ASSESSMENT OF DELIVERY SERVICE PROVIDING CONTRACTS IN GEORGIA

SOCIAL JUSTICE CENTER

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Introduction

Along with the increasing urgency of business operations[1] conducted through the GIG economy, including through electronic platforms (applications), throughout the world, the issue of protection and recognition of the status of workers involved in the GIG economy becomes problematic. For example, couriers working in the delivery service do not have formal employment status and are considered by companies to be "independent contractors", thus not enjoying the guarantees provided by the labor law.

Recent growth in e-commerce and application-based businesses has been linked to the COVID-19 pandemic and respective restrictions;[2] In this regard, Georgia was no exception, where the market size of e-commerce increased by 3.2 in 2020. At the same time, according to Galt & Taggart, the turnover of the direct food delivery service sector last year amounted to 167 million GEL, which is three times more than in 2019.[3] According to the same report, in 2015, about 95% of the market in the food delivery sector was owned by two companies - Glovo and Wolt.

The growth of the food delivery industry in Georgia is accompanied by the practice of violating the labor rights of couriers and breaching labor safety standards. Unfortunately, the Covid-19 pandemic made the already hard working conditions of the couriers even more difficult and dangerous; moreover, it was impossible to include couriers in the state social security system as they are non-standard workers.[4]

Due to the difficult working conditions, the couriers of Glovo and Bolt Food went on separate strikes in Georgia, while the courier of another company - Wolt, is trying to recognize the status of an employee and protect his labor rights. Following the protest of

1 Begadze, Mariam. Regulation of the platform (GIG) economy Review of international experience. Open Society Foundation and Platform of Honorable Work. 2021, 1, https://bit.ly/3kq1Qv9; (afterwards – Begadze, 2021).

2 Galt & Taggart, „e-commerce in Georgia", June, 20, 2021, https://bit.ly/3iwmQ1H.

3 Ibid, 3.

4 Economic Policy in Crisis: Interviews with Economic Researchers "," How is the labor market transformed as a result of the Coronavirus crisis? " - Ana Diakonidze, Center for Social Justice, April 30, 2020, https://bit.ly/3yWN7vD.

Bolt Food couriers the company "blocking" the application for them. Punishing couriers for protesting and expressing critical opinion seems to be a common practice for the delivery service companies. According to the agreement signed by one of the delivery service companies with the couriers, the courier has no right to comment on the company's activities through the social network and through other means damage its reputation. It is true that the Bolt contract does not contain such a condition, but as it turned out, in practice, the company also applies sanctions against those couriers who express a different opinion and protest against harsh working conditions. The Public Defender of Georgia, on June 14, 2021, issued a recommendation, which established a direct discrimination against Bolt couriers on the grounds of differing opinions. That said, the recommendation followed a couriers' protest over the company's unilateral reduction of tariffs. In response to the protest, the company restricted an access to the application for "those couriers who were involved with group of couriers interfering with the company's service and work process of couriers."[5] The Public Defender of Georgia, who defined a direct discriminated on the ground of different opinion, indicated in the Recommendation[6] that "... The applicants demanded an improvement in their working conditions, protesting against low tariffs and a reduced bonus system. According to the Public Defender, applicants have the right to protest against the employer's decisions, which affect their legal status. Restricting an access to the service delivery platform due to a demand for a decent working conditions is alarming and unacceptable. "[7]

Violations detected by the Labor Inspection Service also indicate a dangerous work environment for the couriers. In March 2020, the Labor Inspectorate fined Glovo for failing to report an accident that occurred while on the job;[8] In particular, in February 2020, a courier was injured while traveling by a moped, about which Glovo did not report to the Inspection. In addition, the Labor Inspectorate found 9 various types of violations of labor safety norms during the inspection of the company.[9]

It is noteworthy that in parallel with the non-recognition of the labor relations with the couriers by the delivery service companies (they are considered as "independent contractors"), the Labor Inspectorate has considered the couriers as employees.

5 For more see: "Public Defender Of Georgia Has Established Discrimination On The Basis Of Other Opinion Against Bolt Food Couriers", Young Lawyers Association of Georgia, June 15, 2021, https://bit.ly/2UGteKk.

