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'EMPLOYING' OF SELF-EMPLOYED PERSONS

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Abstract
This paper deals with topic on potential legal consequences in case of contracted self-employed entities which would perform dependent activity (i.e. work). This paper provides a comprehensive overview of contracting self-employed persons to perform dependent work. This paper not only deals with legality of such practice in the Slovak Republic but also examines and assesses the legal practice of the relevant and competent public authorities in this sphere. Besides the evaluation of the legal situation in the Slovak Republic, this paper also provides an overview of the existing legislation mostly in the Czech Republic as well as an overview of recent case-law of the European Court of Justice in this particular sphere. In this paper author provide analysis of legal issue of employment of self-employed persons not only from the viewpoint of legal system of the Slovak and Czech Republic but also examines this phenomenon using an analytical and comparative method with selected European countries. The aim of this paper was from acquired knowledges draw conclusions and proposals de lege ferenda for the Slovak legislator and public authorities to improve the solution to this legal problem. In conclusion of this paper are mentioned recommendations for another research in this area.

Key words
dependent work, bogus self-employment, švarcsystem, illegal employment, simulated and dissimulated legal act

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Introduction

Any natural person may perform work in the legal sense of the word solely in the two following ways: Either as dependent work; to perform dependent work, an employment relationship must be established as laid down in Section 1 Paragraph 3 of Act no. 311/2001 Coll. Labour Code as amended (hereinafter as "*Slovak Labour Code"*) or as work that has characteristics of business activity in compliance with specific commercial regulations.

To perform such work, a civil or commercial legal relationship must be established. In this case, dependent work cannot be performed. Although this legal standard is set in several countries of the European Union (hereinafter as "*EU*"), its compliance is problematic in most of them. The most pressing problems in this area are the former Eastern bloc countries such as the Slovak or Czech Republic what can be measured by the proportion of self-employed persons in these countries (Janíčko, 2013).

Although the following paper analyse legal issue of employment of self-employed persons mainly according to legal system of the Slovak and Czech Republic, but we will compare this phenomenon also with selected European countries. In very beginning of this paper we will outline the key theoretical background from which we will draw in the rest of this paper.

The next part of this paper introduce materials (sources) which were used for analysis and study of the phenomenon of bogus self-employment. In this part we will also provide the presentation of method which we used for study of this phenomenon to reader. In this part of our paper we induct analytical and historical method of legal research. We apply also comparative method, so we present also this method and the way we avail it to compare the situation in Slovak Republic with other selected European countries. According to this method we came to results about the spread of this phenomenon in other countries.

Next section presents differences between dependent work and business activity while it starts with definition of term business activity. This term is defined in legal order of the Slovak republic in two different legislation acts, so in this section of the paper are introduced both legal definitions of term business activity.

Following section continues with presenting of differences between dependent work and business activity while on this point it carries on with definition of term dependent work. In this part of our paper we used historical legal research method by means of which we study development of signs of depend work in Slovak legal order.

Subsequent sections describe in detail signs of dependent work as the superiority of the employer and subordination of the employee, work performed according to employer's instructions, work performed in the name of the employer, personal performance of work, performance of work for remuneration and work performed in a defined working time.

After describing of signs of dependent work follows section about possibility to assessment bogus self-employment as simulated (agreement according to civil or business law) and dissimulated (working agreement) legal act and in the next section is mentioned possibility to assessment of this legal relation as illegal employment.

Next section is about definition of the term bogus self-employment. Definition of this term is drawn from the latest expert publications about this subject. Further section presents legal situation in the Czech Republic and is followed by the section which describe phenomenon of bogus self-employment in others selected EU countries. In part before the results and discussion is located section about recent judgements of the European Court of Justice relevant to this topic.

In conclusion of this paper the author tries to draw proposals from acquired knowledges draw proposals *de lege ferenda* for the Slovak legislator and public authorities to improve the solution

of this legal problem. In case that this aim will be not possible to reach, the author will at least try to drown up a recommendations for another research in this area.

Theoretical background

During recent years, the European labour market has experienced some fundamental changes, particularly with regard to a growing flexibility and fragmentation and "casualisation" of employment, with employers relying more and more on outsourcing and downsizing and moreover a highly "casualised" workforce.

The times when workers were used to having a full time permanent employment relationship with their employer are in the past, and have been replaced with atypical employment situations which were made possible by the development of a wide range of new types of worker (and employment contract), all contributing to the growing Pan-European labour market.

For different social or economic reasons, employers are relying more and more on employees from other companies provided on the basis of service agreements, by outsourcing what are often major company tasks or hiring self-employed personnel.

About decade ago, so-called bogus self-employment ('employing' of self-employed persons) was a barely discussed within the European Union. After eastern expansion in 2004, however, the concept attracted increasing attention (Thörnqvist 2015).

Theoretical background of these phenomenon was described in many articles and books. For purpose of this paper we choose current articles and books which represent most current state of this phenomenon. Most of chosen sources are used for description and interpretation of this phenomenon and its theoretical background are no older than 4 years.

For instance: Schaub et al. (2017), Reichold (2016), Röller et al. (2017), Barancová (2018, 2015), Barancová et al. (2017), Thörnqvist (2015), Behling & Harvey (2015), Thörnquist (2015), Williams & Horodnic (2017), Bengtsson (2016).

Theoretical background of this phenomenon lay down also in decisions (judicature) of national courts and the European Court of Justice what we used in this paper. The basic premise (prerequisite) for all theoretical views is that: dependent work should be performed in the employment relationship, not in the commercial relationship of two quasi- entrepreneurs.

This premise is in practice often destroyed from the side of employer which want to save some financial sources on taxes and contributions for social insurance of employees. For this reason this employers do not employ natural person as employee but they conclude with this person agreement according to civil or business law.

An employer who resorts to self-employed workers instead of salaried employees can sometimes avoid paying considerable social and tax contributions and circumvent other labour obligations. But very often, these so-called self-employed workers an employer relies on, happen in fact to be "disguised" employees.

