

**Analysis of the transposition of Directive 2009/52/EC  
providing for minimum standards on sanctions and measures  
against employers of illegally staying third-country nationals  
in Romania**

**ARCA**

**ROMANIAN FORUM FOR REFUGEES AND MIGRANTS**

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# 1 GENERAL OVERVIEW OF THE DOMESTIC MIGRATION POLICY

In the last decade, the migration policy in Romania has undergone several changes as a result of an increasing flow of migrants in the context of Romania's European Union pre-accession process, followed by Romania's accession to the EU in 2007 and the subsequent measures taken to align the national legislation with the *European acquis* in the field of immigration.

In 2004, the first *National Strategy on Migration 2004-2007* was adopted with the aim to harmonize the internal legislation with the EU *acquis communautaire* in the field and strengthen the institutional management of the immigration phenomenon. The document highlighted the need for action on preventing and combating illegal residence of foreigners, reducing the underground economy associated with illegal migrants, creating a national integration program that could benefit the immigrants in Romania in order to support their active participation to the socio-economic and cultural life of the country, and combating illegal migration by providing diplomatic missions or consular offices with proper equipment to detect forged travel documents.

To respond to existing challenges, the legal framework comprised of Government Emergency Ordinance 194/2002 regulating the entry, stay and exit of third country nationals and was amended with specific provisions on entry requirements, permanent residence and consequences of illegal residence. Regarding the integration process of foreigners, the Government Ordinance 44/2004 on the social integration of foreigners granted a form of protection in Romania, foreigners with a legal stay as well as EU/EEA citizens and later on the Asylum Law No. 122/2006 were adopted in response to the need to facilitate their participation into the Romanian society.

Following the accession to the EU in 2007, the management of the migration phenomenon was marked by a turning point. The second *National Strategy on Migration 2007-2010* was adopted to further harmonize the internal legislation with related EU policies and to strengthen collaboration with the member states on issues related to migration management and border control, combating illegal immigration, social integration of third country nationals and asylum.

The strategy also aimed at strengthening cooperation between the Romanian authorities responsible for combating illegal immigration and work without legal forms,

namely the Border Police, the Agency against Human Trafficking, the General Inspectorate for Immigration (previously referred to as the Romanian Immigration Office), and the Labour Inspectorate. In consideration of the intra-community mobility, new provisions were introduced on the right of free movement and residence within Member States for community citizens and their family members. Also the Government Emergency Ordinance 56/2007 on the employment and secondment of third country nationals in Romania was adopted, which regulated specific provisions of basic conditions for access to the labour market (work authorization, residence permits, employer's obligations etc.).

During 2008-2009, the inflow of migrants peaked; the immigration rate reaching 76.2% increase compared to 2005.<sup>1</sup> The downturn in the Romanian economy at the beginning of 2009, with unemployment falling gradually created the premises for the formerly employed foreigners to seek employment in the black market or to emigrate illegally in another EU country.

The economic downturn and rising unemployment complemented by Romania's accession process to the Schengen area have led to a stronger focus on migration, or more specifically on immigration. In this context, the Romanian government adopted *the National Strategy on Immigration 2011-2014*.

The document lays down a number of strategic priorities including:

- **a properly regulated system of legal immigration.** In this sense, the government underlines the importance of conducting awareness campaigns on Romania's immigration laws with the involvement of Romania's diplomatic missions abroad. Additionally, it emphasizes the need to correlate the migration policy to the existing gaps in the labour market and introduces provisions for the preferential entry and stay of highly qualified workers, foreign investors, students, and researchers.
- **enforcement of removal and restrictive measures against illegal foreigners, undeclared work, work exploitation and human trafficking.** In order to counteract illegal migration, the strategy stresses the importance of providing foreigners with adequate information on the sanctions and restrictive measures taken against illegal foreigners and undocumented workers. It also calls

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<sup>1</sup> The National Strategy on Migration 2011-2014, page 4 available at: [http://www.mai.gov.ro/Documente/Transparenta%20decizionala/Anexa\\_Strategie%20imigratie.pdf](http://www.mai.gov.ro/Documente/Transparenta%20decizionala/Anexa_Strategie%20imigratie.pdf)

for the need to strengthen cooperation between the main institutions responsible for combating illegal immigration and undocumented work as well as cooperation with the states having high immigration rates. Moreover, it calls for effective and immediate enforcement of the returning measures against illegal migrants in case of voluntary or forced return.

- **Improvement of the asylum system and local integration of refugees and third country nationals.** The major points of concern are related to the respect of the *non-refoulement* principle, deterrence of the asylum procedures abuses, the assumed role in the resettlement programme, and improving policies and practices for the local integration of foreigners.

According to the General Inspectorate for Immigration, at the end of 2012 there were 55.823 foreigners legally residing in Romania, accounting for 0.3% of the total population. The largest groups of foreigners residing in Romania originate from Republic of Moldova (24%), Turkey (16%) and China (12%). According to their purpose of stay, the majority are family members of Romanian citizens (46%), students (20%) and workers (11%). The most prevalent employment sectors among the migrant workers are low and middle skilled sectors including construction, trade services, food industry and domestic labour.

Regarding the extent of irregular migration in Romania, it can be inferred that phenomenon is relatively small compared to other EU countries. Based on the statistics put forward by the General Inspectorate for Immigration the number of illegal migrants detected in 2011 (3452) and 2012 (3423) represents approximately 6% of the total immigrant population.