6 Recommendation of the Public Defender of Georgia "On establishing direct discrimination on the grounds of different opinion in labor relations" "On establishing a direct discrimination on the grounds of discrimination on the ground of different opinion", June 14, 2021, https://bit.ly/3xCjcIU.

7 ibid 17.

8 Respective inspection report is available at: https://bit.ly/2VJh9o2.

9 Inspection report is available at https://bit.ly/3CEoE0w.

In addition to the determination of the Public Defender that Bolt Food conducted direct discriminating on the ground of different opinion, it also recognized the couriers as employees. More precisely, according to the Public Defender, "it is incorrect to consider Bolt couriers as independent contractors and/or self-employed in the conditions of subordination, sanctioning, control, and liability". Moreover, as there is a labor-legal relationship between the company and the couriers.

Thus the purpose of this document is to assess the legal status of those employed in the delivery services; This document aims to assess the legal status of persons employed in the delivery service; The submitted document legally reviews the contracts[10] of several companies operating in the field of delivery services in Georgia in order to evaluate the legal relationship, mechanism and practice between the parties.

While considering this document it is important to clarify that for defining the legal qualification of the relationship between the parties the position of the parties to the contract is not central[11], as well as the content and clauses of the contract. In determining the legal nature of the existing relationship, the facts related to the performance of the work and the actual content of the agreement of the parties, regardless of the name or characteristics of the contract concluded between them, are crucial.[12] In other words, even if a service contract or contract for work is concluded between the parties, according to the International Labor Organization, in accordance with the principle of "Primacy of Facts"[13], if there is in fact employment relationship, the worker is considered employed and not an "independent contractor". Thus, reviewing and evaluating the terms of contracts is important not so much to determine the nature of the legal relationship, but to identify the mechanisms / legal techniques or practices used by the companies of application economy in Georgia to "cover up"[14] labor relations and avoid liabilities.[15]

10 The Center for Social Justice is not responsible for the accuracy of the content of the contract, the completeness and conclusiveness of the texts of the contract.

11 The legal nature of the contract, as well as the issue of belonging to any of its categories, is ultimately to be assessed by the court and not by the parties to the contract; please see: Street (Respondent) v. Mountford (A.P.) (Appellant), [1985] UKHL 4, [1985] AC 809, [1985] 2 WLR 877, https://bit.ly/3i2FxZC.

12 Employment Relationship Recommendation, 2006 (No. 198), International Labour Organization (ILO), Geneva, International Labour Conference 95th session, 2006, 9, https://bit.ly/3AWSFb0.

13 Promoting employment and decent work in a changing landscape, International Labour Organization (ILO), International Labour Conference 109th Session, 2020, 230, https://bit.ly/3ec09gR.

14 Salome Kajaia, "Mechanisms for the Protection of Dependent Self-Employed Persons in EU Countries and Perspectives for Georgia, 2020

15 The literature states that the principle of "superiority of facts" is especially useful when labor relations are deliberately disguised; See B. Waas and G. van Voss (eds): Restatement of labor law in Europe, Vol. I: The concept of employee, Hart Publishing, UK, 2017. Also, relying solely on the contract to determine the nature of the relationship is incorrect because the terms of the contract may be another condition imposed by the employer; See, The National Labor Court of Appeal, 7th Chamber, 18 November 2002, Zelasco, José F. v. Ejército Social Work Institute.

How various contracts are used to disguise labor relations?

The studied agreements are characterized by one common feature: all of them are composed in-line with international standards on qualifying criteria and indicators of labor relations and contains a number of aspects aimed at circumventing these criteria or indicators. In addition to the above-mentioned "sophisticated" legal mechanisms, the agreements under consideration also contains a direct denial of the existence of an employment relationship between the parties.[16] Namely, one of the contracts states that the courier is not an employee of the company and does not act as its subcontractor. It provides customer with a delivery service as an independent contractor.[17] Another agreement states that the courier should not have an employment relationship with the company and that both parties are autonomous and independent from one another.

