

A SUMMARY OF THE STUDY ON THE OPTIONS AND LIMITS OF COMPENSATION FOR TRAFFICKED PERSONS

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INTRODUCTION

The study Options and Limits of Compensation for Trafficked Persons in the Czech Legal System (hereinafter, the “Study“) was published in 2009 by the beneficial association La Strada Czech Republic.

The Study is divided into two parts. The first deals with compensation options within the sphere of public law, especially Criminal Law; the other focuses on civil regulation, dealing with compensation within Civil Law and Labour Law.

CRIMINAL LAW

The first part of the study covers the topic of human trafficking and compensation from the point of view of Criminal Law. The advantages of a criminal proceeding for the injured can be seen in the fact that a criminal proceeding is free of charge and the burden of proof does not rest with the injured to such an extent (as compared to a civil proceeding). The compensation can also work as a corrective component of the criminal proceeding. **However, the compensation institute is based on civil regulations, and what is especially regarded as problematic is that the options for compensation of immaterial damage within criminal proceedings are very limited.**

The Study provides **a brief outline of human trafficking in the light of international and European law**. The relevant international documents include the United Nations Convention Against Transnational Organized Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. Both documents were signed but not ratified by the Czech Republic. A similar role is played by the European Council Convention on Action against Trafficking in Human Beings. As far as European documents are concerned, the Study mentions Council Framework Decision of 19 July 2002 on combatting trafficking in human beings - 2002/629/JHA, as well as Council Directive 2004/81/EC of 29 April 2004 on the residence permit 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, who cooperate with the competent authorities. The last-mentioned directive was transposed into the Czech legal order through the provision of § 42e of Act No. 326/1999 Coll., on the residence of foreign nationals. Another European document mentioned in the Study is Council Directive 2004/80/ES of 24 April 2004 on compensating the victims of crimes.

The basic **concept document** of the Czech Republic in the field of trafficking in human beings is being drafted by the Ministry of the Interior of the Czech Republic. The first strategy was published by the Ministry in a document called The National Strategy to Combat Trafficking in Human Beings for the Purpose of Sexual Exploitation in the Czech Republic (2003-2005). Subsequently, the National Strategy to Combat Trafficking in Human Beings (for the period of 2005 – 2007) was drafted, reflecting the change in the facts of the crime of trafficking in human beings, as stated by the Criminal Law valid at the time. The currently

valid concept is the National Strategy to Combat Trafficking in Human Beings (for the period of 2008 – 2011).

The Study also deals with the **development of Czech legal regulation of trafficking in human beings**, where the term trafficking of human beings originally referred to trafficking women abroad for the purposes of sexual intercourse. The 2002 amendment removed sex distinction, and trafficking not only abroad but also from abroad became criminal. Through the 2004 amendment, the facts of the crime of trafficking in human beings extended to other forms of sexual exploitation, including trafficking for the purposes of slavery, involuntary servitude, peonage, forced labour or other forms of exploitation. The cross-border element was abandoned. This definition comprising the division into two facts of crime related to persons under and above eighteen years of age then became the basis for the formulation of the crime of trafficking in human beings in the new Criminal Code. Added to the facts of the crime in this code was trafficking in human beings for sexual harassment, production of pornography, trafficking for the purposes of service in armed forces and tissue sampling. Moreover, the new legal modification (i.e. the Criminal Code valid from January 2010) sanctions the mere profiteering from this activity or the preparation of the crime.

The questionability of the definition, as stated in the Criminal Code valid from January 2010, is seen by the Study as consisting in the fact that in trafficking for the purposes of forced labour and other forms of exploitation, the terms forced labour and exploitation are not defined by practice, which can lead to the current absence in the Czech Republic of any final and conclusive decision on any case qualified as trafficking in human beings for this purpose. Another problem pointed out by the Study is the delimitation of the crimes of procuring and soliciting prostitution and trafficking in human beings. During the validity period of the old Criminal Code, the case law defined that trafficking in human beings was a special crime in relation to the crime of procuring and soliciting prostitution, which, among others, meant that a single person could not be prosecuted for both of these crimes simultaneously. However, this view was still based on an earlier definition of trafficking in human beings, making it difficult to use in today's practice. Therefore, the Study finally reached the conclusion that the distinguishing criteria between the crimes of trafficking in human beings and of procuring and soliciting prostitution are very vague. What the Study also perceives as problematic is the fact that according to the new Criminal Code, the crime of trafficking in human beings is ranked among the crimes subject to duty to inform and duty to intervene, provided that a particular person learns about it. According to the authors of the Study, this constitutes a hindrance to the activity of social workers, as they encounter people in their work who may have been trafficked, and the duty to inform can prevent them from establishing closer co-operation and subsequent help to these people. Moreover, the criminalization of the victims themselves cannot be ruled out.¹