The share of irregular migrants in the Romanian illegal labour market it is however difficult to assess. Based on the official position of the General Inspectorate for Immigration the number of illegally staying foreigners has dropped as a result of strengthening the immigration control and enforcement of strong and effective removal measures. For instance, as a result of the 1849 controls carried out in 2011<sup>2</sup> by the Immigration Inspectorate in cooperation with the Labour Inspectorate and other public bodies to combat illegal work of foreigners, 79 foreigners were found with illegal stay having expired or no residence permits and no work authorization. In 2012, the number dropped to 14. The leading countries of origin of illegal immigrants to the

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<sup>2</sup> According to the 2011 Activity Report of the General Inspectorate for Immigration available at: <http://ori.mai.gov.ro/api/media/userfiles/bilant%202012.ppt>

Romania were Republic of Moldova, Turkey, Tunisia, Algeria, Morocco, Pakistan, Serbia, Israel, Syria, and China.

The procedures in place for returning illegally staying third country nationals are: voluntary return or forced return (removal under escort). In case the migrant cannot be removed under escort within 24 hours, he/she is detained in public custody based on court decision.

According to the General Inspectorate for Immigration, the number of illegal third country nationals in Romania may rise in the upcoming period considering the flow of illegal migrants entering the territory via neighbouring Serbia and rejected asylum seekers refusing to return to their country of origin.

On the part of migrants, in addition to harsh socio-economic conditions in their country of origin, reasons for engaging in undeclared work are mostly related to the strict employment regulations for third country nationals, including the long and costly bureaucratic process of obtaining a work authorization by a potential employer, as well as lack of diplomas or evidence of vocational education and training relevant for the job vacancy, and the possibility to be better paid under the table.

The phenomenon of undeclared work is also widespread among asylum seekers who are not entitled to work in the first 12 month of stay in Romania. The socio-economic conditions and insufficient state assistance constrain them to accept any work conditions.

## 2 CURRENT LEGAL FRAMEWORK CONCERNING MIGRANT WORKERS

The major national act concerning migrants is the Government Emergency Ordinance No. 194/2002 of June 6, 2008 and amended in 2011 on 31<sup>st</sup> of July, on the access to the territory, stay, settlement and removal of foreigners, hereinafter **the Aliens Act**. This

law controls the administrative status of migrants at all stages of their stay in Romania. The access of third country nationals to the Romanian labour market is regulated by the Government Emergency Ordinance No. 56/2007 of June 26, 2007 also amended on 31 July, 2011 regarding employment and secondment of foreigners in Romania (hereinafter **Foreigners Employment Act**).

General provisions regarding employment relationships, occupational safety and health, and some employment standards including obligations of the employee and employer, rules for remuneration payment, the right to leave, termination of the employment relationship etc. are regulated by the Romanian **Labour Code**. Employment relationships under civil law contracts are regulated by **the New Civil Code**. Criminal sanctions against employers of illegal foreign labour are subject to **the Penal Code**.

### 3 DETAILS ON THE TRANSPOSITION OF THE DIRECTIVE

The provisions of the Directive 2009/52/EC of the European Parliament and of the Council establishing minimum standards on sanctions and measures against employers of illegally staying third-country nationals (hereinafter referred to as **the Directive**), published in the Official Journal of the European Union No. L168 on June 30, 2009 should have been introduced into the national legislative systems of the Member States by July 20, 2011.

To transpose the dispositions of the Directive into the national law, Romania adopted Law No. 157/ July 11, 2011 on Amending and Supplementing Certain Laws Regarding Aliens' Stay in Romania which came into force eleven days after the deadline for the transposition that is July 31, 2011.

The amendments in the new law are also reflected in the Aliens Act and in the Foreigners Employment Act. Other specific provisions can be found in the Labour Code, Penal Code, Civil Code and the Law 678/2001 on preventing and combating trafficking of human beings.



## 4 THE LEGAL SITUATION OF THE MIGRANT WORKER IN ROMANIA

### 4.1. ACCESS TO THE LABOUR MARKET FOR MIGRANT WORKERS

According to the Foreigners Employment Act (article 2) an alien is a person who does not have Romanian citizenship, citizenship of another Member State of the European Union or the European Economic Area or the Swiss Confederation citizenship. The law puts forward specific provisions regarding legal employment of foreigners in Romania. Generally, in order to delegate work to a foreigner the following cumulative conditions have to be met:

- vacancies<sup>3</sup> cannot be filled by either Romanian citizens, EU and EEA nationals or permanent residents in Romania;
- the foreigner(s) must provide evidence of training and/or professional experience as required by the employer and in line with the legislation in place;
- the foreigners must show proof of medical clearance as well as proof of no criminal record;
- the number of foreign employees fall under the annual quota approved by government decision;
- the employer actually operates in the field for which the work authorization is requested;
- the employer has never been sanctioned for undeclared work or illegal employment.

In order to obtain a residence permit for work the employer shall apply for a work authorization to the Immigration Inspectorate. A few exceptions apply in the case of permanent residents, aliens whose access to the labour market in Romania is regulated by bilateral agreements between their countries of origin and Romania, persons granted a form of international protection, teachers/researchers, diplomatic staff, foreigners who are appointed heads of branches of international companies, family members, foreign employees seconded from legal entities in the EU/ EEA or the Swiss Confederation, asylum seekers after 12 months of stay year if the claim has not been finalized and those granted tolerated status.

