WORK PERFORMANCE OUTSIDE THE EMPLOYMENT RELATIONSHIP AS AN ADMINISTRATIVE OFFENCE AND ITS PUNISHMENT IN THE CZECH REPUBLIC

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Abstract: *The topic of this article is illegal employment under Section 5(e)(1) of Act No. 435/2004 Coll., on Employment, as amended, and its punishment in the Czech Republic. It deals exclusively with the fulfilment of the definition of illegal employment through the performance of work outside the employment relationship, i.e. situations where dependent work is either concealed, performed without a validly concluded employment contract or performed on a trial basis. The author objects to connect the employment area with the area of administrative punishment and to provide coherent knowledge on illegal work and its detecting and combating in the Czech territory. Hence, the article provides a detailed analysis of the current legal regulation of illegal work and links its wording with selected case law, thus creating a comprehensive overview of this issue.*

Keywords: *Illegal work, bogus employment, administrative offence, administrative punishment, administrative proceedings*

1. INTRODUCTION

As labour costs are high, even prohibitive for many businesses, and many unemployed people are looking for a quick source of income, both sides resort to circumventing the law and committing illegal work. Illegal work is a manifestation of the grey economy, an undesirable phenomenon in the labour market that distorts it and negatively affects its functioning. When an employer allows illegal work to be carried out, he gains economic relief for himself and, as a result, competitive advantages in the market. Of course, the legislator responds to this social phenomenon with appropriate legislation, in particular Act No. 435/2004 Coll., on Employment, as amended, which sanctions illegal work as an administrative offence.

This article deals with illegal work as an offence and its punishment. However, it targets exclusively illegal employment as defined under Section 5(e)(1) of the Act on Employment – the performance of work outside the employment relationship and thus, not illegal employment of foreigners. In the first part, the author focuses on the punishment of illegal work under the Act on Employment, followed by a section on the punishment of illegal work under other legislation. Subsequently, the article mostly follows the course of detecting and combating illegal work, as the next parts deal with proving the commission of illegal work by Labour Inspectorates and its pitfalls, the principles of punishing illegal work applied in the penal administrative proceedings and, in the very end, the sanctions that can be imposed on the perpetrators.

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2. PUNISHMENT OF ILLEGAL WORK UNDER THE ACT ON EMPLOYMENT

According to legal theory, there are two types of delicts - judicial delicts that are criminal offences and administrative delicts, which according to the positive regulation are divided into offences, disciplinary delicts and order delicts. Offences can be considered as the basic type of administrative delicts, since the liability for their commission is essentially general.[1] They can be committed by virtually any person liable in delict. The legal regulation of offences is partially codified by Act No. 250/2016 Coll., on Liability for Offences and the Proceedings in Respect Thereof, which includes *"the conditions of liability for the offence, the types of administrative penalties and protective measures and the principles for imposing them, the procedure before initiating offence proceedings and the procedure in offence proceedings."*[2] This Act therefore regulates the conceptual features of offences, which can be understood as basic attributes common to all offences. At present, administrative punishment is governed by the formal-material concept of an offence, which combines formal aspect - designation in the law as an offence, the presence of the statutory features, and the material aspect of the offence, i.e. social harmfulness.[3] The offence is also defined by a negative aspect - it must not be a crime. In order for an act to be found by an administrative authority as an offence, all of these features must always be fulfilled. Even if the facts of a particular offence were fulfilled and these conceptual features were not, the act would not constitute an offence.[4]

Although this article focuses on labour and employment law, the author considers it necessary to highlight this fact, especially with regard to the social harmfulness. In drafting legislation, the legislator naturally focuses on actions that are socially harmful, and thus in most cases, when the formal aspects of the offence are fulfilled, the material aspect is also fulfilled, but not always. See the SAC decision of 14 December 2009: *"Thus, it can be generally assumed that an act whose formal aspect is defined by law as an offence, fulfils the material aspect of an offence in the most common cases since it violates or endangers a particular interest of society. However, it cannot be deduced from this conclusion that the material aspect of an offence is fulfilled whenever the formal aspect of the offence is fulfilled by the culpable conduct of a natural person. If, in addition to the circumstances of the conduct which fulfils the formal aspects of the offence, other significant circumstances are added which preclude the conduct from violating or endangering a legally protected interest of society, the material aspect of the offence is not fulfilled and the conduct cannot be classified as an offence."*[5] It is the material concept of the offence that has a significant impact on the distinction between lawful and unlawful acts.[6] It is particularly in the area of illegal

[1] KOPECKÝ, M. *Správní právo. Obecná část.* Prague: C. H. Beck, 2021, p. 254.
[2] Section 1 of the Act No. 250/2016 Coll., on Liability for Offences and the Proceedings in Respect Thereof.
[3] PRÁŠKOVÁ, H. *Nové přestupkové právo.* Prague: C. H. Beck, 2017. p. 96.
[4] DOLEČEK, M. Odpovědnost za přestupky podle přestupkového zákona. In: *BusinessInfo.cz* [online]. 30. 6. 2021 [2021-11-29]. Available at: <https://www.businessinfo.cz/navody/odpovednost-za-prestupky-podle-noveho-prestupkoveho-zakona-ppbi/>.
[5] Judgement of the SAC Case No. 5 As 104/2008 of 14 December 2009.
[6] MATES, P., ŠEMÍK, K. Společenská škodlivost jako znak přestupku. In: *advokatnidenik.cz* [online]. 29. 4. 2021 [2021-11-29]. Available at: <https://advokatnidenik.cz/2021/04/29/spolecenska-skodlivost-jako-znak-prestupku/>.

work that situations may arise where an act formally fulfilling the characteristics of an offence and at the same time the facts of the offence may not be socially harmful enough to be found to be an offence. A crime requires a higher level of social harmfulness, *"(...) while an offence can be a culpable act that violates or endangers the interest of society only to a minor degree."*[7] In order for the act not to constitute an offence, the social harmfulness must be almost zero.

However, individual facts of offences, including specific rates of penalties for their commission are not found in the Act on Liability for Offences, as they are scattered in other laws according to the material connection with the subject matter of the respective law. The same is also true for illegal work, as the regulation of the facts of this offence can be found in the Act on Employment, specifically in Sections 139 and 140 of the Act on Employment.

"A natural person commits an offence by (...)
(c) performing illegal work,
(d) facilitating the performance of illegal work as referred to in Section 5(e)(1) or (2),[8] *(…)"*[9]

"A legal person or a natural person engaged in business commits an offence by (...)
(c) facilitating the performance of illegal work in accordance with Section 5(e)(1) or (2), (...)"[10]

The facts of offences and the penalties that can be imposed for their commission vary depending on who is their subject. In the Act on Liability for Offences, the offenders are divided into three main groups - natural persons, legal persons and natural persons engaged in business, with each group having specific conditions of liability for the offence.[11] The liability of the latter two groups of perpetrators shares many common features and they are therefore often sanctioned with identical penalties. The same is true for facilitating illegal work.

