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ADMINISTRATIVE PENAL LIABILITY FOR VIOLATIONS OF THE LABOUR MIGRATION AND LABOUR MOBILITY ACT

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Abstract: The paper examines the specifics and system of regulation of the administrative penal liability under the Labour Migration and Labour Mobility Act (LMLMA). In the context of the peculiarities and essence of the subject matter of this special law, we have analysed the basic administrative offences and the penalties provided for them, as well as the corresponding competence of the control bodies. The authors have drawn conclusions and highlighted tendencies in the control and realisation of legal liability under the legislation, and have set forth basic recommendations for improving the legal provisions and clarifying the described offences.

Key words: occupational migration, labour mobility, administrative penal liability, provision of labour by foreigners, violations of LMLMA

Introduction

The Bulgarian labour market faces challenges arising from the new global trends in migration. A large proportion of the active population is leaving Bulgaria, whereas the immigrating workers are far fewer in number. The National Social Security Institute reports that 107,000 people retired in 2016 and 98,000 in 2017. According to data made public by the Committee on Labour, Social and Demographic Policy of the National Assembly, there are only 63 new entrants against every 100 people leaving the labour market. An additional negative effect is caused by the net emigration, which, despite its downward trend, remains at around 4,000 people yearly [1].

Normally, the labour market has reserves of locals which are currently unemployed. Unfortunately, such people no longer constitute a reserve, as unemployment itself is now below 6%, with most unemployed being unskilled workers. The problems of labour mobility and labour migration have drawn the attention of both lawmakers and legal scholars. This is indicative of the relevance of the present study. These issues are crucial to the regulation of employment of foreigners in Bulgaria, as

well as to employment of Bulgarian nationals abroad. The special law, namely the Labour Migration and Labour Mobility Act, contains not only labour law norms, but also administrative law provisions aimed at guaranteeing compliance with the law.

The aim of the paper is to explore the specifics and the regulation of the administrative penal liability under the LMLMA. In the context of the characteristics and nature of the subject matter of the special law we have analysed the basic administrative offences and the penalties stipulated for them. The authors have drawn conclusions and highlighted tendencies in the control and realisation of legal liability for non-compliance with the legislation, and have set forth basic recommendations for improving the legal provisions and clarifying the described offences.

The following research objectives have been pursued: 1. Explore and analyse the basic administrative offences under LMLMA; 2. Outline the system of the offences; 3. Identify shortcomings of the regulations and put arrive at conclusions and generalizations about the administrative penal liability.

The scope of the study includes domestic rules on administrative offences under LMLMA, and the set aim and research objectives have been pursued using the traditional comprehensive methodology of legal research.

The subject of the analysis are norms of the current domestic legislation on labour mobility and labour migration.

The study makes no claim to be exhaustive of the subject, and given its limited volume, the authors have strived to examine at the doctrinal level the problems of administrative liability in the area of labour mobility and labour migration, thereby putting forward argumentation of the problems and offering a scholarly analysis in terms of the proper application of the provisions.

The paper is consistent with the current legislation as at 31.03.2019.

The administrative penal liability [2] under the special law aims to protect the social relations in the field of labour mobility and labour migration.

The systematics of the administrative offences described in LMLMA can be summarized as follows:

- provision or use of the labour in a situation of labour migration and violations of the special law LMLMA;
- non-compliance with or obstruction of the functions of the control bodies;

- employment of illegal residents in Bulgaria.

The provision or use of labour in a situation of labour migration and in violation of the special law concerns several different offending acts. One clearly defined offending act is that under Art. 75a., Par. 1 LMLMA, which deals with the provision of services without appropriate authorization or registration with the Employment Agency (EA), where the offender is a third-country foreigner, who provides labour or has been accepted as an individual sent or posted in the Republic of Bulgaria to provide services without proper authorization or registration with the EA.