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<sup>3</sup> The provision does not apply in the case of foreigners appointed as business administrators in companies with foreign capital, professional athletes, seasonal workers, nominal work permit holders, cross-border workers, and foreigners holding a residence permit for study purposes.

The work authorization is usually issued within 30 days provided that the employer provides a list of documents related to the business activity and the foreign employee and it is valid for 1 year. If further examination is needed, the document may be issued within 45 days. For EU Blue Card holders the document can be issued in 15 days. The cost for issuing a work authorization is 200 EUR or 50 EUR in case of students and seasonal workers and it is payable by the employer.

The document grants the holder the right to work for one employer and a specific job. Failure to obtain a work authorization leads to losing the foreigner's right to enter or extend his/her stay in Romania. Holding a work authorization is a prerequisite for applying for a long-stay visa for employment or secondment at Romanian diplomatic missions or consular offices abroad.

For aliens in Romania seeking to extend their stay, the work authorization must be renewed yearly. If the foreigner decides to change his/her employer, a new work authorization is required.

In case the migrant is fired or the working contract is terminated by both sides, the authorization shall be cancelled within 5 working days which further leads to losing the right of legal stay in Romania.

Specifically, documents related to the business activity that shall be submitted by an employer include: the company's registration documents; evidence of creditworthiness from the bank, proof that the company has no debts to the state's budget in the last three months from the Tax Office, proof that the job vacancy was registered to the Public Employment Agency issued not more than 60 days prior to the filing date; proof that the vacancy was published in a newspaper of general circulation, a job description for the vacant position as well as an organization chart containing all the filled and vacant positions.

Documents related to the prospective employee include: a resume and a sworn statement on his/her medical condition to undertake employment; criminal record, diplomas or evidence of vocational education and training relevant for the job vacancy; copy of residence permit or passport and two pictures.

In the case of permanent workers, the employer must also present a copy of the ID card, authorization to practice the liberal profession, proof of enough financial means to pay the wage of the foreign employee, and proof of no criminal record.

Depending on the job being applied for, different types of work authorization can be issued for permanent workers, seconded workers, seasonal workers, nominal workers (who previously held an authorization for seasonal work at the same employer and left the country upon contract termination), trainees, athletes, cross-border workers, nominal highly skilled workers, and EU blue card holders.

The number and types of work permits to be issued each year is approved by the government in the form proposed by the Ministry of Labour. The annual quota for 2011<sup>4</sup> and 2012<sup>5</sup> was 5500 work authorizations as detailed below:

Type of work authorization	Annual quota in 2011	Annual quota in 2012
Permanent workers	4000	3000
Highly-skilled workers	-	1000
Seconded workers	600	700
Seasonal workers	200	200
Trainees	100	200
Athletes	300	300
Nominal work permits	100	100
Cross-border workers	200	100

After obtaining the work authorization and concluding the work contract, the employer must register the contract with the Labour Inspectorate one business day prior to commencement of work of the employee.

#### **4.2. LIABILITY OF THE EMPLOYEE WHEN UNDOCUMENTED AND/ OR EMPLOYED CONTRARY TO THE BINDING PROVISIONS**

According to the Aliens Act (article 81), illicit residence of foreigners in Romania as a result of expired/lack of visa, residence permit, work authorization, or rejected asylum claims is subject to removal from the Romanian territory.

<sup>4</sup> According to Government Decision 1345/2010 from 30th of December 2010.

<sup>5</sup> According to Government Decision 1261/2011 from 29th of December 2011.

No financial sanctions are imposed against third country national for illegal employment. In this case, the Immigration Inspectorate issues a **return decision**. The return decision allows for a period of **voluntary departure** ranging from 15 to 90 days depending on the particular situation of the migrant and the type of violations committed as well as instructions on legal recourse. If the illegal migrant refuses to leave the country voluntarily in the designated timeframe, **removal under escort** is undertaken.

An **entry ban** may be given together with a return decision if no voluntary departure is granted or when the illegally staying third-country national has not complied with the return decision. The duration of the entry ban is set on a case-by-case basis, taking into consideration the particular circumstances of the person concerned.

The migrant may appeal to court against a return decision within 3 days after the return decision was issued. Challenging the decision on removal under escort suspends the execution of the decision. The court rules within five days, and the decision is final and irrevocable. If there are serious indications that removal under escort cannot be performed within 24 hours, the alien is **detained in public custody**. The detention period may last for 6 months and may be prolonged in particular circumstances.

Costs of removal from the Romanian territory of aliens who have financial means shall be covered by them. Additionally, the Immigration Inspectorate may prohibit entry into Romania for a determined period.

Certain categories of illegal migrants are excepted from the enforcement of removal measures, including minors with parents having a legal right to stay in Romania, parents of Romanian minor citizens (provided that he/she pays alimony), aliens married to Romanian citizens, aliens older than 80 years, aliens whose life is endangered in their country of origin or if removal is prohibited by international documents which Romania is part to.

### **4.3. GENERAL OVERVIEW OF THE UNDOCUMENTED MIGRANT WORKERS' SITUATION AS REGARDS ACCESS TO HEALTHCARE, EDUCATION AND JUDICIAL PROTECTION**

#### **ACCESS TO HEALTHCARE**

Since foreigners without legal residence do not and cannot legally work, they are restricted from accessing the social security system apart from some exceptions. Although, the public system coexists with a number of private service providers, private health insurance is not available for undocumented migrants.