The fulfilment of these offences occurs when an act meeting the definition of illegal work is committed. In general, according to Section 15 of the Act on Liability for Offences, negligence is sufficient for a natural person to commit an offence, unless the law requires guilt in the form of intent. Natural persons engaged in business and legal persons are, on the contrary, liable objectively, regardless of their fault (Section 20 and 22 of the Act on Liability for Offences). Therefore, it is possible to fulfil the facts of the offences of illegal work only by negligence. The perpetrator may either deliberately conceal the true nature of dependent work or may perform work on the basis of an invalid employment contract and thus fulfil the institute known as the factual employment relationship. At this point it is necessary to return to the requirement of the social harmfulness of the conduct. It is, after all, quite different whether a person seeks deliberately to conceal the nature of the relationship

[7] Judgement of the SAC Case No. 5 As 104/2008 of 14 December 2009.
[8] Of course, to allow illegal work according to Section 5(e)(3) of the Act on Employment constitutes also an offence, but this article focuses exclusively on illegal work as defined in section 5(e)(1) of the Act on Employment, and therefore it is unnecessary to mention other facts of this offence.
[9] Section 139(1) of the Act on Employment.
[10] Section 140(1) of the Act on Employment.
[11] KOPECKÝ, M. *Správní právo. Obecná část.* p. 259.

in the workplace in order to gain economic profit for himself or whether the contractual parties, for example, omit an essential element of the employment contract, as a result of which the employment contract is invalid and the employment relationship was not established. The employer often fulfils all its obligations, makes mandatory payments to the state budget, takes care of the employees, organises OHS training, pays the employee the correct amount of salary, etc. and from the moment the employment contract is concluded, though invalid, the employer *bona fides* believes that there has been no misconduct on his part. However, during the inspection, the employer is informed by the Labour Inspectorate that he has allowed the performance of dependent work on the basis of an invalid contract and has therefore committed the offence of facilitating illegal work. However, in my opinion, such an act should not be considered an offence at all, as the social harmfulness in such a case is zero. Even taking into account the teleological interpretation of the legal norm, there were neither financial leakages from the public budget, nor there has been a threat to the employee by denying him the protection granted by the Labour Code.

There is one significant difference between the liability of natural persons and legal persons or natural persons engaged in business - a natural person is the only one who can also commit the offence of performing illegal work. In general, there is a widespread opinion that only the employer who employs the employees illegally is the perpetrator of the offence of illegal work, but unfortunately this is a common misconception. The perpetrator is also the employee, a natural person, who knowingly entered into the unlawful relationship, pursuant to Section 139(1)(c) of the Act on Employment. For this conduct, the person is liable to a fine of up to CZK 100,000 pursuant to Section 139(3)(c) of the Act on Employment. Thus, while legal persons and natural persons engaged in business are liable only for possible facilitating of illegal work, natural persons may be liable for two different offences.

3. PUNISHING ILLEGAL WORK UNDER OTHER LAWS

It should be noted that the employer may also be indirectly penalised for illegal work in proceedings under other areas of public law, in particular tax or criminal law. If an employer fails to fulfil its obligations under the Income Tax Act, in particular if he does not assess the advance payment of personal income tax on dependent activities for the employee, even though the dependent activity is carried out in fact, he may be punished by the assessment of the unpaid tax and its accessories - penalties and interest, which constitute a financial penalty for non-compliance with tax obligations. According to Section 8(3) of Act No. 280/2009 Coll., the Tax Code, *"(…) the tax administrator relies on the actual content of a legal act or other fact relevant for the tax administration.*" This provision is further specified in Section 23(10) of the Income Tax Act, according to which the tax base is determined on the basis of accounting records kept in accordance with a special regulation, unless a special regulation or the Income Tax Act provides otherwise or unless the tax liability is reduced in another way. These provisions may be interpreted as meaning that even if the parties to the employment relationship have a commercial law contract between them and the employer reports this activity in the accounting documents as work under a commercial law contract, the tax authority may assess the content of this relationship as an employment relationship disguised as a commercial law relationship. This

may be the case in particular if the relationship has the characteristics of a dependent activity. Therefore, the principle of the primacy of reality also applies under tax law. The employer may be assessed the tax and this assessment may be increased by the tax accessories within the meaning of Sections 251 and 252 of the Tax Code, i.e. penalties and interest, which represent a sanction for non-compliance with tax obligations.

While illegal work is classified as administrative delicts under the Act on Employment or the Income Tax Act, it can be also punished as criminal offence under criminal law. However, criminal law represents the means of *ultima ratio*, and therefore the state only punishes illegal work in court in cases of high social harmfulness. In a special part of Act No. 40/2009 Coll., the Criminal Code (hereinafter referred to as the "CrC"), the criminal offence of tax, fee and similar compulsory payments evasion (Section 240 of the CrC), which is punishable by imprisonment for six months to three years or prohibition of activity, and the criminal offence of non-payment of tax, social security contributions and similar compulsory payments (Section 241 of the Criminal Code), which is punishable by imprisonment for up to three years or prohibition of activity.

A common feature of these offences is that both the evasion and the non-payment of tax or other similar compulsory payment must reach a greater extent. According to the commentary to this provision, the interpretative rule of Section 138(1) of the CrC cannot be directly applied to the greater extent of the evasion of tax or other compulsory payment and the profit extorted on any of these compulsory payments, as this only regulates the amount of the damage.[12] However, since other than financial considerations have no relevance here, this term must be interpreted as it is at least CZK 100,000.[13] The perpetrator will therefore fulfil the facts of these crimes if the sum of his unpaid compulsory payments or taxes reaches a total of CZK 100,000, even if they are different taxes or fees, if, in view of the objective and subjective context, it is a continuous crime. *"If the conditions of Section 116 are met, the amounts corresponding to individual taxes (or other compulsory payments) may be summed up, even for more than one tax period, in order to assess whether the tax (or other compulsory payment) has been evaded to a greater extent."*[14] In order to fulfil the facts of these crimes, culpability in the form of intent is required.

4. PROVING THE COMMISSION OF ILLEGAL WORK

However, the role of the Labour Inspectorate in proving the commission of the offence of illegal work under Section 5(e)(1) of the Act on Employment, is considerably more difficult than the other two offences of illegal work,[15] because the inspectors have the task of proving the presence of all the features of dependent work, while focusing on the actual

[12] Alternatively, in conjunction with Section 138(2) of the CrC, the amount of the benefit, the costs to eliminate the consequences of environmental damage, the value of the property and other property value.

[13] ŠÁMAL, P. Section 240 Zkrácení daně, poplatku a podobné povinné platby. In: Pavel Šámal a kol. *Trestní zákoník*. Prague: C. H. Beck, 2012, p. 2414.

[14] Ibid.