These "bogus self-employed" are people who to the outside world behave like employed, although they are registered as self-employed. Bogus self-employment is to all intents and purposes identical to subordinate employment, yet disguised as autonomous work, usually in

order to reduce labour costs, for tax reasons and to avoid payment of high social security contributions.

"Disguised employees" not only have a lesser degree of protection compared to subordinate employees, the fact that a lower level of contributions is paid, may also undermine the stability of the social security systems together with all actions of solidarity. Making a clear distinction between subordinate employment and self-employment is therefore very important.

It is often that this person, who should be employee, agree with this offer because this legal relationship is presented as great solution even for him or her. The person is formally apply for trade licence and formally performs as self-employer. But in fact him or her still meet all signs of dependent work.

This person still work only for one business partner (that subject who should be employer), all the work is performed in a relationship characterised by superiority of the business partner and subordination of the person (that subject who should be employee), personal performance of him or her work is needed, the work is performed according to the this business partner instructions, in these business partners name, during working time defined by this business partner.

Economic dependence of this person who should be employee from their business partner (often also the former employer) points to the continuation of an employment relationship. Considering the fact that this form of employment is relatively casual, there is an arising question: Is this form of 'employment' legal or illegal?

This question naturally follows some sub-questions like what are the consequences of this type of 'employment' and what is possible to do against this phenomenon if is really illegal? Domestic scientific literature shows that this phenomenon is completely illegal (Barancová, 2018). Also from the international scientific literature, which refers to the phenomenon of bogus self-employment, are well known examples of occurrence of this phenomenon in the United Kingdom, Sweden or Germany (Behling & Harvey, 2015; Bengtsson, 2016; Röller et al., 2017; etc.).

The Recommendation of International Labour Organisation no. 198/2006 concerning Employment Relationship (hereinafter as *"ILO Recommendation no. 198/2006"*) takes a broad approach to the notion of "employment relationship" to allow action against sham self-employment. In determining whether or not there is an employment relationship, the primary focus should be on the facts concerning the activities and the remuneration of the employee, irrespective of how the relationship is characterised in, for example, contractual terms.

A hidden employment relationship exists where the employer treats a worker in such a way as to conceal his or her true legal status as an employee, and where contractual terms can have the effect of taking away the protection to which employees are entitled.

According to own-initiative opinion on 'Abuse of the status of self-employed' of the European Economic and Social Committee, there is currently no unambiguous, EU-wide definition making a clear distinction between bona fide self-employed people working on their own account and sham self-employed. Each competent authority and each individual body uses its own legal or regulatory framework, which can differ according to their jurisdiction and policy field (tax legislation, social security, business law, labour market, insurance). These abuses

range from evasion of social security contributions, through tax evasion and undermining labour rights to undeclared work. This is a serious distortion of competition for the genuinely self-employed, micro businesses and small and medium enterprises.

Ortlieb & Weiss (2015) define bogus self- employees as 'workers who formally deliver their services as an independent company, but factually do not fulfil the criteria of self-employment'.

As noted by Hinks et al., (2015) those working in bogus self-employment, are in reality approved by their de facto employer as being self-employed, so as to eschew tax and employment rights liabilities and to avail of employment protection. Such a phenomenon is particularly evident in the construction, homeworking and services industries.

Ortlieb & Weiss (2015) report that due to outsourcing activities and / or franchise-systems, the boundaries between self-employment and employment have become increasingly ambiguous, giving rise to bogus self-employment in Germany.

Masso & Paes (2015) find that bogus self-employment in Estonia is particularly evident in broker activities associated with real estate companies, taxi-drivers, postal services and in the construction industry.

Others definitions we can also find in papers of authors as Thörnqvist (2015), Behling & Harvey (2015), Bogenhold & Staber (1991), Bone (2006), Mühlberger (2007), Röller et al. (2017), Schaub et al. (2017) or Reichold (2016).

Material and methods

The main aim of this paper is from acquired knowledges draw conclusions and proposals *de lege ferenda* for the Slovak legislator and public authorities to improve the solution of this legal problem. Partial aim of this paper is drown up a recommendations for another research in this area.

As fundamental material for study and interpretation of phenomenon bogus self-employment we used labour codes of Slovak and Czech Republic and other related relevant legislation acts. As related legislation acts we can mention for example the Act no. 82/2005 Coll. on Illegal Work and Illegal Employment and on changes and amendments to some other acts as amended (hereinafter as "*Illegal Employment Act"*), the Act no.125/2006 Coll. on Labour Inspection and on changes and amendments to Act no. 82/2005 Coll. on Illegal Work and Illegal Employment and on changes and amendments to some other acts as amended (hereinafter as "*Labour Inspection Act"*) or the Act no. 5/2004 Coll. on Employment Services and on changes and amendments to some other acts as amended (hereinafter as "*Employment Services Act"*).

As related legislation acts we can also assume the ILO Recommendation no. 198/2006, as well as EU Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (hereinafter as *"Directive for Protection of Pregnant Workers"*) even though the directives are (in comparison with a regulations) applicable just to the EU Member States (sets certain aims, requirements and concrete results that must be achieved in every EU Member State or sets a process for it to be implemented by EU Member States – in other words national authorities must create or adapt their legislation

to meet these aims by the date specified in each given directive) while a regulations are immediately applicable and enforceable by law in all EU Member States (as good practice, EU Member States issue national legislation that defines the competent national authorities, inspection and sanctions on the subject matter).

The labour codes of Slovak and Czech Republic and other related relevant legislation acts can be considered as primary sources for our research. Secondary sources for our research were found in judicatory and in actual legal opinions of domestic and foreign jurisprudence. From the judicatory we focused mainly on decision of highest court authorities as Supreme Administrative Court of the Czech Republic or European Court of Justice.

