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Grand Chamber confirms no double punishment for illegal employment (SK)

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Summary

The Grand Chamber of the Slovakian Supreme Court has unanimously decided that employers cannot be penalised by two different agencies for one violation of employment law rules and that the *ne bis in idem* principle also applies to two administrative breaches of the law.

Background

Illegal employment and its punishment are quite specific in Slovakia, because even one omission by the employer, for example in the form of late registration of an employee with the Social Insurance Agency, is treated as illegal employment and a violation of several legal regulations.

According to the Act on Social Insurance, the Social Insurance Agency may collect arrears for late payment of social insurance contributions due to the late registration of an employee. Additionally, according to the Act No. 125/2006 Coll. on Labour Inspection, the Labour Inspectorate may also impose a fine on the employer for the administrative violation of the law in respect of illegal employment.

Both violations of the above legal regulations give rise to administrative (rather than criminal) penalties.

Facts

In 2014, a Slovak employer failed to meet its obligations to duly register an employee with the Social Insurance Agency. The Labour Inspectorate found this omission to be a breach of the illegal employment regulations and imposed a fine of € 2,200. The Social Insurance Agency started a separate proceeding against the employer and fined it with an insignificant sum of € 9.96.

The employer challenged the decision of the Labour Inspectorate, but the appellate administrative authority, the National Labour Inspectorate, confirmed this decision.

The employer decided to file an action with an administrative court because it found the decision to be unfair due to a breach of the *ne bis in idem* principle. The administrative court of first instance agreed with the employer and ruled that the employer had already been penalized for an action identical in manner, place and time of its omission.

The administrative court supported its conclusion by referring to Article 40 of the Charter of Fundamental Rights and Freedoms and the jurisprudence of the European Court of Human Rights (ECtHR) on applying the *ne bis in idem* principle for administrative punishments.

The National Labour Inspectorate appealed to the Supreme Court arguing that the *Engel* criteria set by the ECtHR in *Engel and others – v – The Netherlands* (1976; application nos. 5100/71; 5101/71; 5102/71; 5354/72 and 5370/72) had not been met and the fine imposed by the Social Insurance Agency did not have a criminal character, thus the *ne bis in idem* principle could not be breached.

When deciding on the appeal, the Supreme Court decided that both state agencies cannot separately impose fines for the same omission. The Supreme Court based its opinion (i) on the *Engel* criteria to determine the criminal character of the employer's omission within the meaning of the ECtHR and (ii) the *Zolotukhin – v – Russia* case (2009; application no. 14939/03) to assess the notion of the same offence with respect to the *ne bis in idem* principle. But the Supreme Court also found that its own decisions in similar cases were conflicting and therefore referred the case to the Grand Chamber of the Supreme Court to finally decide.

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Judgment

The Grand Chamber unanimously rejected the cassation complaint filed by the National Labour Inspectorate.

The Grand Chamber, after analysis of the *Engel* criteria and the ECtHR's case law, stated:

i. the legal classification of the offence under national law is an administrative breach for violation of both acts, not a criminal offence;
ii. the second criterion of the intrinsic nature of the offence is fulfilled because the two administrative punishments have both a punitive, as well as a preventive, purpose;
iii. the degree of severity of the penalty (a fine up to € 200,000) is quite severe for employers.

Besides the *Engel* criteria, the Grand Chamber also referred to the *Zolotukhin* case and concluded that the employer was indeed punished for the same act twice. However, this and other cases were dealt with following the *ne bis in idem* principle with respect to a criminal offence and administrative violations of the law, not two administrative violations as it was in this case. It was also noted that the ECJ concluded in the *Menci* case (C-524/15) and *Garlsson* case (C-537/16) that duplication of administrative and criminal penalties is acceptable if national legislation must (i) pursue an objective and the duplicated proceedings and penalties must pursue additional objectives; (ii) provide clear and precise rules allowing individuals to predict which acts or omissions are liable to be the subject of such a duplication; (iii) ensure coordination of the proceedings; and (iv) limit the severity of all penalties.

According to the Grand Chamber, these conditions had not been met. It must be noted that the relevant Slovak legislation does indeed restrict both agencies in imposing a fine if an employer has already been fined. These restrictions apply even if these two laws protect different objectives such as enforcement of laws on illegal employment and collection of social insurance contributions.

Following the references to the above-mentioned ECJ cases, the Grand Chamber criticised the lack of cooperation between both state agencies and noted that these shortcomings were quite usual in view of their past practice and following several complaints. For the future, the Grand Chamber ordered both agencies to communicate intensively and favoured the Labour Inspectorate in punishing illegal employment simply because of the higher fines that can be imposed.