[15] This is illegal work committed by foreign nationals. They need a green card, a blue card and a residence permit in order to legally work in our territory, and the facts under Section 5(e)(2) and (3) are fulfilled by performing work without such a permit. Inspectors need only prove that the foreign national has not obtained such a permit or is working in violation of it.

situation at the workplace, since the principle of the primacy of reality applies in combating illegal work. This opinion was also expressed by the SAC: *"These features [features of dependent work – the author's note] serve to distinguish dependent work from other economic activities (especially self-employment), but also from activities of a different nature (especially interpersonal assistance). Therefore, when prosecuting illegal work, the administrative authorities must prove that the accused fulfils all of the following characteristics - the employee personally and consistently performs work on behalf of and under the instructions of the employer, while being in a subordinate relationship to the employer."*[16]

However, none of the characteristics of dependent work is so essential in the definition of dependent work that the presence of only one characteristic would lead to the conclusion that dependent work is performed. In addition, the standard performance of work by an employee in the workplace is nowadays significantly relativised, as new trends in employment relationships bring new possibilities of performing dependent work. Proving some of the characteristics, for example, that work is performed consistently, is thus almost impossible for inspectors, as the inspection period is limited and the inspectors do not have the opportunity to obtain comprehensive information on the actual situation at the workplace. This often leads to incorrect conclusions by administrative authorities and the need to defend against their decisions in the administrative courts, as in Case No. 4 Ads 75/2011, where the SAC decided on the cassation appeal of a complainant who was punished for facilitating illegal work because his partner replaced him in the shop during his lunch break. *"The fact that during the inspection at the time of lunch break, only the plaintiff's partner was present in the plaintiff's business premises (shop) does not in itself mean that the plaintiff allowed this person to perform illegal work within the meaning of Section 5(e)(1) of the Act No. 435/2004 Coll., on Employment, as in the version before the amendment made by the Act No. 264/2006 Coll."*[17]

Several tests have therefore been developed to prove dependent work, combining different characteristics of dependent work and can provide a notional guide for inspectors to assess the relationship in question. However, these tests generalise the issue and, according to Štefko, cannot be seen dogmatically.[18] The oldest of these is the superiority and subordination test, which assesses whether the employer can instruct the employee to work and, importantly, whether the employer can also unilaterally determine the work conditions, e.g. by ordering the use of rest periods or annual leave.[19] However, it is difficult to apply this test to managers at the highest levels of the organisational structure, as they are the ones who impose work tasks on subordinate employees and they themselves may have a very general job description, e.g. only general objectives to achieve in their work.[20]

Furthermore, the integration test is used, which also appears widely in the decision-making practice of courts in other countries (e.g. in the UK, Spain, France)[21] and in the

[16] Judgement of the SAC Case No. 6 Ads 46/2013 of 13 February 2014.
[17] Judgement of the SAC Case No. 4 Ads 75/2011 of 29 September 2011.
[18] ŠTEFKO, M. *Vymezení závislé a nelegální práce. Studies in Human Rights.* Prague: Charles University in Prague, Faculty of Law, 2013, pp. 193–224.
[19] Ibid.
[20] Ibid.
[21] Ibid.

case law of the Court of Justice of the European Union. In this context we must not omit the decision of Hassan Shenavai v. Klaus Kreischer, in which the CJEU expressed the idea, that *"[i]n that connection it should first be observed that contracts of employment, like other contracts for work other than on a self-employed basis, differ from other contracts - even those for the provision of services – by virtue of certain particularities: they create a lasting bond which brings the worker to some extent within the organizational framework of the business of the undertaking or employer, and they are linked to the place where the activities are pursued, which determines the application of mandatory rules and collective agreements."*[22] In this regard, it is also necessary to recall the decision of 13 February 2014, where the SAC mentioned, among other things: *"The presence of this characteristic*[23] *is indicated by certain typical objective circumstances, in particular the binding nature of the employer's instructions and the integration of the employee into the employer's organisational structure."*[24] The principle of this test is that the performance of dependent work is most clearly indicated by the manner in which the employee performs the work. The employee is generally assigned to the employer's business plant, must perform the work according to the current needs of the employer's business plant, be available to the employer and cooperate with other employees.[25] If these characteristics are met, it is dependent work and not the performance of an independent activity.

Slightly later, the economic reality test evolved as a response to new trends in work performance - e.g. home working, where the employer cannot really supervise the employee and the employee determines the working hours mostly by himself. The economic reality test therefore moves away from mere legal dependence and looks at dependent work also in terms of economic dependence. Critics of this test, however, argue that it is inaccurate because, even in the case of business relationships, the small business owner is the weaker party to the contract and to some extent has an economic dependence on his stronger business partner, and therefore the application of the test itself does not help to distinguish bogus employment.[26]

5. PRINCIPLES FOR PUNISHING ILLEGAL WORK

The common features of the punishment of offences and crimes are certain principles, the application of which must be insisted upon unconditionally in the state governed by the rule of law. They are crucial for the area of criminal law, as they derive from the constitutional order or international law for criminal law, but they also need to be applied in the area of administrative punishment.[27] This was also confirmed by the SAC: *"The punishment of administrative offences must also be subject to the same regime as the punishment of criminal offences, and any guarantees afforded under national law to a person accused of a criminal offence must be interpreted in that sense."*[28] According to the SAC, the

[22] Decision of the CJEU Case No. 266/85 of 15 January 1987.
[23] The SAC dealt with the characteristic of personal dependence.
[24] Judgement of the SAC Case No. 6 Ads 46/2013 of 13 February 2014.
[25] ŠTEFKO, M. *Vymezení závislé a nelegální práce. Studies in Human Rights. p.* 225.
[26] Ibid., p. 227.
[27] KOPECKÝ, M. *Správní právo. Obecná část. p.* 246.

distinction between administrative offences and criminal offences is a manifestation of the state's criminal policy and not an expression of natural law principles, and therefore it is not decisive whether positive law designates a particular act as a criminal offence or an administrative offence. Guarantees provided to the accused must therefore be provided equally in criminal proceedings and in administrative proceedings.[29] Although mentioning these principles might seem unnecessary, the author considers their emphasis in this article to be very important, as neither in the case of punishing illegal work, they must not be forgotten. The principles of punishment can be divided into two basic categories, namely those applied in the field of substantive law and those applied in the field of procedural law.

An elementary principle for substantive law is the principle of *nullum crimen sine lege* and *nulla poena sine lege*, which is expressed in Article 39 of the CFRF. This principle states that there is no crime or punishment without law, i.e. that the conditions of criminality of a crime and the penalties that may be imposed on its perpetrator, must be unconditionally determined by law. Although this principle expresses the requirement of a lawful offence, the concept of offence must be interpreted extensively in the context of Article 2(3) of the Constitution and Article 2(2) of the CFRF (i. e. the principle of the enumerability of public law claims)[30] and apply this principle also to administrative offences.[31] In the case of punishing administrative offences, more than in any other area of public administration, there occurs an authoritative exercise of public power. However, the legal obligation, the breach of which is sanctioned, may also be specified to some extent in another form, e.g. by subordinate legislation.[32] The principle of *nullum crimen sine lege* is further specified by the requirements for the quality of a given regulation that will contain the conditions of criminality, namely (i) *nullum crimen sine lege scripta* (the conditions of criminality must be contained in the written law), (ii) *nullum crimen sine lege certa* (the elements of criminal offences and administrative offences must be set out with sufficient precision and certainty to leave no doubt as to which conduct is punishable and which is not, and so the requirement of legal certainty is not violated), (iii) *nullum crimen sine lege praevia* (prohibition of retroactive effect of criminal and administrative penal law rules) and (iv) *nullum crimen sine lege stricta* (prohibition of the use of analogy to the disadvantage of the perpetrator).