The text refers to two categories of persons: first, persons defined in paragraph 1, item 4 of the Additional Provisions of LMLMA as "third-country nationals", i.e. persons who are not nationals of either the Republic of Bulgaria, a Member State of the European Union, a signatory country to the European Economic Area agreement, or Switzerland.

Second, posted persons, legally defined in item 8 of the Additional Provisions as "workers who are nationals of a Member State of the European Union or of a third country, who carry out work in the Republic of Bulgaria during a specified period, as established in the employment contract with an employer whose registered address is in another Member State of the European Union or in a third country, under the terms and conditions of Art. 121a, Par. 1, item 2, letter "a" and Par. 2, item 2 of the Labour Code.

Another penalized act is the one provided for in Art. 75, Par. 2, which concerns a specific offender: a natural or legal person employer, for whom a foreigner provides labour or who has accepted legally residing third-country nationals without appropriate authorization or registration with the Employment Agency.

The text of paragraph 3 governs acts committed in violation of the principles of hiring and providing labour for seasonal work as prescribed in Art. 24, Para. 3, with the offender being a foreigner who holds a short-stay visa on grounds other than seasonal work. Seasonal work is legally defined as "work that depends on the change of seasons and is tied to a certain time of the year through a repeating event or a series of events related to seasonal conditions under which the need for workforce is significantly larger than for ordinary current works". In this sense, the offender must not have the capacity of a seasonal worker, i.e. a third-country national who retains their principal place of residence in a third country and is legally and temporarily residing in the Republic of Bulgaria in order to perform seasonal work under one or more fixed-term contracts concluded directly with an employer whose registered address is in the Republic of Bulgaria. However, this provision does not be unequivocally interpreted, as it does not indicate which person is subject to penalty. Conversely, the

wording of paragraph 5 clearly indicates that the person liable is the employer, by argument from Art. 75a, Par. 6 LMLMA¹.

Another instance of offence is that under Par. 5, which concerns the provision of labour under Art. 8, Par. 1 LMLMA by a foreigner who has no right of access to the labour market. Under the procedure provided for in the norm, access to the labour market is not granted to third-country nationals holding a short-stay visa for Bulgaria, except for the purposes of seasonal work under Art. 24, Para. 3, nor to persons holding long-term residence permits on the grounds of Art. 24, Par. 1, items 2, 6-8, 10, 14, 16, 19 and 20 of the *Foreigners in the Republic of Bulgaria Act*². The flagrant imperfection of the provision consists again in the failure to identify the person to be penalized, insofar as it stipulates penalties under paragraphs 1 and 2, i.e. the nature and type of penalty, but with no indication of the subject of the penalty. By argument of the context and reference to said paragraphs it should be assumed that it the subject of the penalty may be both the employee and the employer, but the failure to expressly identify the offender makes the hypothesis of the provision undeniably meaningless, in view of the inconsistency in its application.

The law also lists aggravated offences, which consist in repeated cases of violations, where penalties are imposed on the employer for each illegally hired legally residing foreigner.

A specific offence is described in Art. 76, Par. 2, concerning **violation of the conditions and procedures for posting or sending workers**. The offender under this legal provision is a resident who has hired a person posted or sent from either a Member State of the European Union, a signatory country to the European Economic Area agreement or Switzerland, or a third country. According to the definition in item 12 of the Additional Provisions, "a resident who has accepted a posted or sent worker" is a person operating in the Republic of Bulgaria, registered under Bulgarian law or the law of another Member State of the European Union, a signatory country to the European Economic Area agreement, or Switzerland, which employs the services of a person posted or sent from a Member State of the EU or from third countries.

The third paragraph of the same article describes the offence consisting in an employer's failure to declare before the Employment Agency within the statutory deadline the hiring of third-country nationals who have not received a permanent residence permit in the Republic Bulgaria and are family

¹ The text states that "Penalties under paragraphs 2, 4 and 5 shall be imposed on the employer ..."

