

(IN)EFFECTIVITY OF COLLECTING INSURANCE MONEY IN THE SLOVAK REPUBLIC

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Abstract

Even though consequences of the last economic crisis, Covid-19 pandemic, or ongoing war in Ukraine have effect on individuals, they also affect subjects active in economic activities. Current situation forces subjects to implement multiple forms of money saving. Those can be legal, such as various optimizations, or illegal where subjects knowingly break law. The aim of the article is to analyse insurance premium debtors against the Social Insurance Agency in the Slovak Republic in the context of possible suspicion of committing criminal acts of avoiding insurance premiums and non-payment of insurance premiums. The avoidance of tax and insurance premiums requires the committing of an act even on a small scale, i.e. in an extent exceeding EUR 266. Imprisonment is differentiated based on the extent of the damage or the seriousness of the procedure. In relation to criminal proceedings, it is necessary to demonstrate the fulfilment of all the objective elements of criminal acts of avoidance and non-payment of tax and insurance premiums, and in the course of demonstrating them in practice, it is possible to encounter several application problems.

Key words: Not paying taxes and insurance, debtors, social insurance, arrears,

JEL Code: R59, K34, H 25

Introduction

The negative impact of violating laws, particularly laws that also lead to meeting the criteria of criminal acts, cannot be overlooked by society. Even though every individual feels the consequences of the most recent economic crisis, the COVID pandemic, the war in Ukraine, the energy crisis or climate change, such events also have a significant effect on entities that conduct certain economic activities (Rak *et al.*, 2021). The current situation is forcing practically all of us to various forms of savings, when we realise that it will not end any time soon (Procházka, D., 2018). This usually means a rationalisation and optimisation of expenses within existing possibilities and in line with legal regulations. This is referred to as tax optimisation (Peñaflor-Guerra *et al.*, 2020). But more often than we would like, illegal acts

also occur that meet the definition of criminal acts, and there is a need to intervene with criminal proceedings (Kopencová *et al.*, 2020).

In the field of economic crime, the criminal act of tax and insurance evasion committed by various subjects in relation to the Social Insurance Agency is notably common (Ivancik, R., 2012). The managing of insured persons' finances has a major impact on public finances, which consequently affects every individual (Antoch, J. 2008). In recent years, even the collection of social contributions in the amount of approximately 9 billion per year exceeded the strong tax revenues from value added, or income tax¹.

1 The social insurance system in the Slovak Republic

Social Insurance Agency is a public institution that conducts activities in the field of social security as entrusted by law and guaranteed by the constitution. It shares in the implementation of the state's social policy in line with valid legal regulations and recognised values. Through its controlling activities, it protects the interests of insured persons and employees and determines relations with the external environment. It provides social insurance in the field of health insurance, old-age pension and disability insurance, accident insurance, guarantee insurance and unemployment insurance.

The resources of one of the pillars of social security, namely social insurance, are mainly made up by statutory contributions of employers and employees as well as self-employed persons. In total, social insurance in Slovakia has for more than 15 years covered almost 2.7 million insured persons on the basis of the principle of merit in the form of premium payments (social contributions) (Audit Report 2020 of the Supreme Audit Office).

The employer for the purposes of social insurance is mainly a natural person or a legal entity (Rak, 2020). The employer is obliged to provide the employee with income listed as the employee's income from dependent activity within the meaning of the Income Tax Act, or from gainful activity, the income from which is not subject to income tax because the regulations and international treaties on the avoidance of double taxation so provide, or income which is not subject to income tax according to the Income Tax Act, if the regulations of the Slovak Republic (SR) apply to the natural person who performs such gainful activity within the legal relations of social insurance.

¹ <https://www.socpoist.sk/hospodarenie/554s>, <https://opendata.financnasprava.sk/>

2 Criminal offences of tax and insurance evasion and non-payment of tax and insurance premiums

The European Commission understands tax evasion to be illegal agreements in which the tax liability is hidden or not acknowledged; that is, a tax subject pays lower taxes than is required to pay according to the law by hiding income or other information (Dobrovic et al., 2018).

The Criminal Code, in the third part of the fifth title, aside from criminal acts against currency, also regulates tax crimes in the area of insurance premiums. These are criminal acts of reducing tax and insurance premiums (§ 276), evading tax and insurance premiums (§ 277) and failure to pay tax and insurance premiums (§ 278).

