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FOREWORD

Dear reader,

What you are holding in your hands is the first issue of the internationally reviewed scientific journal *Central European Journal of Labour Law and Personnel Management*, published by the Labour Law Association of the Slovak Republic. Let me introduce the background and incentives that led to establishment of the scientific journal, introduce the vision of the founders and the international Editorial Board. The idea of the scientific journal reflects the need of narrowing the specialization of similar scientific and research areas. These are dynamically developing areas of study and research, such as Labour Law, Social Security Law, Personnel Management, Human Resources, Motivation of Human Resources and Human Resources Management. The founders of the journal recognized a gap to fill in these fields of study and research, since the existing scientific journals focus on wider scope of legal and managerial disciplines and do not specifically focus on the fields of study and research listed above.

By setting up a new scientific journal, the Labour Law Association of the Slovak Republic fulfils its core mission of connecting the scientific community with the professional field on international level, not only through an active membership in International Labour and Employment Relations Association (ILERA), International Society for Labour and Social Security Law (ISLSSL) and the International Labour Organization, but also by strengthening its activity in the field of labour law and related legal and non-legal scientific disciplines.

The Publisher, in cooperation with the Executive Director have set several goals at the beginning of publishing the scientific journal: in particular, to create a space for publishing the results of scientific and research activities of the studied fields; creating adequate space for international discussion and confrontation of the results achieved in scientific and research activities; facilitating international dialogue in order to exchange ideas, experience and share knowledge. As a fundamental principle of the scientific journal, we consider the need to place great emphasis on selection of high quality manuscripts and increasing the requirements for publication activity. We have developed the basic framework of scientific and ethical rules for contributors, the members of the Editorial Board and the reviewers. We respect the current trends in science and require APA in-text citation style; the plagiarism checker software, iThenticate is used to verify the originality of the manuscripts; we have established cooperation with CrossRef, an official Digital Object Identifier (DOI). We have selected internationally well-known professionals from different fields of study and research targeted by the scientific journal, so that we can introduce a high-quality and internationally recognized scientific journal. During the existence of the scientific journal, we will do our best to ensure the quality of the manuscripts and increase the quality of our work in line with the global trends respected by the international scientific community. We apply the principle of independent Bilateral Review System to review the manuscripts and respect the scientific and publishing ethics. In order to increase

international presence and acceptance, the authors are required to submit their contributions in English, which is the internationally respected language of scientists, researchers and academic employees. We apply full-text search technique, respecting the principles of Open Access Journals.

We believe that our readers and authors will maintain loyalty, and the scientific journal *Central European Journal of Labour Law and Personnel Management* will be listed among the recognized scientific periodicals, not only in Central Europe but in worldwide scope as well. Creative ideas, high-quality contributions and smooth cooperation we wish to all of our authors.

Ladislav Mura
Managing Editor

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PUBLIC WORK IN AN INTERNATIONAL AND HUNGARIAN CONTEXT

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Abstract

The objective of active labour market policies (providing labour market services and supporting employment) is to channel back those without a job to the labour market as soon as possible. Public work, regarded as an active instrument, is generally criticised for not substantially improving employment rate; most jobs produce low added value; participation decreases the motivation and willingness of those concerned to find a job. In addition, the programmes prove to be expensive and make people more dependent on the unemployment benefit. According to the experts one of the benefits is that in the short and medium term the programmes provide the safety of survival to the participants and can also contribute to implementing the other tasks of improvement while decreasing poverty and inequalities. Another beneficial impact is its suitability to make the disadvantaged groups more dynamic whose primary labour integration is unlikely. It is also suitable for overcoming the challenges of structural unemployment and easing the downsides of global economic crises. The public work programmes are facing similar challenges internationally and in Hungary, as well. Our paper presents the problems of public work (if it is effective enough and able to fulfil its mission) as one of the most frequently applied instruments of employment policies both theoretically and empirically, and also from an international as well as a Hungarian perspective.

Key words: government policy, public work, provision and effects of welfare programmes, unemployment

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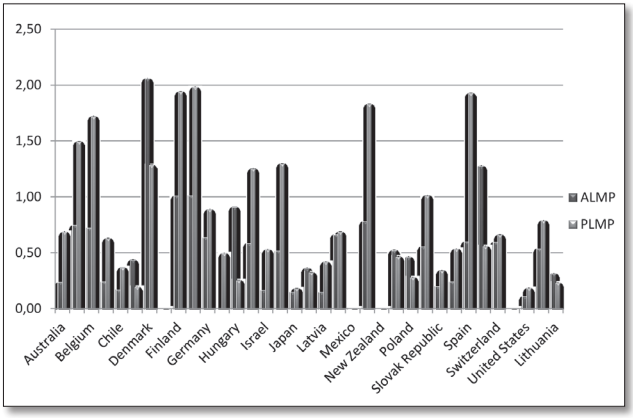
Introduction

Labour market policy makes use of two types of instruments: the active and the passive ones that are different issues. While the active labour market policies (ALMP) assist the unemployed in finding a job, so they reintegrate them into the labour market, the passive ones (PLMP) help the jobless by supporting them with benefits and ease social tensions. Public work and its previous forms can be regarded as the active instruments of employment policy. Public work is the key instrument of employment policy that supports the unemployed who already receive social care with some benefits. The work performed within the framework of the public work programme is aimed at improving the social, health, educational, cultural, safety and transportation situation of the settlements. Public work ensures entitlement to social security, pension and job seeking benefits and also assists in entering or re-entering the primary labour market. Public work can be performed by self-governments, budgetary institutions, the church, civil organisation and social cooperatives.

Theoretical background

The main objective of active labour market policies is to expand the opportunities of employing job seekers and improving job-person fit. Accordingly, they consist of institutional and workplace training offers, encourage indirect employment (creating jobs), protected and supported employment and direct employment (public work). Active labour market policies help channel back the unemployed to the labour market within the shortest time possible. The public expenditure in the active labour market programmes of the OECD countries as of GDP is very varied. The more than 2 percent value of Denmark is followed by the other Scandinavian countries (1-1.5 percent) while the end-tailers include the USA, Japan and the Baltic countries (0.1 percent). Hungary with its 0.8 percent can be found in the first third.

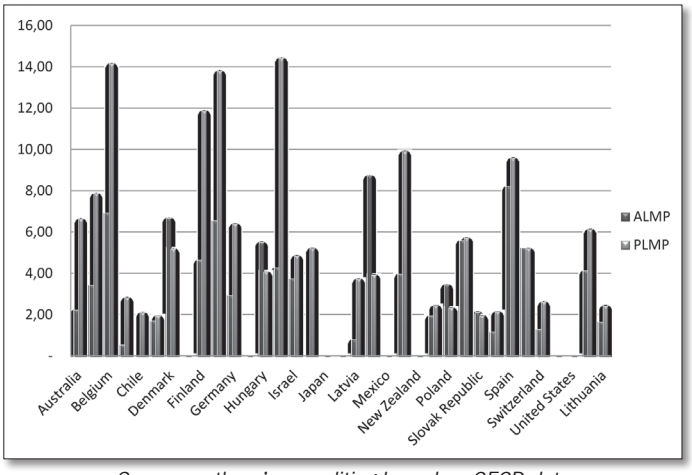
Figure 1 Public expenditure in labour market programmes in OECD countries, 2016 (GDP%)



Source: authors' own editing based on OECD data

Regarding active labour market policies (Figure 2) Luxembourg and Spain take the leading role (more than 8 percent of the labour force receive support) while Hungary (5.5 percent) together with Portugal and Sweden are in the first third again.

Figure 2 Participant stocks in labour market programmes in OECD countries by category, 2016 (%)



Source: authors' own editing based on OECD data

Regarding stocks the highest amount in 2016 was spent by Hungary (0.52 percent of its GDP), Ireland (0.27 percent), Bulgaria (0.15 percent) and France (0.14 percent) on direct job creating public work programmes. Relatively high (0.07–0.14 percent) was the expenditure of Slovenia, Ireland, Lithuania and Latvia. It is these countries coupled by Greece where we can find public work programmes of greater scale (OECD, 2016).

According to international experience real impacts can only be achieved by tailor-made, personalised programmes among the active labour market policies (Martin & Grubb, 2001; Crépon & Van den Berg, 2016). While individual counselling, assistance in finding a job, making use of the services of job centres and distributing wage subsidies (relatively in this order) can be successful, public work programmes fail with regard to finding a job in the future and earn salary. These programmes are partly successful but they are rather expensive (Brown & Koettl, 2015; McKenzie, 2017; Schmidt et al., 2017). When analysing the active instruments of the great Swedish labour market reform in the 1990's experts (Heikkilä et al., 2002; Albćk et al. 2014) concluded that job creating programmes can be more effective if they imitate the real situation of employment more realistically; if they are much more similar to that.

The currently used term workfare is the coinage of „work" and „welfare" known in the 1970's but used only in the 1990's both in the developed and developing world. This system is of

American origin based on the principle that the prerequisite of having benefits is performing work for social good and applying financial sanction in the case of certain failures. One of the objectives of workfare programmes is to respond to labour market changes through active labour market programmes aiming at those on the dole. The concept of workfare lies behind the public work programmes. Basically, these programmes involve both demand based (job creation, wage subsidies) and supply based (flexibility and assisting labour mobility) measures to decrease unemployment (French, British and American examples). In some countries this instrument is more frequently used in the case of clients who have difficulty in finding a job. For them, part of these programmes (the Danish, Dutch, British and Californian programme) also provides opportunities for education and training or social activity. In addition, the Danish, Dutch, British and American programmes also include a case study to tailor the programme to the needs of the clients. Of these four programmes the Danish activity places the greatest emphasis on the long term strategy and developing human capital while the American programmes urge immediate labour market participation (Besley & Coate, 1992; Čapošová, 2015; Eardley et al., 1996; Grover & Stewart, 1999; Brown & Koettl, 2015; Murgai et al., 2015).

The workfare instruments are directed at reducing the number of those on the dole in two ways. On the one hand, they select and exclude those who are working (and not entitled to the benefit) or who are not seeking a job (as it is the prerequisite of the benefit), on the other hand. The filtering impact of the programme can prevail in attracting those who are really in need and keep off the wealthier, which can reduce the administrative cost of the government. If the inconveniences caused by the prerequisites of the benefit (frequent visits to job centres, compulsory public service, possibly trainings etc.) are so huge that it leads to immediately leaving the unemployed status or not applying for the benefit at all or if the work to be performed is much greater than normally done without intervention, the deterring effect prevails (Kálmán, 2015). On the other hand, individuals are pushed into situations where human capital can be improved and chances are higher for finding a job. Workfare includes such different programmes and approaches that are based on the different combinations of these two mechanisms (Heikkilä et al., 2002).

In the developed countries such programmes are applied typically for a short period only when reacting to a short term economic shock or in the case of high unemployment rate primarily to lead the unemployed back to the labour market. In the developing countries the most underdeveloped settlements are targeted, which is a kind of selection, and the public work wages are below the average market wages of the poor. Public work programmes offer few opportunities of breaking out for those in a very disadvantaged situation (Wulfgramm, 2014; Zieliński, 2015; Kádár, 2017; Douarin & Mickiewicz, 2017).

The special nature of the Hungarian public work programme

The impacts of active labour market policies were first analysed in Hungary after the initiation of the ILO Japan Programme between 1992 and 1993 (Godfrey, Lázár & O'Leary, 1993). Since then the monitoring system designed for that purpose has been measuring the aggregate impacts of completed labour market policies. In general, it is concluded that individuals having benefitted from active support previously are more likely to participate in the second phase of the supporting system than the control group (Csoba & Nagy, 2011).