Under the Health Law 95/2006, persons without health insurance have right to emergency medical services, pre and post natal care as well as epidemic treatment free of charge. Since there are no specific legal provisions as regards access to healthcare for undocumented migrants in Romania, the general law applies. Consequently, illegal aliens are entitled to emergency medical services, pre and post natal and epidemic treatment free of charge. Consultation at non-governmental organizations delivering free medical assistance is mostly conditioned by a legal residence status. As regards to access to health care for undocumented migrants under the age of 18, the Children's Rights Protection Law 272/2004 applies, granting all children under the age of 18 medical care free of charge.

Under the Aliens Act, however, undocumented migrants in detention centres are entitled to access adequate medical assistance, medicines and health supplies free of charge.

Although there are no explicit legal provisions granting undocumented migrants the right to stay in Romania based on medical grounds, the Aliens Act offers the possibility for tolerated status.

#### **ACCESS TO EDUCATION**

In Romania, minor migrants have free access to compulsory education according to the Aliens Act (Article 132).

The Education Law currently in place guarantees equal and free access to education in the public system to all Romanian, EU or EEA citizens as well as aliens granted international protection or a legal right to stay under the age of 18. There is no specific

provision regarding access to education for minor undocumented migrants or adults. Consequently, illegally residing migrants do not have the possibility to enrol in primary or secondary education.

Considering schools' obligation to inform the Immigration Inspectorate about the legal status of the foreign students, parents refrain from enrolling their children in school.

In some cases, however, practice has shown that in the case of minors whose legal residence has expired while attending primary school, they were allowed to continue their studies until the age of 18, despite the school's obligation to report the attendance of illegal children.

### **ACCESS TO COURTS**

Aliens in Romania can access the judicial system irrespective of their legal status. Generally, illegal migrants work very hard to stay invisible and refrain from claiming their rights for fear they may be reported to the Immigration Inspectorate.

In case of those detected who are bound to leave the country in a designated timeframe, they can request the assistance of lawyers through the power of attorney and take their case to court. NGOs or trade unions cannot be granted a power or attorney for a court case.

Overall, practice shows that the number of illegal migrants making court claims is extremely small.

## 5 DIRECTIVE 2009/52/EC THE DETAILS OF TRANSPOSITION

### 5.1 EMPLOYER'S OBLIGATIONS (ARTICLE 4 OF THE DIRECTIVE)

The provisions of Article 4 (1) of the Directive have been transposed into the national law accurately. The employer is obliged to require that a third-country national, before taking up the employment in Romania holds and presents him a copy of a valid passport and a copy of the residence permit (if the person was issued one). The documents must be valid and kept by the employer during the entire period of employment (Articles 7 to 14 Foreigners Employment Act). In case of an inspection, the employer must provide the inspecting bodies with all necessary documents of the employee relevant for employment.

Regarding the obligation to notify competent authorities of the employment start of the foreigner, the employer is required to register the employment contract (which must be according the work authorization) in the electronic system of the Labour Inspectorate (REVISAL) no later than one business day prior to commencement of work of the employee. In case the work authorization or residence permit is renewed the employer must inform the Labour Inspectorate within 20 days after the documents were issued (Article 17 in the Foreigners Employment Act).

According to the Labour Code (Article 34), the employer is also bound to keep general employment records for all employees and further send a notification to the Labour Inspectorate which must include detailed information of the Romanian employer, a list of all foreign employees (containing personal information, country of origin, citizenship, date of birth, passport number), the employee's commencement date, position, employment contracts, pay rate (including the gross and net amounts paid and any deductions from the gross amount), the basis of the employee's employment (part or full-time, permanent or temporary, details of any incentive-based payment, bonus, loading, penalty rate, or other monetary allowance or separately identifiable entitlement paid), and termination records. The records shall be transmitted no later than one business day prior to commencement of work of the employee.

Regarding Article 4 (3), if the migrant has falsified his official documents (work authorization, visa, residence permit), the employer, will not be held responsible assuming *bona fide*. In turn, the employee will be liable to legal consequences of forgery

and use of forged documents and punished with imprisonment from 6 months to 3 years according the Penal Code. Complicity is also sanctioned. If the employer knows that the identity documents of the migrant are forged, and proceeds with the employment, then he himself is liable to complicity to forgery and use of forged documents and punished from 3 months to 3 years or a fine.

## **5.2 FINANCIAL SANCTIONS AGAINST EMPLOYERS (ARTICLE 5 OF THE DIRECTIVE)**

According to the Aliens Act, sanctions for delegating work to an illegally third country national can range from 340 EUR to 1350 EUR and are related to the gravity of the violation(s), the particular situation of the UM employee, and the number of UM employees. The total amount of sanctions cannot exceed 22,500 EUR regardless of the number of the illegally employed UM and the identified violations (Article 26 the Foreigners Employment Act).

More specifically, delegating work to a foreigner not having work authorization or a residence permit for the purpose of employment is sanctioned with a fine from 660 EUR to 890 EUR for each employee while delegating work after expiry of the documents is sanctioned with a fine from 330 EUR to 450 EUR for each employee.