The most important cases four our research were for instance the Judgement of the European Court of Justice in the case of Mr. Asscher from 27.06.1996, C-107/94 (hereinafter as *"Asscher case"*), in the Judgement of the European Court of Justice in the case of Dita Danosa vs. LKB Lízings SIA from 11.11.2010, no. C-232/09 (hereinafter as *"Danosa case"*), the Judgement of the European Court of Justice in the case of Kiiski from 20.09.2007, no. C-116/06 (hereinafter as "*Kiiski case"*), Judgement of the Supreme Administrative Court of the Czech Republic, file no.: 2 Afs 62/2004 from 24. February 2005 (hereinafter as *"the ZX Trading, s.r.o. case"*) or Judgement of the Supreme Administrative Court of the Czech Republic, file no.: 7 Afs 72/2008-97 from 15. January 2009.

Actual legal opinions of domestic and foreign jurisprudence we found in papers from journals (e.g. Behling & Harvey 2015, Bengtsson 2016, Thornqvist 2015, etc), in books (e.g. Barancová 2015, 2018, Hůrka, Novák & Vrajík 2012, etc.) and in papers from conference proceedings (e.g. Janíčko 2013). As most relevant sources of legal opinions of jurisprudence we used papers which were indexed in databases as Scopus or Web of Science.

In this materials we examine using an analytical and historical method of legal research. The analytical method, well known in the Anglo-Saxon legal world, but less known in the rest of the world, is the analysis of the concept of 'right' by the American law professor Wesley Newcomb Hohfeld. He noticed that the concept of 'right' is used in several different meanings. It may mean a 'claim', a 'power', a 'liberty', or some other legal concepts, which he calls 'immunity' (escaping from someone else's legal power) and 'privilege' (an exception to a more general prohibition). This refinement of the concept of 'right' was an important step forward in analysing the 'deep structure' of the concept of 'right' and in clarifying the actual meaning of this word, as used in several different contexts. Moreover, and most importantly, he studied the logical relation between the different sub-concepts of 'right' and other concepts, such as 'duty' or 'liability'. For example, if one has the right to do A, there can be no duty not to do Hohfeld distinguished 'legal opposites' (one cannot have at the same time a right and non-right on the same object, or a privilege and a duty as to the same behaviour) and 'legal correlatives' (when A has a right against B, then B has a correlative duty towards A) (Hohfeld 1919).

The analytical method is a generic process combining the power of the scientific method with the use of formal process to solve any type of problem. Use of the analytical method is critical the problem of sustainability because it appears that current processes are inadequate. They are intuitive, simple, and based on how activists approach everyday problems. We mostly used the analytical method by studying relevant materials.

On the other hand, historical method of legal research we used mainly by study of historical development of term dependant work. The historical method of legal research we decided to use because fully understanding the law as it functions today in some society, is only possible when one knows where it comes from and why it is as it is today.

The process of learning and understanding the background and growth of a chosen field of study or profession can offer insight into organisational culture, current trends, and future possibilities. The historical method of research applies to all fields of study because it encompasses their origins, growth, theories, personalities, crisis, etc. Both quantitative and qualitative variables can be used in the collection of historical information. To our historical research we used Charles Busha and Stephen Harter six steps process for conducting historical research.

We compared our results with theoretical background contained in this paper mentioned above and with decisions of highest court authorities. According to this we had described individual signs of dependent work and possibility to assess the factual situation as a simulated and dissimulated legal act on the basis of whether it met or not the signs of dependent work.

In our paper we also used a comparative research method. This method is casually used for consideration or estimation of the similarities or dissimilarities between two or more legal orders. Based on comparative research method we compared the situation in Slovak Republic with other selected European countries.

According to this method we came to results about the spread of this phenomenon in other countries. Knowledge from other countries can help to better understanding of this phenomenon and can contribute to solve this problem also for the Slovak Republic. Using above mentioned materials and methods we tried to achieve the main and partial aim of this paper.

Dependent work v. business activity – business activity

Section 2 of the Act no. 513/1991 Coll. Commercial Code as amended (hereinafter as *"Commercial Code"*) defines business activity as systematic activities, which are independently conducted for the purpose of making a profit by an entrepreneur in his own name and at his own responsibility. The entrepreneur is a party listed in the Commercial Register, a party doing business based on a trade licence, a party who does business based on a license other than trade licence as laid down in specific legal regulation or a natural person involved in agricultural production and is registered in compliance with a specific legal regulation.

According the Section 2 of the Act no. 455/1991 Coll. on Trade Licensing as amended (hereinafter as „*Trade Licensing Act"*), business activity under trade licence is a systematic activity for the purpose of making a profit that is independently conducted by the licence holder in his/her own name and at his/her own responsibility in compliance with the provisions enacted by the Trade Licensing Act. As laid down in Section 5 of the Trade Licensing Act, a trade-

license business activity can be performed by a self-employed person or a legal entity provided that the conditions enacted in the Trade Licensing Act are complied with.

Thus, as laid down in the Commercial Code as well as the Trade Licensing Act, the legal notion of "business activity" is defined by the following characteristics: it is a systematic activity, it is performed/carried out by the entrepreneur independently, in the entrepreneur's own name, on the entrepreneur's own responsibility, it is performed for the purpose of making a profit.

Dependent work vs. business activity – dependent work

The legal notion of "dependent work" is defined by the Section 1 of the Slovak Labour Code. The notion of dependent work was introduced in the Slovak Labour Code in 2007. The amendment of the Slovak Labour Code (Act no.348/2007 Coll.) coming into effect as of 1st September 2007 changed the Section 1 by changing the paragraph 1 as two new paragraphs were inserted: paragraphs 2 and 3 and also the additional wording was inserted in the paragraph 6. The above amendments resulted in exhaustive definition of the notion of "dependent work" as well as to a negative provision defining what activities do not meet the definition of dependent work. This extended the subject-matter scope of the Slovak Labour Code that regulates individual employment relationships that always concern dependent work.

The definition of dependent work in the Slovak Labour Code is based on the ILO Recommendation no. 198/2006 as well as on the labour legislation theory that stipulate the dependent nature of work belonging among the essential characteristics of any employment relationship.

