

NATIONAL STRATEGY TO COMBAT TRAFFICKING IN HUMAN BEINGS (2008 – 2011)

(...)

A. Description of the Situation and Evaluation of Measures Adopted

2) Overview of Activities against Trafficking in Human Beings 2005 - 2007

A) Legal Regulation

Measures Adopted at the National Level

Since the amendment of the CC made by Act No. 537/2004 Coll. came into effect on 22 October 2004 and its Section 232a established a brand new definition of trafficking in human beings, **problems in application of the law concerning the partial overlapping of constituent elements of offences of procuring and trafficking in human beings under the provisions of Sections 204 and 232a of the CC** have persisted. Not only the Czech police but also public prosecutors' offices and courts struggle with such problems¹. This problem appears to be critical and therefore it is analysed in more detail in Part B) - Measures Proposed for 2008 - 2011.

¹ This is demonstrated both by the information acquired in drawing up this document and by other documents, for example the '2005 Report on Activities of Public Prosecutors' Offices' of 28 June 2006. The '2006 Report on Activities of Public Prosecutors' Offices' of 18 June 2007 states: "With respect to offences of trafficking in human beings, legal application problems concerning overlapping relations of constituent elements of such offences under Sections 232a and 204 of the CC, mentioned in previous Reports, persist".

One of the key topics in the framework of combating trafficking in human beings is to find a certain balance between human and legal requirements for the protection of and care for victims, and the interest of law enforcement authorities when prosecuting offenders. This was the reason why the Czech Republic adopted special provisions regulating residence rules directly in relation to victims of trafficking in human beings. In June 2006 the **amendment to Act No. 326/1999 Coll., on the Residence of Aliens in the Czech Republic and on the Amendment to Some Other Acts, as amended (hereinafter referred to as the 'Act on the Residence of Aliens')** improved the status of victims of trafficking in human beings. A **new type of residence** was introduced and this may be applied to victims of trafficking in human beings cooperating with law enforcement authorities in criminal proceedings. It is a **longterm residence for the purpose of protection in the Czech Republic** and it is the Asylum and Migration Policy Department of the Ministry of the Interior which decides whether such residence permit shall be granted. Foreign nationals may be provided financial assistance under Sec. 48a of the Act on the Residence of Aliens, dependant on circumstances, up to the amount of the minimum cost of living and for the period of validity of the long-term residence permit for the purpose of protection in the Czech Republic - a relevant foreign national is considered to be a foreign national who was granted permanent residence². Since June 2006 this amendment was also reflected in the Programme on Supporting and Protecting Victims of Trafficking in Human Beings (hereinafter referred to as the 'Programme')

With respect to providing care and protection to victims of trafficking in human beings, the question was raised as to how to ensure certain standards for victims' family members. Task No. 19 of the National Strategy to Combat Against Trafficking in Human Beings (2005-2007) (hereinafter referred to as the 'National Strategy 2005-2007') stipulated the analysis of options to protect family members of foreign victims of trafficking in human beings in the Czech Republic and to propose corresponding measures. After having analysed the current provisions of the Act on the Residence of Aliens in order to decide on **residence rules for victims of trafficking in human beings or their family members or persons who are treated as family members**, the Government of the Czech Republic approved by its Resolution No. 343/2007 of 11 April 2007 a draft amendment to the Act on the Residence of

Aliens. This governmental draft amendment was adopted by the Chamber of Deputies of Parliament of the Czech Republic on 31 October 2007 and it was being discussed by the Senate of Parliament of the Czech Republic at the time that this document was being drawn up (Senate Bill No. 128). The draft amendment, *inter alia*, extends those provisions regulating long-term residence for the purpose of protection in the Czech Republic. In relation to persons eligible to apply for a residence permit for the purpose of protection in the Czech Republic within the meaning of Sec. 42e (1) of the Act on the Residence of Aliens, **the draft**