The criminal offence of evading tax and insurance according to § 277 is committed by a person who withholds and does not submit to the designated recipient taxes due, insurance premiums for social insurance, public health insurance or contribution to old-age pension savings, which should be withheld or collected by law, with the intention of supplying himself or another undue advantage. In order for such acts to be considered criminal acts, they must be committed to a certain extent. With these acts, we cannot speak about damage, and as so it cannot be recognised in adhesion procedures. It is not a matter of damage, because it involves the fulfilment of obligations arising from regulations falling within the area of public law. Pursuant to § 125 par. 1 of the Criminal Code, however, the same considerations as for determining damage will be used to determine the amount of the scope of the crime.

Pursuant to provisions of § 125 par. 1 of the Criminal Code: Minor damage is understood to be damage exceeding the amount of EUR 266. Greater damage is understood to be an amount achieving at least ten-times that amount. Substantial damage is understood to be an amount achieving at least one hundred-times that amount. Large-scale damage means an amount achieving at least five hundred-times that amount.

The avoidance of tax and insurance premiums requires the committing of an act even on a small scale, i.e. in an extent exceeding EUR 266. The condition for using the objective element (*actus reus*) of this criminal offence is the committing of the relevant act on a larger scale (i.e. in the amount of at least EUR 2,660), on a substantial scale (i.e. in the amount of at least EUR 26,600) or on a large scale (i.e. in an amount reaching at least EUR 133,000). Imprisonment is differentiated based on the extent of the damage or the seriousness of the procedure.

The criminal offence of failure to pay tax and insurance premiums according to § 278 is committed by a person who, to a larger extent, fails to pay the due tax, insurance premiums

for social insurance, public health insurance or contribution to old-age pension savings. According to this paragraph, an offender who fails to pay tax that is due in a large amount is punished more severely.

In the case of the crime of failure to pay the insurance premium, the basic objective element of this crime requires that it be committed on a larger scale, i.e. in the amount of at least EUR 2,660, and only the committing of the act on a substantial scale or on a large scale conditions the use of a qualified objective element.

In the case of criminal acts of avoidance and non-payment of insurance premiums, we can under certain circumstances speak about ongoing criminal acts. Namely, if a person who has an obligation to pay an insurance premium, or is obligated to pay the insurance premium to the authorised beneficiary, avoids or does not pay the insurance premium in several consecutive periods, and for the purposes of determining the range of the crime, the amounts of avoided, or unpaid insurance premiums, will be summed up. The crime is therefore committed by several partial acts.

Avoiding the payment of an insurance premium to a certain extent on the due date or in the period of its maturity is only a formal sign (a sign of the objective side) of the fulfilment of the objective element of the crime. For fulfilment of all the signs, it is necessary that such an action be culpable in the form of intentional culpability. In such a case, the committing of these criminal acts shall also be considered a one-time intentional act, i.e. when the obligated person does not pay (avoids) the insurance premium in the required scope for only one period within the period of its maturity. Without intentional culpability, a criminal act has not been committed, and thus punishment is not considered. Violation of the obligation to pay insurance premiums for social insurance does not automatically mean fulfilment of the objective element of a criminal act. There is a difference between when a person does not pay an insurance premium because he does not want to, and when the person does not pay the insurance premium because he is objectively unable to (e.g. due to insolvency).

In relation to the subject of the Social Insurance Agency, avoiding the payment of insurance premiums is a withholding and non-payment of insurance premiums to the designated recipient of the due insurance premium that was withheld or collected in accordance with the Social Insurance Act with the intention of procuring an unauthorised benefit for oneself or others. Only a special entity, namely the payer of the insurance premium, can be the perpetrator of this crime. Such a situation happens if one entity (an employer) does not pay the payable insurance premium to the Social Insurance Agency which it collects from another entity (an employee). The employee is a subject from whose wages insurance premiums for compulsory

social insurance are deducted; the employer calculates this insurance premium and is then obligated to pay it to the Social Insurance Agency on behalf of the employee. From the employer's point of view, this is "foreign money" that belongs to the employee, because it is a part of his gross salary.

In the case of this crime, it is necessary to investigate whether the mandatory social insurance payments were in fact deducted from the employees' wages. This is due to the fact that in many cases, due to insufficient funds, an employer pays employees only net wages, or does not pay wages to employees at all. If the employer only pays employees "net wages" due to a lack of funds, he cannot commit the crime of avoiding the payment of insurance premiums, because the employer does not deduct anything from "net wages" and the essence of this crime consists in "withholding and not deducting".

Following application practice and jurisprudence, the perpetrator (employer) can commit this crime only if he actually deducted the amounts for social insurance from the employee's gross salary and did not forward them to the Social Insurance Agency, despite the fact that he had sufficient funds to pay them, and instead used these for other purposes.