Another principle is the principle of subsidiarity of criminal repression. This principle stems from the idea that public law punishment should be used only as a last resort in socially harmful cases, i. e. in cases where, due to their seriousness, the application of other legal or non-legal means – private law liability or social condemnation (defamation) – is not sufficient to remedy them.[33] This principle manifests itself on two levels, namely on the legislative level, where the legislator must consider, when drafting legislation, which

[28] According to the SAC judgement Case No. 6 A 126/2002 of 27 October 2004.
[29] Ibid.
[30] Article 2(3) of the Constitution: *"State power serves all citizens and can only be exercised in cases, within limits and in ways, as provided by law."*
[31] KOPECKÝ, M. *Správní právo. Obecná část.* p. 246.
[32] Ibid.
[33] KOPECKÝ, M. *Správní právo. Obecná část.* p. 247.

conduct is so reprehensible that it should be punishable by public law penalties, and on the level of application, where the condition for administrative or criminal liability is also the fulfilment of the characteristic of the social harmfulness of the conduct in question.[34] Therefore, an offence is characterised in Section 5 of the Act on Liability for Offences as *"(...) a socially harmful unlawful act which is expressly designated as an offence in the law and which exhibits the features provided for by law, unless it is a criminal offence."* Thus, if a certain conduct would fulfil the facts of a particular offence (or a crime) but would not meet the requirement of social harmfulness, it would not be an offence (or a crime).

Equally important is the principle of proportionality and individualisation of punishment, which obliges the administrative authority (or the court in the case of a crime) to determine a punishment for the offender that corresponds to the nature and seriousness of the offence (or a crime) and all the circumstances in which it was committed. The punishment must further reflect the financial and other conditions of the offender. Section 35 of the Act on Liability for Offences contains an exhaustive list of a total of five types of administrative penalties: a) a reprimand, b) a fine, c) prohibition of activity, d) forfeiture of property or substitute value, e) publication of the decision on the offence. These penalties may be imposed separately or in addition to each other, but the reprimand may not be imposed at the same time as fine. In Section 43, the Act on Liability for Offences even gives the administrative authorities the possibility to refrain from imposing a penalty in precisely defined cases. This means that the offence is processed and the decision of the administrative authority pronounces the offender guilty, but the administrative penalty is not imposed. This procedure may be chosen by the administrative authority where the procedure itself appears to be sufficient to correct the offender (Section 43 (2) of the Act on Liability for Offences), or in the case where several offences should have been subject of a joint proceedings, but were not, and the penalty already imposed for the offence in a separate proceedings can be regarded as appropriate to the administrative penalty which would otherwise have been imposed in the joint proceedings (Section 43(1) of the Act on Liability for Offences).

The universal administrative punishment imposed for employment offences is an administrative punishment of a fine. A fine is a proprietary sanction and, like other interventions in the offender's property, it is felt as heavy, but it fulfils its repressive and preventive purpose. It is important that these purposes are balanced since if the repressive purpose were to prevail, the fine would be felt destructive.[35]

On the contrary, however, even a fine that is too light must not be imposed, since according to the SAC, if the fine is to fulfil also its preventive function in addition to its punitive function, the penalty must have the power to discourage other holders of the same legal obligations from unlawful practice.[36] *"This effect can then only be triggered by a sanction appropriate to the significance of the protected interest, timely and factually correct. If it is a financial penalty, it must be noticeable in the offender's financial sphere, i.e. not negligible for him, and must therefore necessarily contain a repressive component. Otherwise,*

[34] Ibid.
[35] According to the SAC judgement Case No. 1 Afs 50/2005 of 24 May 2006.
[36] According to the SAC judgement Case No. 3 As 21/2005 of 10 May 2006.

the sanction would be meaningless. The court's moderation right provided for in Section 78(2) of the Code on the Administrative Courts Procedure, i.e. the possibility of refraining from or reducing the penalty, therefore has a place only where the penalty is clearly disproportionate."[37]

As with other penalties, when imposing a fine, the administrative authority must apply the principle of individualisation of the sanction. The application of this principle in administrative punishment is closely linked to the administrative discretion, since the statutory rate of the fine expresses only the general gravity of the offence in question.[38] As pronounced by the SAC: *"The administrative authority imposing a fine for another administrative offence shall take into account the personal and financial conditions of the offender if, according to the offender's person and the amount of the fine that may be imposed, it is clear that the fine could be liquidating, even where the relevant law does not list the personal and financial conditions of the offender in an exhaustive list of the aspects relevant for determining the amount of the fine.*"[39] At the same time, in this resolution, it provided guidance to the administrative authorities on how to obtain documents to establish the offender's financial conditions: the administrative authority should rely on the data documented by the party to the proceedings itself, or on those which have come to light in the course of the proceedings so far or on those which it obtained itself without the offender's cooperation. If the administrative authority fails to obtain accurate information in this way, it may even determine the financial conditions by estimate.[40]

Determination of the offender's conditions is also important in view of the fact that in extraordinary cases, the administrative authority has the possibility to exceptionally reduce the fine below the lower limit of the rate if the statutory fine would be disproportionately severe for the offender in accordance with Section 44 of the Act on Liability for Offences. However, the institute of extraordinary reduction of the fine is by no means a proposal based institute. The administrative authority is obliged to consider whether there are grounds for proceeding under Section 44 of the Act on Liability for Offences. This also fulfils the principle of legality of punishment and the principle of individualisation of the sanction.[41]

With regard to the offence of facilitating illegal work, a total of four procedural principles should be highlighted, namely the principle of due lawful process, the principle of *ne bis in idem*, the principle of the presumption of innocence and the principle of non-self-incrimination. The principle of due lawful process, or *nullus processus criminalis sine lege*, provides that a criminal trial or administrative proceedings for an offence must be carried out on the basis of the law. The administrative authorities shall proceed in the proceedings *ex officio*, but according to Article 8(2) of the CFRF, no one may be prosecuted except on the grounds and in the manner provided for by law. A person accused of an offence (or a crime) has the right to a fair trial. However, the right to a fair trial is not provided for as such anywhere in the Czech legal system, it arises from Article 6 of the European Conven-

[37] Ibid.
[38] According to the SAC judgement Case No. 3 Ads 101/2013 of 10 July 2014.
[39] According to the resolution of the Extended Chamber of the SAC Case No. 1 As 9/2008 of 20 April 2010.
[40] Ibid.
[41] According to the SAC judgement Case No. 4 As 96/2018 of 5 June 2018.

tion on Human Rights and Article 14 of the International Covenant on Civil and Political Rights, and only some individual aspects of this right can be found in the Charter of Fundamental Rights and Freedoms. In any proceedings for an offence (or a crime), the rights of the accused must be respected, his dignity must be preserved, the accused has the right of access to the court (or the administrative authority), he has the right to be heard in all the circumstances and, at the same time, the facts must be established in accordance with the principle of substantive truth so that there is no reasonable doubt about them.

