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Paths of Evaluation of Labor Relations in Cases of Civil Contracts Concluding in Accordance with the European Legislation & Court Practice in European States

Abstract

In current labor law, there is a widespread tendency of hiding entrepreneurs of labor relations through the execution of civil-law contracts, which provides a number of benefits to employers and has negative consequences for employees. The article analyzes the legislative and judicial approaches of different European countries to solve this problem. Particular attention is paid to the analysis of the signs of dissimilation of civil-law and labor contract, which the courts recognize as fundamental.

The issue of the distinction between employees and independent contractors is a critical one for employers, as an incorrect classification may have significant consequences. From the very beginning labor law was formed as a right of workers' protection and separated from civil law in connection with the necessity to counteract the tyranny of employers and to protect employees, granting them rights and privileges as a weaker party to an employment contract. In the XXI century labor law is considered to be one of the most important branches of law, which continues to evolve rapidly, responding to changes in the labor

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market, in the economic and financial spheres, in order to minimize the negative consequences for employees. In many countries, high level of labor standards is set at the legislative level, and the protection of a wide range of workers' rights is guaranteed. However, in an era of fierce competition, labor and social standards lead to increasing in employers' costs, and, as a consequence, to minimize costs by entrepreneurs through various means. Thus, we can confirm that the trends of transferring of assets and the shifting of place of company registration into states with more favorable conditions of doing business, cheap labor, lower taxes, outstaffing, the attraction of posted workers, etc. are becoming widespread. The use of the work of posted workers causes wide dissatisfaction with local workers, collective action, strike. The problems of the balance between the rights of local workers and the free movement of services, the right of establishment of business and the use of posted workers were considered by the ECJ in a number of cases, in particular Laval[1], Viking[2], Ruffert[3], Commission against Luxembourg[4].

However, the most popular method of minimizing employers' labor costs and non-concluding of labor contracts with a part of the workers, and, accordingly, not extending to them certain social standards, including those defined in collective agreements, remains the usage of civil-law contracts with persons by employer instead of labor contracts. The fact of working under a civil law contract allows an employer not to pay compulsory social insurance, premiums and other social deductions, not to adhere to the standards of working time and rest time, not to pay temporary disability, not to be entitled to participate in collective bargaining, etc. In the context of non-labor civil-law contracts, employers are also not bound with minimum wage obligations.

So, more and more employers from different countries using actually hired labor, are trying, if possible, to establish relationships with some employees, under civil law. This situation, along with the expansion of the flexibility of labor law, leads to a deterioration of the legal status of workers and a new increasing of employer's arbitrariness. A sufficiently

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[1] C-341/05Laval, 2007.

[2] C-438/05 Viking, 2007.

[3] C-346/06 Rüffert, 2008.

[4] C-319/06 Commission vs Luxembourg, 2008.

effective instrument of preventing this phenomenon is the recognition of the status of workers by such persons and the retraining of formal civil relations in the workplace, both under the workers' initiative, as well as decisions, lawsuits of the state authorities that control and supervise the observance of labor legislation, social insurance bodies and tax authorities.

In the labor legislation of many European countries, the concept of an employee is legally enshrined and interpreted in court practice. In particular, the definition of a worker is contained in the Maltese Labor and Industrial Relations Act[5]. From 2012, there is also a list of eight criteria, five of which must be observed for the recognition of a person as an employee[6].In accordance with German legislation, instead of the concept of an employee, there is the definition of a self-employed person which covers individuals that are able to carry out his professional activities at his own discretion and independently determine the time. Due to practice, an individual is considered to be an employee with opposite characteristics. Although the term «worker» is considered to be nothing more than an indication of a kind of employment relationship.[7]

In cases of absence detailed definition of the concept «employee», this gap is filling in by judicial authorities. Thus, the lack of the inclusion in the Swedish legislation of the notion of «employee» has enabled the judiciary to formulate the main criteria for its definition, which include the similarity of the status of the executor of work under a civil law agreement to the characteristics of a regular worker, including the economic and social status of this person.

Currently, in cases of substitution of labor contracts by civil law contracts, more and more states are granting national courts the right to recognize such relationships as labor. The main consequences of such retraining for a person who is an executor are laid in recognition of the establishment of labor relations since the conclusion of a civil contract,

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[5] http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8918&l=1.