The Supreme Court, as an appellate court, has repeatedly stated in its decision-making activity that "if a company gets into a situation such that, as a debtor, it does not have sufficient funds to pay all its due obligations, it is obligated to satisfy all of its creditors (employees, Tax Office, Social Insurance, health insurance company, business partners and others) proportionally and evenly. If the business is unable to cover operating costs, compulsory levies as well as the wages of its employees, it must adapt the management of the company such that it can fulfil all its obligations, or terminate his business."²

In the case of an extension or insolvency, the employer should thus satisfy all of its obligations proportionately and evenly, including the payment of the wages of its employees. By paying net wages at the expense of other obligations, the employer, even though in the indirect intention of thwarting the satisfaction of the authorised recipient of payments (Social Insurance Agency), could commit the criminal act of favouring a creditor.

3 Analysis of debtors of the Social Insurance Agency in Slovakia

A list of debtors is regularly published on the website of the Social Insurance Agency. The list of debtors includes legal and natural persons who owe at least EUR 5. The list of debtors of the

² For example, Decision of the Supreme Court of 16 August 2012, doc. no. 6 Tdo 6 2/2011, or also the Decision of the Supreme Court of 26 April 2018, doc. no. 3 Tdo 85/2017

Social Insurance Agency published at the 31 July 2022, consisted of 101,979 unique debtors and the total amount owed reached EUR 718,311,117.

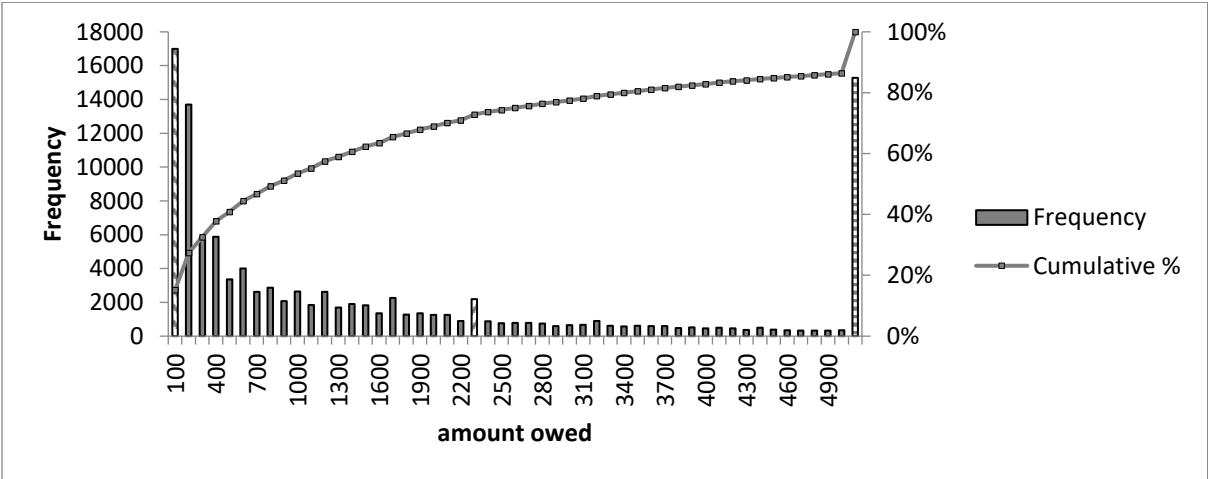
The largest debtors include exclusively health care institutions. The insurance premium debts owed by health care institutions are due to non-payment of employer’s insurance premiums, which are a specific type of debt and are not systematically recovered.

The Social Insurance Agency, to collect these receivables in proper performance, or does not proceed with the form of execution because “it takes into account the impact on society as a whole, which in the case of execution would clearly result in the total insolvency of medical facilities”³.

In case of non-payment of an amount owed, the Social Insurance Agency collects the debt from an official authority, or in cases of suspicion of committing a crime of avoiding or non-payment of insurance premiums, it files a criminal report.

The idea of the distribution of debtors based on the amount owed was carried out by frequency analysis, the result of which is depicted using a histogram in fig. no. 1, with the distinction of the width of the debt interval of EUR 100 on the horizontal axis.