² A new legal provision relating to residence is based on Council Directive 2004/81/EC of 29 April 2004 on residence permits issued to third country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration and who cooperate with the competent authorities. It is very important that any foreign national concerned is, according to this Act, informed of his/her right to apply for a long-term residence permit for the purpose of protection in the Czech Republic and also on the conditions to be satisfied, while a 30-day time limit for reconsidering such application is maintained. During this time limit the foreign national may not be deported or his/her residence may not be otherwise terminated.

amendment newly regulates a long-term residence permit for the purpose of protection in the Czech Republic of a husband/wife, a minor or a child of age who does not earn for his/her living, or a foreign national who is incompetent to make any legal acts and who has been placed, by the decision of a competent authority, in the custody of a person who is a probable victim of trafficking in human beings or a person who was smuggled across the national border or was enabled to illegally cross the national border and whose testimony is important for detecting the offender or organised group involved in organising or enabling illegal such crossings of the national border, provided that such person cooperates with law enforcement authorities. The purpose of the residence permit is unification of the family, and a fundamental condition for granting such residence is the presence of those persons in question in the Czech Republic at the moment when those persons eligible under Sec. 42e (1) of the Act on the Residence of Aliens file the relevant application. The draft amendment further regulates conditions for the termination of this type of residence for family members concerned or persons who are treated as family members. Further proposed changes concern accommodation and options for providing financial assistance. In order to prevent abuse of this type of residence, stricter conditions apply if the person in question intends to change the purpose of his/her residence. The text approved by the Chamber of Deputies of Parliament of the Czech Republic includes further partial modification of Sec. 42e (2) of the Act on the Residence of Aliens (i.e. when compared to the original governmental draft amendment). Specifically the possibility to terminate the time limit of one month with which the foreigner was provided in order to reconsider his/her decision as to whether he/she will cooperate with law enforcement authorities, was incorporated. Such an option will be used if the foreign national ceases to satisfy some of the required conditions for being granted a long-term residence permit for the purpose of protection in the Czech Republic or if it is necessary for securing public order or safeguarding the security of the state, or if the foreign national requests cancelling the time limit provided (see the draft amendment to Sec. 42e (2) – amendment point 44).

The last of those pressing problems with which the Czech Republic has coped since the beginning of the 1990s is the **issue of prostitution, its definition and its regulation within the Czech legal framework**. The solution of this issue partially receded into the background when in spring 2006 the Draft Act on Regulating Prostitution was withdrawn, together with a proposal to remove the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (UN Assembly. New York on 12 December 1949. The Czech Republic acceded to the Convention on 14 March 1958, the New York Convention) from the agenda of the Parliament of the Czech Republic. With regard to the fact that the scope and cultivation of the prostitution scene affect the environment and the scope of the phenomenon of trafficking in human beings for the purpose of sexual exploitation, it is necessary to pay adequate attention to this topic. Therefore, one of the proposed measures included in Part B) – Measures Proposed for 2008 – 2011- is devoted

namely to prostitution.

Measures Adopted at the International Level

The Czech Republic signed the **Convention against Transnational Organised Crime (of 12 December 2000, the Palermo Convention) and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (10 December 2002), supplementing the Convention in question**. Even though the Czech legal framework satisfies almost all the requirements which the Protocol imposes upon signatory countries, the Czech Republic can, at the moment, ratify neither the Convention nor its Protocols³. The reason is that the liability of legal entities has not yet been defined by Czech national law. Introduction of criminal liability of legal entities was one of the heavily discussed proposals contained in the original draft recodification of the Criminal Code⁴. As regards the punishment of offenders who have committed the crime of trafficking in human beings, it is an important requirement because it is very often legal entities which participate in such illegal activities, as trade companies running hotels, bars, night clubs, gambling clubs, agencies dealing with intermediation of work abroad, travel agencies and transport companies, and publishing houses and printing works producing pornographic goods. The liability of individuals fails due to notoriously cumbersome procedures of international legal assistance and other difficulties in supporting investigations with relevant evidence. Adoption of the Action Plan of the Council of the European Union (**EU plan on best practices, standards and procedures for combating and preventing trafficking in human beings - 2005/C 311/01**) in December 2005 is considered to be a significant activity.