It should be noted that, given the complexity of employment and the non-standard naturecharacter of employment in the GIG economy, the traditional model of labor relations may be useless for consideration; The new forms of employment create new forms of subordination and dependence that can hardly fit into the dichotomous framework of the employee-employer. At the same time, it should be taken into account that various legal mechanisms are used to disguise the labor relationships. That is why, in order to draw a conclusion about the nature of the relationship, along with a scrupulous study of the factual circumstances, it is important to use and reconcile several legal criteria[18] and mechanisms at the same time.[19] And in case of at least one indicator characteristic

16 There is an opinion that the provisions of the contract, which aim to exclude the validity / dissemination of the legislation, have no legal force from the very beginning. In the opinion of the Supreme Court of the United Kingdom, an attempt to exclude the extension of the guarantees provided by law under the contract to protected groups should be considered hostile to the objectives of the legislation; See, Uber BV & Ors v Aslam & Ors [2021] UKSC 5 (19 February 2021), 81, https://bit.ly/36zEgnu.

17 While making a differentiation between a contract for work and employment contract it is important to cite a definition of the Supreme Court of Georgia according to which the employment process is crucial in the employment relationship, which is organized in accordance with the rules and conditions established by the employer (via employment contract, internal regulations, legislation, etc.). And the main characteristic of a "contract for work" is that it is mutually binding, and is of a consensual nature, that is, it is considered by the parties from the moment of agreeing on the essential terms of the contract and the equality of its subjects is maintained throughout the period; which is oriented on achieving the goals of the contract, not on creating an organizational subordination. See the recommendation of the Public Defender of Georgia "On establishing direct discrimination on the grounds of dissent in labor relations" "On establishing a direct discrimination on the grounds of discrimination on the ground of different opinion", June 14, 2021, https://bit.ly/3xCjcIU

18 Federal Court of Australia, ACE Insurance Limited v. Trifunovski, 2013, FCAFC 3.

19 Promoting employment and decent work in a changing landscape, International Labour Organization (ILO), International Labour Conference 109th Session, 2020, 104, https://bit.ly/3ec09gR.

of a previous employment relationship, a legal presumption[20] must apply in favor of the existence of an employment relationship.[21]

A) Legal subordination

According to the International Labor Organization, the criteria used to determine the existence of an employment relationship are legal subordination and economic affiliation.[22] A person is considered to be in an employment relationship with a company if he or she provides services to a third party on the latter's behalf and this process is overseen by the company.[23]

The agreements examined contain a number of provisions that, despite attempts to disguise, make it clear that legal subordination exists and that couriers are required to serve in accordance with the terms, conditions, and instructions established by the companies.

Scope and area of the contract

The agreement under consideration applies to all relationships between the company and the courier in the process of using the company's platform. According to the "Terms of Service" of another company, these terms regulate the access of couriers to the platform, the rules of its use, and have a limiting power. Determining the terms of service in this way and their unequivocally binding nature is an obvious manifestation of "Directional Power"[24] and reveals subordination. In the recommendation made on the basis of the application of the employees of Bolt Food, the Public Defender of Georgia, among other criteria, indicates the following signs confirming the subordination: the courier fee and the method of its calculation is determined by the company; The customer can

20 The case law indicates that there is a general, void presumption in favor of employee status whenever one person provides services. See: United States: Supreme Court of California, Dynamex Operations West, Inc. v. Superior Court of Los Angeles County, 2018, 27, https://bit.ly/36wncyv.

21 The Employment Relationship: An annotated guide to ILO Recommendation No. 198, International Labour Organization (ILO), 2007, 33, https://bit.ly/3yLbrQS.

22 The Employment Relationship: An annotated guide to ILO Recommendation No. 198, International Labour Organization (ILO), 2007, 27, https://bit.ly/3yLbrQS.