Commentary

The Grand Chamber's decision to unify the different approaches and decisions of the administrative courts and the Supreme Court itself as an appellate court has been highly praised among labour law practitioners.

The Grand Chamber's advice of better coordination of agencies involved was heard and we have noticed a new legislative initiative to set rules for investigating and punishing illegal employment.

Although the decision of the Grand Chamber of the Supreme Court is binding for other chambers of the Supreme Court as well as for the lower courts, from 1 August 2021 this will not be so certain. From this day a new supreme judicial authority operates in Slovakia, namely the Supreme Administrative Court, which takes over all pending and future administrative complaints. And although both Supreme Courts are equal, they are independent of each other, and it is not clear whether this judgment will also be binding on the new Supreme Administrative Court which could theoretically overrule this decision.

It is also unclear whether the Grand Chamber's decision also opened a door to applying the *ne bis in idem* principle even in cases where employers are subject to a secondary punishment for illegal employment such as a ban on employment of foreigners, a ban on participation in public tenders, a loss of state aid, or blacklisting of an employer because of a Labour Inspectorate decision on illegal employment. These consequences of illegal employment have a significantly severe negative impact on employers more than any fine imposed by the agencies and may even jeopardize an employer's business.

Comments from other jurisdictions

Germany (Leif Born & Phyllis Schacht, Luther Rechtsanwaltsgesellschaft mbH): In Germany, the *ne bis in idem* principle is enshrined in the constitution. Furthermore, it is concretised by simple law that an offence may no longer be prosecuted as an administrative offence if a conviction for a criminal offence or administrative offence has already been issued. In this respect, the legal situation in Germany corresponds to the result found by the Grand Chamber of the Supreme Court of Slovakia.

Regarding the situation where an employer fails to register its employees for social insurance, there is a graduated system of penalties:

– Failure to register an employee is an administrative offence, which can be punished with a fine of up to EUR 25,000.00.
– If the failure to register an employee results in non-payment of social security contributions, this constitutes another administrative offence that can be punished with a fine of up to EUR 50,000.00.
– If the employer deliberately fails to pay social insurance contributions, this constitutes a criminal offence under Section 266a paras. 1, 2 of the German Criminal Code (*Strafgesetzbuch*, 'StGB'), which is punishable either by imprisonment for a term not exceeding five years or a fine.

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Due to the legal situation, only one of the three penalties can be imposed. Priority is given to the punishment of the criminal offence. If the criminal proceedings take place later, a previously imposed administrative fine will be cancelled.

Italy (Caterina Rucci, Katariina's Guild): Italy had and still has a similar problem as the one indicated in this case. In fact we had at least three categories of inspectors, related to the Ministry of Labour, to INPS the social security institute and to INAIL (accidents at work insurance institute). Basically a visit of any of these three institutes was normally followed years after by either new inspections by the other two institutes, or directly by legal requests of payments, based on the result of the first visit. These inspectors are also under an obligation to inform the public authority, i.e. criminal judges, if the violations found are of a sufficient level. In 2015 a law was brought into force to unify these bodies, or at least their inspectors. Easy to say, difficult to do. First of all, even if unified, the inspector are still few in number (5,000 for 55 million inhabitants), and Italian laws, regulations and case law are virtually impossible for these inspectors to have sufficient knowledge of (most of whom are really hard workers and brilliant and specialized people). Secondly, the reduced nu mber of inspectors makes it impossible to conduct inspections at night, with the consequence of a *de facto* immunity for employers working at night, such as bars, restaurants etc. Also small companies are often exempted, since inspectors are supposed to inspect where more money can be recovered. Third, being an inspector for these bodies or ministries is not really a recognized specialization, nor a career that lots of people would like to follow, nor people even vaguely correctly compensated for the hard work they carry out. As can easily been understood, such a situation makes it easy even if not so usual for employers to try to pay these inspectors to obtain favourable inspections. But the truth is that the preparation required for this work is at the level of state judges, while these inspectors do not even have (contrary to France, with its distinguished and world famous ENA, *Ecole nationale pour administration*) a school they can attend in order to be duly prepared. Coming back to the Slovakian Supreme Court decision, being penalised twice is not at all an exception in Italy, due to it overcomplicated legislation, which makes it impossible to really understand if a certain behaviour will be held as correct or not and by whom. Needless to say that in such a situation corruption is an actual risk, as well as connections with illegal organizations and the danger for enterprises of being asked for money in order to be protected from inspections but also from sudden accidents.

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