The notion of dependent work is defined in compliance with the generally accepted definition of dependent work in the European as well as international labour-law science as well as in compliance with understanding of this notion by the International Labour Organisation. However, apart from this definition provided by the ILO Recommendation no. 198/2006 (which does not require that all the characteristics of the notion of dependent work be fulfilled simultaneously), to meet the definition of dependent work as laid down in Section 1, paragraph 2 of the Slovak Labour Code, all the characteristics of the notion of dependent work must be fulfilled simultaneously (in a cumulative manner).

The authorities submitting the amendment of the Slovak Labour Code coming into effect as of 1st September 2007 stated that the reason for the proposed changes, or to be precise, for the introduction of the legal construction defining dependent work was an increased number of cases where, in the legal practice, employees were being forced to change their legal employment status to a commercial relationship status despite the fact that these natural persons continued to perform the same dependent work as they did before. In this way, employees were formally transformed into entrepreneurs (henceforth labelled as "self- employed persons" – abbreviated as SZČO in the Slovak legislation) although in fact the essential characteristics defining 'business activity' were not fulfilled (e.g. the work activities were not performed in the natural person's own name but in the name of the 'customer' or that the work was not performed to make profit but to earn a wage or for a payment of remuneration).

The amendment of the Slovak Labour Code effective as of 1st January 2013 concerned the Section 1 by amending paragraphs 2 and 3, leaving out the four defining characteristics of dependent work in paragraph 2 thus narrowing the definition of dependent work and therefore potentially extending the scope of authority of the Slovak Labour Code that was now regulating a wider group of contractual relationships and also resulting in a change of the so-called negative definition of dependent work in the paragraph 3, which enabled authorities to examine the defining characteristics of dependent work even though formally business activities were performed.

Therefore, after the amendment of the Act no. 361/ 2012, from the original definition of dependent work (in the wording of the amendment of the Slovak Labour Code No. 348/2007 Coll.) the following characteristic of dependent work remained in Section 1, paragraph 2. of the Slovak Labour Code: the superiority of the employer and subordination of the employee, personal performance of work by the employee for the employer, the work performed according to the employer's instructions, in the employer's name, wage or remuneration provided for the performance of work, work performed during working hours or working time.

While the following characteristics of dependent work were left out: performance of work on the employer's costs, performance of work using the employer's means of production, performance of work on the employer's responsibility, and performance of work that predominantly concerns repetition of defined activities. In 2015, yet another defining characteristic of dependent work was left out, that is, the characteristic of compensation (i.e., wage or remuneration provided for the performance of work).

Therefore, at the moment, the notion of dependent work is legally defined only by the following characteristics that, however, have to be met simultaneously: the work performed in a relationship characterised by superiority of the employer and subordination of the employee, personal performance of work, by the employee for the employer, the work performed according to the employer's instructions, in the employer's name, during working time defined by the employer.

The principle of superiority of the employer and subordination of the employee must be constantly regarded as the most significant notional characteristic defining the notion of dependent work. This is the subordination principle.

Following the specification via several amendments of the Slovak Labour Code, the legislative-technical definition of the term "dependent work" in the provisions of Section 1 (2) is aimed to ensure with even higher degree of effectiveness prevention of exclusion (disqualification) of employees from the legal protection offered by employment relationship when the legal relationship of self-employed persons (in fact 'employees') does not meet the characteristics of individual business activity, e.g. as defined by the Trade Licensing Act. The objective of the legislators is preventing the practice of camouflaging employment relationships with different legal forms.

The superiority of the employer and subordination of the employee

The most important indicator of dependent work is the subordination of the employee to the employer. With respect to the substantial changes in the content of work at the beginning of the third millennium, only the formulation "according to the employer's instruction" would be useful to express the relationship of subordination and superiority, which stresses not only the subordination of the employee to the employer but also the fact that the employee alone as an individual is not allowed to decide about the course of the working process but he/she is obliged to follow the instructions of their employer. This is an indicator of non- independent work apart from work activity of a self-employed person, who performs work on his/her own account and own responsibility. This differentiating characteristic is most helpful also in legal practice when differentiating the notion of dependent work from business activities as defined in Section 2 of the Commercial Code as well as in the Trade Licensing Act. The subordination and superiority principles are often derived from the right of the employer to define the time, length, place, and manner of work performance.

Another proof of non-independent work of the employee is also the fact that the employee alone may not decide about the work process without the employer. The employer manages the whole process of employment and also bears the economic risks of work performance. Even though in performance certain functions the employee may have the possibility to make independent decisions, this possibility is not unlimited. The principle of personal dependence and subordination of the employee to his or her employer (the subordination principle) most powerfully characterises the employment relationship as a contractual legal relationship and simultaneously differentiates it from other types of legal relationships, particularly from civil legal regulations governed by the equality principle. The equality principle is not characteristic of employment, although some elements of legal - not factual - equality prevail upon its establishment, i.e. when concluding employment agreement.

Economic dependence of the employee on the employer in an employment relationship is demonstrated by the fact that in an employment relationship, the employee does not perform work to make profit. Work as a systematic activity with the purpose of making profit and performed in the party's own name should not be subject of an employment relationship as this type of work is deemed business activity pursuant to the Commercial Code (Barancová, 2018).

Work performed according to employer's instructions

Performing of work according to employer's instructions is an essential characteristic of dependent work, which always represents a personal dependence of the employee on his or her employer. Personal dependence of the employee on the employer, his/her subordination, has a contractual base that is based on a concluded employment agreement. Personal dependence of the employee on the employer is not unlimited. Its content and framework are defined by the extent of the authority of the employer which is, in turn, directly determined by the extent of the type of work agreed in the employment agreement as well as by the agreed place of performing work (Barancová, 2015).

Work performed in the name of the employer

The employee does not perform dependent work which is supposed to be a subject of employment in his or her own name, but he/she performs it in the name of the employer. Therefore, in an employment where dependent work is performed, the employer bears the risk of the work performed (Barancová, 2015).