[6] *Regulating the employment relationship in Europe and Central Asia: a guide to Recommendation*, No. 198, International Labour Office, Governance and Tripartism Department–Geneva 2014, p. 50.

[7] Ibidem, p. 59–60

the transfer and payment of unused annual paid leave, temporary disability assistance, the extension to the person of all rights granted to the workers concerned by law and collective agreements. For companies (undertakings), not only fines are the consequence of violation of labor relationships, but the recalculation of taxes, insurance premiums, etc. as well.

The jurisprudence on the argumentation and definition of labor and civil-law relations is gradually formed in Ukraine as a result of the increasingly frequent masking of labor relations by employers in civil-law contract. According to the Labor Code of Ukraine (Article 265)[8], for such actions, the employer is liable for a fine for the following actions: for de facto admission of an employee to work without an employment contract; for the registration of an employee for part-time work in the case of the actual performance of work full time worked at the company; and payment of wages (remuneration) without accrual and payment of a single contribution to compulsory state social insurance and taxes. Such kind of sanctions are established in the form of fines in amount of thirty times of state regulated of the minimum wage for each employee for which a violation was committed (this sum currently is around 4,000 euros). In addition, special penalties are foreseen for officials responsible for violations of labor legislation in the amount of 500 to 1000 non-taxable minimum incomes of citizens.

Taking into account the distrust of the population of Ukraine to the judicial system, employees do not often apply to the court with claims on establishing the existence of actual (de facto) labor relations and retraining of civil relations into the employment. However, thanks to the activities of the State Labor Service of Ukraine and increasing of court reviewing of imposed fines under Art. 265 of the Labor Code in cases of revealing signs of an employment contract in civil law agreements, it can be argued that there is a certain judicial practice on this issue in Ukraine.

The Decision of Kharkiv Regional Administrative Court dated April 24, 2017[9] resolved the issue in the dispute between LLC «Altekhprom» and the Main Directorate of the State Labor Service in Kharkiv region

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[8] http://cis-legislation.com/document.fwx?rgn=8651.

[9] The Resolution of the Kharkiv District Administrative Court in the case No. 820/1432/17 dated April 24, 2017. Official state register of court decisions,

regarding the civil-law agreements concluded between the enterprise and individuals and the qualification of such relationships as hidden employment. According to the contracts, the employees did not organize themselves and did not carry out their work at their own risk and discretion, without setting deadlines, within which the performers were obliged to provide services specified in the contract. Also, it was not determined which particular services should be provided in terms of their volume in the form of specific quantities that are measurable and can be reflected in the acts of their adoption. Signed civil contracts foresee the subordination of the executors to the relevant officials of the enterprise and the rules of internal labor regulations[10]. The court acknowledged that this situation is a sign of the labor contract itself and it was a violation of labor legislation on the mandatory conclusion of labor contracts and regulations on compulsory state social insurance of employees. Accordingly, the company was denied in satisfaction of claims regarding the recognition of the actions of the Office of the State Labor Service unlawful, including the reservation of the imposition of penalties in the amount of 384 000 UAH.

The opposite conclusion was reached by the Lviv Administrative Court of Appeal in the Decision of January 16, 2017[11], regarding the civil-law nature of the agreements concluded regarding the cleaning of the territory, the provision of primary medical care, and the sampling of grain. Position of the cleaner of the office premises of the mill's mill and the position of the assistant in accordance with the Classifier of professions and positions DK 003: 2010 are provided by the staff list of the enterprise. Therefore, in the opinion of the inspector of the State Service of Ukraine for Labor, the admission of employees to work under civil-law contracts for the provision of the above services is prohibited. There was no evidence that the company had taken adequate measures

electronic resource (in Ukrainian language): http://reyestr.court.gov.ua/Review/66154006.

[10] *Labor or civil law contracts*, publication of the "Experts: Golubukh" system, http://1gl-vip.expertus.ua/#/document/16/23805/dfas6b97tg/?of=-copy-33f091284c.