In case the employer failed to comply with the obligation to notify the Labour Inspectorate about the employment of foreigners, the entity faces a fine of 660 EUR to 1330 EUR. Milder sanctions are applied in the following situations: the work authorization or residence permit (granting the holder to right to work) was lost, damaged or destroyed or the employment contract was terminated and the employer failed to notify the Immigration Office (330 EUR to 660 EUR); the employer does not have a copy of the work authorization, residence permit or a passport copy of the employee (150 EUR to 220 EUR).

Considering the above, one may conclude that articles 5 (1) and 2 (a) of the Directive have been transposed in the national legislation accurately.

In terms of rights and liabilities of employers hiring illegally staying third-country nationals, the legal framework in Romania makes no distinction between an employer as a legal entity and natural person. Therefore, the same provisions are applicable in both



cases. Important to mention is that article 3 of the Directive does not make its provisions mandatory for the member states.

Regarding the provisions of article 2 (b) related to the payment of the costs of return of illegally employed third-country nationals by the employer, as part of the financial sanctions, in Romania the cost of return is not directly reflected in the sanctions. More specifically, the sanctions applied to the employer must be paid to the state's Treasury Office and not directly to the Immigration Inspectorate. In turn, the Immigration Inspectorate co-finances projects on voluntary return jointly with the EU and OIM under the European Return Fund.

### **5.3 FURTHER SANCTIONS AGAINST EMPLOYERS (ARTICLE 7 OF THE DIRECTIVE)**

According to article 26(1) in Foreigners Employment Act and 265-4 in the Labour Code, an employer found committing an offence related to illegal employment of third country nationals (including migrants without valid residence permits or work permit) may be encumbered with additional sanctions if the case is brought to court.

The court may rule to exclude the employer from entitlement to some or all public benefits, aid or subsidies, including EU funding, for up to five years and prohibit the employer to participate in public procurement procedures from one to five years. The court may also require the employer to partially or fully return the amounts obtained from such funds for the period of the previous 12 months.

Moreover, depending on the gravity of the violations, the court may rule temporary or permanent shut down of the place(s) where the violations were found or the withdrawal of the commercial activity license.

### **5.4 CRIMINAL LIABILITY OF THE EMPLOYER (ARTICLE 9-10 OF THE DIRECTIVE)**

The provisions of articles 9 and 10 of the Directive have been transposed in the Romanian Labour Code and the Law on preventing and combating trafficking of human beings. Since no distinction is made between an employer as a legal entity and natural

person, the same provisions apply.

The following circumstances constitute a criminal fine:

- Delegating work to a foreigner without respecting the minimum national wage salary- fine of 70 EUR- 450 EUR (Article 260-a in the Labour Code). Failure to comply with a court order regarding payment of employee's salaries within 15 days is punished with imprisonment from 3 to 6 months of a fine (Article 261).
- Simultaneous employment of less than 5 third country nationals – fine of 2250 EUR to 4450 EUR per person (Article 260-e in the Labour Code). There is no harsher provision if the employer persists in delegating work to an illegal foreigner.

The following circumstances constitute a criminal offence (articles 264-265 the Labour Code):

- simultaneous employment of more than 5 third country nationals is punishable with imprisonment from 1 to 2 years ;
- delegating work to a foreigner victim of human trafficking with the knowledge that he or she is a victim of trafficking in human beings is punishable with imprisonment from 6 months to 3 years (unless the act does not constitute a more serious offense) or a criminal fine;

Additionally, in case of delegating to more than 5 UM or to foreigners victims of human trafficking considering that the work endangers their physical integrity or health, other measures can be taken against an employer as detailed above with reference to article 7 of the Directive (Further sanctions against employers).

- delegating work to a foreigner under particularly exploitative conditions is punishable with imprisonment from 1 to 3 years. Exploitation is defined as performing as work or services carried out forcibly, in violation of the specific provisions on working conditions, wages, health and safety rules; slavery or any form of freedom deprivation or violation of human rights, prostitution and sexual exploitation and removal of organs (article 2 in Law No. 678/2001).
- Delegating work to a minor is punishable with imprisonment from 1 to 3 years (Article 265 in the Labour Code).

Criminal offences concerning trafficking are regulated under the Law on preventing and combating trafficking of human beings (articles 12 - 18 in Law No. 678/2001). The criminal offense of trafficking is defined as the recruitment, transportation, transfer, harbouring or receipt of persons by means of threat, or any form of violence or other forms of coercion as well as offering, giving or receiving financial incentives or other benefits in order to get that person's consent for the purpose of exploitation and it is punishable with imprisonment from 3 years to 10 years and interdiction of certain rights. Important to mention is that regardless of the victim's consent, the employer is held liable under the law (article 16 in Law No. 678/2001).

According to the Labour Code (article 26-2), an employer who is aware of the illegal status of the migrant and that she/her is a victim of human trafficking shall be punished with imprisonment from 1 to 2 years or a penalty fine.

Exploiting the special condition in which is found that person, because of its illegal entry or stay in the country, or because of pregnancy, disease or disability, or any other physical or mental condition, is a criminal offense and it is punished accordingly under the provisions of human trafficking (Article 17 in Law No. 678/2001).