Personal performance of work

Apart from other types of legal relationships, in an employment, the employee cannot have himself/herself substituted in their work activity. The work that the employee agrees on with the employer is bound exclusively on himself or herself as an individual. In contrast to the employee, the change of entity is possible on the side of the employer. Another employer may be involved in the rights and obligations of the previous employer without any negative impact on the legal status of the employee. Apart from the dependent work, which is to be performed within the scope of employment relationship, an exclusive personal performance of work is not characteristic for any other legal relationships – only for employment (Barancová, 2015).

Performance of work for remuneration

According to the most recent legal situation (since 2015), performance of dependent work does not have to be of compensatory character although compensation (remuneration) for the performance of work in an employment is one of the substantial characteristics of employment as a contractual legal relationship, which represents a synallagmatic (a relationship in which each party to the contract is bound to provide something to the other party) type of legal relationship. The essential obligation of the employee to perform work corresponds with the essential obligation of the employer to pay remuneration for the work performed. In employment, this remuneration has a character of a salary. The compensatory character of work performance in employment expresses the so-called material dimension of the relationship. The participation of the employee also in the profit of the employer essentially does not represent a legal barrier for a natural person to be in the legal position of an employee (Barancová et al., 2017).

Work performed in a defined working time

This is a highly important legal characteristic of dependent work. Time-related definition of employment is based mainly in the provisions of Section 47 of the Slovak Labour Code. The employee performs dependent work in a defined working time. The above legal characteristic of the notion of dependent work also concerns home work as well as agreements on work performed outside employment (Barancová, 2015).

Simulated and dissimulated legal act

If a legal act is vitiated by defects related to free will (i.e. it has not been performed freely and with serious intention) or if it is vitiated by defects related to manifestation of will (it has not been performed definitely and comprehensibly) it becomes fully void. Legal acts that become fully void do not result in establishing, changing or elimination of right and duties. A legal act becomes fully void directly based on law (ex lege) and has effect from the outset, from the very beginning (ex tunc) on every party. This right does not become statute-barred nor does it expire as no legal consequences result from such legal act through later conformation (ratihabition), or cessation of the defects related to manifestation of will (convalidation). The court must consider this full nullity and voidness, or it must draw consequences from such nullity and voidness even without an ex officio proposal.

If a legal act is performed to camouflage another legal act, then this another legal act is valid (e.g. if an employer concludes a mandate contract with a holder of a trade licence but their legal relationship meets the characteristics of dependent work, this legal act can in fact be an employment agreement) if it represents the will of the parties and if all the legal requirements under Section 41a Paragraph 2, 1st sentence of the Act no. 40/1964 Coll. Civil Code as amended (hereinafter as *"Civil Code"*) are met. It therefore results from the above that if a certain legal act, that is specifically a simulated legal act or perhaps a feigned legal act (the so-called simulated legal act) is performed to camouflage another legal act (to so-called dissimulated legal act), the simulated legal act become void due to lack of necessary will of the parties to truly enter into such agreement. In such cases, the other act that is the camouflaged legal act becomes valid and applicable. However, under a condition that this camouflaged legal act represents the will of both parties and also that also meets the other characteristics required by the law to ensure its validity (e.g. that it complies with the legislation, that it does not circumvent the legislation, or that it is not in contradiction with good morals). Provided that the camouflaged legal act itself is prohibited, it becomes equally null and void according to Section 39 of the Civil Code (Lazar, 2014).

Possible assessment of a legal relation as illegal employment

Pursuant to Section 2, paragraph 2, letter (a) of the Illegal Employment Act is illegal employment defined also as employment by a legal entity or a natural person that is an entrepreneur, if this party takes advantage of dependent work of another natural person and has not entered into employment relationship with this natural person.

Pursuant to Section 6 of the Illegal Employment Act, sanctions for illegal employment are governed by specific legal regulation such as, e.g. the Labour Inspection Act or the Employment Services Act.

The authorities competent to deal with the above breaches of law are the local Labour Inspectorates as well as Offices of Labour, Social Affairs, and Family and also the Centre of Labour, Social Affairs, and Family of the Slovak Republic (hereinafter as "competent authorities").

Pursuant to Section 19, paragraph 2, letter (a) of the Labour Inspection Act, the labour Inspectorate shall impose a penalty to the employer for breaching the prohibition of illegal

employment from € 2,000 to € 200,000 and if the illegal employment concerns two and more natural persons simultaneously the minimum penalty is € 5,000.

Pursuant to Section 68a paragraph 1 letter (b) of the Act on Employment Services, Centre of Labour, Social Affairs, and Family of the Slovak Republic or the locally competent Office of Labour, Social Affairs, and Family shall impose a penalty to a legal entity or a natural person for breaching the prohibition of illegal employment pursuant to special legal regulation (Illegal Employment Act) from € 2,000 to € 200,000 and if the illegal employment concerns two and more natural persons simultaneously the minimum penalty is € 5,000.

Should the competent authorities evaluate the legal relationships stablished between entrepreneur and its suppliers as employment relationships, an entrepreneur may be sanctioned for illegal employment pursuant to applicable legal regulations.

So far, however, apart from the Czech Republic, in Slovakia the competent authorities or courts have not decided in any case similar to the case of ZX Trading, s.r.o. (the case is described below in greater detail).

Rudolf Kubica from the Labour Inspectorate in Žilina claims that although they are aware of the issue of 'employment' based on trade license relationships, it is very difficult to prove it. According to Mr. Kubica, a clear evidence of existence of the Slovak phenomenon labelled as forced self-employment is, among others, also the fact that there are simply too many holders of trade license as self-employed persons (Ďurišková, 2004).

Definition of the term "bogus self-employment"

According to some opinions (Thörnqvist, 2015) there are still some difficulties in identifying a clear definition of this concept. But in the end of the these authors also come to the opinion that common denominator of most definitions is that bogus self-employment is 'disguised employment' occurring when a worker who has employee status in practice is not classified as an employee, in order to hide the true legal status and to avoid costs such as taxes and social security contributions.