The Plan is to guarantee better coordination of activities between EU Member States and to enhance assistance and protection of victims of trafficking in human beings.

Trafficking in human beings is described as “a contemporary form of slavery, a serious crime and gross violation of fundamental human rights which reduces persons to a dependant position through threats, violence and humiliation”. The Plan, *inter alia*, obliges EU Member States to secure a certain minimum standard concerning care for victims (for example to grant both to cooperating and non-cooperating victims a short-term residence permit for at least 30 days which victims may use for the stabilisation of their health and mental state and evaluation of their situation, and ensuring the access of victims to information on legal and administrative procedures in the language they understand alongside free legal assistance, and so forth). Other measures comprise for example more intensive cooperation with relevant

³ It is true that the international community places a great emphasis so that the above-mentioned instruments are ratified by the highest possible number of states as soon as possible. For example the Palermo Convention was included by the European Commission in the indicative list of international agreements to which the Czech Republic should accede in the nearest future in accordance with the Act on the Czech Republic's Accession to the European Community, i.e. at least by 1 May 2004 with the exception of cases where problems of a technical nature present obstacles to such ratification.

⁴ At the time of this document being drafted, the Ministry of the Interior and the Ministry of Justice intensively cooperate on finding the optimal way in which to introduce the liability of legal entities in compliance with international obligations.

⁵ <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:311:0001:0012:EN:PDF>

organisations such as Europol, Eurojust, Frontex or respective NGOs, the establishment of a focal point network, the support of the efforts of all EU Member States in order to sign and ratify the Palermo Convention and its supplementing Protocols, and introduction of the Day against Trafficking in Human Beings within the EU. Such day was celebrated for the first time on 18 October 2007.

The European Commission set up in 2003 **an Expert Group of the European Commission on Trafficking in Human Beings**, the participants of which are foremost experts from governmental offices of EU Member States, research and scientific institutes, law enforcement agencies, and non-governmental organisations. In 2004 the Group completed a comprehensive Report on Trafficking in Human Beings, including 132 recommendations which indicated directions for strengthening the fight against trafficking in

human beings within the EU. Recommendations, which always emphasised the necessity to adhere to a human rights approach, were aimed at prevention (not only in EU Member States but also in source countries) as well as the promotion and protection of victims of trafficking in human beings, and also at law enforcement authorities, and they proposed establishing new coordination mechanisms. As a result the Report became one of the most important sources of information for the development of the above-mentioned EU Action Plan.

The Group continued its activities also after the EU Action Plan was adopted, in particular through delivering opinions on different relevant issues (such as an opinion supporting preventive activities adopted before and during the World Football Championship in Germany in 2006). At present the Group is preparing a list of indicators enabling assessment of the effectiveness of measures adopted.

The **'Committee on Action against Trafficking in Human Beings'** (CAHTEH) of the Council of Europe - cannot be omitted. This Committee drew up the **Council of Europe Convention on Action against Trafficking in Human Beings and published it under No. 197**. The Convention was approved at the Council of Europe Summit held on 3 May 2005 and it was open for signature. The condition upon which the Convention may come into force is its signing and ratification by at least ten states, including eight states of the Council of Europe. The Convention has been so far signed by 29 of the 46 member states of the Council of Europe (as of 12 August 2007), and has already been ratified by Albania, Austria, Bulgaria, Croatia, Denmark, Georgia, Moldova, Romania, Slovakia (March 2007), and Cyprus. Thus the requirement of ten states has been satisfied and the Convention will come into force on 1 February 2008.