A more severe punishment is applied in case of children trafficking depending on the victim's age. In case of children trafficking for the purpose of exploitation between the age of 15 and 18 years, the punishment is imprisonment from 3 to 12 years and 5 to 15 years in the case of minors under the age of 15 (article 13-1 and 2 in Law No. 678/2001). In both cases, imprisonment is complemented by interdiction of certain rights. If the offense is committed in the conditions prescribed the definition of human trafficking, the employer faces imprisonment from 5 to 15 years in case of minors older than 15 years and 7 to 18 years in case of minors under 15. The punishment is also complemented by interdiction of certain rights (article 13-3 in Law No. 678/2001). The period of imprisonment may be longer if the criminal offence was committed by two or more offenders, by an organized crime group or if the crime endangered the health of the physical integrity of the victim.

If any of the acts referred above are committed by a legal person, in addition to the fine and penalty, the court shall rule on the dissolution of the entity or the suspension of activities, as applicable (article 18-1 in Law No. 678/2001).

Considering the above provisions in the national legislation, articles 9 and 10 of the Directive have been transposed accordingly with one exception, namely the criminal offence in case the infringement continues or is persistently repeated.

## **5.5 LIABILITY OF LEGAL PERSONS (ARTICLE 11 - 12)**

The Romanian legislation provides for the legal persons to be held liable for the crime offences committed by a natural person, if the latter acted in the interest of the legal entity according to its scope and objectives.

Generally, the relationship between the legal entity and the natural persons having power of representation, authority to make decisions on in behalf of the legal person or to exercise control is regulated by a legal mandate unless otherwise provided by specific provisions in the incorporation act or legal statute of the legal entity. A natural person acting in excess of the powers granted by a legal mandate triggers the liability of the legal person. The same holds for any third parties who have not been granted a legal mandate.

Liability of a legal person does not exclude criminal proceedings against natural persons who are perpetrators, inciters or accessories in a crime offence related to employing an undocumented migrant. In this sense, the same penal measures referred to in article 7 of the Directive (exclusion from entitlement to public benefits, aid subsidies or EU funding and reimbursement of such funds for the last 12 months, prohibition to participate in public procurement procedures, and temporary or permanent shut down of the workplace(s)) also apply.

Considering the above provisions in the national legislation, articles 11 and 12 of the Directive on the liability of a legal person in a crime offence committed by a natural person acting either individually or as part of an organ of the legal person are reflected in the national legislation.

## **5.6 COMPLAINT AGAINST THE EMPLOYER (ARTICLE 13 OF THE DIRECTIVE)**

The complaint mechanism provides for the claimant the opportunity to file a written complaint against the employer with the Labour Inspectorate. Currently, there are no provisions in place regarding a third-party complaint mechanism, that is NGOs or trade unions cannot act on behalf of the employee in lodging a complaint with the Labour Inspectorate or initiate court proceedings.

Complaints cannot be anonymous; they must contain the claimant's personal information. Once a complaint has been lodged, the Labour Inspectorate has the obligation:

- a) to inform the Immigration Inspectorate about the illegal status of the foreigner based on a formal agreement between the two public bodies. The Labour Inspectorate's responsibilities do not include imposing sanctions on illegal migrants breaking the law, dealing with illegal migrants being the sole duty of the Immigration Inspectorate.
- b) to conduct a workplace inspection and provide the claimant with the visit results within 30 days.

Before leaving the country and based on the results of the workplace inspection (which may be available after the foreigner has left the country), the foreigner may grant the power of attorney to a lawyer to initiate court proceedings in his/her absence.

In theory, if a foreigner has left the country and decides to make a complaint against his/her former employer a claim can be filed with the Labour Inspectorate within 3 years of the occurrence of the violation(s). In practice, however, this has never been the case.

Regarding the transposition of article 13(4), a residence permit of 6 months, (with the possibility to extend it) shall be granted to a minor employee or an undocumented employee working in particularly exploitative conditions possessing the wronged party status in penal proceedings against an employer, at the request of the prosecutor or the court.

The temporary residence permit (based on tolerated status) can be granted regardless of the legal or illegal entry status of the foreigner in Romania.

Clearly, the effectiveness of the complaint mechanism is doubtful. Considering the formal collaboration between the Labour Inspectorate and the Immigration Inspectorate, lodging a complaint directly by the claimant with the Labour Inspectorate (before being detected by any public bodies) will trigger his/her expulsion from Romania. Naturally, illegal migrants refrain from filing complaints against their employers.

In most cases, site inspection visits are carried out jointly by the Labour Inspectorate and the Immigration Inspectorate and illegal migrants are handed over the latter on the spot. Since neither the Labour Inspectorate nor the Immigration Inspectorate is

currently responsible for providing information to the migrants on their rights and procedure to recover outstanding remuneration, they have very limited or no knowledge on the matter. Consequently, illegal employees' access to the complaint mechanism is bottlenecked.

## **5.7 BACK PAYMENTS (ARTICLE 6 OF THE DIRECTIVE)**

Based on a written complaint filed by UM employee prior to returning or being returned, the Labour Inspectorate or the Immigration Inspectorate are entitled to order the employer to pay:

- a) any outstanding remuneration to the illegally employed third-country national. The agreed level of remuneration is assumed to be equal to the national average wage unless either the employer or the employee can prove otherwise;
- b) the amount of all taxes and social security contributions that the employer would have paid if the alien was legally employed, including penalty payments and relevant administrative fines;
- c) any cost arising from transfer payments to the country in which the alien has returned or has been returned.

The order is subject to immediate enforcement. If the employer refuses to comply, action shall be taken to court.

Despite the fact that Directive 2009/52 introduces the presumption of the employment relationship lasting for three months to facilitate the illegally employed third-country nationals to claim outstanding remuneration, the assumption has not yet been transposed in the Romanian legislation. In this case, the above provisions become vague.