Public work is one of the oldest and the second active programme in the Hungarian labour market that affects masses of people of active employment policies. According to the quick analysis of the European data the extent of the Hungarian public work programme is unique in Europe. Act IV of 1991 regulates public work on the Hungarian labour market after the change of the regime. According to this act public work is an alternative to unemployment, an emergency arrangement that temporarily ensures the labour market reintegration of the jobless with an objective of assisting those who are unable to find a job. Public work served two declared purposes: the so-called work test on the one hand, which means those who refuse public work will be excluded from the unemployment register; and it could also ensure normal and not subsidised jobs to the participants (Galasi & Nagy, 2008).

The system of public work has undergone several changes since the 1990's in Hungary. Employment for public good existed between 1987 and 2010, public work programmes from 1996 to 2010 and work for public purposes between 1999 and 2010. In 2011 a great change took place in the system of public work as the several forms created after the regime change were replaced by the unified system of public work that is regulated by Act CVI of 2011 on public work and the modification of the act on public work and other acts. The description of new supports can be found in Government Decree 375/2010. The act also regulates the legal relationships of public work and wages (approximately 76-88 percent of the net minimum wage). Personal income tax advances (16 percent), superannuation tax (10 percent), healthcare contribution (7 percent) and labour market contribution (1.5 percent) are deducted from the wages while the employers are obliged to pay social contribution (13.5 percent) and vocational contribution (1.5 percent) (Szabó, 2013; Bördős, 2015). The concept of 'work instead of benefits' induced the changes as since then there have been no work for public good, public work programmes and work for public purposes as the unified system of public work took their place on 1 September 2011 (Bankó, 2015).

The public work programmes in Hungary serve three purposes: social, employment and political ones. The social objective is to ensure income for those seeking job for a longer time. The aim concerning employment is to improve employability skills and reintegrate the individuals to the primary labour market. The other disclosed objective was to decrease black employment and receive greater attention paid by the employers. Concerning the political objective it was directed at making up for the loss in the budget of local governments and easing local social tensions.

In Hungary 30-40 thousand people were engaged in public work between 1996 and 2006 on the average. This number has been growing to 60-100 thousand since 2009 and in 2013 it reached more than 130 thousand. In 2018 190 thousand, in 2019 170 thousand and in 2020 150 thousand are estimated (Table 1). This number is considered high even in the international scenario.

In an international comparison Hungary spends a lot on public work programmes and little on other labour market instruments that are to retrain the unemployed or assist them in finding a job. The expenditure on public work was continuously growing between 2011 and 2016 (from 7 billion Ft to 340 billion Ft) but the projection for 2018 is much lower (220 billion Ft).

On the average, 200-220 thousand people are employed monthly in the current system of public work and the annual average is 355 thousand. In addition, the distribution is very uneven in the country following the regional distribution of unemployment (where unemployment rate is high, many are employed in public work programmes) (Figure 3.).

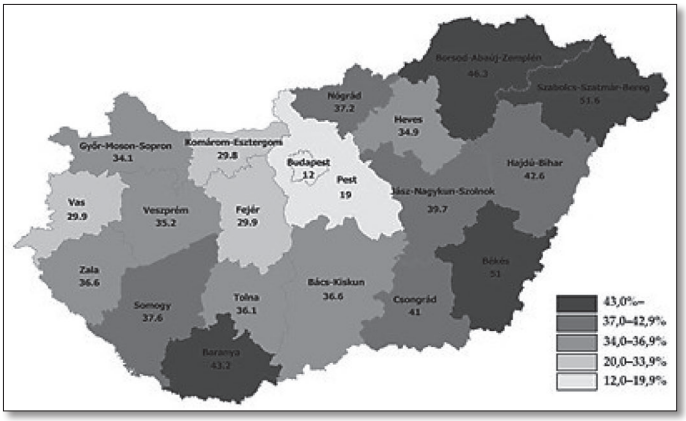
Table 1 The expenditure and participants of the Hungarian public work programmes from 2011 to 2018

Years	Expenditure (bn HUF)	Participants (person)
2011	66	75000
2012	132	92000
2013	171	121000
2014	225	178000
2015	270	208000
2016	340	223000
2017	298	210000
2018	225	190000

Source: authors' own editing based on http://kozfoglalkoztatas.kormany.hu/

Most people participated in public work programmes in Borsod-Abaúj-Zemplén county (34091) followed by Szabolcs-Szatmár-Bereg (34082), Hajdú-Bihar (18779) and Békés (13668) counties while in Vas (1885) and Győr-Moson-Sopron counties (1734) the number of those concerned is only 5 percent of the value in Borsod.

Figure 3 Changes in the rate of public work employment per county in 2017



Source: http://kozfoglalkoztatas.kormany.hu/download/e/a6/02000/Kozfoglalkoztatasi%20rata%20alakulasa%20megyenkent_2017%20oktober.JPG

Regarding the diversity of the employers we primarily find non-profit, construction firms and the church. In 2017 the biggest Hungarian employer was NMI Cultural Institute Nonprofit Public Good Kft. Volt (2589) followed by the Hungarian Reformed Charity Service (1959) and Hungarian Public Road Nonprofit Zrt. (1928). Then came several regional water management authorities in the rank (1200-1700 persons), then the National Széchenyi Library (1140) and the Hungarian Railways Zrt. (1060). Local governments can also be employers quite frequently. The typical jobs include post delivering, weeding (ragweed), cleaning, sweeping the street, collecting litter, agricultural hand, clerk, keeping records etc. The latter ones are available only for the highly qualified like teachers or graduates with a degree.

Considering industries agriculture is highly overrepresented in public work (26605 persons). A promising tendency is that in the past 2-3 years the number of public work programmes focusing on local specialities is strikingly high (14248 persons) followed by those engaged in road works (9834) and inland water management (7257). In 2018 the 8-hour-wage in public work remains 81 530 Ft gross and the guaranteed salary in public work 106 555 Ft gross for 8 hours a day (http://kozfoglalkoztatas.bm.hu/).

The government target for 2018 is the decrease of the monthly average maximum number of participants in public work programmes to 150 thousand gradually till 2020. There is a change as those under 25 and skilled can only be part of the public work programmes if the job centre made three attempts unsuccessfully due to the employers or the job centre was unable to offer them a suitable job for three months. The young under 25 not taking part in public work programmes are compensated by the government with the help of the Youth Guarantee Programme funded by the European Union that tries to assist them in finding a job. Data prove that by 2017 the number of the young in public work programmes decreased to 19 thousand, which is 6 thousand lower than in the previous year. A further objective is that starting from June 2018 within three years no one could be a public worker for longer than one year except there is no proper employment for them in the private sector. It is very difficult to stop being a public worker as one cannot look for a job in the meantime. The new government decree makes it possible to compensate the public workers for their travelling expenses while looking for a job (Márk, 2017).

Material and methods

Labour market issues are frequently discussed and given the dynamics of changes it is necessary to deal with them intensively. The aim of this paper is to analyse these changes. The main objective of active labour market policies is to expand the opportunities of employing job seekers and improving job-person fit.

This paper is primarily based on the available macroeconomic data that were collected from relevant national sources. In addition to these national data sources, figures published by the OECD were also used. Further scientific papers and sources published at home and abroad were also used, all of which come from recognized scientific journals. Our findings from previous research projects and reports served as our primary data sources.

The collected data were further analysed by using qualitative and quantitative methods. From among qualitative methods inductive-deductive approaches and critical analysis were applied, and from among the quantitative ones descriptive statistics were used. The research findings are presented both in text and in graphical form.

Results and discussion

Taking the expenditure or the number of participants into account, the Hungarian public work system is unique in Europe. It is the most important employment policy of the period after 2010 so analysing its long term and short term impact is an important task. Researchers mention several advantages and disadvantages of the public work programme as written below.

The positive aspects of public work programmes include (Csehné, 2018; Csoba, 2017; Czirfusz, 2014; Czibere – Molnár, 2017; Koltai, 2014; Koós, 2016; Uszkai, 2014; Váradi, 2010; Váradi 2016; Virág, 2017):

- Society supports "work for benefit" principle.
- Undoubtedly, result is that the employment rate has significantly been improved as of 2010 by public work. Reintegrating inactive employees is a serious achievement.
- In areas where local governments are the sole employers, it is the ultimate instrument in fighting against poverty and desolation indirectly.
- For those who have been unemployed for long it ensures occupation, structures their time, they can be in community, make new contacts and feel useful.

The negative aspects of public work programmes include (Csehné, 2007; Csoba, 2010; Csoba, 2017; Cseres-Gergely – Molnár, 2014a,b; Fazekas, 2015; Frey, 1995; Köllő, 2014; Koltai, 2014; László, 2016; Scharle, 2013):

- It only takes employees to the primary labour market in minimal numbers. One of the reasons for this is lack of vacant positions.
- There is no effective educational system for public work programmes although there are enough vacant positions in the developed regions of the country but they require skilled labour force. Although the skilled worker also is very important in the case of other positions (Czeglédi-Juhász, 2014).
- There is a secondary, closed, devaluated labour market with lower efficiency where public work wages are lower than the minimum wage.
- The typical tasks of public work in greater number (manual, unskilled jobs) do not prepare employees and do not provide them with work experience that would assist them in finding a job.

The results of the examinations carried out so far point out that the expenditures on public work prevent the employability of active instruments and there is a strong 'getting stuck effect' (Frey, 2007; Galasi – Nagy, 2008; Cseres-Gergely – Molnár, 2014a). After the programme terminates, the chances of finding a job are much lower and almost half of those concerned work at the same workplace several times. Public work has resulted in a quasi-secondary market that can slow down economic development programmes.

Conclusion

Measuring the success of active employment policies properly is essential in the case of every programme so that feedback can be obtained and the possible faults may be eliminated. One of the most important lessons to be learnt from international examinations is that active labour market programmes are effective if they can ensure well-rounded complex solutions while concentrating on a special problem. However, in Europe expanded national programmes can be seen for a broad target audience and potential participants are not selected and higher allowances are given than the benefit. In most cases these programmes operate with a low level of efficiency. Accordingly, the Hungarian programmes are also not expected to serve as a remedy to structural unemployment and the problem of low employment rate. Based on the results of the analysis the Hungarian public work programmes have not resulted in decreasing unemployment in the long term. This is in line with international experience and the previous research results on national public work programmes. Experts agree that the most important objective is to avoid getting stuck in public work. Ensuring the transparency of the programme, clarifying its conditions and guaranteeing its high standard is the task of national politics. The employment problems of the settlements could be solved by the simultaneous presence of public work, job creation and training.

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OPERATION AND ACTION OF A TRADE UNION (IN TERMS OF CZECH REPUBLIC LABOUR LAW)

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Abstract

Social dialogue constitutes an important part in the process of shaping of social relationships. The importance of social dialogue comes to attention particularly in connection with working conditions for employees. They also have the right to establish different forms of employee representatives so that their economic, social and cultural interests can be promoted and protected with a higher level of dignity and with greater force. A trade union represents one of the fundamental employees' representatives recognized by law and it also has the right to bargain collectively. Collective bargaining leads to the conclusion of collective agreements that guarantee better working conditions for employees. The prerequisites for operation and action of a trade union within an undertaking differ according to national legislation. The presented article points out the terms and prerequisites of operation and action of a trade union within an undertaking in the scope of the Czech legal order. It brings to attention several application impacts of a trade union's fulfillment prerequisites of its operation and action, as well as the yet unresolved issue of plurality of trade unions.

Key words: social dialogue, labour condition, trade union, acting, right to collective bargaining

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JEL classification: J51, J52, K31

Introduction

The Czech legal order implements transnational sources of law (for instance Council Directive of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship (91/533/EEC); Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, etc.) and guarantees the right to information and consultation for employees. In order to exercise their right to information and consultation, employees can choose their representative, typically a trade union. The employer is

obliged to inform the employees and to deal with them directly if there is no trade union, workers council or a representative for occupational safety and health protection (hereinafter referred to as *"Employees Representatives"*). Where there are more employee representatives within the employer's undertaking, it is required that the employer fulfills obligations (duties) pursuant to Labor Code in relation to all employee representatives unless another manner of collaboration is agreed within the Employee Representatives and between the Employee Representatives and the employer (Toman & Švec &Schuszteková, 2016). An employee information and consultation procedure is implemented at the level corresponding to the subject-matter of consultation and with regard to competence and scope of powers of the employee representatives and the management level - Section 276 (1) of Act No. 262/2006 Coll., hereinafter 'Labor Code'). The Labor Code does not prioritize any type of Employee Representative (Tomšej, 2018). They can operate and act parallelly. In the Czech Republic, however, the representation of employees is historically carried out mainly by the trade union (Horecký, 2012).