23 Begadze 2021, 15, see the reference 1.

24 G. Casale: „The employment relationship: A general introduction", in Casale: The employment relationship: A comparative overview, 2011, cited in: Promoting employment and decent work in a changing landscape, International Labour Organization (ILO), International Labour Conference 109th Session, 2020, 107, https://bit. ly/3ec09gR.

leave a review and file a complaint regarding the delivery service; The Company reviews the grievances at its own discretion, investigates it (if necessary) and decides on a further action plan; If the courier has materially breached its obligations or received several complaints, the company has the right to temporarily or permanently suspend its use of the Bolt Food application; Bolt can see the geographical location of the courier, as well as information about the delivery and the time of use of the service.[25]

Binding "Recommendations" about the rules of direct activity, according to one of the articles of the contract, are given in Annex 2 of the contract, which "is only a guide and has no binding power." For their part, as stated in Annex 2, although the relationship between the parties is a relationship between independent parties, they will cooperate to ensure that the service is provided properly.[26] The annex uses formulations such as "company reminds the courier ...", "courier says ..". It is obvious that the contract is designed to create the false impression that the terms of delivery of the service directly are of a recommendatory nature and thus, the delivery service company does not set them unilaterally. This is because the definition of service conditions by a company is one of the important criteria for qualifying for legal subordination and, consequently, labor relations.[27]

However, despite the attempted disguise, the terms of service that the company sets unilaterally are evident from the consideration of various provisions of the contract. First of all, it should be noted that Annex 2, presented as a "recommendation" by the company, is not at all a non-binding. According to the general terms of the contract, the "independent contractor" is responsible for carrying out the activity properly, and the standard for the proper performance of the service is given in Annex 2. The Section 7, in turn, stipulates that the "independent contractor" agrees to provide the courier service to the customer in compliance with the quality required by these terms. The quality of service, as mentioned, is defined in Annex 2 of the contract. However, the legal nature of this annex is best reflected in the legal consequences of its violation. If it is really only a recommendation, its violation should not entitle the company to terminate the contract as provided for in Article 10.[28]

25 The recommendation of the Public Defender of Georgia "On establishing direct discrimination on the grounds of dissent in labor relations" "On establishing a direct discrimination on the grounds of discrimination on the ground of different opinion", June 14, 2021, https://bit.ly/3xCjcIU

26 The appendix is titled: "Standard of Proper Service Performance".

27 Begadze 2021, 18, see the reference 1.

28 According to Article 10 of the contract, the grounds for termination of the contract by the company may be the violation of the "conditions" by the courier. Under the contract, the courier, upon signing the contract, agrees to the terms of the contract and its annexes and agrees to abide by the terms of service. It is obvious that the terms of service include both the body test of the contract and its annexes. Moreover, annexes are generally considered to be an integral part of the contract.

It should also be noted that the terms of service delivery are not given only in Annex 2 of the contract. The rules governing the service are also contained in the main text of the contract and Annex 3. It is noteworthy that, like the 2nd, Annex 3 ("Food Treatment") contains non-binding wording (eg, "We recommend .."), while its binding nature is not in a doubt either: According to Article 11, violation of the terms of Annex 3 is a ground for termination of the contract.

Courier Responsibility

In addition to setting conditions for the performance of work and the provision of services ("Directional Power"), the companies in question also have "Disciplinary Power" over couriers as employees: In case of violation of the above conditions and relevant instructions, companies have the right to terminate the contract, and in practice this means that the couriers are restricted an access (temporarily or permanently) to the digital platform. According to one of the agreements under consideration, in the event that the courier breaches any of its obligations under the agreement, the company has a right to restrict its use of the platform without any obligation to reimburse losses. In other occasions it is important to notice that "any condition" is not only the norm refereeing to the legal relationship between the two parties - the independent contractor and the client, but also refers to the terms of the service contract stipulated in the service contract with a third party that is set by the company unilaterally and the deviation from which causes the employee to be sanctioned.[29] In the case of another company, as it was mentioned above, if a courier violates the terms of service set by the company, the company is entitled to terminate the contract without any notice, meaning restrict courier's access to the application.

Possibility of unilateral change of the terms of the contract

Under one of the agreements, the company reserves the right to update the basic terms at any time, of which it shall notify the courier at least 15 days in advance.[30] Similarly, another agreement gives the company the power to change the terms of service at its own discretion.[31]

Although the contract is a bilateral transaction, the conclusion and amendment of which requires the expression of will of both parties, the contracts in question allow companies