If an illegal employee decides to sue an employer for outstanding remuneration, a claim may be lodged in the court directly by the claimant prior to returning or being returned to the country of origin or by a third party, namely a lawyer granted a power of attorney prior or after his/her departure from Romania. Although the written consent to a lawyer is not mandatory before the UM leaves the country, it makes the procedure much simpler. If the UM has left the country and wants to take action in court, the power of attorney can be sealed and sent via post in order for the latter to initiate civil

proceedings.

NGOs, trade unions or any other third party cannot be granted a power of attorney for a court case.

If the UM is also a victim of human trafficking, that is a minor or a person under exploitative working conditions, the legal provisions of the human trafficking shall be considered.

To initiate court proceedings to recover outstanding remuneration is rarely an option for the illegal migrants. Despite the difficulty to gather evidence, other discouraging factors are the cost of hiring a lawyer the long duration of the proceedings.

## **5.8 EFFECTIVENESS OF THE CLAIM AFTER THE EMPLOYEE HAS OR HAS BEEN RETURNED**

### **(ARTICLE 6 OF THE DIRECTIVE)**

Court proceedings can be initiated only by a lawyer based on a power of attorney from the employee prior to leaving or being returned from Romania and provided that a claim has been lodged with the Labour Inspectorate beforehand.

The case may be pursued in the absence of the claimant, but only based on strong evidence the court may rule in his/her benefit. In most cases, it is very difficult to gather evidence in order to establish liability.

If the court case is resolved in favour of the employee to pay the outstanding remuneration, the employer shall be obliged to pay: the minimum wage rate unless either the employer or the employee can prove otherwise, an amount equal to any taxes and social security contributions that the employer would have paid had the third-country national been legally employed, including penalty payments for delays and relevant administrative fines, and the cost arising from sending back payments to the country to which the foreigner has returned or has been returned (the Foreigners Employment Act art. 27-1(1)).

Despite the above transpositions, inaccuracy arises with respect to the way the amount of outstanding remuneration is established since there is no assumption regarding the

presumed length of the employment relationship.

### **5.9. THE LIABILITY OF SUBCONTRACTORS (ARTICLE 8 OF THE DIRECTIVE)**

A subcontractor delegating work to an undocumented migrant is held liable jointly with the main contractor (and any other intermediary contractors) only if there is evidence that the latter entity was aware about the illegal status of the migrant and the subsequent illegal employment relationship (Article 27 (2) Foreigners Employment Act)

In this case, the subcontractor and the main contractor are responsible to pay any outstanding remuneration and cost arising from transfer payments to the country in which the UM migrant has returned or has been returned. Additionally, sanctions are related to the gravity of the violation(s) and the number as well as the particular situation of the illegally employed UM (having expired or no residence permit or work authorization) and can vary between 160 EUR and 22,500 EUR. The total amount of sanctions cannot exceed € 22,500 regardless of the number of the illegally employed UM and the identified violations.

In case the subcontractor is insolvent, the main contractor is responsible to pay the employee the adjudicated outstanding remuneration, transfer costs to the country in which the UM has returned or has been returned in addition to the related penalties mentioned above.

### **5.9 THE OBLIGATION OF NOTIFICATION (ARTICLE 6, 13 OF THE DIRECTIVE )**

The obligation of notification regarding the UM right to receive outstanding remuneration and the mechanism in place has not yet been transposed in the national legislation. Consequently, neither the Labour Inspectorate nor the Immigration Inspectorate has the obligation to provide information on the matter.

Being unaware of their rights, the overwhelming majority of the UM take no action against the employer.



However, if a migrant requests information in this regard at the moment of signing the return decision (voluntary or enforced), the immigration officer may provide relevant information. It should be considered that this is not a practice since it is not mandatory for the immigration officer to inform, advise or assist the UM. Although the illegally employed third-country nationals may be informed about their rights at this point, it is contradictory to article 6 (2) of the Directive which stipulates that illegally employed third country nationals shall be systematically and objectively informed about their rights under this paragraph and under Article 13 before the enforcement of any return decision.

### **5.10 RESIDENCE PERMITS (ARTICLE 6(5), ARTICLE 13(4) OF THE DIRECTIVE)**

Articles 6(5) and 13(4) of the directive have been transposed in the national legislation by the Aliens Act (No.194/ 2002) and Law on preventing and combating trafficking of human beings (No. 678/2001).

The Law on preventing and combating trafficking of human beings regulates the right for the exploited employees and victims of human trafficking to be granted a temporary residence permit as provided by the Aliens Act (Article 130). Article 39-1 in Law No. 678/2001 stipulates that for persons in this category a reflection period of 90 days is granted in order to be able to take an informed decision on their cooperation with the investigating authorities, to recover and to escape from under the influence of the perpetrators of the offences. Provided that these conditions are fulfilled, and subject to public policy and national security, a prosecutor or the court may request the Immigration Inspectorate to grant the person a residence permit based on tolerated status.

The residence permit is valid for a period of six months but may be renewed if the relevant conditions continue to be satisfied. It grants the holder access to the labour market, vocational training and education. Therefore, if an illegal employee does not fully comply under the law on preventing and combating trafficking of human beings, a temporary residence permit may be granted according the Aliens Act provisions.