The wording of the above-mentioned provision also implies the possibility of parallel operation and action of more Employees Representatives. It does not mean that only different types of Employees Representatives (e.g. trade union and workers councils - the rule under which the workers council was dissolved and all competences were supposed to be transferred to the trade union was abolished in 2008 - abolition of the ban on the coexistence of the workers council and the trade union) could act simultaneously, but parallel operation and action of more trade unions is in compliance with law as well. So-called plurality of trade unions may exist within the employer's undertaking. The employer has no legal right to prohibit or otherwise prevent the establishment of an Employees Representative (the establishment of a trade union or operation and action of an already existing trade union - Section 276 (1) of the Labor Code).

The presented article points out the terms and prerequisites of operation and action of a trade union within an undertaking in the scope of the Czech legal order. It brings to attention several application impacts of a trade union's fulfillment prerequisites of its operation and action, as well as the yet unresolved issue of plurality of trade unions.

Theoretical background

The transition from the planned economy to market economy resulted in almost complete disintegration of both economic and legal norms. The emergence of the new economy based on market forces has changed not only the existence of companies or organizations, but also the position of individual actors and their mutual relations. The gradual establishment of organizational-legal forms of entrepreneurship has brought about the establishment of statutory and facultative bodies of enterprises. Large companies have gradually disappeared or transformed into small and medium-sized businesses. The new circumstances have brought about significant changes in the employer-employee relation.

According to Bronstein (2011), the gradual liberalization of the business environment in the post-communist countries with an emphasis on removing barriers and facilitate entrepreneurship resulted in series of changes in the employer-employee status. The

new situation created unequal conditions for employees, with extremely small space for improvement with absence of employee representation. Several professional discussions have been made about the legal protection of individual participants. Expert dilemmas have emerged whether or not enter the way of liberalization. The issue was closer discussed by Koldinska (2008).

The issue of forming new conditions anchored in law was not only the problem of former Czechoslovakia, but also the problem of other post-communist countries in Central and Eastern Europe. Several examples have emerged, in terms of substantial changes the analysis made by Dimitriu (2017) is worth mentioning. Trade unions were established in the former Czechoslovakia during the era of planned economy. Their main objective was to create suitable social conditions and possibilities for regeneration of employees instead of representing the rights of employees. Nowadays, trade unions mainly focus on protection of employee rights and the employees' status in relation to the employer. Effective functioning of the organization requires a bilateral dialogue based on constructive proposals and collective bargaining. That has not been and not only the problem of former post-communist countries in Central and Eastern Europe. It is considered to be a global and transnational problem (Blackett, 2018).

National conditions for application of legal acts are based not only on legal background, but also on the economic and social development of the country. According to co-authors Wasileski and Turkel (2008), this served as a basis for the Czech reforms of labour law. Even though national conditions vary from one country to another, there are still a number of conditions that are similar. It is possible to conduct both a legal analysis and comparison on professional and scientific level to provide and impulse on international level of employment law (Burchill, 2016).

Currently, not only the Czech, but also the international labour law is striving to contribute to establishment of proper working conditions for employees, ensuring and respecting their rights in the framework of labour relations. This might happen in form of a demanding social dialogue between the employees and employers (Magnani, 2018). Collective bargaining is the most suitable tool that enables better conditions to be achieved through adoption of the collective agreement of particular company or organization. Further part of this article will deal with the legal arrangements and the ideas of recognized Czech experts on labour law e.g. Pichrt (2010).

The described issues are not addressed by many authors. It rather represents an area out of focus and beyond the interest of practical interpretations. Although the theme of pluralism of trade unions and the operation and action of a trade union organization at the undertaking originally formed part of conceptual changes to the Labor Code (2016) as a result of the pressure of the Central Workers' Representative in the Czech Republic – Czech Moravian Confederation of Trade Unions, the issue was dropped during the amendment work. As the result of this situation in the Czech Republic still persist especially the question, how to solve the question of trade union plurality. Although the issue of plurality and conditions of operating and action was dealt with by the Constitutional Court No. 10/12 and the Supreme court (21 Cdo 2622/2017-160), but with regard to international conventions (e. g. ILO Convention No. 87)., the current state of affairs can be criticized. With regard to the logical structure of the contribution, the sources are mentioned in the respective sections.

Employee representatives – that is, trade unions, Works Councils, and safety at work and health protection stewards – are statutorily required to keep employees in all workplaces duly informed about their activities and about the content and conclusions of all information and negotiations with the employers. Employee representatives must not be disadvantaged, advantaged or discriminated against because of their membership in a Works Council (Pichrt, 2017). Trade unions play by far the most significant role in employee representation by virtue of regulation in terms of competency but also in practice from the perspective of occurrence, function in social dialogue and particularly collective bargaining. Only trade unions can represent employees in labour relations, in collective bargaining by concluding collective agreements and in tripartite negotiations. Regulation of the role and prerogatives of trade unions is such as the reduction of working hours without reducing wages and leave entitlement. The agreements also cover employment conditions, for example fixed-term work, part-time work and temporary agency work. Furthermore, the agreements consider social policy, such as employee recreation and transport, as well as continuous vocational training, and health and safety. Collective agreements usually also set principles for the cooperation of the contractual partners (Alberti & Pero, 2018).

Material and methods

The objective of the paper is to discuss the issue of plurality of trade union and conditions of operation and action of trade union organization at an undertaking according to the Czech Labour Code and partially sketch the situation to propose possible solutions. The main goal of this text is to map and evaluate the current system of the above mentioned topics of using the employee participation rights in terms of the Czech labour law and to lead theoretical criticism (and prepare the first step for upcoming contributions). The partial goal is to point out the interdependence and interaction of the economic and legal definition of labour relations and protection of employee interests.

Although the Constitutional Court of the Czech Republic and the Supreme Court held the situation of plurality of trade union and the conditions of operating and action of trade union at an undertaking for clear, there is enough place, with regard of some of the conventions of International Labour Organization to determine and assume that the Czech Labour Code does not correspond entirely with the international convention anchored rights of employee participations. Qualitative scientific methods were used for the discussion of above mentioned issues: critical in-depth analysis of the current legal framework, descriptive method and scientific cognitive methods.

Results and discussion

The operation and action of a trade union within the employer's undertaking. A trade union can perform a number of activities within an undertaking and possesses a wide range of authorizations (which is mirrored by the employer's obligations that need to be fulfilled towards the trade union). As a result of the fulfillment of the prerequisites which are mandatory so that the trade union can start its operation and action within an undertaking, the trade union has the right to information (e.g. about

development in wages, the average wage and its individual constituents /elements/, including breakdown according to individual occupational categories unless it is agreed otherwise) consultation (e.g. amount of work and working pace or remuneration system for employees), co-determination (the period of collective leave), control (compliance with working conditions and health and safety conditions) and the right to collective bargaining - concluding a collective agreement (Horecký & Samek, 2015).

In order for a trade union to be able to exercise all the above mentioned rights and authorizations, it must meet the legal prerequisites of its operation and action. If such prerequisites have been met, the trade unions can exercise their rights and authorizations within the particular undertaking, regardless of its age, size or original professional orientation. The Charter of Fundamental Rights and Freedoms of the Czech Republic prevents unequal treatment of trade unions. Reducing the number of trade unions operating and acting within an undertaking is inadmissible, as well as favoring some of them (whether in the enterprise or in the industry - Article 27 (2) of the Charter of Fundamental Rights and Freedoms).

The prerequisites of operation and action of the trade union are explicitly stated in section 286 of the Labor Code. A trade union that operates within the employer's undertaking may only act if it is authorized thereto in the Articles and if at least three members of such trade union are in an employment relationship to the employer (i.e. such undertaking); collective bargaining may be done and collective agreements may be concluded under hereinbefore mentioned conditions only by a trade union or its branch organization if the trade union is in that respect authorized by its statutes. Having met the minimum number of union members who are in an employment, the trade union still has to fulfill the so-called obligation to notify. The trade union may start to operate the day following the day on which it notified the employer that it had met the abovementioned prerequisites. If the trade union ceases to comply with these prerequisites, it shall notify the employer about such fact without undue delay.

In sum, the legal order of the Czech Republic assumes the basic three prerequisites for the operation and action of a trade union within the employer's undertaking:

(a) the right of a trade union to operate and act within an undertaking (must be established in its Articles),
(b) the fact that the trade union has at least three employees in employment, and
(c) a notice to the employer showing that it has met the prerequisites under (a) and (b) - point no. 18 of the Judgment of Constitutional Court of Czech Republic from the 23th of May 2017, ref.. Pl. ÚS 10/12. (hereinafter „Judgment2"). Although the prerequisites seem to be quite formal, the interpretation of each of them causes complications and practical problems.

The fact that a trade union associates at least 3 members who are in employment relationship to the employer is perceived as conflicting with the right to freedom of association (compare point no. 21 of *Judgment2*). As for the minimum number of employees, the said provision permits the establishment of a trade union, but at the same time it does not allow a trade union to be established and operate within an undertaking with fewer than three employees or, where fewer than three employees are members of the trade union. This approach practically prevents employees from

exercising, for example, their right to representation in dealing about the amount of property damage (for which the employee is responsible) and the manner of its compensation (section 263 (3) of the Labor Code) or professional representation in cases of solving individual questions related to the employee (section 279 of the Labor Code). However, according to the Czech Constitutional Court, the described situation is constitutionally conforming, i.e. it does not violate the rights of employees (point 52 of *Judgment2*).

The Czech Constitutional Court has also dealt with the question whether it is righteous that the prerequisites for operation and action of a trade union apply only to the employees in the employment relationship (in the Czech Republic, employees may perform dependent work also outside the scope of employment based on so called agreement to complete a job or agreement to work - as the flexible forms of employment). The Czech Constitutional Court has concluded that the prerequisite mentioned is entirely consistent with the law (Sil, 2017), since the long-term stability of the employment relationship cannot be expected for employees working outside the scope of employment (flexible forms of employment) and it is, therefore, necessary to take into account the legitimate interests of the employer. The Constitutional Court has thus practically stated that the protective function of labor law is shifted to the employer's side (point 53 of Judgment2).

The condition of notification - notification to the employer that the trade union meets the prerequisites and thus can act and operate - also poses a conflicting question in practice. The Labor Code places a requirement on the trade union to notify the employer in writing that it fulfills the prerequisites for operation and action (i.e., first of all, that it associates three of its employees in the employment relationship). Employers, supported by the views of some authors, insist that the trade union demonstrates to the employer the fulfillment of the abovementioned prerequisites, i.e., they insist that it also designate the three employees from whom they derive their right to operate and act (Vozábová, 2014). The author of this article, on the contrary, takes the opinion that the trade union does not have the obligation to prove the fulfillment of the conditions to operate and act (Act no. 89/2012 Sb., hereinafter "Civil Code"). The Civil Code, i.e. the statute establishing the general rules of legal action, constitutes the rule that those who act are considered to act honestly and in good faith, in other words that they do not seek to deceive the addressee of the negotiations (the employer) and abuse their rights. It is up to the employer to initiate a lawsuit to confirm the fulfillment of the prerequisites of operation and action. This opinion can be supported by the case law of The Supreme Court of the Czech Republic (though The Supreme Court of the Czech Republic had assessed the situation before the obligation to notify was enacted), which indicates that the trade union acts and operates not only after having notified the employer, but also "as soon as it (effectively) exercises (has begun to exercise) acts that are characteristic for the activities of trade unions and from which the employer must have (with no reasonable doubt) recognized (Judgment of The Czech Supreme Court from 28. Mai 2013, ref. 21 Cdo 390/2012) that it is a sui generis association – a trade union.