Rights of the Trafficked Person as the Injured in a Criminal Proceeding

The Study further deals with the rights of the trafficked person as the injured in the criminal proceedings. According to § 43 of Criminal Code, the injured is a person whom the criminal act harmed in health or caused a material, moral or other damage. The injury must arise through the offender's fault and be in causal link with the criminal act for which the criminal

¹ Note: Since the time of writing the present Study, the duty to inform has been mentioned by the Criminal Law Amendment adopted in October 2011 on the initiative of the organization La Strada. Through this amendment, the duty to inform on the crime of trafficking in human beings has been lifted for persons providing assistance to crime victims.

proceeding is being conducted. The Study goes on to name individual rights that the injured has within the criminal proceeding. They include the right to make motions for evidence, to search in documents, to participate in the main hearing, to participate in the public convention held during appeal, to express one's opinion of the matter before the end of the proceeding, etc. The Study also mentions the right of the injured to select a representative who may, under certain circumstances, provide legal assistance free of charge. The injured also has a right to an interpreter. The injured may file a complaint against the decisions in the preliminary stage of the proceeding. A complaint may thus be filed against all resolutions related to the injured (in case a complaint against these regulations is permissible). The most significant cases involve a complaint against the suspension of the matter or a complaint against the cessation of criminal prosecution.

The injured is also entitled to **the right of appeal**, but this is considerably limited since the possibility to appeal only involves the statement of compensation of damage. The appeal has to be lodged within 8 days after a copy of the verdict has been delivered to the court against whose decision the appeal is directed. In connection with enforcing the rights of trafficked persons as the injured in a criminal proceeding, the Study also deals with the possibility of their remaining on the territory of the Czech Republic, as the persons involved are often foreign nationals whose residence on the territory of the Czech Republic is illegal. The Study draws attention to the Programme for the Support and Protection of Victims of Trafficking in Human Beings and to § 42e of the Alien Act (long-term residence permit for the purpose of protection on the territory for persons who are probable victims of, among others, trafficking in human beings, is contingent on whether these victims cooperate with authorities active in criminal the proceeding and whether, on the other hand, they refrain from cooperating with the crime suspects). According to the authors of the Study, the State fails to provide such extent of protection and assistance to the trafficked persons that would enable them to sufficiently exercise their rights during the criminal proceeding. What is involved here, then, is a kind of barter where the trafficked person provides necessary information to the authorities active in the criminal proceeding in exchange for the possibility to assert in the proceeding conducted against the offender his/her procedural rights allowed to him/her by the Criminal Procedure Code.

Compensation

One of the crucial and fundamental rights of every injured person in a criminal proceeding is asserting the right to compensation for damage. The Study devotes a whole chapter to this issue. The part of the criminal proceeding where the compensation claim of the injured is being decided upon is called the **adhesion proceeding**. The conditions necessary for the successful allocation of a compensation claim as listed by the Study include a timely and correct proposal assertion, the fact that damage was incurred in causal link with the offence of which the accused is found guilty by the court, and the material character of the damage, meaning that it can be evaluated financially.

The **advantages** of compensation within Criminal Law include the fact that criminal proceedings are free of charge, that the burden of proof does not rest with the injured to such an extent and that the adhesion proceeding itself can, besides the imposed penalty, serve as a corrective element of the criminal proceeding. The **disadvantages** perceived by the Study consist in the fact that in a criminal proceeding the court can only order the accused to compensate for property damage, i.e. damage that affected the personal property of the injured.

The Study also deals with the types of compensation that can be asserted in a criminal proceeding. This especially concerns material **damage**. Immaterial damage can be compensated only when it can be evaluated financially, such as in health damage. Therefore, within a criminal proceeding it is only possible to claim compensation for the following damages: health damage compensation (through the institutes of damages for pain and social impairment), compensation for material damage, compensation for costs related to medical treatment, compensation for adequate costs related to a burial, compensation for the loss of earnings during and after the period of an employee's inability to work or disability, compensation for the loss of pension.

The authors of the Study go on to provide a detailed coverage of **health damage compensation**, stating that the compensation of this damage is possible through the institutes of damages for pain and social impairment. Here, the court works on the basis of a submitted expert opinion which the injured is obliged to secure him/herself. The term "damages for pain" refers to the compensation for pain caused by health damage, its treatment or the removal of its consequences. Contrary to damages for social impairment, it does not have a lasting effect nor an adverse impact on the life of the injured.

Next, the Study proceeds to compare the institute of social impairment and the right to the protection of personal rights in Private Law, concluding that if the adjudicated compensation for social impairment does not compensate for the given damage in full due to particular circumstances, it is possible to provide compensation even exceeding the lump sum determined, thus within the framework of the protection of personal rights. The authors go on to quote the standpoint of Eliška Wágnerová, a former Constitutional Court judge, who deems it necessary to regard even immaterial damage, consisting, for instance, in emotional injury, as true damage.

