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Modern Tendencies for Persons Performing Work Through Digital Platform to Qualify as Employees

Determining legal status of persons performing work through digital platform is the challenge of modern employment law, as far as it is very important to develop a uniform approach towards this issue because of the specific character of this type of work. The tendency of widening the concept of employee in scientific literature and judicial practice is observed, the aim of which is to provide minimal social guarantees to persons.

Key Words: *Digital Labour platform, Application, Employment relationship, Economically dependent self-employee, Control through algorithm, Organization of working process.*

1. Introduction

The issue of qualifying person as an employee is crucial for an individual to be provided with legal and social guarantees conferred by the law. In modern circumstances, especially with the influence of digital technologies, the standard classifiers defining the concept of employee are increasingly losing their grounds. While evaluating essence of labor relations, courts mostly put an accent on real circumstances of subordination, in order to exclude “camouflaged” labor relations. According to the ILO¹ N198² Recommendation (herein after Recommendation), the framework of labor relations must be reviewed periodically, in order to be adequate. The issue of review and adaptation of national policy also responds to processual approach, which is the irreversible process of evolution. Necessity of regular review derives not only from the purpose of protecting persons, but also from the interests of entire society.³

Necessity of review of the standard classifiers is mostly evident with regard to labor relations performed through usage of modern internet technologies, where nonexistence of fixed working hours or working place, untraditional methods of implementation of control by the employer, and other numerous factors create illusion of absence of labor relations,⁴ because of which often persons of certain category, even if their activity is labor relation, are left without legal and social guarantees.

The purpose of the article is to evaluate criteria for qualifying persons left outside legal protection (in this particular case persons employed through online platform) to qualify as employees,

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¹ ILO-International Labour Organization.

² R198 – Employment Relationship Recommendation, 2006 (No. 198).

³ A fictitious self-employment may disrupt the financial stability of the social security system. Companies, which use fictitious self-employed persons do not pay installments of social maintenance aimed for the budget, therefore comparing to competitors who use legal employees, they are in better condition.

⁴ As a rule, companies consider platform as connecting circle between courier and customer. *Hartmann-Cortés K.*, How did a Food Delivery Platform’s Judgement Transform Freedom of Association into a second- class right? *Comparative Labour Law and Policy Journal*, 2021, 3.

outlined from the analysis of legislations and judicial practice of various countries in order to improve legal condition of vulnerable groups.

2. Employment Through Digital Labour Platform

In the modern world performance of work through digital labour platform (herein after – platform) is especially topical.⁵ Noncompliance with labour standards and minor tax responsibilities give to platforms considerably big advantage comparing to competitors.⁶ It is possible to use the term “platform work” as a common term in general, with regard to types of online work.⁷ The digital online platforms are considered here, which comprise platforms connected to network that are functioning in the geographically distanced area (“crowdwork”) and where people are gathering throughout the world, as well as applications based on location (apps), which unite people in specific geographic area.

There is also content-wise difference between these two notions. The first one is that the service is performed “online” (micro projects, informative access, business consultations) and second, providing service through application, but “offline” (transport, delivery service, housekeeping service, cosmetic service). While the first category (crowdworkers) mostly perform administrative (office) work and this entails global or regional market, the workers of applications based on location are involved in physical work and their usage is targeted to local conditions. In both cases the information technologies and internet are important, in order to provide demand and supply of service in maximally short time, as far as the remuneration of such workers happens momentarily, by principle pay-as-you-go.⁸

3. Criteria for Considering Persons Working Through Digital Platform as Employees

The number of criteria necessary for classifying work performed through digital platform increases day by day.⁹ Their essence is also different and the reason is in volumetric character of the

⁵ Platform work.

⁶ Unregulated activity of digital platforms creates danger of disappearance of such companies, which perform activities in line with labor standards and by following tax legislation fully. See *Rodríguez-Piñero Royo M.*, Platforms and Platform Work in Spanish Industrial Relations, *Comparative Labor Law & Policy Journal* 41, Issue 2, 2020, 452.

⁷ OECD (Organisation for Economic Co-operation and Development) considers under the notion of platform works the deals and web-pages performed through application, which through the specific algorithm connects customers and clients with persons, who performs certain type of work in exchange to payment.

⁸ There is no difference whether person applies online platform for earning extra money, or it is the only source of his/her income, the labor standard must be same in both occasions. See *De Stefano V.*, A manifesto to reform the Gig Economy, Institute for Labor Law, 2019, <<http://regulatingforglobalization.com/2019/05/01/a-manifesto-to-reform-the-gig-economy/>> [02.10.2021].

⁹ In 2007 the new term was established in the legislation of Spain: so-called “economically dependent self-employee”, in short “TRADE”. Here the category is considered, which receives 75% of income from one person. This legal construction was introduced as a mechanism for protection of economically tormented workers, however, it resulted not in real improvement of persons’ condition, but legalization of fictitious employment. That was an offer of intermediate model between employee and independent contractor.

multifactorial test. Besides the traditional control test, which was inadequate in this case, courts had to outline other elements as well, such as for instance acting by using other's brand, influence of algorithm and rating of clients, etc., which is subject to interpretation.¹⁰ The wide scale discretion in terms of evaluating various factual circumstances is added to the mentioned, which brings courts to different legal outcome even within the common framework of legal system.