From the point of view of punishing illegal work, the *ne bis in idem* principle, in English "not twice in the same case", is very important. The idea behind this principle is that an offender who has already been finally convicted or acquitted of a certain act cannot be punished again for the same act. At the international level, this principle can be found in Article 4 of the Protocol No. 7 to the ECHR, which states that: *"[n]o one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State."*[42] Although this article refers to a criminal offence, it must also be applied to administrative offences, which results from the extensive case law of the European Court of Human Rights, in particular the judgment of Engel and Others v. the Netherlands of 8 June 1976.[43] In this decision, the ECtHR expressed the idea that the distinction between criminal offences and administrative offences cannot be left to the individual States, as this would lead to a different interpretation of the Protocol No. 7 between them. Thus, the ECtHR has pronounced certain criteria (the so-called Engel criteria) which determine whether a certain sanction is a criminal sanction within the meaning of the ECHR and the Protocol No.7. These criteria are: (i) the legal qualification of the offence in national law, (ii) the nature of the offence, and (iii) the degree of severity of the sanction to be imposed on the offender. Thus, most administrative sanctions will be regarded as criminal sanctions under these criteria and the *ne bis in idem* principle will have to be applied in relation to them.

The difficulty with this principle is the interpretation of the *"idem"* element, i.e. the identity of the act. The ECtHR's Zolotukhin v. Russia judgment is a breakthrough on this issue, where the ECtHR disregarded the legal identity and favoured to an assessment of factual identity. According to the ECtHR, Article 4 of the Protocol No. 7 thus prohibits prosecution for a second offence if the second offence is based on an identical or substantially identical act (*faits identiques et faits memes de la substance*). Identity of the offence is then established when the specific facts concern the same defendant and are inseparably linked to a specific place and time.[44] Section 77(2) of the Act on Liability for Offences therefore states the rule that no person may be accused of an offence for an act which has already been finally decided in another proceeding against the same person, and this decision includes also a decision under criminal law. For this reason, the CPC states that the LEA shall refer the case to the competent authority for the hearing of an offence if it ap-

[42] Article 4(1) of the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms.
[43] Engel and others v. Netherlands, Application nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72.
[44] Sergey Zolotukhin v. Russia. Application No. 14939/03. Decision of 10 February 2009.

pears that the case is not a matter of suspicion of a crime,[45] which shall ensure that a person cannot be punished for one act as both - an offence and a crime.

However, the situation is far more problematic exclusively in the area of public administration, where the subject-matter competence of the public authorities may not be clearly defined and the perpetrator is punished for the same act by multiple administrative authorities in different proceedings. The SAC has repeatedly addressed the issue of subject matter competence, in one of its earliest decisions in this area it stated: *"With regard to the principle of the predictability of the law and the principle of minimizing state interference in the private sphere of natural and legal persons, it is necessary to strive for an interpretation of the legal regulations that aims to clearly define the subject-matter competence of individual administrative authorities so that these competences do not overlap with each other. Such an interpretation is particularly desirable in those cases where, as a result of the activities of state authorities, decisions are issued which by their nature constitute sanctions addressed to the participants in administrative relations, or where the administrative procedure itself is reasonably perceived by the subjects concerned as a detriment."*[46]

As noted above, an employer can also be punished for illegal work indirectly in other areas of public law. This raises the question of how to approach the *ne bis in idem* principle in the area of punishing illegal work if an employer is assessed for tax and imposed penalties for not paying personal income tax advance payments on behalf of his illegal employees and is also punished by the LI in close temporal succession. Therefore, it is necessary to apply Engel criteria here too. According to Příkazská, the tax penalties under Section 251 of the Tax Code constitute a criminal sanction within the meaning of the ECHR, and should therefore be treated as such.[47]

Decisions of the ECtHR, such as the decision Lucky Dev v. Sweden of 27 November 2014 or the decision A B v. Norway of 15 November 2015, have again brought solutions to such cases. The European Court of Human Rights has set out a total of four criteria that must be applied in administrative punishment to ensure that the *"ne bis*" element is met in practice, namely: (i) whether the two separate proceedings pursue complementary objectives, and therefore whether they relate *in concreto* to different aspects of the antisocial conduct, (ii) whether the combination of the two proceedings is a foreseeable consequence of the antisocial conduct, (iii) whether the competent authorities conduct the proceedings in a mutually cooperative manner with a view to avoiding, as far as possible, repetition in the gathering of evidence, in particular whether evidence previously gathered and evaluated can be used in further proceedings, and most importantly, (iv) whether the sanction imposed in the earlier proceedings is taken into account in the imposition of the sanction in the subsequent proceedings so that the offender is not ultimately subjected to an excessive burden.[48] In my opinion, conducting tax proceedings and labour inspec-

[45] Section 159a of the CPC, Section 171 of the CPC.
[46] The SAC judgement Case No. 5 A 116/2001 of 21 August 2003.
[47] PŘÍKAZSKÁ, L., KADLEC, T. Ne bis in idem a daňové delikty. In: *epravo.cz* [online]. 26. 6. 2019 [2021-10-11]. Available at: <https://www.epravo.cz/top/clanky/ne-bis-in-idem-a-danove-delikty-109555.html#_ftn1>.
[48] Judgment of the European Court of Human Rights in Lucky Dev v. Sweden of 27 November 2014, Application No. 7356/10, Judgment of the European Court of Human Rights in A and B v. Norway of 15 November 2016, Application Nos. 24130/11 and 29758/11.

torate investigations as a result of illegal work is an expected consequence of its practice, but the competent authorities should cooperate in the proceedings and the imposed sanction should reflect the sanction imposed in the earlier proceedings. According to Morávek, there would therefore have to be a functioning channel of communication between the various authorities through which information could be effectively transferred between the authorities concerned.[49]

Another principle that must be mentioned in this regard is the principle of the presumption of innocence. This principle means that until the accused is found guilty by a final decision of a court or an administrative authority, he is presumed innocent.[50] This principle is linked to the principle *in dubio pro reo*, i.e. on factual questions in favour of the perpetrator. If the guilt is not proven beyond reasonable doubt, it cannot be pronounced and the accused is presumed innocent. On the principle of the presumption of innocence in relation to offence proceedings, the CC has made clear that, insofar as the offence proceedings are proceedings to determine the legitimacy of criminal charges against him within the meaning of Article 6(1) ECHR,[51] the complainant enjoys all fundamental rights in criminal proceedings, including the right under Article 6(2) ECHR, which provides that anyone accused from a criminal offence shall be presumed innocent until proven guilty in a lawful manner.[52]

The consistent application of the presumption of innocence in offence proceedings is also supported by the SAC when in one of its judgments, it states the following: *"The administrative offence proceedings as a specific type of administrative procedure is nevertheless special in that it also applies the same principles as in the criminal law, in particular the principle of punishment for culpable conduct, the principle of the presumption of innocence or the in dubio pro reo principle. (…) In other words, in the offence proceedings, one cannot be satisfied with the fact that the accused committed the offence is probable, or even the most probable version of the facts. Unless it is proved beyond reasonable doubt that all the elements of the offence have been fulfilled, it cannot be concluded that an offence has been committed."*[53] It is clear from the above that the Labour Inspectorates must be safely convinced that the accused is guilty of the offence in question and also that the offence actually occurred.