A trade union's entitlement to act and operate must result from its Articles. Articles are considered to be a public document (Decision of Constitutional Court of Czech Republic from 25. August 1998, ref. III. ÚS 195/98). The legislator does not require trade unions to lay down specific names of the employers in their fundamental

documents, but they must lay down the rules under which they can perform their activities, i.e. to determine who can act on behalf of the trade union. A trade union has the right to create an internal organizational structure without the intervention of the state or the employer (point 333 ILO - Digest of decision and principles of the Freedom of Association Committee of Governing Body of the ILO). The operation of a trade union can also be linked to a particular sector, but it cannot be understood that a trade union can only operate within an employer (undertaking) which, from the point of view of the industry, falls under the umbrella union confederation. The law does not require any identification of a particular employer and does not impede operating in an industry other than the original one, and nor can such obligation be inferred from the case law. In practice, however, it is possible to meet the views that trade unions cannot operate outside of their original sector (for example, KOVO – metal workers - could not operate in the chemical and energy industries). However, it is clear from the available decision-making practice that the autonomy of a trade union is not only a matter of defining its internal structure but a trade union can also define its scope of operation, irrespective of the specific industries (Judgment of the Czech Supreme Court from 21. December 2017, ref. 21 Cdo 2622/2017-160).

The solution of the issue of the trade union's right to operate and act also involves the need to deal with the problem of pluralism of trade unions during collective bargaining, realization of the right to information and consultation. It is of high importance not to forget to focus on other issues, such as the employer's duty to ensure adequate opportunities for the exercise of trade union's operation and activity. The provisions of section 277 of the Labor Code implies an obligation on the part of the employer to create, at own cost, conditions for proper performance of activities by Employee Representatives, in particular by providing them, within operational possibilities and within appropriate scope, with rooms (furnished and equipped as necessary) and by bearing the cost relating to their maintenance and technical operations and also by covering the cost of necessary documents. Simultaneous activity of several trade unions may impose a considerable economic burden on the employer. It is clear from the case law of Supreme Court of the Czech Republic that an employer may not treat individual trade unions unequally, in other words the employer must not discriminate one trade union against another one. On the other hand, taking into consideration the adequacy and proportionality of the rights of the trade union on the one hand and the obligations of the employer on the other hand, the employer does not need to equip all the trade unions with the same tools, resources and/or provide them with the same amount of money, etc. In carrying out their duties, the employer can take into account the popularity of the trade union, its size and the extent of its activities the trade union actually carries on, etc. (Judgment of the Supreme Court of Czech Republic from 28. January 2013, ref. 21 Cdo 974/2012).

A trade union that fulfills the prerequisites for operation and action has the right to collective bargaining. Collective bargaining represents one of the basic possibilities in the Czech Republic how to adapt the working conditions within the employer's undertaking. In a collective agreement, the contracting parties may modify their mutual (reciprocal) rights and obligations (e.g. the employer's duty to provide a trade union with premises - an office for a trade union official, including the facilities, or the possibility to be present at meetings of the higher decision-making bodies of the employer, or limiting the scope of agency employment or its use only in agreement

with the trade union, etc.) and consequently the collective agreement shall include the regulation of employees' rights - not obligations. In the collective agreement, the employer may, in agreement with the trade union, guarantee more favorable working conditions than the Labor Code and other labor law provisions. Determining new obligations for employees, modification of the existing ones, does not belong in a collective agreement - employers may use an internal regulation to modify employee obligations, typically the Work Rule. Where a trade union exercises activity within the employer's undertaking, the employer may issue or modify the work rules (work regulations) only with a prior written consent of the trade union (section 306 (4) of the Labor Code).

Collective Agreement represents one of the possible sources of law in labor law (in the normative part - collective regulation of working conditions for an indefinite number of employees). The process of conclusion of a collective agreement is governed by a specific legal regulation - Act No. 2/1991 Coll., On collective bargaining, hereinafter "Collective Bargaining Act"). The Collective Bargaining Act contains the regulation of the collective bargaining process and the settlement of disputes concerning the fulfillment of collective bargaining obligations or disputes on conclusion of collective agreements. The Collective Bargaining Act, Labor Code and other labor law regulations do not address the situations in which collective bargaining is about to take place and more than one trade union operate within the employer's undertaking.

Consequences of plurality of trade unions

The basic rule, which can be inferred from the Labor Code, states that the trade union concludes a collective agreement on behalf of all employees within the employer's undertaking, that is, also on behalf of the employees who are not trade union members (Aimo & Izzi, 2018). However, with regard to the question of the operation of a trade union, a crucial question arises - and that is how many collective agreements can be concluded within the employer's undertaking in a situation when there are several trade unions operating within the employer's undertaking, i.e. there is a plurality of trade unions within the employer's undertaking. The plurality of trade unions is compliant with the Czech legal order (see above). It would, therefore, be possible to derive from the abovementioned fact the plurality of collective agreements. The Labor Code, however, in the provision of Section 24 (2) contains the explicit rule according to which where two or more trade unions operate within one employer's undertaking (plant, enterprise), the employer must negotiate the conclusion of the collective agreement with all such trade unions. Unless the trade unions agree between (among) themselves and with the employer otherwise, the trade unions act and negotiate the collective agreement jointly and in mutual consent, with legal consequences for all employees (of the employer concerned). Thus, the plurality of collective agreements is not admissible by law. In connection with the question of the operation of the trade union within the employer's undertaking and its right to conclude a collective agreement, it is, therefore, decisive how to deal with the situation when the operating trade unions do not have the same intentions and wish to negotiate the working conditions to a different extent, or when trade unions compete or when one of the trade unions can be considered a so-called yellow trade union, which is established only with the purpose to complicate the use of the right to collective bargaining and the conclusion of a collective agreement (Horecký, 2012).

The Labor Code introduces a rule according to which there can only be one collective agreement within the employer's undertaking. Only after an agreement between (among) the pluralist trade unions, and followed by an agreement with the employer, a collective agreement can be concluded, and such collective agreement may contain different arrangements for employees who perform, for example, a substantially different work. However, plurality of trade unions tends to create a legal obstacle to the conclusion of a collective agreement, as trade unions are often unable to agree on a particular procedure. If there is a plurality of trade unions and no agreement on a special procedure has been reached, a collective agreement cannot be concluded. The employer cannot choose a contracting partner - a trade union – according to their liking. The employer should also not bargain collectively when being asked to do so by only the collective agreement is only valid if it is signed by the contracting parties on the same deed (section 27 (2) of the Labor Code). If the collective agreement is not signed on the same deed by the contracting parties, the collective agreement is null and void, i.e. the collective agreement is seen as if it has never been concluded. The collective agreement cannot be concluded only with one of the trade unions, i.e. without all of the trade unions having agreed on a specific procedure. Failure to proceed according to the aforesaid would result in the collective agreement being null and void under section 27 (2) of the Labor Code as there would be no manifestation of will and it would be in obvious contradiction with the law. Neither (None) of the trade unions can be excluded from the negotiations on the collective agreement.(Šubrt, 2013).

The legal order of the Czech Republic does not adequately addresses the problem of plurality of trade unions in collective bargaining. In the previous form of the Labor Code, the rule for dealing with plurality of trade unions could be found, but with regard to the ruling of the Czech Constitutional Court (Judgment of Constitutional Court of Czech republic from 12. March 2008, ref. Pl. ÚS 83/06., hereinafter "Judgment"), the mentioned rule was abolished in 2008. The Labor Code, as the fundamental legal norm regulating the means of solving the plurality of trade unions, acknowledged the so-called majority principle (i.e. principle of majority), according to which the employer could, in the event that the trade unions failed to come to a mutual agreement, enter into a collective agreement with a trade union, or several trade unions, which associated the highest number of union members (§ 24 sect. 2 Labour Code in wording to 13. April 2008). The case law of the Czech Constitutional Court does not leave any room for doubt that the majority principle is not acceptable as the solution of the plurality of trade unions in collective bargaining, as that principle does not comply with constitutional principles of the Czech Republic and especially with the rules of equality (point 265 of Judgment).

The Labor Code only provides the rule for dealing with the situation of the use of the right to information and consultation and representation by an Employee Representative if the employee is not a union member or in matters of individual nature (i.e. those concerning a particular employee).

Where two or more trade unions exercise their activities within one undertaking in those cases which concern all the employees or a large number of employees and in which the Labor Code or other statutory provisions require information, consultation, the expression of consent by, or agreement with, the (competent) trade union, the employer shall fulfil the duties in relation to all the trade unions (exercising their

activities within the undertaking) unless the parties determine some other information and consultation procedure or another manner of expression of consent.

Where two or more trade unions exercise their activities within one undertaking, such trade union organization, of which a certain employee is a member, shall act on his behalf in labor (industrial) relations. As regards an employee who is not a member of any trade union organization, the trade union organization with the largest number of members who are employed by (i.e. are in an employment relationship with) the employer shall act on behalf of the employee in labor relations unless otherwise determined by the employee (Magda & Marsden & Moriconi, 2012). Unlike the case of plurality of trade unions during collective bargaining (or collective adjustments to working conditions), the majority principle is seen as acceptable in situations concerning individual employees.

Conclusion

The solution of the issue of the fulfillment of the prerequisites of operation and action of a trade union within the employer's undertaking as well as the issue of plurality of trade unions represents a substantive aspect of successful fulfillment of the right of trade unions to collective bargaining (Myant, 2013) and full use of the right of employees in the Czech Republic is crucial for the successful fulfillment of the right of trade unions to collective bargaining and full use of the employees' rights – freedom of association – in the use of the right to information, consultation and representation by Employees Representatives in collective labor relations and in solving individual labor issues (Myant, 2017). At present, however, it is possible to meet completely contradictory views on the fulfillment of the prerequisites that a trade union needs fulfill to be able to operate and act (e.g. obligation to notify and proving thereof). Authorization to act in accordance with the Articles can be seen as another area triggers passionate debates, same as the yet unresolved issue of plurality of trade unions. De lege ferenda it is advisable to deal with the outlined situations expressly.

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HUMAN RESOURCE AND CORPORATE CULTURE: GENDER-BASED DIFFERENCES IN THE ASSESSMENT

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Abstract

Within the different concepts of the business efficiency growth, now the corporate culture is part of a modern enterprise management. Managers start to consider the corporate culture as an important factor in successful business especially in the area of human resource management. Corporate culture research was conducted through questionnaires based on the Cameron and Quinn methodology. The questionnaires were distributed in 2017 to employees working in companies operating in Slovakia. The sampling unit consisted of 3,750 respondents. The aim of the research was to identify gender-based differences in the assessment of corporate culture in enterprises in Slovakia. Based on the results, we can state that there exist no differences in assessment of corporate culture based on gender.

Key words: human resource management, corporate culture, gender-based differences, Slovakia

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JEL classification: O15, J24, M14

Introduction

The main aim of each business is to achieve success and prosperity. From the main aim the overall corporate strategy, decisions, and specific business activities are developed (Carreras, Arroyo, & Blanco, 2018; Caha, 2017; Straková, Pártlová, & Váchal, 2017; Diaz-Fernandez, Bornay-Barrachina, & Lopez-Cabrales, 2015; Demir, Demir, & Nield, 2015; Korcsmáros, & Seres Huszárik, 2015; Mura & Machová, 2015; Poliačiková, 2015). Increasingly, in this context, the concept of 'corporate culture' is used. Managers are beginning to realize that corporate culture can be a source of competitive advantage, especially if it is considered as valuable, rare, difficult to imitate, and if it is embedded in strategic management (Matraeva, Belyak, & Konov, 2018; Olšovská, Mura, Švec, 2016; Llorente-Galera, & Martos-Calpena, 2014; Graham,

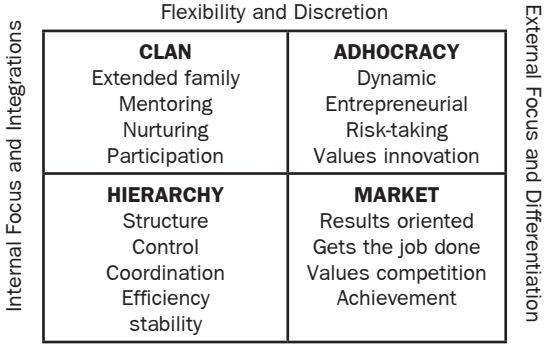
Harvey, & Puri, 2013). Subsequently, a corporate culture represents a combination of a strategic business perspective with human resources management which results in a positive behavior of managers and employees (Prange & Pinho, 2017).