For above mentioned reasons is this topic also closely linked to social security law and tax law. In British literature we can find the term 'false self-employment' which is used here to describe self-employed persons who declare themselves (or were declared) as self-employed 'simply to reduce tax liabilities, or employers' responsibilities'. It is a false form of self-employment because normal activities of self-employment are limited or non-existent, such as tendering for different contracts, negotiating prices for services with clients or employing workers in addition to, or in place of, themselves. False self-employment is also marked by many of the characteristics of direct-employment: substantial continuity of engagement with a single employer over many contracts, lack of control over working times, not supplying plant or materials, or obeying instructions in everyday routines (Behling & Harvey, 2015; Bogenhold & Staber, 1991; Bone, 2006; Mühlberger, 2007).

Above mentioned literature deals with a small but growing body of research that focuses on the negative forms of self-employment in Britain. Swedish authors define false and dependent forms of self-employment as phenomena in the 'grey area' between subordinate/dependent employment and genuine/independent self-employment. Another phenomenon that appears in

the grey area, for example in transport and cleaning, is that employers transfer costs, risks and responsibilities in production to the employees, but still within the framework of an employment relationship. For example, employees may be required to bear the costs of transport, tools and other equipment used at work. In theoretical terms, this can be regarded as a form of objectively ambiguous employment. This too means a drift away from the regular employment relationship, in which the employer alone should carry all costs and risks in the production. The workers have an unclear employment status, which implies blurred borders between the employer and the employees, as well as between self-employment and employment. In practice, the workers have to pay for working (Thörnquist, 2015).

In Germany is this concept called "*Scheinselbstständigkeit*". This term refers to situation when somebody under an existing contract provides a dependent work but actually does work in employment relationship. As a result, social security contributions and wage tax which should be payed are not (Röller et al., 2017). This definition is with some small variations generally accepted in whole German literature (see for instance Schaub et al., 2017 or Reichold, 2016).

Masso & Paes (2015) find that bogus self-employment in Estonia is particularly evident in broker activities associated with real estate companies, taxi-drivers, postal services and in the construction industry.

Ortlieb & Weiss (2015) define bogus self-employment as 'workers who formally deliver their services as an independent company, but factually do not fulfil the criteria of self-employment'.

As noted by Hinks et al., (2015) those working in bogus self-employment, are in reality approved by their de facto employer as being self-employed, so as to eschew tax and employment rights liabilities and to avail of employment protection. Such a phenomenon is particularly evident in the construction, homeworking and services industries.

Ortlieb & Weiss (2015) report that due to outsourcing activities and / or franchise-systems, the boundaries between self-employment and employment have become increasingly ambiguous, giving rise to bogus self-employment in Germany.

In Czech Republic is this concept called švarcsystem (pronounced as Schwartz system). Name of this system is based on the name of the entrepreneur Miroslava Švarc, who began with this type of business/employment activity in 1990 as one of the first entrepreneurs (Hůrka, Novák, Vrajík, 2012).

We can conclude that all above mentioned terms s refer to the worker being pushed by an employer to conduct the work on a self-employed basis (Williams & Horodnic, 2017).

Legal situation in the Czech Republic

In the Czech Republic, this type of 'employment' grew strong mainly in the 1990s and is often labelled as the so-called švarcsystem. In the early 1990s, švarcsystem was a very widespread phenomenon in the Czech Republic and was not breaching the legislation. It became literally prohibited in the Czech law only in 1994, however, when the new Act no.264/2006 Coll. Labour Code as amended (hereinafter as "*Czech Labour Code"*) was adopted in 2006 this explicit ban was left out and only after the next amendment of the Czech Labour Code effective as of 1st January 2012 this explicit ban of the švarcsystem was renewed.

Legislative development in Slovakia, just like in the Czech Republic, is aiming to limit the švarcsystem, although in the Czech Republic, legislative changes that have a much more restrictive character than those in the Slovak law were adopted.

The fact that švarcsystem is actually illegal in Czech Republic can be derived from the definition of dependent work pursuant to Section 3 of the Czech Labour Code and the definition of illegal work pursuant to Act no.435/2004 Coll. on Employment as amended (hereinafter as "*Czech Employment Act"*). Thus, in 2012, the explicit ban on švarcsystem was reintroduced into Czech legislation. More precisely, it is a ban on performance of dependent work by a natural person outside the framework of legal employment relationship. Therefore, any performance of dependent work outside employment can be sanctioned, that is, including the cases when performance of dependent work is camouflaged by another commercial or trade agreement.

The Czech Employment Act also increased the severity of sanctions concerning both employers as well as self-employed 'employees' who are deemed accomplice under the švarcsystem. It is necessary to mention that Czech legislation regards the (proven) application of švarcsystem as a form of illegal work and imposes corresponding relevant sanctions.

Section 139 of the Czech Employment Act enacts sanctions for the breach of obligations for natural persons and Section 140 deals with sanctions for natural persons who are entrepreneurs and for legal entities. As of 1st January 2012, these sanctions were increased in relation to the changed definition of illegal work.

The sanction was doubled for employers [that is up to CZK 10 million (1 € is roughly 25.2 CZK as of 2nd February 2018) as the upper limit of the sanction rates]. For natural persons performing illegal work, the sanction may reach up to CZK 100,000. Simultaneously, the minimum penalty was introduced The Czech inspection and supervision authorities (e.g. Labour Inspectorate) will impose on an employer in case they apply švarcsystem that is CZK 250,000 (the penalty is imposed in the minimum volume per each single case of illegal employment).

Together with the penalty form the competent Labour Inspectorate, another risk when using the švarcsystem is that following the proving of such practice, the Czech Financial Authority will impose outstanding tax and penalisation for overdue payment of this tax. The same applies to social security authorities and health insurance companies in terms of health and social insurance deduction payments.

Before the legislative changes in the Czech labour legislation that came into effect in 2012, there often appeared contradictions in the legal practice when švarcsystem was concerned. Even the Czech authorities not always reached agreement when assessing the švarcsystem (For example you can see judgement of the Supreme Administrative Court of the Czech Republic, file no.: 7 Afs 72/2008-97 from 15. January 2009).