The last principle that can be mentioned here with regard to the offence of facilitating illegal work is the prohibition of self-incrimination. In the area of employment offences, it will be applied to the greatest extent in the LI inspections, since Act No. 251/2005 Coll., on Labour Inspection, as well as Act No. 255/2012 Coll., on Control (Control Code) apply to its procedure. According to Section 10 of the Control Code, the inspected, i.e. the particular employer, is obliged to provide the inspecting cooperation. However, this obligation is certainly not unlimited. Its corrective is precisely the principle of the prohibition of self-

[49] MORÁVEK, J. *Důkazní prostředky a jejich přípustnost zejména se zaměřením na kamerové sledování.* Prague: Charles University, Faculty of Law, 2020, p. 42.
[50] JÍLEK, J. Zamyšlení nad aplikačním pojetím presumpce neviny. In: *epravo.cz* [online]. 11. 2. 2020 [2021-12-03]. Available at: <https://www.epravo.cz/top/clanky/zamysleni-nad-aplikacnim-pojetim-presumpce-neviny-110606.html>.
[51] Article 6(1) of the ECHR provides for the right to a fair trial.
[52] Ruling of the CC Case No. II. ÚS 82/07 of 17 January 2008.
[53] The SAC judgement Case No. 4 As 206/2015 of 9 October 2015.

incrimination, in latin *nemo tenetur se ipsum accusare*. This principle is based in particular on the right of the accused to refuse to give testimony, but may also apply to other acts, e.g. the obligation to submit material evidence.[54]

In the event that the accused does not voluntarily hand over material evidence, it may be forcibly taken away from him, as the CC does not understand such procurement of evidence as a compulsion to self-incrimination, but as an objectively necessary activity to secure all evidence, both in favour and against the perpetrator. According to the CC: *"such "seizure of an item" cannot be interpreted as compelling the provision of substantive evidence against oneself. In this respect, the seizure of the item is of the same nature as other seizure measures under the Criminal Procedure Code applied without regard to or against the will of the accused. (…) In these cases, it is not a matter of forcing the accused to provide evidence against himself, but of forcibly seizing material evidence, even if against the will of the accused. It is not unconstitutional to carry out such acts against the will of the accused."*[55]

Already in this decision, in my view, the idea of the dual nature of investigative acts was partly expressed. It is necessary to distinguish between those acts which are carried out by the LEA or administrative authorities in the course of delicts investigation without the need for the active participation of the accused, since, using the statutory mechanisms provided for, the respective act will take place whether or not the person concerned consents to it (in the case of an accused person, it is sufficient if he refrains from the activity - *non facere*, or if he tolerates it - *pati*) and those acts which, by their very nature, require the action of the accused (*facere*).

In legal theory and practice, there has long been disagreement about the scope and limits of the principle *nemo tenetur*. This issue was clarified only in 2010 with the Opinion of the CC: *"It is only in the further development of case law in the USA and European countries that the interpretation of this provision has been broadened so that the accused may not be compelled not only to testify, but also to take any other active steps that would contribute to the procurement of evidence against him. (...) The accused may be called upon to perform the acts listed, possibly also summoned or brought before the court, but may not be compelled to do so in any way, without prejudice to the imposition of a fine. (...) The different regime for obtaining evidence in terms of the right not to self-incriminate is based on the different nature of the testimony and the listed evidence. The latter*[56] *exist objectively, independently of the will of the accused, and although they are obtained against the will of the accused, the accused is not required to actively participate, but only to endure enforcement actions. In contrast, a testimony, a word, does not exist objectively, independently of the will of the accused, and can only be obtained against the will of the accused when the will is broken by physical or psychological coercion, i.e. only when the dignity of man as a free being is degraded."*[57]

In the first group of investigative actions it is necessary to mention, for example, the possibility to enter land, buildings and other premises (Section 7 of the Control Code) or

[54] Ruling of the CC Case No. l. ÚS 402/05 of 8 November 2005.
[55] Ruling of the CC Case No. Pl. ÚS 29/2000 of 20 February 2001.
[56] Odour trace, hair sample and buccal swab.
[57] Opinion of the CC Case No. Pl. ÚS-st. 30/10 of 30 November 2010.

to carry out control purchases (Section 8 (c) of the Control Code), which may be carried out in accordance with Section 3 of the Control Code even during the actions preceding the inspection.[58] Therefore, the inspected person should not even know about their execution, as revealing the identity of the inspectors would result in the loss of the possibility to carry out such an action. Although it might seem that this institute would have no use in the field of employment, with the help of control purchases, the performance of dependent work by a shop assistant can be proven in the field of illegal work.[59] According to Section 7 of the Control Code, the inspector may even enter a dwelling, but here the active cooperation of the inspected person is required, especially in the context of the constitutional principle of inviolability of the home (Article 12 of the CFRF). The inspector must not enter the dwelling by force.[60] In criminal proceedings, however, the entry into a dwelling may also be carried out against the will of the accused on the basis of a court search warrant (Section 83 of the Criminal Procedure Code).

The second group of actions in connection with uncovering of illegal work includes the aforementioned obligation to give testimony or, for example, to create certain documents or records (under threat of a fine for failure to cooperate), which a person is not required to keep by law.[61] Although at first glance it might seem that the obligation stipulated in Section 9 of the Act on Labour Inspection, according to which the inspector may invite the inspected person to come to the office or inspectorate within a specified period of time and provide data, documents or things related to the performance of the inspection and the inspected person is obliged to obey this invitation, even though this action of the inspected person is clearly her active action, this obligation will not be included in the second group. Pursuant to Section 9a of the Act on Labour Inspection, a fine of up to CZK 200,000 may be imposed on the inspected person for breach of this obligation, thus the limits of the *nemo tenetur* principle remain very vague.

The SAC has expressed its opinion on this issue in its judgment No. 4 As 29/2016 in the sense that the supervisory authority is entitled to oblige a party to the proceedings to submit documents relating to the facts, even if they could prove the unlawful conduct of the party itself or another entity. Granting an absolute right to remain silent would unreasonably impede the exercise of supervisory powers. In its decision, the SAC adopted an important conclusion of the General Court in relation to self-incrimination: *"The obligation to answer purely factual questions put by the Commission[62] and to comply with its requests for the production of pre-existing documents cannot lead to a breach of the principle of respect for the rights of the defence or the right to a fair trial. There is nothing to prevent the addressee from demonstrating, in the course of the subsequent administrative procedure or in proceedings before the Community court, in the exercise of his rights of defence, that the*

[58] STÁDNÍK, J. Section 7 Oprávnění inspektora. In: Jaroslav Stádník – Petr Kieler – Martin Štefko *Zákon o inspekci práce. Komentář.* Prague: Wolters Kluwer ČR, a. s., 2016. p. 48.
[59] Ibid.
[60] Ibid., p. 47.
[61] MORÁVEK, J. Zákaz nucení k sebeobviňování. In: Jakub Morávek a kol. *Zákaz nucení k sebeobviňování při činnosti inspektorátu práce.* Prague: Charles University, Faculty of Law, 2020, p. 35.
[62] The case law referred to by the SAC relates to the protection of competition, but according to the SAC, the conclusions on the application of this principle can also be applied to the broader legal area of administrative punishment.

