finally, a potentially very effective measure against an employer or the main contractor: preventing access to public procurement procedures and any aid including the access to the EU funds. In the Czech law, this "smartly" applies to the holders of business licences – small tradesmen – only even though the Czech criminal code newly comprises the criminal offense required by the Directive: unauthorised employment of foreigners. The Czech law includes a completely vague formulation regarding unauthorised employment of foreigners "in a greater extent".

The result is simple: the manhunt for illegally employed and/or illegally residing foreigners continues all over the Czech Republic; media stigmatization of foreigners as chronic law violators does not cease either. Not even one foreigner has been issued a residence permit to make the claims mentioned in the Directive, not one employer has been convicted of the criminal offense of illegal employment, nor has even one administrative proceeding been launched regarding the liabilities of the main contractor. Although we register a number of Foreign Police decisions on the expulsion of foreigners because of illegal employment (216 such cases in 2011), thus having clear evidence of this deed, administrative and criminal proceedings with the employers of these foreigners is usually not even launched. Information on the financial costs connected to such "efficient" control actions against foreigners, of course, cannot be found in the report of the Ministry of the Interior or in the information provided by the Ministry of Labour and Social Affairs.

What could bring change is a more efficient use of the Sanctions Directive - especially if more groups of foreigners would be protected against illegal employment and if there was an easier way to exclude the main contractor / the employer from access to public procurement procedures and any aid including the access to the EU funds. Unfortunately, even today, it still holds true that in the Czech Republic, without the money from the European Union you do not get even a bench in a park. What would help regarding sanctions for dishonest employers: A significant strengthening of the rights of those foreigners who muster the courage to stand up against such employers and much more support for organizations assisting them in doing so. The main

change, though, would be brought about by a political willingness to take truly effective action against the illegal practices of some employers.

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