And this is not the only case when the Czech Supreme Administrative Court passed a judgement in favour of the employers and self-employed. In 2005, a similar judgement was made in the case of Prague-based Company ZX Trading, s.r.o., for which seven qualified bricklayers were working based on holding a trade license. The court stated that the state should not force employees and companies to enter solely into employment relationships (see for example Judgement of the Supreme Administrative Court of the Czech Republic in the ZX Trading, s.r.o. case").

However, after 2012 the situation in the Czech Republic started to change and Czech inspection and supervision authorities started to pay more attention to inspections related to švarcsystem. For example, only in 2013, the State Labour Inspection Authority exposed 196 cases of illegal work where švarcsystem was applied (Annual summary report of State Labour Inspection Authority of Czech Republic for year 2013).

Czech inspection and supervision authorities can from 1st January 2012 enjoy a stronger legal position when proving švarcsystem owing to the above amendment of the Czech Labour Code that divided the original definition of dependent work (which was analogical to the definition of dependent work in the Slovak Republic) to: notional characteristics of dependent work and conditions of performing dependent work.

Therefore, the Czech Labour Code, section 2 paragraph 1 states that "*dependent work is the work that is performed in relation to superiority of the employer and subordination of the employee, in the name of the employer, according to the employer's instructions and the employee performs the work for the employer in person*" (characteristics of dependent work) while section 2 paragraph 2 states that "*dependent work must be performed for a wage, salary or remuneration for work, on the costs and responsibility of the employer, in working time and at the workplace of the employer or alternatively at another agreed location*" (conditions of performing dependent work).

In principle, this means that if it is found out based on the characteristics under section 2 paragraph 1 of the Czech Labour Code that the concerned work is dependent work, this work must be, pursuant to section 2 paragraph 2 of the Czech Labour Code, performed under the above-stated conditions (e.g. in working time – maximum length must be agreed, and for the costs and responsibility of the employer – that is, these cannot be transferred on the employee). This led to extension of the set of work relationships that will be deemed as dependent work.

Bogus self-employment in others countries

From the international scientific literature which refers to the phenomenon of bogus self-employment are well known examples of occurrence of this phenomenon from the United Kingdom, Sweden and Germany (Behling & Harvey, 2015; Bengtsson,2016; Röller et al., 2017; etc.).

However, situation in Western Europe countries is still little bit different as situation in Eastern Europe countries. For instance in Sweden, there is problem with truck drivers which come to Sweden from other countries (for example from Poland) and provide in Sweden bogus self-employment as truck drivers and by this way their 'employers' avoid to paid wages according to collective agreement (Bengtsson, 2016).

In case of Romania started government legislative reforms with aim to avoid bogus self-employment by reform of the Romanian Fiscal Code in July 2015. This legislative changes actually brings to Romanian legal system unit definition of independent activity. The Romanian Fiscal Code after novelisation consider an independent activity as "any activity conducted by an individual to obtain revenue, which meets at least four of the following criteria: (**1**) The individual has the freedom of choice of where and how to work, as well as the freedom to choose the work program; (**2**) The individual has the freedom to have multiple customers; (**3**) The inherent risks of the business are assumed by the individual; (**4**) Work is performed by using an individual's assets; (**5**) Work is performed by the individual through the use of intellectual and/or physical skills, depending on the particularities of each activity; (**6**) The individual is a member of a professional body, which has the role of representation, regulation and supervision of the carried out profession, according to special normative acts regulating the organization and the way the profession in question is conducted, and (**7**) The individual has the to conduct the activity directly, with employees or in collaboration with third parties, according to the law" (Williams & Horodnic, 2017).

Even the Czech and Slovak Republic have longer time similar legislation against the bogus self-employment, but this phenomenon can't be effectively avoided and is still relatively common. The problem lays probably not in the legislative solutions but in the huge roots and widening of this phenomenon in society of these countries.

Above mentioned argument support the fact that the proportion of self-employed in the Czech Republic (and also in Slovak Republic) is particularly high in comparison with countries such as Germany and Austria (and the Scandinavian countries) and is even markedly higher than in Anglo-Saxon countries (UK and USA) with their typical high preference for "entrepreneurship". On the contrary, the amount is approaching the level of the countries of southern Europe (Italy, Spain, Greece), which have a slightly different structure of the economy (a large proportion of small-scale services, or in agriculture), and are characterized by a high level of grey economy. The interpretation of this phenomenon consists in the structure of economies shifts the transition countries of Eastern Europe (decrease in the number of large enterprises, increase the share of services), further reducing the protection standard employment relationships, but also undoubtedly the growth of illegal employment practices, in this context, the Czech Republic is especially in boom of švarcsystem (Janíčko, 2013).

Recent judgements of the European Court of Justice

The judgement of the European Court of Justice (hereinafter as *"The Court of Justice"*) in the Danosa case that concerned the interpretation of the notion 'worker' in cases that do not meet the typical classification of an employment relationship shows the tendencies where labour law is headed in the European legal space. The given case concerns Mrs. Dita Danosa as the plaintiff, a sole Executive Officer (i.e. member of the Board of Directors) of Latvian company LKB Lízings SIA (hereinafter as *"LKB"*), who was appointed to the position by the decision of the sole shareholder of LKB on 21.12.2006. On 23.7.2007, Mrs. Danosa was removed from her position of Executive Officer, whereas during the removal, she was in the 11th week of pregnancy.

Mrs. Danosa filed a complaint against LKB justified by a factual existence of an employment relationship and the resulting breach of Latvian Labour Code that prevents dismissal of employees when pregnant. The first-degree court as well as the court of appeal rejected the complaint. Subsequently, Mrs. Danosa filed an appeal to the court of cassation justified by her statement that in compliance with the EU legislation, she should be regarded as a worker and therefore the prohibition of dismissal pursuant to Article 10 of the Directive for Protection of Pregnant Workers should also concern her.

Article 10 of the Directive for Protection of Pregnant Workers provides that workers may not be dismissed during the period commencing with the beginning of the pregnancy until the end of maternity leave save in exceptional cases not connected with their pregnancy (Watson, 2014).