facts set out in his replies or the documents submitted have a different meaning from that attributed to them by the Commission."[63] The crucial issue in this regard is whether the participant has been requested by the supervisory authority to hand over records related to his legal obligations that are subject to supervision of that authority.[64] In conclusion, the prohibition of self-incrimination cannot be claimed in respect of purely passive activities of a participant and in respect of documents which the participant is legally obliged to keep and the labour inspectorate is legally obliged to supervise. The *nemo tenetur* principle applies both to natural persons and to legal persons in respect of whom it is exercised through the members of the statutory body.[65]

6. SANCTIONS

If the Labour Inspectorate finds out during an inspection that illegal work is being carried out at a given workplace, it may initiate administrative proceedings for an offence under Section 141(2) of the Act on Employment in combination with Section 78(1) of the Act on Liability for Offences. If it becomes apparent during the proceedings that the offences under Section 139(1)(c) or (d) or Section 140(1)(c) of the Act on Employment have actually been committed, it may impose sanctions on the perpetrators. As stated above, Section 35 of the Act on Liability for Offences contains an exhaustive list of five types of administrative penalties that may be imposed for offences: a reprimand, a fine, prohibition of activity, forfeiture of property or substitute value, and publication of the decision on the offence. Either an administrative penalty of a reprimand or a fine may be imposed for employment offences. This follows from the fact that a reprimand is the mildest type of administrative penalty that can be imposed for any offence, unless this possibility is expressly excluded by law.[66] The penalty that is universally imposed is a fine, the amount of which also determines the seriousness type of the offence. Forfeiture of property (Section 48 of the Act on Liability for Offences) and forfeiture of substitute value (Section 49 of the Act on Liability for Offences) is imposed for the purpose of taking away property which has been used or intended for the commission of offences or which constitutes the proceeds of the commission of offences.[67] The application of these types of punishments is therefore difficult to imagine in the field of employment. Other types of administrative penalties may be imposed by the administrative authority only if they are expressly provided for in a specific law for a given offence.[68]

Currently, employers who allow the performance of illegal work under Section 5(e)(1) of the Act on Employment are subject to fines of up to CZK 5 million for natural persons and up to CZK 10 million for legal entities or natural persons engaged in business. These are the most serious offences under the Act on Employment. Employees who perform il-

[63] The SAC judgement Case No. 4 As 29/2016 of 21 June 2016.
[64] Ibid.
[65] MORÁVEK, J. Zákaz nucení k sebeobviňování. In: Jakub Morávek a kol. *Zákaz nucení k sebeobviňování při činnosti inspektorátu práce*. p. 35.
[66] KOPECKÝ, M. *Správní právo. Obecná část*. pp. 289–291.
[67] Ibid.
[68] Ibid.

legal work are at risk of a fine of CZK 100,000.[69] But the level of sanctions has evolved dramatically over the past two decades, as has the legislation governing illegal work and the different approaches to punishing illegal work have become the subject of numerous debates.

In the first version of the Act on Employment effective from 1 October 2004, the amount of the fine was set at a single amount for both natural and legal persons and could reach a maximum of CZK 2 million. The amendment made by the Act 382/2008 Coll.[70] increased the upper limit of fines to CZK 5 million for both natural and legal persons and natural persons engaged in business. I consider the most controversial Amendments No. 367/2011 Coll.[71] and No. 1/2012 Coll.,[72] which not only doubled the upper limit of five million, but also introduced, with effect from 1 January 2012 (respectively from 5 January 2012), a minimum limit of CZK 250,000 for fines imposed on legal persons and natural persons engaged in business for facilitating illegal work.[73] Although many believed that the primary objective of these amendments was to tighten penalties for illegal work, which, among other things, the legislator himself stated in the explanatory memorandum to the respective act: *"[t]he purpose of the proposed legislation regulation is to strengthen the deterrent effect of imminent fines,"*[74] the true purpose was to transpose Directive 2009/52/EC of the European Parliament and the Council of 18 June 2009.[75,76] The implementation of this EU secondary legislation was intended to prevent the employment of third-country nationals illegally staying in the EU territory with the aim of combating illegal immigration, and these objectives should also have been reflected in our national legislation.[77] The establishment of a minimum penalty of CZK 250,000 for the commission of illegal work was the result of an initiative by several MPs who incorporated this part into the bill in the second reading of the legislative process as part of the recommendations of the Committee on Social Policy.[78] The minimum sanction was not included in the Government's bill at all.[79]

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[69] According to Section 139(3)(c) of the Act No. 435/2004 Coll., on Employment, as amended.

[70] The Act No. 382/2008 Coll., which amends the Act No. 435/2004 Coll., on Employment, as amended, the Act No. 326/1999 Coll., on the residence of foreigners in the territory of the Czech Republic and on amendments to certain laws, as amended, and other related laws.

[71] The Act No. 367/2011 Coll., which amends the Act No. 435/2004 Coll., on Employment, as amended, and other related laws.

[72] The Act No. 1/2012 Coll., which amends the Act No. 435/2004 Coll., on Employment, as amended, and other related laws.

[73] PRŮŠOVÁ, A. Nelegální zaměstnávání a jeho postih aneb kolik tedy hrozí? In: *pravniprostor.cz* [online]. 15. 4. 2015 [2021-08-03]. Available at: <https://www.pravniprostor.cz/clanky/pracovni-pravo/nelegalni-zamestnavani-a-jeho-postih-aneb-kolik-tedy-hrozi>.

[74] Explanatory Memorandum of the Act No. 367/2011 Coll., which amends the Act No. 435/2004 Coll., on Employment, as amended, and other related laws. Parliamentary press No. 373/0. The Chamber of Deputies, 6th electoral term, 2010-2013. In: *psp.cz* [online]. [2023-06-29]. Available at: <https://www.psp.cz/sqw/text/tiskt.sqw?O=6&CT=373&CT1=0>.

[75] 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.

[76] PICHRT, J., MORÁVEK, J. O lidové tvořivosti a sankcích za výkon nelegální práce. *Právní rozhledy: časopis pro všechna právní odvětví*. 2014, Vol. 22, No. 3, p. 94.

[77] BIČÁKOVÁ, O. Euronovela zákona o zaměstnanosti. In: *pravniradce.ekonom.cz* [online]. 24. 11. 2011 [2021-10-03]. Available at: <https://pravniradce.ekonom.cz/c1-53786390-euronovela-zakona-o-zamestnanosti>.

[78] Resolution of the Committee on Social Policy of its 10th meeting, held on 30 August 2011. Parliamentary press No. 373/2. The Chamber of Deputies, 6th electoral term, 2010-2013. In: *psp.cz* [online]. [2023-06-29]. Available at: <https://www.psp.cz/sqw/text/tiskt.sqw?o=6&ct=373&ct1=2>.

The inspectorates could therefore punish illegal work with fines ranging from CZK 250,000 to CZK 10 million, which, however, according to Kolman, significantly limits the administrative discretion of the competent authority and can lead to significant injustices.[80] Administrative discretion, or discretionary power, is a very important component of the application of the administrative law norms and the exercise of public authority in the state, as it allows the administrative authorities to choose the most appropriate of the solutions offered by the norm after considering all the circumstances. The determination of minimum fines has always been seen as highly problematic in the settled case law of the courts,[81] since in the case of imposing, even the lowest possible, "only" a quarter of a million fine on a non-wealthy natural person engaged in business, could be devastating for him.