[11] Decision of Lviv Administrative Court of Appeal dated 16.01.2017 in case No. 876/9669/16.

to fill these vacancies. The given works belonged to the main activity of the enterprise, the functions performed on a specific post were carried out and the work was not individually defined, for the registration of the acts of acceptance-transfer of works performed or services rendered on the basis of which payment is made. The State Service insisted that in cases where work performed under a civil law contract corresponds to a vacant position and is carried out regularly, and the executor submits to the internal labor regulations of the customer, then this contract can be considered as having signs of labor.

However, the court found that the cleaning of the workshop of the plant was carried out during the non-working time on a regular post or on weekends and days off at its own discretion. Provision of medical services was irregular and was carried out in the period when the administration and, if necessary, at any time of the day informed. At the same time, in the explanations given, the said persons indicated that they were not subject to the rules of the internal labor regulations of the enterprise. The works that were entrusted to the disputed contracts were accepted by the enterprise in accordance with the acts of acceptance of the works performed, that is, the amount and quality of the services rendered, and not the process of work, were paid. Therefore, in the opinion of the court, civil contracts did not hide labor contracts, since such transactions were concluded for the achievement of the results of labor- the receipt of certain services, did not regulate the process of work, which is inherent in labor contracts. Consequently, the court found that it was civil law contracts, and the prohibition on the conclusion of civil-law agreements between the enterprise and the employee for the performance of work or the provision of services, including the time free from the execution of the main work under a contract, time does not provided by the legislation[12].

In another ruling, the Lviv Administrative Court of Appeal dated April 12, 2017[13] outlined the features that are typical of civil law contracts and

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[12] "Labor relations and wages and salaries", publication of the system "Experts: Head Guard", http://1gl-vip.expertus.ua/#/document/117/614/dfasp2mh1o/?of=-copy-9f4ed9a25c.

[13] The decision of the Lviv Administrative Court of Appeal dated April 12, 2017 in case 876/2515/17.

can serve as a guideline for differentiating labor and civil law relations. In particular, such features include: the provision of services, payments agreed between the parties on a case-by-case basis and accrued in accordance with the actual services rendered, the contractor's performance is performed by the performer independently at his own risk. In addition, the performer is not subject to the rules of the internal work order, having to organize the process of work and working time independently without observance of standards of working time, does not pay some premiums and is not entitled to receive certain types of social insurance benefits, such as with the temporary disability.

In addition, the Transcarpathian administrative district court in case 807/1134/16, considering that the contract was concluded for the achievement of the results of labor, the receipt of certain services and did not regulate the process of work itself, confirmed the conclusion of the conclusion by the entrepreneur with individuals of civil law contracts, and not labor contracts.

An analysis of this practice of the Ukrainian courts provides an opportunity to consider one of the important criteria for distinguishing civil law from an employment contract that is taken into account by Ukrainian judges, their subject (object), the duty of the person performing the work, to pass on the result.

Khmelnytsky District Administrative Court in one of the decisions emphasized on another characteristic of a hired employee. The court took into account one of the main general features of the notion of employee: a person entered into an employment contract, if it performs work under the direction of the other party, which assumed the obligation to organize work, obtained the right to give instructions on the sequence of works[14].

However, with the proper execution of the civil law agreement and the concealment of the existing labor relations, it is difficult for state authorities to prove their existence in the courts in the absence of the employee's desire to re-qualify the relationship and disclose the actual details of the relationship. Individuals have the right to freely dispose

[14] Resolution of the Khmelnytsky District Administrative Court dated 20.04.2017 in case No. 822/723/17.

of their abilities to work and to conclude both labor and civil law agreements, and, as a general rule, civil contracts can be concluded by businessmen with their own employees for the performance of certain works or services during non-working hours. On the other side, cases of misunderstanding of employees by their status and revealing the problem of legal registration of relations in the event of non-payment of benefits during temporary disability or in the detection of non-payment of insurance premiums to pension and other insurance funds are widespread. In cases of application of employees to court in order to establish the fact of labor relations, the probability of a positive decision is sufficiently high in the presence of the inclusion of labor and legal elements in the concluded civil contract and other evidence.