The employees are proprietors of corporate culture. Corporate culture is a reflection of the human dispositions, thinking, and behaviour in the enterprise. It is recognizable, it acts on human consciousness and subconsciousness and in both, it manifests, too (Guiso, Sapienza, & Zingales, 2015b; Fernandez & Fogli, 2009; Beckmann, Menkhoff, & Suto, 2008). Corporate culture influences the management processes (Guiso, Sapienza, & Zingales, 2006). Corporate culture is extremely inertial and therefore, it is difficult to change it in the long term (Minárová, 2015; Kachaňáková, 2008). Each company has a dominant culture that is unique to this company. It provides its members the boundaries and guidelines that shape their behavior.

Theoretical background

A strong corporate culture positively influences decision-making, collaboration, communication, motivation, problem-solving and its implementation. The strong corporate culture facilitates the progress and implementation of management processes (Pan, Siegel, & Wang, 2017). Corporate culture gives individuals the ability to justify their behaviour in line with the values preferred in the company. On the other hand, managers can use corporate culture to support the activities of interest (Denison, Haaland, & Goelzer, 2003).

Figure 1. The Organizational Culture Assessment Instrument (OCAI)



Source: Cameron and Quinn (2006).

Each company is different. A unique corporate culture is typical for each company (Guiso, Sapienza, & Zingales, 2015a). However, each company joins a combination of four different types of corporate culture within a single cultural style leader (Cameron & Quinn, 2006). The authors cited have developed an Organizational Culture Assessment Tool (OCAI). It is a validated research method for assessing of existing

and preferred level of corporate cultures. The OCAI model is based on a model of company competitive values.

The framework explains how four corporate cultures compete with each other. Four frame parameters include internal focusing and integration vs. external focus and differentiation and stability and control vs. flexibility and discretion. Based on these parameters, the framework breaks corporate cultures into four different quadrants or cultural types: clan culture, adhocracy culture, market culture, and hierarchy culture.

Clan culture has roots in co-operation. Members share common views and see themselves as part of a large family that is active and committed. Management has the form of mentoring, and the organization is bound by commitments and traditions. The core values are rooted in teamwork, communication, and consensus.

Adhocracy culture is based on energy and creativity. Employees are encouraged to take risks, and leaders are considered to be innovators or entrepreneurs. The organization combines experimentation with an emphasis on individual ingenuity and freedom. Basic values are based on change and agility. The market corporate culture is built on the dynamics of competition where concrete results are achieved.

Market culture is focused on goals, as leaders are demanding. The main aim of succeeding and defeating all opponents combines the company. Market share and profitability are the main values.

A hierarchy corporate culture is based on structure and control. The working environment is formal, with strict institutional procedures. Management is based on organized coordination and monitoring, with culture emphasizing efficiency and predictability. Values include consistency and consistency (Teravainen, Junnonen, & Ali-Loytty, 2018; Jaeger, Yu, & Adair, 2017; Demski, van Ackeren, & Clausen Moraga, 2016).

The OCAI methodology reveals that it is rare for companies to share the same characteristics of all four cultural types. Quinn and Cameron (2006) found that flexible companies are more successful than rigid because the best companies can manage intercultural competition while activating each of the four value sets when needed.

Material and methods

Research of corporate culture was realized in 2017. Questionnaires were distributed to employees working in companies operating in Slovakia. To calculate the minimum sampling unit size following mathematical relation was used (Mason et al. 1990):

$$n = \frac{z_2^{0,025} \times \sigma_{\bar{x}}^2}{\Delta \bar{x}} \quad (1)$$

Total of 154 returned questionnaires were the minimum necessary to meet the pre-defined accuracy and confidence requirements. The aim of the research was to identify gender-based differences in the assessment of corporate culture in enterprises in

Slovakia, therefore the total sampling unit of 3,750 respondents was divided into men and women. 1,876 men and 1,874 women participated in the research. Comparison of sampling units is shown in Table 1.

Table 1. Sampling units

Data to identify respondents		Men		Women	
		Absolute frequency	Relative frequency	Absolute frequency	Relative frequency
Age	Up to 30 years	520	27.72	383	20.44
	31-40 years	591	31.50	553	29.51
	41-50 years	525	27.99	567	30.26
	51 years and more	240	12.79	371	19.79
Completed education	Primary	44	2.35	10	0.53
	Lower secondary	352	18.76	147	7.84
	Upper secondary	1,025	54.64	954	50.91
	Higher	455	24.25	763	40.72
Seniority	Less than 1 year	181	9.65	149	7.95
	1-3 years	489	26.07	690	36.82
	4-6 years	423	22.55	389	20.76
	7-9 years	354	18.87	312	16.65
	10 years and more	429	22.86	334	17.82
Working position	Managers	225	11.99	184	9.82
	Blue-collar workers	595	31.72	504	26.89
	White-collar workers	1,056	56.29	1,186	63.29

Source: Own research.

The role of the respondents was to divide 100 points between several statements corresponding to four types of corporate culture. This method evaluates the combination of four types of cultures that dominate to the current level of corporate culture. By answering the questionnaire for the second time, respondents divided 100 points according to what respondents preferred for the future. Respondents assessed six key aspects of corporate culture (dominant characteristics, organizational leadership, management of employees, organization glue, strategic emphases and criteria of success). By averaging all individual scores, the overall corporate culture profile was calculated.

Gender-based differences observed were tested using Student two-sample t-test. The null hypothesis of equal averages of corporate culture in terms of belonging to the gender was used. Testing the null hypothesis was performed at the significance level $\alpha = 0.05$.

Results and discussion

The research of corporate culture examined a total of six key aspects: dominant characteristics, organizational leadership, management of employees, organization glue, strategic emphases and criteria of success. The area of dominant characteristics was the first research area. 100 points were assigned among the following four statements:

- *Alternative A* – The organization is a very personal place. It is like an extended family. People seem to share a lot of personal information and features.
- *Alternative B* – The organization is a very dynamic entrepreneurial place. People are willing to stick out their necks and take risks.
- *Alternative C* – The organization is very results-oriented. A major concern is getting the job done. People are very competitive and achievement-oriented.
- *Alternative D* – The organization is a very controlled and structured place. Formal procedures generally govern what people do.

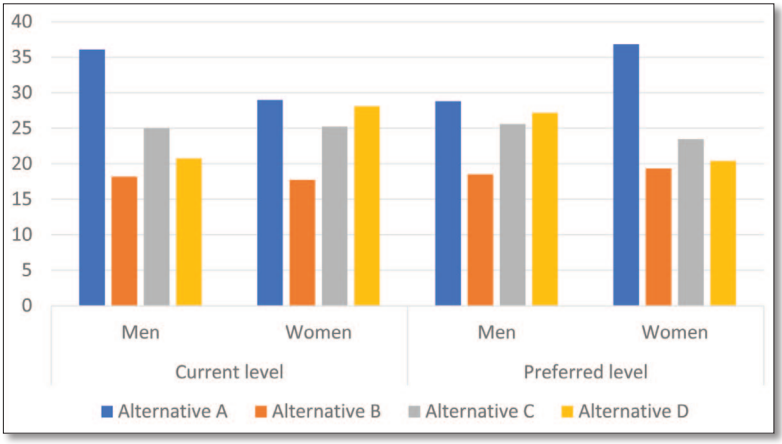
The results of the research are presented in Table 2 and Figure 2. Alternative A achieved the highest average values. At the present time, the both groups studied considered the organization as a very personal place, similar to a multiple family where people are often in touch with each other and have a lot in common. Alternative A was preferred by both genders in the future.

Table 2. The assessment of dominant characteristics

Level of corporate culture	Gender	Alternative A	Alternative B	Alternative C	Alternative D
Current level	Men	***36.09***	18.17	25.00	20.75
	Women	***28.98***	17.71	25.21	28.10
Preferred level	Men	***28.80***	18.47	25.57	27.16
	Women	***36.82***	19.32	23.45	20.41

Note: The highest average values are highlighted in bold.
Source: Own research.

Figure 2. The assessment of dominant characteristics



Source: Own research.

Organizational leadership was the second area studied. Respondents divided points between the following statements:

- *Alternative A* – The leadership in the organization is generally considered to exemplify mentoring, facilitating, or nurturing.
- *Alternative B* – The leadership in the organization is generally considered to exemplify entrepreneurship, innovation, or risk taking.
- *Alternative C* – The leadership in the organization is generally considered to exemplify a no-nonsense, aggressive, results-oriented focus.
- *Alternative D* – The leadership in the organization is generally considered to exemplify coordinating, organizing, or smooth-running efficiency.

The results shown in Table 3 and Figure 3 indicate that organizational leadership is represented by alternative D, both by men and women. Currently, the respondents consider company as a controlled and structured place. People are governed by formal methods.

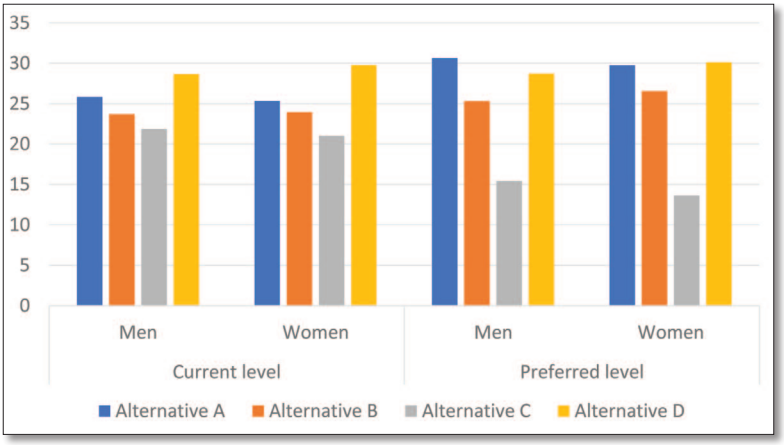
Differences occurred in the future direction of organizational leadership. According to men's opinion, in the next five years, alternative A should dominate the organizational leadership where leadership is generally considered to exemplify mentoring, facilitating, or nurturing. On the contrary, women's view of the future in the area of organizational leadership is leading for alternative D, where leadership is generally considered to exemplify coordinating, organizing, or smooth-running effciency.

Table 3. The assessment of organizational leadership

Level of corporate culture	Gender	Alternative A	Alternative B	Alternative C	Alternative D
Current level	Men	25.83	23.68	21.85	***28.63***
	Women	25.31	23.92	21.02	***29.76***
Preferred level	Men	***30.62***	25.29	15.40	28.70
	Women	29.73	26.54	13.61	***30.12***

Note: The highest average values are highlighted in bold.
Source: Own research.

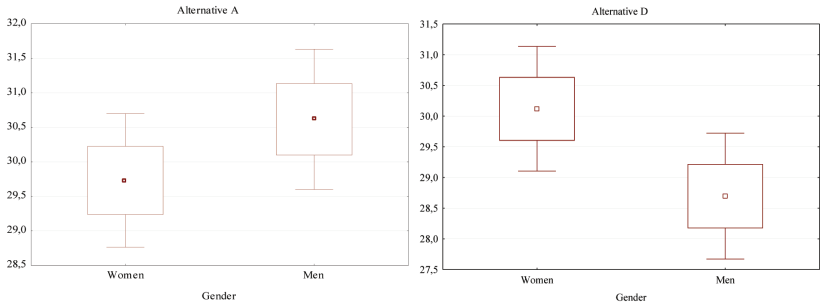
Figure 3. The assessment of organizational leadership



Source: Own research.