The Convention covers all forms of trafficking in human beings (trafficking in human beings committed both at international and national levels, by organised criminal groups and/or individuals, and applying to trafficking in women, children and men for all possible purposes of exploitation). Further the Convention specifies goals consisting in measures of a

⁶http://ec.europa.eu/justice_home/doc_centre/crime/trafficking/doc_crime_human_trafficking_en.htm#Experts%20Group%20on%20Trafficking%20in%20Human%20Beings

⁷http://www.coe.int/T/E/human_rights/trafficking/PDF_Conv_197_Trafficking_E.pdf

preventive nature, it proposes a framework regulation of protection of and assistance to victims as well as to witnesses and it calls for effective detection and investigation of crimes in question, strict sanctions for offenders and expresses support for international cooperation. The Convention also introduces its own independent mechanism (GRETA) which is to ensure the compliance of regulations adopted by Member States with the Convention. The Czech Republic was repeatedly⁸ criticised for its position, according to which its accession to the Convention is predominantly hindered by the requirement of the Convention to implement liability of legal entities for some types of criminal conduct defined by the Convention as criminal acts. The Convention requires the introduction of criminal, civil or administrative liability (Article 22 of the Convention Corporate liability – in particular paragraph 1 and paragraph 3). The Ministry of the Interior in cooperation with the Ministry of Justice is currently working on a draft stipulating the form in which liability of legal entities should be introduced in the Czech legal framework. Implementation of such legal provisions would enable ratification of the Council of Europe Convention as well as other international conventions pertaining to this area.

'The 2006 Trafficking In Persons Report' of June 2006⁹ and **'The 2007 Trafficking In Persons Report'** of June 2007 will be mentioned only marginally. The so-called TIP report is an annually published status report on trafficking in human beings and encompasses measures adopted by individual countries worldwide. The respective Report is drawn up by the US Office to Monitor and Combat Trafficking in Persons¹⁰. The Czech Republic, after having been evaluated positively for many years, fell, in 2006, from Group 1 to Group 2. It was criticised especially for low, frequently unconditional, sentences imposed on offenders of trafficking in human beings, and repeated media reports on alleged cases of forced labour occurring in the community of female labourers from North Korea. The 2007

Report was more favourable for the Czech Republic which was again, together with another 28 countries, included in Group 1. At the same time a measure consisting of establishing a new sub-unit which is specifically involved in investigations of trafficking in human beings for the purpose of forced labour and works within UCOC was included in the list of recommendations which are stated as examples of good practice. As in previous years the 2007 report also puts an emphasis on consistent prosecution of offenders engaged in trafficking in human beings so that they are sentenced to imprisonment, and the reports contains recommendations to continue the training of public prosecutors, judges and labour inspectors regarding the issue in question.

⁸ For example at the seminar entitled 'Seminar on the problems of trafficking in human beings – measures to protect the rights of victims', which took place from 19-20 April 2007, which was organised in Berlin by the Council of Europe and the Konrad Adenauer Foundation.

⁹ <http://www.state.gov/g/tip/rls/tiprpt/2006/>

¹⁰ States are divided into three groups according to the measures adopted by individual states in combatting trafficking in human beings, of which measures pertaining to the area of repression, prevention, and care for the victims of trafficking in human beings are important.

(...)

B. Measures Proposed for 2008-2011

B) Draft Amendments to Acts and Related Legal Provisions

A difficult situation relating to the partial **overlapping of constituent elements of the criminal offences of procuring under the provisions of Sec. 204 and trafficking in human beings under Sec. 232a of the Criminal Code** was mentioned above. The problem came into existence after a new definition of a constituent element of the crime of trafficking of human beings was included in the CC TZ by Act. No. 537/2004 Coll. which came into effect in October 2004. It is a problem which considerably annoys law enforcement authorities – the police and public prosecutors.¹¹

With respect to the differing severity of both criminal offences, problems arise, for example if taking into account utilisation of operative means (in particular the provision of the Sec. 88 of RoCP – eavesdropping and records of telecommunication operations, Sec. 158e - use of provocateurs) or when determining a relevant supervising public prosecutor or determining which of the aforementioned criminal offences will be taken into account. Such problems occurred repeatedly in the past period.