The law also entitles UM in particularly exploitative working conditions, victims of

human trafficking and minors to receive outstanding remuneration from the employer based on a claim lodged with the Labour Inspectorate. The victim can also initiate court proceedings under the civil law.

If the competent bodies instituted penal proceedings against the employer and awarded the foreign national with the wronged party status, mandatory legal assistance is provided at all stages to support their rights and civil claims against the offenders (article 44, Law no. 678/2001). In this case, the temporary residence permit may be renewed for the same period of time until they obtain the outstanding remuneration from the employer or the lawsuit is over, provided this is supported by a particularly significant interest of the foreign national. There Aliens Act makes no specific provision regarding the maximum period of stay granted in these cases.

### **5.11 INSPECTIONS (ARTICLE 14 OF THE DIRECTIVE)**

According to Article 14 of the Directive, it is mandatory for the Member States to ensure that appropriate inspections are carried out based on risk assessments drawn up by the competent authorities with the aim to control the employment of illegally staying third-country nationals.

In Romania, inspections on the legality of stay and employment of third country nationals are carried out by the General Inspectorate for Immigration (under the Ministry of Internal Affairs) and the Labour Inspectorate (under the Ministry of Labour, Family, and Social Protection and the Elderly), respectively. In this regard, representatives of the two institutions meet regularly.

The responsible body for elaborating annual risk assessments on the sectors where the employment rate of the illegally staying third-country nationals is the highest is the Labour Inspectorate in cooperation with the Immigration Inspectorate.

The cooperation between the two public bodies is formal and it is primarily related to the exchange of information about the third country nationals infringing regulations governing their right to stay and work in Romania. In most cases, inspections are conducted jointly by the two institutions.

Since the Immigration Inspectorate is the national authority responsible to manage immigration and enforce the legal framework in the field, it is the only institution responsible with deporting UM to their home countries. Based on the provisions of the Aliens Act (article 27(1)), immigration officers as well as labour inspectors may impose a number of sanctions for delegating work to an illegally third country national.

The Labour Inspectorate is mainly charged with verifying whether employers comply with their obligations in labour relations, including labour conditions, life protection, corporal integrity and health of employees and any person participating in the labour process. In order to fight discovered irregularities, labour inspectors can use the following legal measures: administrative sanctions (included in the report on finding and sanctioning of contraventions), that could be in the form of warnings or administrative fines; referral to criminal prosecution authorities in cases covered by criminal law. In Romania, Labour Inspectors do not have criminal prosecution competence, but can address issues to other authorities (referral to criminal prosecution authorities in cases covered by criminal law). Labour Inspectors may also request deletion of the legal person from the Trade Registry, when the employer repeatedly commits serious violations of the labour legislation or of the rules of health and safety at work.

Although labour inspectors cannot take any measure against the legality of foreign nationals' stay, they are obliged to inform the Immigration Inspectorate about the status of the UM employee (without valid residence permit or work authorization).

## 6 PROJECTED EFFECTS OF THE NEW PROVISIONS

The EU Sanctions Directive provides for a more protective approach towards irregular immigrants based on the assumption that protecting their rights will lead to the reduction and prevention of the wider phenomenon of irregular immigration. The transposition of the Directive in the national legislation has a number of flaws which undermine its expected outputs.

For instance article 6 of the Directive provides that an irregular immigrant should be entitled to make a claim for outstanding remuneration. Although the national legislation acknowledges this right the mechanism place to recover outstanding remuneration has a chilling effect on claims by irregular immigrants for various reasons.

Firstly, no public body has the obligation to provide information about the right and procedure in place to recover outstanding remuneration, thus most UM are unaware of this option and take no action against the employer.

Secondly, if a migrant decides to initiate court proceedings to recover outstanding remuneration, the only option is to bestow power of attorney on a lawyer since associations or trade unions cannot take action in court. This is rarely choice considering the difficulty to gather evidence, the cost of hiring a lawyer or the long duration of the proceedings. Moreover, in the case of undetected illegal migrants, claiming their rights in court is hardly an option considering that a claim against their employer must be lodged to the Labour Inspectorate beforehand, hence the certainty that his/her illegal status shall be reported to the Immigration Inspectorate resulting in inevitable deportation or potential detention.

Thirdly, there is no assumption regarding the presumed length of the employment relationship of at least three months, thus it is not clear how the amount of outstanding remuneration is established if no clear evidence exists.

Another flaw is related to the assumption that heavy financial sanctions imposed on employers (under the Labour Code) will deter them from hiring illegal workers thus reducing the levels of irregular immigration. Practice has shown that in some cases high financial sanctions imposed on employers may trigger the legal entity's

dissolution. In most cases, if a company is declared insolvent the financial debts cannot be recovered. This approach potentially exposes the irregular immigrant to exploitative working conditions to the economic and competitive advantage of the employer.

Another incomplete transposition of the Directive is related to the lack of sanctions if the infringement of delegating work to an illegal foreigner is persistently repeated.

Therefore, the imperfect nature of the protective measures awarded by the Directive to the undocumented migrants as transposed in the national legislation may lead to the situation that they are not used in practice.

To conclude, further action is needed to ensure that the protective approach of the Directive applies starting with ensuring that undocumented migrants are informed about their rights prior to their departure from Romania. Information should be provided at the moment of the workplace inspection when undocumented migrants are detected as well as in the return decision. Additionally, the legislative framework should be amended to incorporate the above references and to ensure full transposition of the Directive.