The Latvian court of cassation filed a proposal for initiating preliminary ruling proceedings at the Court of Justice and asked the Court of Justice to elaborate a statement on: the possibility of applying Article 2 and 10 of the Directive for Protection of Pregnant Workers on an Executive Officer of a capital company (that is, whether an Executive Officer can be regarded as a worker in compliance with the EU law); and compliance, of the Latvian Commercial Code that allows for removal of pregnant Executive Officer of a capital company without any limitations, with the Directive for Protection of Pregnant Workers.

Previously, the Court of Justice stated in the Kiiski case that the key feature of the notion 'worker' is the fact that a person performs, for a certain time, activities for the benefits of another party, and under this party's leadership and receives remuneration for this activity.

The Court of Justice also presented its opinion on legal position of persons managing companies in the Asscher case, whereupon it published the statement that company director who is simultaneously the sole shareholder in that same company does not perform his or her activity based on the subordination principle, therefore he or she cannot be regarded as a worker, since such director is not led by another party no by any other body of the company that is not under this director's direct control. However, Mrs Danosa was in her case subordinate to another body of the company.

In the Danosa case, the subject of the ruling by the Court of Justice was to establish whether or not, and to what degree the Executive Officer of a company can regard himself or herself as a person performing his/her tasks in the company based on the subordination principle and not as an independent service provider.

Regarding the first question under consideration, the Court of Justice decided that the Executive Officer (Member of the Board of Directors) of the capital company that performs activity for this company and constitutes an integral part of this company must be regarded as a person with the position of a worker for the purposes of the Directive for Protection of Pregnant Workers provided that she performs her activity for a specific period of time, under the leadership or supervision of another body of this company and she receives remuneration for this activity.

Besides other facts, the Court of Justice gave grounds for its ruling by claiming that the notion 'worker' cannot be interpreted in various ways pursuant to the respective national legal regulations and that it cannot depend on the qualification of the legal relationship (employment, mandate contract/agreement or a different type of relationship) nor can it depend on formal labelling of the person as self-employed but it must be defined pursuant to objective criteria characterising employment relationship with respect to the rights and obligations of the concerned persons, whereas specific attention should be paid to the circumstances of recruitment for the company, subordination to supervision and the possibility of removal.

The Court of Justice further stated that performance of managing function as such does not exclude the existence of subordination and that when assessing the question of subordination, special and individual attention should be paid to the relationship with the entrepreneur, the nature of the positions, the scope of authority and the existence of hierarchically superior body.

Since the position of the Executive Officer (Board of Directors member) in this particular case was close to the position of an employee, considering the circumstances of the case characterising the legal relationship of the Executive Officer to the company, Mrs. Danosa could be regarded as a worker.

The ruling of the Court of Justice with regards to the first question states that eventually a member of the Board of Directors or even a member of the Statutory Body of a commercial company can be regarded as a worker as long as he/she performs his/her activity under leadership or supervision of another corporate body, is an integral part of the company, and receives remuneration for this activity.

The above needs to be applied reasonably to any person performing work based on a mandate agreement or any other type of contractual relationship regulated by the Civil Code or the Commercial Code, whose legal relationship could be – based on certain characteristic signs – regarded as dependent work pursuant to EU law.

Results and discussion

This paper has evaluated the bogus self-employment in Slovakia and in others European countries. It is a practice under which the employer 'employs' self-employed persons to perform dependent work.

Based on the above paper, we can state that to so-called švarcsystem is a really widespread phenomenon in the Czech Republic and Slovakia.

The most essential aspect in the assessment whether or not any particular legal relationship represents a form of dependent work will be exactly the fact whether this legal relationship meets the notional characteristics of dependent work, e.g. the work is going to be performed under the principle of superiority of the employer and subordination of the employee, personally by the employee for the employer, according to the employer's instruction, in the employer's name and in working time specified by the employer.

As long as a particular activity meets the characteristics defining dependent work, then any such work must be performed under employment (or alternatively in a similar type of legal relationship – e.g. agreement for part-time work activity which is in Slovak labour law titled as "dohoda o pracovnej činnosti"). If an activity that meets the characteristics defining as dependent is performed outside employment under a civil or commercial legal relationship, then any such legal relationship can be deemed a simulated legal act and the competent court may judge such relationship as an employment relationship. Should such judgement be made, there is a risk that the employer will have to additionally pay to the employee any amount this employee is entitled to under employment and, at the same time, also to retroactively pay all the tax-related payments as well as social security and health-care deductions.

The results show that legislative in Slovakia is relatively strongly aimed against this phenomenon but the results the Labour Inspectorates and other competent public authorities in Slovakia do not indicate an interest in solving this problem (for example: missing case law of Slovak courts in this area). This argument is also supported out by the high profile of self-employers compared to the others countries of the European Union.

Slovakia have adopted in his legal system definition of dependent work and independent activity for a long time despite this brings any progress with the fight against bogus self-employment. In contrast, the reformation of taxation system in Romania brought instantly positive results.

Conclusion

According to our legal research is unmistakable proven that the phenomenon of bogus self-employment is not allowed by law in Slovak republic, Czech Republic and also in selected EU countries in our research. This fact is proved by actual legal opinions of jurisprudence and this opinion is supported by actual jurisprudence to this topic. Nevertheless, the phenomenon of bogus self-employment is in general still persisting negative phenomenon in society.

This phenomenon is from social point of view very negative because it is causing exclusion of employees from employment relationship. Exclusion of employees from the employment relationship decrease their social security and opportunity of legal protection as weaker part. Because this phenomenon is widespread in Slovakia, it is quite hard to solve this problem. Our recommendation heads the point that the future research in this area in Slovakia should be focused on finding reasons why public authorities do not proceed active steps against bogus self-employment.

In this state we are not able to bring proposals *de lege ferenda* for the Slovak legislator because this problem looks to be in Slovakia more linked with factual and social situation than with legislative problem.

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