Although characteristic features of both offences overlap, the crime of trafficking in human beings is considered under Sec.232a (1) (a) or (2) (a) or (3) (d) of the CC to be a special provision in comparison with procuring under Sec. 204 (1) of the CC and thus it is impossible to consider both crimes simultaneously. When applied, these features cause large classification problems¹². A draft solution has been drawn up both in the new re-codification

¹¹ It results, *inter alia*, from the 2005 Report on Activities of Public Prosecutors. The 2006 Report on Activities of Public Prosecutors states, *inter alia*, the following: "With respect to offences of trafficking in human beings application problems concerning overlapping relations of constituent elements of such offences under Sections 232a and 204 of the CC, mentioned in previous Reports, persist".

¹² The Regional Public Prosecutor's Office (hereinafter referred to as 'RPPO') in Hradec Kralove in relation to the described issue states that after Sec. 232a of the CC was implemented through the amendment to Act No. 537/2004 Coll. effective of 22 October 2004 the tendency of the police was to assess the conduct so far investigated as procuring under Sec. 204 of the CC pursuant to the stricter provisions of Sec. 232a of the CC. For example if offenders hired women under 18 years to provide sexual services for consideration in a night club or a rented flat the police assessed such conduct as being a crime of trafficking in human beings under Sec. 232a (1) (a) and (3) (d) of the CC.

It is obvious that constituent elements of the criminal offence of procuring under 204 (1) and (3) (c) of the CC and the criminal offence of trafficking in human beings under Sec. 232a (1) (a) and (3) (d) of the CC regulate similar conduct of offenders and interpretation of these provisions in new explanatory guidelines to the Criminal Code do not provide a sufficient basis for which provision to apply, although in the case of the crime of procuring under 204 (1) and (3) (c) of the CC district public prosecutors carry out relevant supervision while crimes pursuant to Sec. 232a (1) (a) and (3) (d) of the CC are supervised by regional public prosecutors.

When solving a particular case (at RPPO in Hradec Karlove recorded under No. KZN 783/2005) the fact that Sec. 232a of the CC (trafficking in human beings) regulates the conduct of an offender who forces, hires, lures,

transports, hides, restricts the freedom or provides a person under 18 years of age to be used for sexual intercourse or other forms of sexual harassment of exploitation shall commit an intentional criminal offence of using a person for prostitution was taken into account. Interpretation of this provision drew the conclusion that an offender must treat a person in a certain manner (i.e. he/she must have trafficked her/him) so that such person is used by somebody else for sexual intercourse or prostitution. On the other hand a procurer within the meaning of Sec 204 of the Criminal Code – Sec. 140 on trafficking in human beings and Sec. 160 on procuring. This should come into effect in January 2009. If this deadline for a recodified Criminal Code is postponed then a partial amendment to the current Criminal Code in order to remove the partial overlapping of Sections 232a and 204 must be submitted. Until such amendment is adopted and comes into effect it will be necessary especially for supervising public prosecutors and training sessions to pay sufficient attention to this problem. The unifying opinion of the Supreme Court can be also considered (pursuant to Sec. 14 (3) and Sec. 21 of Act No. 6/2002 Coll., on Courts and Judges, as amended).

Another problem which also relates to the new definition of trafficking in human beings under Sec. 232a of the CC, is a missing **binding interpretation or missing interpreting guidelines of the term ‘forced labour and other forms of exploitation’**. Many European states which implemented the UN Convention on Transnational Organised Crime and Its Supplementing Protocols cope with the same problems.