According to the Study, a practical problem related to claiming health damage compensation in the form of social impairment is posed by the elaboration of the expert opinion, as it is generally written no sooner than with a year's delay, the danger thus being that the injured will not have it at his/her disposal during the court's deliberation on the compensation for damage within the criminal proceeding.

The Study further mentions the victim's claim to **financial assistance from the State**. The person entitled to claim compensation pursuant to the Act on the provision of financial support to the victims of criminal acts is someone to whom a more serious health damage was incurred as a result of the criminal act. However, the assistance is limited in terms of the persons eligible as the financial amount; furthermore, it is contingent on numerous conditions. Simultaneously, assistance will not be provided to those persons who failed to co-operate as needed with the authorities active in the criminal proceeding, especially if they did not report the crime without unnecessary delay or used their right to deny witness testimony, having appealed to their relationship with the offender.

As the Study states, a significant means of protecting the interests of the injured in a criminal proceeding is the institute of **securing the claim of the injured**. The basic condition is a substantiated concern that the satisfaction of the claim of the injured for compensating the damage incurred by the criminal act will be hindered or frustrated, whereby the property of the accused can be secured to the probable amount of damage. The securing, however, must

be requested by the injured, which presupposes the knowledge of this institute by the injured. The Study also hints at the differences in securing institutes according to Criminal Law.

Whereas it is sufficient for the needs of securing the claim of the injured to limit for the accused the right of disposition of his/her property, for other purposes of the criminal preceding it is possible, under certain circumstances, to secure the property not owned by the accused. Securing the claim of the injured, however, does not mean that the injured could, even in the case of a lawfully adjudicated claim for damage compensation, satisfy himself/herself directly on the secured property; the injured is only entitled to submit a proposal for decision enforcement or an execution order pursuant to civil regulation, if the accused does not voluntarily fulfill what the lawful decision issued in the criminal proceeding orders him/her to do. The claim of the injured can also be secured by a financial security, deposited at the court by the accused; the injured can then satisfy himself/herself directly there from. Unless the court decides otherwise, the securing of the claim of the injured lasts until the verdict comes into force, whereby if the injured is adjudicated a claim for damage compensation, the court will pay it from this security. However, the Study points out here that the depositing of the security only occurs at the will of the accused, who chooses this option so that his/her other property is not secured.

CIVIL LAW

The second part of the Study deals with the options for **compensation within Civil Law**. In the first chapter, attention is paid to damage compensation in Civil Law. Generally, the responsibility for damage, as defined by the Civil Code, consists of four elements, which must be met simultaneously. These include illegal action, damage, causal link between illegal action and the damage incurred, and fault. Illegal action is action through which a person breaches his/her legal duty. Action is seen by law as both activity and omission. Damage refers especially to material injury which can be evaluated financially. The Study goes on to mention that damage consists above all in the loss of earnings, i.e. the enumeration of the property that the injured could have gained had the damage not occurred, or in real damage, which involves financial enumeration of the devaluation, decrease or loss of the existing property of the injured. Causal link means that the breach of legal duty is the cause of the damage incurred. Fault is an inner psychological relationship of the wrongdoer towards his/her illegal action as well as towards its consequence, i.e. the damage. It involves the component of consciousness and the component of will. The Study perceives as problematic the relationship of legal entities to fault, as they have no inner psychological relationship towards their action. Despite this, however, their responsibility for damage applies in Civil Law, a fact that the Study highlights as the main difference from Criminal Law, where this responsibility of legal entities is missing.

Next, the Study deals with the shared responsibility for damage of more wrongdoers, who answer jointly and severally, and covers in greater detail the possibility of contributory fault of the injured.

In property injury, damage and loss of earnings are paid. The damage is paid in money but it is also possible to ask for return to the original state. In immaterial health or life damage, the scope of compensations is precisely stated; they include purposeful costs related to treatment, loss of earnings, pain compensation, social impairment, in the case of death a lump compensation sum paid to the survivors, food costs of the survivors and adequate costs related to a burial.

Pursuant to the personality protection provision, it is also possible to compensate other types of immaterial injury besides health damage. This is contingent on unlawful intervention causing harm to the protected rights of the injured, with the concrete circumstances of the case being of such a nature that other types of satisfaction are insufficient. The other types of satisfaction include the duty to refrain from intervention, the removal of the effects of the intervention and moral satisfaction such as an apology or financial satisfaction.

LABOUR LAW

The final part of the Study deals with compensation options within Labour Law. Dependent work is defined as work carried out in an employment relationship pursuant to the Labour Code. It is a relationship of the superiority of the employer and the subordination of the employee. The features of dependent work include the exclusively personal work performance of the employee for the employer according to the employer's instructions, on behalf of the employee, for a wage, salary or remuneration for work, during the working hours or otherwise agreed time, at the employer's workplace or another agreed place, at the employer's expenses and responsibility.