However, based on all the circumstances of the case, the courts take into account the various distinctive features of civil and labor contracts. For example, the Iceland judicial authorities give preference to the nature and the essence of the actual existing relations. Thus, in one of the decisions, the Iceland Supreme Court recognized a person considered to be self-employed, an employee on the basis of receiving a monthly fixed remuneration, which was changed in accordance with the provisions of collective agreements, and in connection with the absence of a clearly defined task that the person must was to perform[15].

The case of Henry Denny & Sons (Ireland) Ltd v Minister for Social Welfare[16] considered various tests and criteria in determining the status of the contract. It introduced the economic test which examines if the individual is economically independent from the person requiring the work to be done. The Supreme Court of Ireland at the hearing of Henry Denny and Sons Ltd. v. Minister of Social Welfare did not take into account the employer's statement on the nature of the relationship that was established that the person concerned would not be an employee of this company but would be an independent executor whose duties would include payment of taxes and fees in accordance with national law, and the sole responsibility for the tax return, however, is that the provisions of the Law on protection against unfair dismissal will not be

[15] Decision of the Supreme Court of Iceland No. 381/1994.

[16] Henry Denny & Sons (Ireland) Limited v The Minister for Social Welfare (1998) 1 I.R. 34.

applied to it. The court recognized that the actual nature of the relations that have developed and the provisions of the treaty are more important than those declared orally. Accordingly, an employer's oral statements may be considered rather as legal opinions on the effects of the civil law contract at issue, such statements were not contractual terms and did not affect the actual relations that existed and which, in the Court's view, still had such labor character[17].

The actual nature of the relationship between an entrepreneur and a person performing work or providing services, and not the name of the signed agreement, is taken as the basis for establishing the existence or absence of labor relations in the courts of the Russian Federation. Execution of specific official functions with the receipt of a clearly recognizable remuneration twice a month for a long period of time, observance of the rules of the internal labor regulations, norms on labor protection, provision of material liability was sufficient for re-qualification of civil contracts concluded with drivers, electric locksmiths, cashiers in labor agreements on the decision of the Federal Administrative Court of the North-Western District of November 9, 2010[18].

Analysis of the above-mentioned decisions of courts of different states provides an opportunity to agree with the opinion of O. Kurbangaleeva, which defines the main grounds for the recognition of civil-legal relations with the labor, which include: the duties of observance of the rules of internal labor regulations and subordination to the employer, regular payment of wages, a person of a specific job for a long period of time, arranging a workplace for an employee for an employee, imposing material liability on the performer civilly of contract[19]. However, it should be noted that payments under a civil contract may include advance payments and a phased payment for the work performed, however, this should be clearly stipulated by the contract. At the same time, it is necessary to add to the abovementioned reasons that the obligation of

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[17] *Legal regulation of labor relations in Europe and Central Asia: Guide to Recommendation*, op.cit., p. 56.

[18] Decision of the Federal Administrative Court of the North-Western District # A of 66–2676 / 2010, dated November 9, 2010.

[19] O. Kurbangaleeva, *Labor contract and Civil contract: what are the differences*, https://www.b-kontur.ru/enquiry/89.

settlements under a civil law contract is not influenced by the financial condition of the entrepreneur, reduction of the amount of remuneration for the work performed or termination of the contract is possible in accordance with its provisions and civil law of the state. On the other hand, in cases of growth of financial capacity of an entrepreneur, the executor under a civil contract does not have the right to demand an increase in the amount of the prescribed remuneration.

The list of basic grounds may also include repeatedly concluding and redefining civil agreements with one and the same person for the execution of the same works, performance of a civil-law contract of work to be performed by a full-time employee whose office is vacant. The availability of an order for recruitment, the storage of a work book, in the states that envisage it, the establishment of a personal affair, the definition of leave and the payment of periods of temporary disability can also indicate the existence of labor relations. Thus, according to Luxembourg's case law, granting an annual leave to a person, the payment of holiday and non-working days clearly indicate the labor nature of the relationship, as well as the payment of premiums for the year, the payment of temporary disability[20]. According to Canadian law, there are four main criteria for identifying a self-employed person from an employee: controlling, ownership of tools, equipment, risk-sharing loss, integration and relationship with the employer[21].

However, the most common is the differentiation of civil and labor relations under three groups of indicators: those relating to behavior and control, financial and those that characterize relations between the parties[22].