Therefore some states, such as Italy, decided to incorporate a legislative definition – a certain amount of minimum wage, under which work is considered to be exploitation, and recognition of the criminal law definition of forced labour or other similar forms of serious labour exploitation (exploitation of the work of another person under the use of coercion, a position of vulnerability or otherwise disadvantaged position of an exploited person). It was also stipulated that when investigating and prosecuting the aforementioned conduct the similar provisions of procedural criminal law may be used as for cases of trafficking in human beings for the purpose of sexual exploitation. Sentences imposed are similar as well. The relevant provisions protect against serious labour exploitation of nationals of Italy, EU nationals as well as third-country nationals. Another relating and follow up provision is the sanction to be imposed on an employer who seriously breaches labour law regulations or provisions of labour safety regulating work shifts and breaks during work (for example the Italian Penal Code defines new constituent elements of a crime of ‘serious breaches of labour law regulations’¹³). The objective of such provisions is to guarantee the maximum protection of labourers, in particular those with low qualifications or those working manually, and at the same time such provisions represent an obstacle to distortion of competition since for example an employer who does not provide to workers protective clothes and equipment can offer cheaper work than an employer who invests quite large financial amounts in such prescribed protective clothes or equipment.

The last area relates to the implementation of some provisions concerning illegal labour migration. The Chamber of Deputies of the Parliament of the Czech Republic approved, at the time when this document was being drawn up, new provisions of the Criminal Code which cover illegal migration. This is in particular **Sec. 171d of the CC on** of the CC directly arranges, forces or lures to prostitution other persons and benefits from prostitution carried out by somebody else.

¹³ The Ministry of the Interior in cooperation with TAIEX organised a conference the topic of which was ‘Trafficking in Human Beings for the Purpose of Forced Labour and the Client System in Italy’, Prague, April 2007.

assisting illegal residence in the Czech Republic. The draft provision is also encompassed in a new draft Criminal Code (Sec. 317), however due to harmonisation of the Czech legal framework with EU law (in particular with Directive 2002/90/EC of 28 February 2002 and Council Framework Decision 2002/946/JHA of the same date), a partial amendment was submitted.

It is not clear from the explanatory report concerning the provision in question whether it will be possible under this provision to punish persons who ‘employ’ a foreign national illegally residing in the Czech Republic and who, as a matter of fact, provide

him/her with financial resources for facilitating his/her residence in the Czech Republic. It holds true that this provision does not apply to foreign nationals who reside in the Czech Republic legally but they are employed contrary to the relevant legal regulations. This reference to the provisions of Sec. 171d of the CC and the relating explanatory report is important in particular with regard to the fact that the original provisions of the new Criminal Code proposed as **Sec. 318 of the CC - illegal employment of foreign nationals** - were left out. Both above-mentioned provisions should have enabled prosecution of the offenders who are members of organised criminal groups through which foreign nationals arrive in the Czech Republic illegally or legally, but then they are illegally employed again through such organised criminal structures. Because of their illegal status such foreigners can end up in the situation where they can be abused and exploited. This concerns both sexual, labour and other forms of illegal exploitation. On the other hand some business undertakings can arrive at, thanks to organised groups, a more advantageous position within the market. The state is also damaged by tax evasions and unpaid health and social insurance

There is no reason to draw differences between illegal employment of foreign nationals (third-country nationals) and Czech or EU nationals. However, it seems to be beneficial to take into account higher sentences for illegal employment if such employment results from a disadvantaged position, for example in the case of illegally residing foreigners, as the reason why they are exploited is just the unequal relationship between a labourer and an employer.

Due to the fact that any cases classified as criminal offences of trafficking in human beings for the purpose of forced labour have not yet been finally and conclusively decided on it is impossible for the purpose of the definition of the term of forced labour or other forms of exploitation to adopt the opinion of the Supreme Court. The need to elaborate a better definition of forced labour, to stipulate sanctions for serious forms of labour exploitation, and serious forms of violations of labour law regulations and illegal employment, was applied when comments from other ministries were requested as regards the new draft Criminal Code.

II.

To analyse the situation and to submit a minimum legal definition of forced labour or new constituent elements of criminal offences of 'serious forms of labour exploitation' and 'serious forms of violations of

MoI in

cooperation

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and MoJ

31 July

2008

labour law regulations'. The definition of new constituent elements should be to stipulate sanctions for 'illegal employment' including a higher sentence according to the severity of exploitation of a labourer by his/her employer.