Fig. 1: Histogram of the distribution of the number of debtors based on the size of the debt



Source: Social Insurance of the SR, own graphic processing

The most numerous category (about one-fifth of all) are debtors with an amount of up to EUR 100 shown on the left at the start of the horizontal axis. These are minor debts, the non-payment of which probably occurred due to an inadvertent omission on the part of the premium payer. For example, in the case of self-employed persons, we could speak about arrears of

³ Minutes from the 06/18 meeting of the Supervisory Board of the Social Insurance Agency, held on 10 December 2018 at the Social Insurance Agency headquarters from 10:00 a.m. to 12:15 p.m., no. BA-1032440/2018

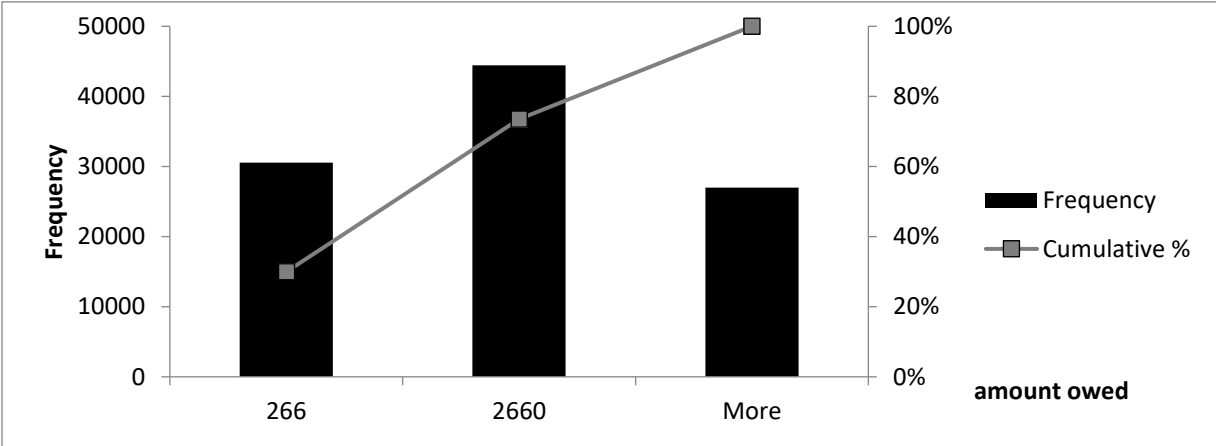
insurance premiums for less than one period (the minimum monthly social contributions in 2022 totals EUR 187.78).

The largest non-payers, with a social insurance debt of more than EUR 5,000, are the second most numerous category of the histogram, accounting for approximately 15% of all monitored debtors. There were 254 debtors with over EUR 100,000 of debt, among which, aside from medical facilities, are mainly employers represented by limited liability companies, joint-stock companies, non-profit organisations and private schools, several of which are in bankruptcy, liquidation or restructuring.

Slightly to the left of the centre of the histogram the local maximum, with the amount of EUR 2,300, is highlighted by the sample. This is the amount close to EUR 2,660, which represents the lower limit of the classification of larger scale damage. The sudden increase in the number of debtors with this amount may point to a certain calculation to keep the debt at a small level in a controlled manner.

From the viewpoint of criminal law, with reference to the crimes of avoidance of tax and insurance premiums and non-payment of tax and insurance premiums, debtors are categorised into three categories based on the amount owed: up to EUR 266, more than EUR 266 but less than EUR 2,660 and more than EUR 2,660. The distribution of debtors in July 2022 based on this categorisation at the national level is provided in fig. no. 2.

Fig. 2: Histogram of the distribution of the number of debtors based on the size of the debt



Source: Social Insurance of the SR, own graphic processing

The most frequent debtors for social insurance contributions lie in amounts between EUR 266 and EUR 2,660. Therefore, theoretically, in terms of the scope of the committed act, the fulfilment of one of the signs comes into consideration only in the case of the criminal offence of failure to pay the insurance premium (provided that the other signs are fulfilled), in