Sometimes the increase in the number of concluded civil contracts for the substitution of their existing labor relations is considerable and

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[20] Judgement CSJ, IIIe, 9.02.2006, No. 28060, judg. CSJ, IIIe, 27.02.2003, No. 26541, *Legal regulation of labor relations in Europe and Central Asia: Guide to Recommendation,* op.cit.

[21] S. Ward, *Independent contractor vs employee: which one you?*, https://www.thebalance.com/are-you-a-contractor-or-an-employee-2948639.

[22] *Independent contractor (self-employed) or Employee?*, IRS, https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee.

requires immediate state intervention. Thus, in the early 2000s, the replacement of labor contracts with civil law has become a commonplace in Moldova, which led to the imposition of legislative restrictions, which in fact completely limited the conclusion of civil service contracts. Sometimes later, in 2010, amendments to national legislation were introduced and criteria were defined which, in the presence of which tax authorities recognize a civil contract as labor.

In order to overcome the spread of the situation of abuse of entrepreneurs the possibility of concluding civil-law agreements instead of labor contracts in since January 1, 2014, it was enshrined the right of workers to require the establishment of labor relations instead of civil law in the presence of real grounds[23]. Unfortunately, the prohibition of substitution of labor contracts by civil contracts is not reflected in the current labor legislation of Ukraine, despite the inclusion to the General Agreements concluded at the national level between national trade unions associations and employers' organizations and the government, the provision on the prohibition of substitution of labor contracts by civil.

At the same time, despite different national approaches, practice shows that the balance of centralized and contractual regulation of labor relations is important in regulating this issue. Extremely centralized rigid regulation of labor relations is unjustified, and causes decrease in competitiveness, on the other hand, only contractual regulation leads to a light substitution of labor relations by civil contracts, the inability of the state to ensure compliance with labor rights and to provide vulnerable categories of persons with additional (supplementary) protection.

One of the instrument of protection against the substitution of labor relations by civil contracts by entrepreneurs for the non-proliferation of such persons in labor legislation is to identify by certain States a special category of quasi-workers or workers like workers and to provide them with adequate protection within the framework of labor and social law. In particular, such categories of persons are defined in the legislation of Germany, Belgium, Austria. Under Italian law, virtually all workers' rights, including annual paid leave, apply to self-employed economically

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[23] O. Kurbangaleeva, *Labor contract and Civil contract: what are the differences*, https://www.b-kontur.ru/enquiry/89.

dependent workers. At the same time, it is determined what criteria such employees should answer, in particular, not to hire other employees and not to reassign work to other persons, to receive not less than 75% of income from professional activity for work on this person-customer. In Swedish law and judicial practice, economically dependent self-employed persons are included in the concept of employee. Thus, an employee is also considered to be any person who performs work for another person without employment, but according to characteristics and position similar to an employee[24].

The above mentioned examples clearly show that the scope of labor law does not always correspond to the current realities and the situation that occurs in the labor market. Modern labor law should deviate from the understanding of the regulator of exclusively hired labor and begin to regulate work in a broad sense, reflecting the general trends and prospects for future regulation of labor, which should help protect workers and counteract the tyranny of employers.

In general, employers in many countries use civil contracts to mask existing labor relations in order to reduce tax rebates and labor costs, prevent collective measures and protect such workers by the trade union. In the case of the correct execution of a civil contract without the inclusion of any signs of an employment contract it is so difficult to establish the fact of labor relations. States use different approaches to reveal this phenomenon from the formation of certain distinctive features in judicial practice to the legal limitations of the conclusion of civil contracts. Also, more and more courts take into account the nature and essence of real relationship between the entrepreneur and the individual, rather than the name and position of the contract.

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[24] *Legal regulation of labor relations in Europe and Central Asia: Guidance to Recommendation*, No. 198; International Labor Office, Department of Management and Tripartism, op.cit., p. 45–46 (*Pravovoye regulirovaniye trudovykh otnosheniy v Yevrope i Tsentral'noy Azii*, Rukovodstvo k Rekomendatsii, No. 198; Mezhdunarodnoye byuro truda, Departament upravleniyu i tripartizma, MTB, Zheneva 2014, p. 45–46).