In one of its resolutions, the Enlarged Senate of the SAC defined the liquidation sanction as follows. It is: *"(…) a sanction which is disproportionate to the personal and financial circumstances of the offender to the extent that it is capable of rendering him insolvent or forcing him to cease business activity, or as a result of such a fine, the sole purpose of his business activity may become essentially the repayment of the fine for a long period of time, and at the same time there is a real risk that the offender or his family (if he is a natural person engaged in business) will be placed in existential difficulties as a result of the fine."*[82] The CC also commented on the term in relation to the minimum amount of the fine set out in the 1976 Building Act:[83] *"In the opinion of the Constitutional Court, the basic criterion from which it is necessary to start, is the so-called criterion of substance, according to which it is not every deprivation of property on the basis of fines, fees and taxes, which constitutes an interference with property rights, but only that which fundamentally changes the property relations of the subject concerned, i.e. in such a way that it changes his overall property position by "destroying" the very substance of the property. In particular, in the case of fines imposed on legal and natural persons engaged in business under special regulations, it must be assumed that such an interference with property as a result of which the property base for further business activity would be "destroyed" is excluded."*[84] In comparison with the above, the amount of the fine for the offence of illegal work has exactly these features.

However, it was not necessary to wait long for a remedy of this tragic situation, as the CC cancelled the respective part of Section 140(4)(f) of the Act on Employment in its ruling on 9 September 2014.[85] Consequently, the sanction for performing illegal work was set only by the upper limit, which Pichrt and Morávek considered as the most appropriate solution.[86] In the meantime, the legislator itself had already come to the conclusion that

[79] PICHRT, J., MORÁVEK, J. Ještě jednou k sankcím za výkon nelegální práce. *Právní rozhledy: časopis pro všechna právní odvětví*. 2014, Vol. 22, No. 21, pp. 748–753.
[80] KOLMAN, P. Boj proti švarcsystému: „less is more". *Právní rozhledy: časopis pro všechna právní odvětví*. 2012, Vol. 20, No. 9, pp. 326–328.
[81] E. g. ruling of the CC Case No. Pl. ÚS 3/02 of 13 August 2002 or ruling of the CC Case No. Pl. ÚS 12/03 of 10 March 2004.
[82] Resolution of the SAC Case No. 1 As 9/2008 of 20 April 2010.
[83] Determination of the minimum amount of the fine of CZK 500,000 in Section 106(3) of Act No. 50/1976 Coll., on Spatial Planning and Building Code (Building Act), as amended by Act No. 83/1998 Coll.
[84] Ruling of the CC Case No. Pl. ÚS 3/02 of 13 August 2002.
[85] Ruling of the CC Case No. Pl. ÚS 52/13 of 9 August 2014.
[86] PICHRT, J., MORÁVEK, J. *Ještě jednou k sankcím za výkon nelegální práce*. pp. 748–753.

the quarter-million lower limit of the fine would be draconian in the vast majority of cases of illegal work, but could not be satisfied with limiting the fine to the maximum amount, and so Act No. 136/2014 Coll. of 18 June 2014 amended Section 140(4)(f) of the Act on Employment with effect from 1 January 2015 to the following wording: *"CZK 10,000,000, in the case of an administrative offence under paragraph 1(c) and (e), but not less than CZK 50,000."* The legal situation in which the CC, as a negative legislator, cancelled the lower limit of the sanction, which was therefore not set in the law at all, lasted almost three months before the above amendment came into force.

The Explanatory Memorandum to Act No. 136/2014 Coll., in relation to point 48, which amends the limit of the sanction states that: *"On the basis of the inspections and the subsequent administrative proceedings, it can be concluded that the current minimum amount of the fine (CZK 250,000) exceeds the preventive function in many cases (...) [,] it becomes in fact liquidating and thus exceeds the intention of the legislator. (...) The establishment of a new minimum sanction threshold is (...) also intended to meet the fact that the employers must not profit from the illegal employment. These aspects are met by the minimum threshold of approximately CZK 50,000. The sanction set in this way leaves sufficient space for the administrative discretion in the administrative proceedings to determine the amount of the sanction, taking into account the specific circumstances, especially the number of illegally employed, up to the limit of the maximum range, i.e. CZK 10 million."*[87] Such sanctions for illegal work have persisted until now.

7. CONCLUSION

In the Czech Republic, illegal work is first, and foremost an offence defined in the Act on Employment. However, it can also be punished under other legislation in the field of tax and criminal law, as it often results in the leakage of money from the state budget.

Unfortunately, proving the performance of dependent work outside the employment relationship is very difficult for the Labour Inspectorates because, unlike proving illegal work of foreigners, they have to prove that all the elements of dependent work are fulfilled. In order to facilitate their work, several tests that combine multiple features of dependent work have been developed and therefore, can serve as a notional guide for them.

Generally, the administrative punishment of illegal work must be treated as punishment under criminal law and must respect all related principles and the right to a fair trial. On the other hand, however, the perpetrator may be punished for the commission of illegal work both in the administrative offence proceedings and in the assessment proceedings before the Tax Office. Although this would appear to be a violation of the *ne bis in idem* principle, it is an expected consequence of illegal law and thus completely lawful.

The fine for commission of illegal work is the highest in the Act on Employment, making illegal work the most serious employment offence. The development of the fine levels into the current one is very controversial, with even a very high lower limit of the fine being set in the past.

[87] Explanatory Memorandum of the Act No. 136/2014 Coll., Parliamentary Press 84/0. Chamber of Deputies, 7th electoral term, 2013–2017. In: *psp.cz* [online]. [2023-06-29]. Available at: <https://www.psp.cz/sqw/text/tiskt.sqw?O=7&CT=84&CT1=0>.

8. LIST OF ABBREVIATIONS USED

Act on Employment	Act No. 435/2004 Coll., on Employment.
Act on Labour Inspection	Act No. 251/2005 Coll., on Labour Inspection
Act on Liability for Offences	Act No. 250/2016 Coll., on Liability for Offences and the Proceedings in Respect Thereof.
CC	Constitutional Court of the Czech Republic
CFRF	Charter of Fundamental Rights and Freedoms
CJEU	Court of Justice of the European Union
Code on Administrative Courts Procedure	Act No. 150/2022 Coll., the Code on Administrative Courts Procedure
Coll.	Collection of Laws
Control Code	Act No. 255/2012 Coll., on Control (Control Code). Constitution - Constitutional Act. No. 1/1993 Coll., the Constitution of the Czech Republic.
CPC	Act No. 141/1961 Coll., the Criminal Procedure Code.
CrC / Criminal Code	Act No. 40/2009 Coll., the Criminal Code.
CZK	Czech Crowns
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights.
e.g.	For example
EU	European Union
Ibid.	Ibidem
i.e.	that is
Income Tax Act	Act No. 586/1992 Coll., on Income Tax
LEA	Law Enforcement Authorities
LI	Labour Inspectorate
MP	Member of Parliament
No.	number
OHS	Occupational Health and Safety
p.	page
pp.	pages
SAC	Supreme Administrative Court of the Czech Republic.
Tax Code	Act No. 280/2009 Coll., Tax Code
UK	United Kingdom
v.	versus
Vol.	volume