In the following step, significant differences in the opinions of men and women in the future direction of organizational leadership in alternative A and alternative D were investigated. Results are presented in Figure 4.

Figure 4. Statistical testing of gender-based differences in the area of organizational leadership



Source: Own research.

Significant differences in the respondents´ opinions in alternative A (p = 0.217) and alternative D (p = 0.053) were not confirmed by Student two-sample t-test.

In the third area researched (management of employees) presented in Table 4 and Figure 5, respondents assessed the level of corporate culture through the following statements:

- *Alternative A* – The management style in the organization is characterized by teamwork, consensus, and participation.
- *Alternative B* – The management style in the organization is characterized by individual risk taking, innovation, freedom, and uniqueness.
- *Alternative C* – The management style in the organization is characterized by hard-driving competitiveness, high demands, and achievement.
- *Alternative D* – The management style in the organization is characterized by security of employment, conformity, predictability, and stability in relationships.

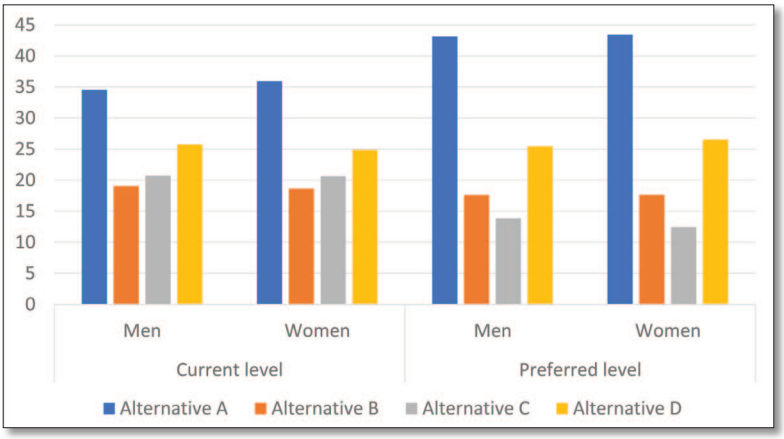
Table 4. The assessment of management of employees

Level of corporate culture	Gender	Alternative A	Alternative B	Alternative C	Alternative D
Current level	Men	***34.53***	19.04	20.73	25.70
	Women	***35.91***	18.64	20.61	24.84
Preferred level	Men	***43.12***	17.60	13.84	25.43
	Women	***43.42***	17.64	12.43	26.52

Note: The highest average values are highlighted in bold.
Source: Own research.

Table 4 and Figure 5 presents the same opinion of men and women on the current and future direction of corporate culture in the field of management of employees. All respondents agreed that the alternative A is dominant. In the opinion of all respondents, the teamwork and cooperation are used in companies operating in Slovakia.

Figure 5. The assessment of management of employees



Source: Own research.

The opinion of what joins the company was examined in the fourth area researched. Respondents assigned 100 points to the following statements:

- *Alternative A* – The glue that holds the organization together is loyalty and mutual trust. Commitment to this organization runs high.
- *Alternative B* – The glue that holds the organization together is commitment to innovation and development. There is an emphasis on being on the cutting edge.
- *Alternative C* – The glue that holds the organization together is an emphasis on achievement and goal accomplishment.
- *Alternative D* – The glue that holds the organization together is formal rules and policies. Maintaining a smooth-running organization is important.

Based on the results presented in Table 5 and Figure 6, we can state that gender-based differences were observed in the current level of organization glue. According to the men, alternative A achieved the highest average values. In men's view, loyalty, mutual trust and high loyalty to the company are factors connecting employees. According to women, employees are currently linking by formal rules and business policies. Maintaining a smooth-running organization is important.

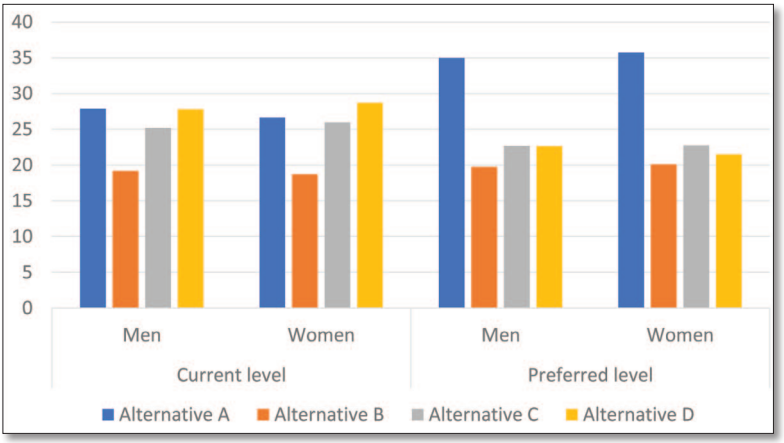
The opinions of men and women on the future direction of corporate culture in the area of organization glue are identical. Both men and women prefer loyalty, mutual trust and high loyalty as crucial factors connecting the company's employees.

Table 5. The assessment of organization glue

Level of corporate culture	Gender	Alternative A	Alternative B	Alternative C	Alternative D
Current level	Men	***27.88***	19.14	25.18	27.80
	Women	26.62	18.70	25.96	***28.73***
Preferred level	Men	***34.98***	19.74	22.67	22.61
	Women	***35.70***	20.07	22.73	21.49

Note: The highest average values are highlighted in bold.
Source: Own research.

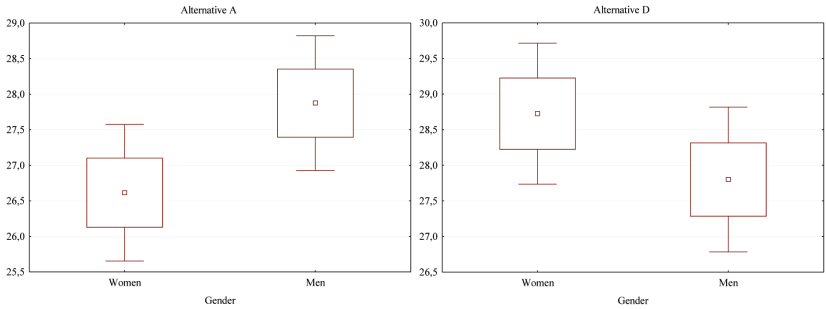
Figure 6. The assessment of organization glue



Source: Own research.

Gender-based differences observed in the area of organization glue in the current level were tested by Student T-test. Results are presented in Figure 7.

Figure 7. Statistical testing of gender-based differences in the area of organization glue



Source: Own research.

Significant differences in the respondents´ opinions in alternative A (p = 0.067) and alternative D (p = 0.201) were not confirmed by Student two-sample t-test.

In the next area researched, the OCAI methodology examines the respondents' view on the strategy used in the company. The respondents were asked to assess the following statements:

- *Alternative A* – The organization emphasizes human development. High trust, openness, and participation persist.
- *Alternative B* – The organization emphasizes acquiring new resources and creating new challenges. Trying new things and prospecting for opportunities are valued.
- *Alternative C* – The organization emphasizes competitive actions and achievement. Hitting stretch targets and winning in the marketplace are dominant.
- *Alternative D* – The organization emphasizes permanence and stability. Efficiency, control and smooth operations are important.

Based on the results shown in Table 6 and Figure 8, differences in gender were observed in the current level of strategic emphases. In the opinion of men, business strategies are focused on stability, efficiency, and control. The highest average was achieved by alternative D. In the area analysed, women have a different opinion. Alternate A achieved the highest average values. The results show that according to women's opinions, human development, high trust, and openness are dominant in strategies.

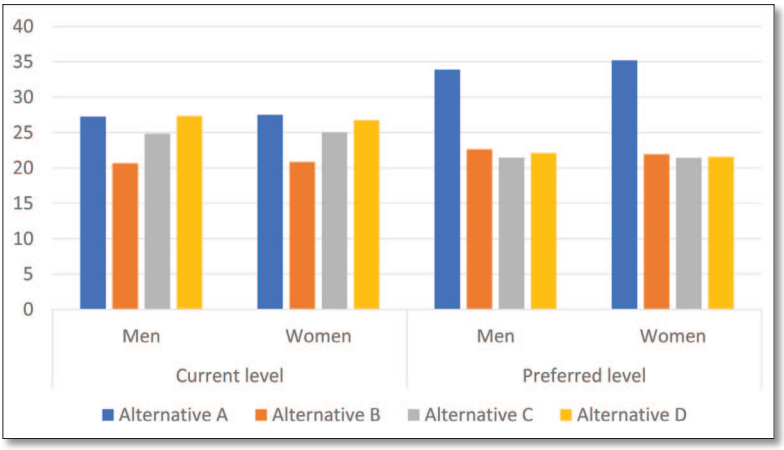
Opinions of respondents of both genders are identical in the area of the future direction of corporate strategies. All respondents believe that factors such as human development, high trust, and openness should dominate in the future. Alternative A is preferred in the future.

Table 6. The assessment of strategic emphases

Level of corporate culture	Gender	Alternative A	Alternative B	Alternative C	Alternative D
Current level	Men	27.23	20.63	24.82	***27.32***
	Women	***27.47***	20.82	24.97	26.74
Preferred level	Men	***33.89***	22.60	21.43	22.09
	Women	***35.16***	21.91	21.39	21.54

Note: The highest average values are highlighted in bold.
Source: Own research.

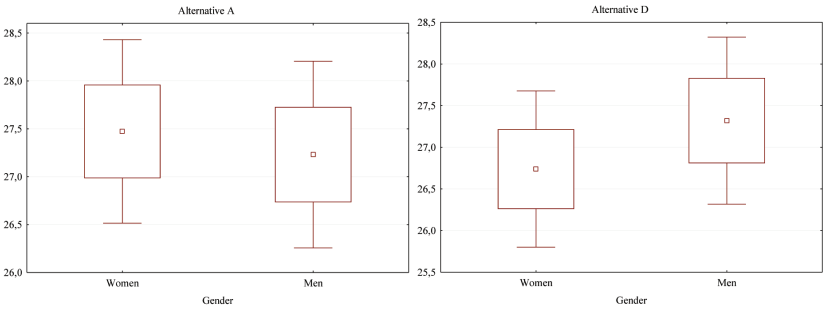
Figure 8. The assessment of strategic emphases



Source: Own research.

Significant differences in the opinions of men and women in the future direction of strategic emphasis in alternative A and alternative D were investigated in the following step. Results are presented in Figure 9.

Figure 9. Statistical testing of gender-based differences in the area of strategic emphases



Source: Own research.

Based on the results presented in Figure 9, significant differences in alternative A (p = 0.729) and alternative D (p = 0.407) were not confirmed.
The area of criteria of success was the last examined by the OCAI methodology. Respondents allocated 100 points among the four statements, depending on the experience from the company they work in:

- *Alternative A* – The organization defines success on the basis of development of human resources, teamwork, employee commitment, and concern for people.
- *Alternative B* – The organization defines success on the basis of having the most unique or newest products. It is a product leader and innovator.
- *Alternative C* – The organization defines success on the basis of winning in the marketplace and outpacing the competition. Competitive market leadership is a key.
- *Alternative D* – The organization defines success on the basis of efficiency. Dependable delivery, smooth scheduling and low-cost production are critical.