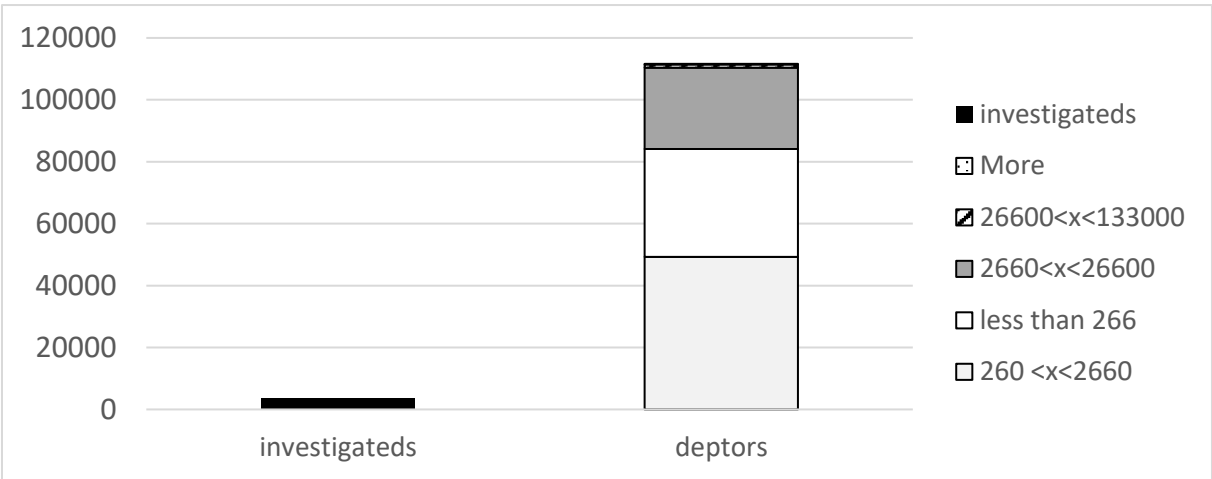
which the committing of the act is required already on a small scale, i.e. at least EUR 266. With the crime of failure to pay an insurance premium, the amount required of EUR 2,660 even in the basic objective element is not fulfilled. Attention needs to be paid to the high number of debtors over EUR 2,660, where this could also be a case of criminal activity.

1.1. The share of law enforcement authorities in the recovery of social insurance contributions

In the interest of improving the collection of insurance premiums, the Social Insurance Agency can file a criminal complaint. Annually, there are an average of 4,553 submissions at various stages of the procedure⁴.

In recent times, in connection with the increasing number of criminal reports by the Social Insurance Agency, the topic has resonated that “law enforcement agencies are becoming branches of the Social Insurance Agency for debt collection”, to which they must shift part of their agenda. Fig. no. 3 points to the opposite of this statement. It compares the number of criminal reports registered by the police in 2021 with respect to the total number of debtors with a distinction of the amount owed.

Fig. 3: Number of persons who did not deduct/did not pay tax and insurance premiums (§ 277, § 278) with a distinction of scope and region of the SR compared with the number of criminal activities solved by the Slovak Police, July 2022



Source: Social Insurance of the SR, Presidium of the Police Force of the SR, own graphic processing

From the comparison, it is evident that the share of cases solved by law enforcement authorities is relatively small compared to the total number of claims of the Social Insurance Agency. From the total number of debtors on insurance premiums against the Social Insurance

⁴ Report on the result of the 2020 inspection of the Supreme Audit Office, System of collection and administration of social insurance contributions and old-age pension savings

Agency in whom we can theoretically consider the suspicion of committing criminal acts in terms of the size of the scope, criminal reports are not filed against debtors *en masse*, as is heard in practice. In reality, this is a small group of debtors according to a key that has not been identified, which points to a non-systemic setting of the control mechanisms.

Conclusion

Taxes and their payment have almost always been considered as “necessary evil (Jiang Cheng *et al.*, 2021, Pezzolo, 2020, Suchahyo *et. al.*, 2020, Lisoň, 2016). The aim of the article was to analyse insurance premium debtors against the Social Insurance Agency in the Slovak Republic in the context of possible suspicion of committing criminal acts of avoiding insurance premiums and non-payment of insurance premiums. In relation to the potential criminal activity of failure to pay insurance premiums, it can be said in conclusion that the majority of debtors against the Social Insurance Agency are not committing a criminal offence, since one of the formal signs of the objective element is not fulfilled, namely from the point of view of the assessed amount of the scope of the committed act (even if, theoretically, the other traits were met). More than 25% of debtors owe less than EUR 200 to the Social Insurance Agency, and they represent a relatively heavy administrative burden on the performance of control mechanisms.

For improving the collection of insurance premiums, one of the tools of the Social Insurance Agency is the submitting of a criminal report in cases of suspicion of criminal acts of avoidance or non-payment of insurance premiums. The Social Insurance Agency uses this tool to a relatively small extent, not *en masse*, as is heard in practice. In relation to criminal proceedings, it is necessary to demonstrate the fulfilment of all the objective elements of criminal acts of avoidance and non-payment of tax and insurance premiums, and in the course of demonstrating them in practice, it is possible to encounter several application problems. For example, the non-submitting of accounting by the subject (intentionally?), which is necessary to assess his ability to pay his obligations to the Social Insurance Agency. Because when the principle “*in dubio pro reo*” is applied in criminal proceedings and in accordance with this principle, the debtor is probably not threatened with any sanction.

Acknowledgement

The paper was prepared with the support of the project APVV-19-0102 Effectiveness of preliminary proceedings – examination, evaluation, criteria and the impact of legislative changes.

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