29 Begadze 2021, 18, see the reference 1.

30 Bolt Contract, Article 14.4.

31 Bolt Contract, Article 19.

to unilaterally change the content of the contract, including the substantive terms of the contract, without gaining consent from an employee.[32] It should be noted that according to Article 20, Part 2 of the Labor Code of Georgia, change of the substantive terms of the employment contract is possible only with the consent of the parties. Even though the contracts with the couriers are not qualified as labor contracts by the companies, the law still does not allow unilateral changes in the terms. In particular, according to Article 347 of the Civil Code of Georgia, the provision in the standard terms of the contract is considered invalid, if it allows the offeror (in this case delivery service companies) to change the work defined by the contract or deviate from it if the change is unacceptable for the other party (in this case couriers).[33]

In addition, international case law indicates that the lack of influence of the courier on the terms of the contract may be grounds for invalidity of the contract.[34]

B) Integration in business organization: primary and secondary activities

According to the International Labor Organization, with the emergence of new forms of employment, it is important to pay due attention to such indicators of labor relations as the integration of the employee in the organization of the company's business.[35] According to this criteria, if the "contractor" performs such work, which is the main activity of the company, most likely, it is the employment relationship. In such a case, the employee's work is integrated into the company's core business and the company conducts its "core" business through that employee. This criterion is especially important in a scenario where there is a relationship between several different subjects (in this case, the "platform" company, courier, food facility, and customer).[36] Due to the diversification of labor relations, it is necessary to distinguish what is the main goal of a particular business operation and what contribution the "contractor" makes to achieve this goal.

32 The unilateral change of the essential terms of the contract regarding the amount of remuneration, became one of the reasons for the protest of Glovo and Bolt Food couriers in Tbilisi; See: "What are the working conditions and what are the demands of Glovo couriers", Netgazeri, January 29, 2021, https://bit.ly/3yUx9lu. „The inspection should start monitoring the working conditions of the couriers, says shroma.ge", Netgazeti, March 26, 2021, https://bit.ly/3xGB5pK.

33 Law of Georgia "Civil Code of Georgia", Article 347(d), https://bit.ly/3wAX5kD.

34 Begadze 2021, 15, see the reference 1.

35 Promoting employment and decent work in a changing landscape, International Labour Organization (ILO), International Labour Conference 109th Session, 2020, 113, https://bit.ly/3ec09gR.

36 N. Contouris and V. De Stefano: New trade union strategies for new forms of employment, ETUC, Brussels, 2019, 62, https://bit.ly/36wLHeX.

In the given case, the contracts of the delivery service companies operating in Georgia contain a number of provisions that present the main activity of the company as creating and developing a "platform" application (thus, the company considers those who are specifically involved in this activity as employees)[37]. And food / product delivery service is a subsequent event caused by this core business. According to this logic, platform companies, as software, application providers, enable couriers, caterers, and customers to connect with each other.

The emphasis on the "platform" as an electronic information service can be seen throughout the text of the agreements under consideration. It is clear from the definition of "platform" as defined in one of the agreements that the company sees its role in providing intermediary services through the platform between partners (food and trade facilities) and consumers and couriers. However, under Section 2.3 of the Agreement, through the platform, the company acts as the sole provider of electronic information services and is not a party to the delivery agreement. According to the first article of another agreement, the main activity of the company is the creation and development of an application, and the role of an intermediary in the delivery chain is only an adjacent activity. At first glance, these provisions are irrelevant to the legal relationship between the courier and the company, and the purpose of inclusion in the contract is vague.[38] However, as previously mentioned, the contracts made by the stated companies are based on the knowledge of the international standards that define the existence of labor relations. In this case, as mentioned above, the criterion is relevant, according to which a person is considered employed if he / she performs a job that is part of the "usual" activities of the company.[39] Accordingly, the above-mentioned provisions in the agreements and the focus on the development of the "platform" as the main activity are aimed at "bypassing" this criterion. However the compliance of this record of the contract with the reality is extremely doubtful. The fact is that the purpose of the electronic platform is to provide delivery service, therefore, the development of the platform is not something separate and, moreover, cannot be considered as a "core" activity of the company; Moreover, some argue that such an statement is far from the economic reality and even a common sense.[40]

37 This is the why the Glovo agreement states that an "independent contractor" will operate in a different way from a Glovo employee.