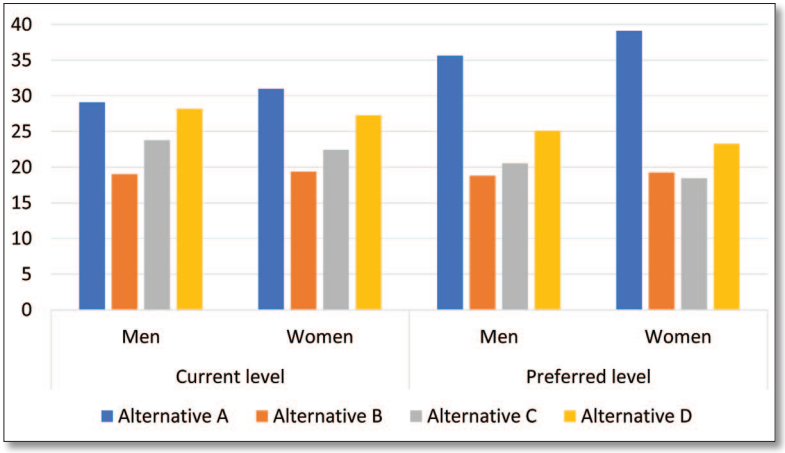
Table 7 and Figure 10 show the highest average values in alternative A. Both men and women agreed in the current and future direction of corporate culture in the area of criteria of success. In the opinion of all respondents, the company defines success on the basis of development of human resources, teamwork, employee commitment, and concern for people.

Table 7. The assessment of criteria of success

Level of corporate culture	Gender	Alternative A	Alternative B	Alternative C	Alternative D
Current level	Men	***29.10***	18.99	23.75	28.17
	Women	***30.96***	19.37	22.40	27.27
Preferred level	Men	***35.61***	18.78	20.54	25.08
	Women	***39.09***	19.19	18.45	23.28

Note: The highest average values are highlighted in bold.
Source: Own research.

Figure 10. The assessment of criteria of success



Source: Own research.

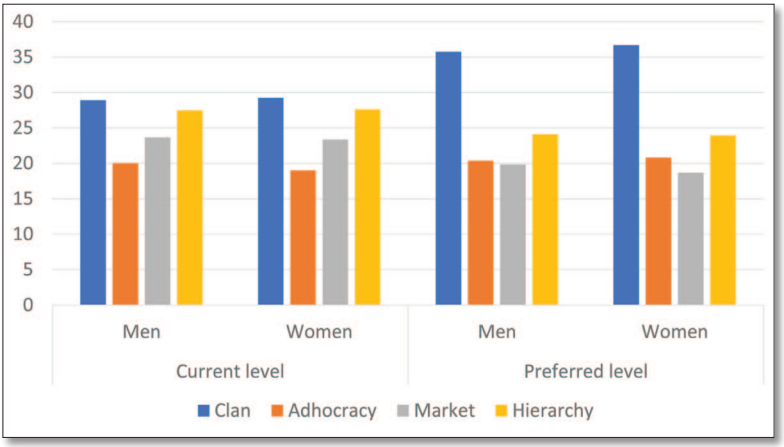
Based on the Cameron and Quinn methodology, the overall corporate culture profile was calculated by averaging all individual scores. The results are presented in Table 8 and Figure 10. Men and women agreed that clan corporate culture is currently dominated in companies operating in Slovakia. It focuses on creating of a very nice place for work where people share a lot of personal information, like a multiple family. Leaders are considered mentors and parents. Loyalty and tradition are dominant as well as teamwork and collaboration. Men's and women's views are identical in the future direction of corporate culture in companies operating in Slovakia. Respondents of both gender demand that tools typical for clan corporate culture should be used in future.

Table 8. The assessment of corporate culture profile

Level of corporate culture	Gender	Clan corporate culture	Adhocracy corporate culture	Market corporate culture	Hierarchy corporate culture
Current level	Men	***28.89***	19.99	23.65	27.46
	Women	***29.21***	18.96	23.36	27.57
Preferred level	Men	***35.72***	20.36	19.81	24.11
	Women	***36.65***	20.78	18.68	23.89

Note: The highest average values are highlighted in bold.
Source: Own research.

Figure 10. The assessment of corporate culture profile



Source: Own research.

Conclusion

In the area of human research management, corporate culture is a central theme now. Many researchers consider corporate culture as an important factor affecting the success of the company (Matraeva, Belyak, & Konov, 2018; Pesämaa, & Svensson, 2018; Sánchez-Sellero, Sánchez-Sellero, Cruz-González, & Sánchez-Sellero, 2018; Yao & Wang, 2014). Its goal is to ensure that employees are personally identified with an organization's activity which result in company success. In order to achieve the success, managers are supposed to design and maintain a positive corporate culture.

The research aimed at identifying gender-based differences in assessment of corporate culture in enterprises in Slovakia was conducted in 2017. Based on the results, gender-based differences were observed.

The first difference is evident in the assessment of the future direction of organizational leadership. For the future, men prefer applying tools such as mentoring, facilitating, or nurturing. According to women, the leadership in the organization is generally considered to exemplify coordinating, organizing, or smooth-running efficiency. However, statistically significant differences were not confirmed by Student two-sample t-test.

Another difference was observed in the current level of organization glue. In the opinion of men, loyalty and mutual trust bring employees together. Commitment to this organization runs high. According to women, formal rules, policies, and maintaining a smooth-running organization are important. Differences were tested by Student T-test. Based on the results, there exist no statistically significant differences in the assessment of corporate culture in the area of organization glue.

The area of strategic emphases was the last area where gender-based differences were observed. At present, in the opinion of men, the organization emphasizes permanence and stability. Efficiency, control and smooth operations are important. According to women, the organization emphasizes human development. High trust, openness, and participation persist. After testing, we can conclude that statistically significant differences were not confirmed. There were no differences in the other areas studied.

Corporate culture becomes an integral part of modern enterprise management, abroad (Machova, Bencsik, & Simonova, 2018; Singh & Sadri, 2015; Llorente-Galera & Martos-Calpena, 2014). A strong corporate culture enhances co-ownership, identifies employees with the organization, gives clear guidance on employee behaviour even in difficult situations, accelerates decision-making and implementation of plans and projects, increases participative internal management of the company, improves communication, reduces conflicts, reduces control demands, improves motivation and loyalty, increases the organization's competitiveness by clearly presenting it externally, increases stability and reliability. Emphasizing the corporate culture in Slovak companies, regardless of gender, will lead the company to gain a competitive advantage and to overall company success in the time of tough competition.

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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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PERSONALITY ASPECTS OF THE EMPLOYEE AND THEIR EXPLORATION FROM THE GDPR PERSPECTIVE

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Abstract

The paper addresses the issue what impact the personal aspects have on work performance in the light of the current European legislation on protection of personal data. The authors focus on two selective issues (mental ability and physical ability) with a practical impact on the activity of the employer. The goal of the submitted contribution is to assess whether the information about the mental and physical health of the employee is considered to be a personal data or sensitive information, and what legal basis the employer has for processing this data. Assessed is the holistically perceived personality of the employee with an emphasis on information about his mental and physical health, since it affects the legislation handling personal data. The second part of this study examines the legitimacy of processing personal data in the work environment of the employer. A resolved partial issue is the possibility of the employer to receive information about the mental health of the employee even if specific legislation does not provide such a prerequisite for work performance. To examine the defined legal issue we applied qualitative methods, critical in-depth analysis of the law and logico-cognitive methods. Based on the legal background and personal opinion, the authors consider determining the concept advocated by WP29, which provides a broad meaning of the term personal data regarding the health condition. According to this, the employers should consider not only the specific information about the health condition of the employee, but also the data concerning the health condition that can be deducted from the existing data.

Key words: mental health, physical health, personal data of the employee, employer

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JEL classification: : J81, K31, M12

Introduction

With an effect from 25 May 2018, a single regime of personal data protection is applied in the member states of the EU in the form of Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 94/46/EC (General Data Protection Regulation, hereinafter referred to as regulation). The regulation represents the basic legal framework for protection of personal data in all cases personal data are processed, including the work environment. The Collection of Laws under the number 18/2018 Coll. about the protection of personal data (hereinafter referred to as *„GDPR"*) is applied in cases not covered by material scope of the regulation.

The Regulation and the Personal Data Protection Act also applies when selecting the appropriate candidate for the job, since it is a process in which general data and sensitive personal data about the candidate is processed. The volume of processed personal data differs regarding the position the candidate is applying for and being shortlisted i.e. depending on the requirements to perform the agreed work determined by the employer in internal regulations of the workplace or according to assumptions stipulated by legislation. The basic guide is determined by Article 11of Act No. 311/2001 Coll. of the Labor Code. According to this, the employer may collect only the personal data regarding the qualification and professional experience of the employee, which may be essential in terms of work to be conducted by the employee. This involves information about the mental and physical health of the employee and his capability for work to be conducted. The first part of the study focuses on the issue whether information about mental and physical health of the employee is a general or sensitive personal data. Processing sensitive personal data requires the fulfillment of several specific obligations not possessed by the employer if they process only general personal data. The second part of the paper analyses the legal conditions of processing this information, indicating how to respect the legal regulation and apply in practice.

Theoretical background

Mental and Physical Health – general or sensitive personal data?

According to the Act. § 41 par. 2 of the Labor Code *if a specific legal regulation requires a certificate of mental and physical health or other preconditions to conduct the work, the employer may conclude a contract with a natural person mentally and physically competent for the position or a natural person who fulfills other assumptions.* Assessing the physical and mental health of the natural person in order to perform a particular type of work is intended to ensure the employer that the employee is mentally and physically capable to perform the work, as well as his health and life will not be endangered. The research of mental and physical health of the job seeker is a very sensitive field to study, but also important issue in terms of labor relations. This kind of research interferes with the physical integrity of the person and undoubtedly can be considered a personal data.

The law makes difference between the general and sensitive personal data. The sensitive personal data form a subcategory of personal data that reveals *racial or ethnical origin, religious or philosophical beliefs, membership in trade unions, processing genetical and biometric data for identification of the individual,* ***data concerning health condition*** *or data related to the sexual life and sexual orientation of the individual* (Article 9 (1) of the Regulation, resp. § 17 (1) of the Personal Data Protection Act). Processing of these data compared to general personal data may represent a higher risk to the person concerned and his interests protected by law, also providing information about the privacy of the individual in unwanted measure. The misuse of these data may have irreversible and long-term effects on the social status of the individual. This is the reason why distinctive, strict legal regulations apply to process these data, as well as increased requirements for data protection. Processing of sensitive data requires further obligations. The first is to keep a record about the activity of processing data according to Article 30 of the Regulation resp. § 37 of the Personal Data Protection Act. Furthermore, processing sensitive data on large scale is cited as an example, when it will be necessary to conduct impact assessment on protection of personal data according to Article 35, resp. § 42 of the Personal Data Protection Act. Finally, if the main activity is focusing on processing sensitive personal data on a large scale, it is obliged to appoint a person responsible to conduct this activity according to Article 37 of the Regulation, resp. § 44 of the Personal Data Protection Act (Žuľová, Valentová & Švec, 2018; Žuľová & Švec, 2018). While assessing personal data on large scale it is necessary to consider the amount of data being processed, the diversity of data, the geographical extent of the territory the processed data originates from and the data retention policy. It is important for the employer to be informed whether the information about the physical and mental health to conduct work is a data regarding the health condition of the employee or it can considered to be a sensitive personal data.

