COMMON POSITION OF STATE AUTHORITIES ON THE ISSUE OF POSTING OF THIRD-COUNTRY NATIONALS TO THE CZECH REPUBLIC BY AN EMPLOYER ESTABLISHED IN ANOTHER MEMBER STATE OF THE EUROPEAN UNION

The state authorities of the Czech Republic have noted with concern the spread of illegal practices in the field of labour migration, which threatens the Czech labour market and abuses the principle of free movement of services within the EU. Its essence is **the pretended temporary posting of third-country nationals who hold residence permits issued by other Member States (in particular Poland) to the Czech Republic for the alleged provision of services** by an employer established in that other state. **The opinion that this practice cannot be accepted, as it is in conflict to Czech and EU legislation, the case law of the Court of Justice of the EU and the courts of the Czech Republic, is unequivocally held by all state bodies with management and control authority in this area**, i.e.

- Ministry of Labour and Social Affairs,
- Labour Office of the Czech Republic,
- State Labour Inspection Office,
- Ministry of the Interior,
- Police of the Czech Republic – Foreign Police Service,
- Customs Administration of the Czech Republic.

The current control practice reveals clear evidence of frequent abuse of the right to free movement of services in order to circumvent the mandatory permitting of employment of third-country nationals in the Czech Republic.

In order to inform the Czech business community about the features and risks of the above-mentioned illegal practice and the conditions of employment of third-country nationals in the Czech Republic in the context of their broadcasting for the purpose of providing services, the following opinion is issued:

A valid residence permit issued by another Member State entitles a third-country national to stay temporarily in the Czech Republic, not to work. The performance of work by a third-country national is subject to authorisation by the administrative authorities of the Czech Republic, unless the Employment Act expressly provides for an exception.

Act No. 326/1999 Coll., on the Residence of Foreigners in the Territory of the Czech Republic (hereinafter referred to as the "Act on the Residence of Foreigners") postulates in **Section 18 (d)(5)** that "*a foreigner may reside in the territory temporarily without a visa (...) if (...) he/she holds a document authorising his/her residence in the territory of another Contracting State and the period of stay in the territory does not exceed 3 months*".

In European Union law, this provision corresponds to **Article 21(1) of the Convention Implementing the Schengen Agreement** of 14 June 1985, which provides that *foreigners holding a valid residence permit issued by a Member State may, on the basis of that permit and a valid travel document to move freely for a maximum period of three months during any six-month period within the territory of the other Member States*...'; **Section 2(a)** adds that "*the right of free movement (...) shall also apply to foreigners holding a valid long-stay visa issued by a Member State...*".

For **a stay exceeding 90 days**, a third-country national must always obtain **a valid residence permit issued by the Ministry of the Interior** – a visa for a stay exceeding 90 days or a residence permit – in accordance with the Act on Residence of Foreigners.

The third-country national is entitled to perform work in the territory exclusively under the conditions postulates in Act No 435/2004 Coll., on Employment (hereinafter referred to as the "Employment Act"). To work, he/she needs **an employment permit, an employee card, an intra-corporate transfer card or a blue card**, unless this law specifically provides for an exception. The exhaustive list of exceptions is set out in **Section 98 and 98a** of the Employment Act.

Execution of work without a permission is punishable by low with fine and measures in the form of expulsion.

The performance of work by a foreigner outside the employment relationship, without an employment permit, an employee card, an intra-corporate transfer card or a blue card, or in conflict with these documents, or the performance of work without a valid residence permit, is qualified as illegal work under **Section 5(e) of the Employment Act**. The performance, facilitation or mediation of illegal work are administrative offences punishable under this Act by a fine, that may be imposed on a foreigner, the employer or the mediator.

Section 119(1)(b)(3) of the Foreigners Act provides for the sanction of administrative expulsion from temporary residence: "*The police shall issue a decision on the administrative expulsion of a foreigner who is staying in the territory temporarily, with a period of time during which the foreigner cannot be allowed to enter the territory of the Member States of the European Union (...) for up to 5 years (...) if the foreigner is employed in the territory without a residence permit or an employment permit, although this permit is a condition for employment (...) or without the employment permit has employed the foreigner or mediated such employment for the foreigner*."

A third-country national employed in another EU member State may be posted to the Czech Republic as part of the provision of services. Based on the exception provided by the Employment Act for this case, his work is not subject to permission by the Administrative Authorities of the Czech Republic.

One of the exceptions listed in the **Employment Act** (see above) is the provision of **Section 98(k)**, which provides that "*an employment permit, an employment card, an intra-corporate transfer card or a blue card is not required under this Act for the Employment of a foreigner (...) who has been posted to the territory of the Czech Republic as part of the provision of services by an employer established in another Member State of the European Union*."

This provision corresponds to **Article 56 of the Treaty on the Functioning of the European Union**, which provides that "*restrictions on the free movement of services within the Union for nationals of Member States who are established in a Member State other than that of the recipient of the services shall be prohibited. The European Parliament and the Council may, in accordance with the ordinary legislative procedure, extend the applicability of this Chapter also to service providers who are nationals of third countries and who are established in the Union.*" **Article 57** then specifies that "*services (…) shall be deemed to be services normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons*."

The provision of services by the posted workers is not their performance of dependent work in the territory of the Czech Republic.

The nature of the activity of the posted third-country national cannot have the characteristics of dependent work for the natural or legal person to whom he or she has been posted. Dependent work is defined in **Section 2 of Act No. 262/2006 Coll., The Labour Code**:

(1) Dependent work is work that is performed in a relationship of superiority of the employer and subordination of the employee, on behalf of the employer, according to the employer's instructions, and the employee performs it for the employer in person.
(2) Dependent work must be performed for wages, salary or remuneration for work, at the employer's expense and responsibility, during working hours at the employer's workplace or at another agreed location.

Act No. 222/2009 Coll., on the Free Movement of Services, which transposes Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, defines in **Section 3(a)** a service such as "...*the provision of any performance* ***outside the performance of dependent work***...".

A posting in the framework of the provision of services is a posting where a third-country national is temporarily posted from the state where he or she normally works and there is an employment relationship with the posting foreign employer for the duration of the posting.

Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services ("the Posting of Workers Directive") lays down the conditions for the posting of third-country nationals, which applies to undertakings established in a Member State if they take the transnational measures specified in exhaustive terms in accordance with Article 1(3) of that Directive:

a) send a worker to the territory of another Member State on their own account and under their direction on the basis of a contract concluded between the undertaking by the posting worker and the party for whom the services are intended, operating in that Member State (…), or
b) send the worker to an establishment or undertaking belonging to a group undertakings in the territory of a Member State (...), or
c) as a temporary employment business or undertaking providing workers, they send the worker to an undertaking which uses him/her, established or carrying in the territory of a Member State (...).

In all these cases, there must be an employment relationship between the posting undertaking or the temporary employment business or the undertaking providing the workers, on the one hand, and the worker, on the other, for the duration of the posting.

Article 2 of the Posting of Workers Directive explicitly states that "for the purposes of this Directive, a posted worker means a worker who, for a limited period, carries out work in the territory of a Member State other than the Member State in which he/she normally works".