38 A similar text, with almost identical wording, is given in Article 5 of the contract.

39 See for example, California Labor Code, Section 1750.5(c), https://bit.ly/3k95DMX.

40 United States: Supreme Court of State of California, No. CGC-20-584402, Order on Peoples Motion for Preliminary Injunction and Related Motions, August 10, 2020, 5.15, https://bit.ly/3r9B1N4.

C) Platform-based companies: Intermediary or an employer?

In modern labor relations, a persons and a legal entity can act as an intermediary between the employer and the employee[41], for instance, as an employment agency does. Standard "intermediary" services are a different legal category and have little to do with the "mediation" of delivery service companies. Also, the mediator usually does not become a party to the employment contract.[42]

In this case, the platform companies try to present themselves as "intermediaries", but unlike the standard "mediation" activities in labor relations, when the agency connects the employer and the employee, the delivery service companies act as intermediaries between the food, the courier and the customer. At the same time, none of the named entities is formally an employer of the courier and the latter is given a status of an "independent contractor".

The agreements under consideration contains number of provisions that serve to strengthen the intermediary status of the platform provider companies. According, to the "Courier Confirmation Letter" of an agreements, an courier "appoints the delivery service company" as [its] agent".[43] Under the agreement, through the platform, the company acts as a courier agent in mediating delivery agreements between them and clients.

A "delivery agreement", in turn, is defined as an order delivery agreement between a client and a courier entered into force through the company's platform and deemed to have been initiated from the moment the courier confirms receipt of the request on the application.[44] It should be noted that the mentioned supply agreement and, in general, the legal relationship between a courier and a customer is artificial from the beginning to the end and in practice, it is clear that by receiving an order and clicking the button, the courier does not enter into any legal relationship with a client, and, on the other hand, neither the customer perceives him/herself as a party to the delivery agreement: it uses a particular company platform and thus it perceives this company as its counterpart.

41 For example: Home Work Convention, 1996 (No. 177), International Labour Organization (ILO), article 1, https://bit.ly/3AXBd6t

42 Private Employment Agencies Convention, 1997 (No. 181), International Labour Organization (ILO), Article 1, https://bit.ly/2U42xiN.

43 Bolt's "Courier Confirmation Letter" also states: "You acknowledge and accept that you provide delivery service to customers as an independent entity and Bolt is not your employer and does not have any agreement with you to regarding providing delivery service. Each time you receive a delivery order from a client on the Bolt Food platform, a delivery agreement is made between you and the client, in which Bolt participates as an intermediary through the Bolt Food platform."

44 Ibid. Article 2.2.

According to the agreement, the company is an intermediary between the courier and the customer and does not participate in the provision of services.[45]

It should be noted that such an approach by platform-based delivery service companies and their representation as intermediaries has been severely criticized as these companies actually have "unprecedented control" over employees, including through a use of an algorithm-based system.[46] In addition, the California District Court found it "fatally incorrect" to consider these types of companies as mere "technology intermediaries." The Court noted that Uber, a taxi-ordering-app, uses technology as a tool in a broader context, and that it "does not just sell solemnly a software, but a travel."[47] Therefore, in order to determine the essence of the company's activity, first of all, the essential aspect of this activity must be considered (and not how, in what way the service is delivered), which shows that in the given case the platform-based delivery service companies are "technologically sophisticated" delivery companies[48] and not technology companies.[49]

Thus, it is clear that the provisions of the contracts regarding the "intermediary" function of the delivery service companies, again serve as a legal disguise for the main activities of the company and, consequently, the employment relationship, although the analysis of the factual circumstances shows that the activity of these companies is the delivery of a customer service, which is carried out through the couriers.

45 General clause of Glovo Contracts and, also, Article 1.2.

46 See for example Kenney, Martin, and John Zysman, „The Rise of the Platform Economy", Issues in Science and Technology, 2016, 32(3) (Spring), https://bit.ly/3i44Om6.

47 O'Connor v. Uber, No. 14-16078 (9th Cir. 2018), 10, https://bit.ly/3i5RNZd.

48 Ibid.

49 This issue is related to the discussion of the primary and secondary activities discussed above. The fact that Glovo and Bolt are supply companies and not technology companies also means that the couriers who are primarily involved in the company's core business are employed and not independent contractors whose work is beyond the scope of the company's core business.