² By analogy, penalties should not be imposed for provision of labour by persons entitled to access to the labour market, in particular third-country nationals legally residing in the Republic of Bulgaria, when they are: 1. persons of Bulgarian origin – until they obtain a permanent residence permit; 2. persons who have worked in a previous period, before submitting the application for access to the labour market, under the terms of an international treaty to which Bulgaria is a party; 3. persons working without a work permit under Art. 9, Par. 3 – where the employment continues more than three months; 4. the family members of a third-country national who is a long-term resident in the Republic of Bulgaria.

members of a Bulgarian national or a national of a Member State of the European Union, of a signatory country to the European Economic Area agreement, or of Switzerland, who are entitled to free movement under international treaties concluded with the European Union. The offence has a complex factual composition provides and requires the following cumulative conditions to be met: 1. employment of third-country nationals, who have not been granted a permanent residence permit in the Republic of Bulgaria, 2. these nationals must be members of the family of a Bulgarian national or a national of a Member State of the European Union, of a signatory country to the European Economic Area agreement, or of Switzerland, who, by virtue of international treaties concluded with the European Union, 3. are entitled to free movement, and 4. failure to declare this circumstance to the Employment Agency within the prescribed deadline.

The offences preventing the execution of control duties are associated with two main hypotheses. On the one hand, this refers to non-compliance with mandatory instructions to terminate the offences under this law, given by control bodies to natural or legal persons – employers, officers and residents hiring posted or sent employees from Member States of the European Union or third countries.

The second hypothesis concerns acts of unlawful obstruction of the performance of duties of control bodies, where the offender may be an employer, an officer, an individual or a resident, who has hired posted or sent employees from Member States of the European Union or third countries.

Offences constituting **violation of the rules for hiring and provision of labour under Article 13, i.e. the employment of third country nationals illegally residing in the Republic of Bulgaria**, are laid down in Art. 77, paragraphs 1 to 5. The offender is an employer – a natural person who violates the prohibition on hiring third country nationals illegally residing in the Republic of Bulgaria. At the same time, according to item 13 of the Additional Provisions, the act of illegally hiring a third-country national is legally defined as "hiring an illegal third-country national and hiring or accepting a third-country national without proper permit by or registration with the Employment Agency". In addition, such act would be punishable if the relevant employee meets the definition of § 1, item 3b of the Additional Provisions of the Foreigners in the Republic of Bulgaria Act, which defines "an illegally residing foreigner" as any third-country national who is in the Republic of Bulgaria and does not meet or no longer meets the conditions for stay or residence.

Obviously there is some discrepancy in terms of the wording of the offending act and its elements. On the one hand, the act has to consist in the hiring of illegal residents, and on the other hand the definition in the Additional Provisions introduces the concept of "illegal hiring", which is obviously

a different situation and a qualitatively different offending act, which may refer to the hiring of otherwise legal residents, but in violation of the requirements of the licensing regime. This creates an unfounded collision of statutory provisions, which results in restricted application of the norm as a whole and in penalizing only a limited number of cases with indisputable facts.

The act is considered aggravated in the event of repeated commission, and, similarly to the previously examined act and in implementation of the adopted legislative technique, penalties are imposed on the employer for each illegally residing foreigner hired.

Conclusion

The analysis of the definitions of offences under LMLMA allows us to draw some conclusions and outline shortcomings in the current legislation. In particular, these boil down to the following typical instances:

- Lack of precision in the formulation of the provisions, mainly in terms of wordings not specifying the offender;
- Discrepancy between the wording of the offending act and its references in the additional provisions, which establish a situation that is different in terms of its nature or deviates from the letter of the norm;
- Convoluted descriptions of the offences, requiring a sequence in the occurrence of circumstances of different nature, thus creating a generally cumbersome hypothesis;
- Low in amount and identical in nature penalties with weak preventive effect.

One positive legal technique is imposing penalties for each illegally employed legally residing foreigner, without supplementing or modifying the principle of repeated violation.

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