The Study also focuses on **agency employment**, where a work agency temporarily assigns its employee to perform work for a different employer. The employer here is the work agency, which conducts entrepreneurial activity consisting in hiring labour on the basis of an employment agency licence, issued by the Ministry of Labour And Social Affairs. Agency employment is based on two employment relationships: first, a relationship between the work agency and the employee, established through an employment contract or an agreement to perform work (however, it cannot be established through an agreement to complete a job) and, secondly, a relationship between the work agency and a user, established through an agreement on the temporary assignment of a work agency employee, which is laid down by the Labour Code as a special contractual type.

Thus, an employment relationship is established by concluding an employment contract; furthermore, it can also arise on the basis on an agreement to perform work or an agreement to complete a job.

From the employment relationship a right to wage arises for the employee, which the employer is obliged to pay within the term agreed. Should the employer fail to do so, the employee can have recourse to a court. The employee only needs to prove in court the duration of the employment relationship and the wage level. What he/she does not need to prove is that the wage has not been paid to him/her. The Study sees the option for wage claim even in an employee who works without an employment contract. In addition, the Study compares the differences between work performed without a written contract and illegal work. Attention is paid to the possibility of sanctioning an employer who enables illegal employment. A so-called EU Sanctions Directive is mentioned in this context, which lays down, among others, sanctions against employers who employ persons residing illegally on the EU territory. Member states were obliged to implement this directive by 20 July 2011 at the latest.²

² Note: Since the time of writing the present Study, the provisions of the directive enabling the prosecution of employers for illegal employment was transposed into the Employment Act Amendment. The Amendment was approved by the Parliament of the Czech Republic in December 2011.

The employee can also claim other rights of material character arising from employment relationships. These especially include minimum wage top-up, overtime work, surcharges for holiday work or night work, wage compensation for undrawn holiday and compensation for obstacles to work on the part of the employer. Likewise, in the case of an invalid notice or redundancy payment, it is possible for the employee to claim his/her rights. The Study also deals with discrimination and the options for defence against it. This Labour Law issue is laid down by two norms, i.e. the Labour Code and the Anti-Discrimination Act.

Employer Damage Responsibility

Another part of the Study deals with the employer's responsibility for damage. Labour Law requires the same conditions to be met as Civil Law. Generally, it can be said that the employer is responsible to the employee for the damage incurred as a result of breaching the employer's duties, as a result of the employer's deliberate unethical conduct or as a result of breaching legal duties of employees acting on behalf of the employer while performing their work tasks. When damage is incurred, the employer is responsible to the employee only for damage incurred during the performing of work tasks or in a direct link therewith. If fault is involved, the employer's responsibility is conceived of as objective, i.e. the employer is responsible for the damage regardless of whether he/she caused it.

The Labour Code also lays down the employer's responsibility for the damage in work injuries and occupational diseases. The condition of the employer's responsibility for the damage is the existence of a work injury or occupational disease, as a result of which damage is incurred to the employee. The employee who suffered a work injury or occupational disease is entitled, under the above-mentioned circumstances, to the compensation for the loss of earnings, pain and social impairment, to purposeful treatment costs and material damage.

Particulars of a Civil Lawsuit Involving Trafficked Persons

The Study further discusses the particulars of a civil lawsuit involving trafficked persons. The first problem mentioned is the material need of the trafficked persons, impacting the options for access to asserting legal rights. The Study mentions the institute of exemption from court fees and the possibility of free legal representation. Another passage is devoted to a specific lawsuit with an international element and the options for requesting even here the exemption from court fees. The Study mentions the institute of depositing a so-called security. A foreign national who seeks a decision on a property right will be ordered by the court, based on a suggestion by the respondent, to deposit a security for the costs of the proceeding as determined by the court. If the security is not deposited within the agreed term and the respondent or the accused does not agree with the continuation of the proceeding, the court will terminate the proceeding. In connection with the presence of an international element in the proceeding, the Study raises the question of a court's jurisdiction and applicable law, mentioning the Private International Law Act and conventions called Rome I and Rome II as the basic sources related to this issue.

CONCLUSIONS

According to the Study, the most pressing problem related to compensation options within Criminal Law consists in the fact that only material damage can be compensated. In the case

of immaterial damage, it is only damage that can be evaluated financially. The Study further points out that persons residing on the territory of the Czech Republic are often prevented, contrary to legal regulations, from claiming their legal rights. In addition, the pitfalls of the compensation-related civil lawsuit are mentioned. The Study also discusses the problematic agency employment and the particulars of court proceedings with an international element.