Health-related data are defined in Article 4 (15) of the Regulation resp. § 5, letter d) of the Personal Data Protection Act *personal data regarding the physical and mental health of the person, involving the data about providing health services that reveal information about the health condition of the individual*. Article 35 of the recitals of the Regulation explains that *personal data should include all the information regarding the health condition of the person concerned, providing information about the past, present or future physical and mental condition of the individual*. For example, data referring to health condition of the individual is the *information about the natural person obtained via registration to provide health services for the individual: number, symbol or specific data obtained by the person for individual identification to provide access to health services, information obtained conducting health tests, regular checks, genetic data and biological samples, any kind of information about illnesses, disability, risk of diseases, health record, clinical treatment, physiological or biomedical condition of the individual regardless to the source of information, whether the information is obtained from the doctor or other healthcare professional, information from hospital or healthcare institution or conducting a diagnostic test in vitro.* The term disease risk refers to data about the future health condition of the individual. According to WP, personal health information also includes the information about obesity, information about high and low blood pressure, hereditary or genetic predisposition, excessive consumption of alcohol, smoking or drug usage, and any other information that is scientifically proven or commonly perceived as a disease risk for the future. Based on the standpoint of WP 29 this type of data is also an information whether the individual is wearing glasses

or contact lenses, information about IQ, information about smoking and drinking habits, information about allergies, membership in support groups (alcoholic anonymous group, weight loss support group, support group for cancer treatment...) and also providing a fact that someone is ill in terms of labour relations. Personal data referring to health condition of the individual according to Article 8 (1) of Directive 95/46 (currently Articles 4 (15) and 9 (1) of the Regulation is also a data that the individual concerned had a leg injury or temporarily unable to work, Case C-101/01 Bodil Lindqvist, the Court of Justice of the EU. According to the EU Court of Justice, it is necessary to interpret health information broadly in order to include information about all health aspects of the individual, physical and mental condition as well. It is clear that the scale of personal data that may fall within the category of personal data regarding health is wide, and the WP 29 advocates an extensive interpretation of the concept of health data.

With reference to § 41 (2) of the Labor Code in case of required physical and mental capability for work, the content of information of the employer can only be oriented at the results of such assessments e.g. whether the individual is physically and mentally capable to conduct the work. The result of the pre-employment medical examination shows, whether the job applicant is capable to perform the work with temporary limitations or not capable in long-term to conduct the work he is applying for. The employer cannot use the details of such information with respect to detailed description of the health condition of the individual. Is the information about the physical and mental health of the candidate considered to be a data about the health condition?

The Czech Office for the Protection of Personal Data represents an opinion that certificates of a health institution or a doctor (e.g. pre-employment medical examination, preventive medical examination) whether the applicant is capable or not to conduct the work he is applying for is not treated a sensitive information about the health record. They argue that the documentation does not reveal specific information about the health condition of the employee, it reports whether the employee is capable to conduct the work required (Janečková & Bartík, 2016).

We are ready to argue against the opinion above in the light of the interpretation of the concept of health-related data advocated by WP 29. We can agree that based on *„positive"* assessment about work capability (capable to conduct the work required from the employee, health condition of the employee is acceptable to conduct the work) it is difficult to gain information about the specific health condition of the employee. However, it is necessary to reflect on generalization of the Personal Data Protection Authority of the Czech Republic. If the conclusion of the medical report says that the employee is capable for work with temporary or permanent limitations, the doctor provides a list of operations and tasks the employee can cope with. It cannot be excluded that in combination with the medical report it is defined in the decree (Professional Guideline of the Ministry of Health of the Slovak Republic about the preventive medical examinations related to work In: Bulletin of the Ministry of Health of the Slovak Republic, chapters 1-10, 29 January, 2014.) the conclusion about the health condition and health risks of the individual will be assessed. Regardless of whether these conclusions are accurate or inaccurate, legitimate or not, appropriate or inadequate are regarded to be relevant data related to health condition of the individual according to WP 29. Moreover, as it is stated by WP 29, in order for this data to be

qualified as a health-related data it is not always important to specify *„bad health"*. Information gained from medical examination is considered to be health-related, does not matter whether the results are within *„healthy"* limit or not. We represent the opinion that sensitive data related to health might be positive or negative information about the capability of the employee to conduct the required work (Slávik, 2014).

Crucial point is whether the personal data related to health is considered to be sensitive data or not in terms of the definition provided by the Regulation resp. the Personal Data Protection Act. Assessing the nature of data is not enough. At first, it might seem to be a *„raw"* data, which can hardly provide any detailed information about the health condition of the individual. However, potential utilization of this data should be considered. If there is a chance to gain information about the actual and possible health condition of the individual, information will be considered to be a sensitive personal data related to health condition of the individual.

Material and methods

The main objective of the presented scientific article is to assess the compliance of legal and regulatory requirements brought about by the new legislation on the protection of personal data, applied by small and medium-sized enterprises mainly in relation to identify personal data and sensitive personal data as well as utilization of these in employment relations. The subject of the research are the legal regimes, the General Data Protection Regulation puts emphasis on the assessment of information as a personal data and the sensitive personal data focusing on the information about the health condition of the individual as well as introducing the theoretical-legal background, which should be the determinant of the employer's behaviour when implementing employment relations.

The partial objective was to identify the criteria and possibilities of applying the new legal framework for protection of personal data, with an impact on direction of the company's personnel management in order to implement relevant changes required by the new legal framework, primarily determined by the General Privacy Protection Regulation. Primary data was obtained in the framework of the research project conducted by the Slovak Research and Development Agency (APPV) 16-0002: *„Mental Health in the Workplace and Employee Health Assessment."* Secondary data was obtained partly from domestic, but mainly from foreign scientific literary sources. While drafting the article, it was necessary to focus on underlying material based on primary and secondary sources. Due to the nature of the problem we decided to apply the selected qualitative methods. Critical in-depth analysis of the legal status and the logico-deductive methods were applied.

Results and discussion

Processing of information about the physical and mental health with an impact on work performance

As mentioned above, processing of sensitive personal data has its own legal rules and further requirements from the employer. In general, *processing of sensitive personal data is prohibited until there are no exemptions determined (Article 9 (2) of the Regulation, resp. § 17 (2) of the Personal Data Protection Act). The employer is authorized to process personal data related to the health of the employees according to the exemption formulated in Article 9 (2b), resp. § 17 (2b) of the Personal Data Protection Act, if processing data is necessary to meet the obligations regarding specific rights of the employer or the responsible person concerned in the field of labor law and the social security law as permitted by the law of the EU or the law of a member state of the EU resp. collective agreement in accordance with the law of the member state guaranteeing the protection of fundamental rights and interests of the individual concerned.* The purpose of protecting life, health and property is ensured by the exemption the employer is entitled for in the framework of the employment relationship to process the information about the physical and mental health of the job applicant.

The existence of an exception is the primary condition for processing sensitive personal data. The second condition requires a legal background for data processing (Nulíček, 2017). These are listed in Article 6 (1) of the Regulation, resp. § 13 (1) of the Personal Data Protection Act. Simplification is about the following six legal titles: agreement; execution of contract; legal license; protection of life, health and property; public and legitimate interest.

In order to avoid administrative offenses in processing of personal data, the *„safest"* legal title for data procession of the employer regarding the health issues of the employee is the legal license. Processing is necessary to fulfill the statutory duty of the employer resp. processing of personal data is necessary under a special regulation or an international treaty, the Slovak Republic is bound to (Article 6 (1) (c) of the Regulation, resp. § 13 (1) (c) of the Personal Data Protection Act). The employer is authorized to process the information (consent of the employee is not necessary) about the mental and physical health of the employee based on § 41 (2) of the Labor Code. If a particular type of work under a specific legal regulation requires physical or mental capability of the candidate, the employer can sign a contract with an applicant who fulfills the specific requirement. The fulfillment of this legal duty requires processing of data related to health condition of the candidate. It cannot be forgotten that assumptions about the physical and mental health and its impact on work performance must be laid down in a legal regulation.

A wide-spread practice of HR professionals to shortlist the appropriate candidate is to apply psychometric tests. Psychometric tests reveal information about the candidate they did not intend to reveal themselves, and also provide information about the mental health of the candidate, the personality, ability to work under pressure etc. (Olšovská & Švec, 2017). If the purpose of the psychometric test is to gain information about the mental health of the candidate as a precondition to conduct particular work

requires a specific legal regulation set out in Article 6 (1) (c) of the Regulation resp. § 13 (1) (c) of the Personal Data Protection Act. What happens if such specific legal regulation does not exist? Is the employer entitled to apply psychometric test if no specific legal regulation is provided?

Requiring medical examination from the applicant results in assessment of the mental capability of the job applicant to conduct the work he is applying for. The § 63 (1) (d) point 3 of the Labor Code empowers the employer (although indirectly) to require medical examination from the applicant resp. employee. According to the existing legislation, the employer is entitled to determine requirements for the proper performance of the agreed work, which are laid down in the document about the internal regulations of the company. There is no legal provision to prohibit the employer specifying the requirements and require a medical examination from the candidate resp. employee about the mental health to prove the ability to conduct the agreed work. According to our research and perspectives about the protection of personal data, it is necessary to respect the legal requirements while processing this kind of personal information. The lawfulness of processing information about the mental health requires the existence of **derogation** (Article 9 (2) of the Regulation, resp. § 16 (2) of the Personal Data Protection Act) and the **legal basis** (Article 6 (1) of the Regulation, resp. § 13 (1) of the Personal Data Protection Act).

When processing information about the mental health, while this information is obtained as a requirement by the employer to conduct specific work, the employer may also rely on exemption according to Article 9 (2) (b) of the Regulation, resp. § 16 (2) (b) of the Personal Data Protection Act. Thus, the law of the member state permits processing of data about mental health in order to exercise specific rights in the field of labor law. The employer should be careful about the importance of processing this type of information. It is necessary to consider it from certain aspects. The purpose of psychological assessment with the help of psycho-diagnostic methods should focus on determination of personality traits of the employee i.e. performance, temperament, motivation that are necessary and relevant in order to perform the agreed work. Test about mental competence of the employee is necessary to conduct in case of performing specific work. If the employer cannot justify why test on mental competence is required to perform a particular job and that job can be performed without meeting this requirement, we cannot talk about a necessity.

As we have presented, apart from exemption, processing of personal data also requires legal basis. If the internal regulations of the employer require mental competence as a necessary requirement to conduct a particular job, two legal bases are available for processing this personal data. Legitimate interest of the employer according to Article 6 (1) (f) of the Regulation, resp. § 13 (1) (f) of the Personal Data Protection Act, when information about the mental health of the employee is processed without the consent of the employee. The second applicable legal basis is the consent of the person concerned according to Article 6 (1) (a) of the Regulation resp. § 13 (1) (a) of the Personal Data Protection Act, which must be explicit since it is about processing sensitive personal data. However, the employers are recommended to restrict the processing of personal data in employment relationship on the legal basis of employee's consent to the maximum extent possible. According to WP 29, the employee's consent

might not be valid at all, since specific position of employee-employer relationship will always be doubt whether the consent was given freely by the employee.

In summary, if a particular work requires the employer to set requirements about the mental health of the candidate resp. employee, it is also possible for the employer to require statement about the mental competence and require the employee to undergo examination about the mental health. Area regulation of psychological examination of employees regardless to the type of work and specific tasks employees perform, we consider unjustified and inappropriate, and it is not in accordance with the Labor Code and the legislation about protection of personal data. In case of work positions where mental capability of the employee is required, we can list all those positions where organizational and leadership skills are required to exercise authority and manage stressful situations etc.

Conclusion

According to labor relations, health of the employee is a value that the employer is legally bound by law. The aim is to perform work that does not harm or threaten the health of the employee, therefore the employer is entitled to *„work"* with this kind of personal data in statutatory terms. In case of some processing operations, it is not clear whether such processing is classified as processing of sensitive data about the health concerns of the employee or not. Disputative is the issue of processing information about the impact of mental health on work performance gained as a result of medical examination. In line with the concept of WP29, promoting a broad approach to concept of health-related personal data. Not only employers should consider specific data about the health of the employee, but also the data concerning the health condition can be deducted from the existing data.

The basis for processing sensitive personal data according to regulation and the Personal Data Protection Act is to lay down the general prohibition of processing. Whoever has to or wants to process sensitive personal data must justify processing of such data based on exemptions that allow processing of such data (Article 9 (2) of the Regulation, resp. § 16 (2) of the Personal Data Protection Act). Consequently, processing of data is conducted on one of the legal bases in Article 6 of the Regulation, resp. § 13 of the Personal Data Protection Act. In order to process information about the mental and physical health, the employer should refer to exemption in Article 9 (2) (b) of the Regulation, resp. § 16 (2) (b) of the Personal Data Protection Act, as well as the consent of the person concerned (see above) legal license and legitimate interest.

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