For instance, the Unemployment Insurance Appeal Board in the state of New-York has ruled repeatedly that the Uber taxi drivers are employees, however, it considered that couriers of Postmates does not fall within the category of employees.¹¹ The appellate court of the New-York State has ruled that the Postmate conducted non accidental control of personnel, but rather the control of couriers was enough for considering them employed. Moreover, the court has decided that it is important to evaluate control of different degree and it derives from the characteristics of the work.¹²

In the judicial practice of national courts four different factors may be outlined for determining labour relations, which essentially responds to ILO labour relations Recommendation (2006, N°198).¹³ These factors are: 1) flexibility of working hours; 2) control over technologies; 3) usage of tools and other resources of the provider of work; 4) possibility of replacement.¹⁴ It is possible that all four factors are used cumulatively and are altogether evaluated by the court. This does not mean that other factors, such as universal principle of primacy of facts, is worthless.¹⁵ This principle is logical prerequisite of study of all other indicators. When while using this principle, the discussion takes place regarding the classification of labour relation, the court of some countries directly indicated the ILO N198 Recommendation as a theoretic framework.¹⁶ In USA using the ABC test for determining

Rodríguez-Piñero Royo M., Platforms and Platform Work in Spanish Industrial Relations, Comparative Labor Law & Policy Journal 41, Issue 2, 2020, 448.

¹⁰ Ibid, 454.

¹¹ Legal argumentation is that the Uber controls working tools and working methodology of driver, such as classification of Uber transport (UberX and UberXL); Uber requires from drivers to have cars technically fit condition, clean and all sanitary requirements must be protected; Uber prohibits presence of other person in the car during the ride, rather than passenger; Uber defines 15 second time limit to accept the ride; It determines what type of details and when should be exchanged during the communication between driver and passengers; It gives recommendation to wait at the destination point minimum 10 minutes; It provides driver with GPS navigation system. Unemployment Insurance Appeal Board, New York, 2019, № 603938. <<https://uiappeals.ny.gov/system/files/documents/2019/09/603938-appeal-decision.pdf>> [11.10.2021].

¹² For classification as labor relation it is essential that the control of making important business decisions must be in employer's hands. State of New York, Court of Appeals, 2020, № 13. *Commissioner of Labor v. Postmates Inc.*, <<https://www.nycourts.gov/ctapps/Decisions/2020/Mar20/13opn20-Decision.pdf>> [07.09.2021].

¹³ According to the article 13 of the Recommendation, one of the indicators of existence of labour relations is performance of work for only one employee, which aims to define economic dependence on the employee. See *Matcharadze M.*, Expediency of the Review of the Concept of Employee Considering the Technological Progress, Journal of Law, № 2, 2020, 57 (in Georgian).

¹⁴ *De Stefano V., Durri I., Stylogiannis, C., Wouters M.*, Platform Work and the Employment Relationship, ILO Working Paper 27, Geneva, 2021, 30.

¹⁵ Principle of primacy of facts – is the standard of International Labour Law and is widely used by national courts. The principle indicates how important is the analysis of terms of the contract and factual circumstances of the case.

¹⁶ *De Stefano V., Durri I., Stylogiannis, C., Wouters M.*, Platform Work and the Employment Relationship, ILO Working Paper 27, Geneva, 2021, 31.

existence of labour relation is one of the effective methods, especially when the burden of proof is transferred to employer, who is obliged to prove that there is not a labour relation.¹⁷ One of the potential outcomes is abolishment of statuses of employer and independent contractor, and consequently all categories of workers must be protected. In USA some statuses already resemble this idea.¹⁸

3.1. Flexibility of the Work Schedule

The possibility of persons employed through digital platform to individually determine their working schedule, as they do not have an obligation to be in the system at fixed hours of the day or week, is defined as “flexibility of work schedule”. This criterion is mostly used by national Courts as an argument to dissociate employee from independent contractor.¹⁹ For instance, it happened in Brazil when both Courts (Superior Tribunal de justica and Tribunal Superior do Trabalho) ruled that flexible work schedule of Uber drivers does not give possibility to consider them as employees.²⁰ Besides, the Labour Tribunal in Turin did not consider food delivery couriers as employees because of the flexible work schedule. Similar argument – absence of fixed working hours was in substantiation of the Labour Tribunal of Milan.²¹ However, flexibility of work schedule has not created compelling obstacle in some jurisdictions. The evident example is France. Where the Appellate Court of Paris has rules with regard to Deliveroo in 2017 that there is no labour relation in place when working days, hours is a choice of person, whether to work hourly or daily, personally decide when to rest and for how long.²² The same court in January 2019 has not excluded freedom of choosing working hours with regard to Uber from the scope of labour relation, considering the fact that when drivers connect to the application, they connect to the activity organized by the company, which gives them directions, controls their performance and implements disciplinary powers over the employees.²³ Along with organization of working process, when assessing labour relation it is necessary to take into consideration length of relation and its continuing nature.²⁴ In March 2020 the Cassation Court has

¹⁷ *Bellomo S., Ferraro F. (eds.), Modern Forms of Work, A European Comparative Study, Roma, 2020, 35.*

¹⁸ *Bales R., Mikhelidze A., Legal Responses to the Rise of the On-Demand Economy in Georgia and the United States, Modern Law Journal, V.I, Book I, 2019, 11 (in Georgian).*

¹⁹ In the paragraph 13 of the ILO Recommendation № 198 it is noted that the work is performed in hours specially determined for that or on the specifically determined or agreed location or the accessibility of employee is required – are the probable admissible indicators for existence of labour relation.

²⁰ Drivers are not in depending relation with the Uber company, as far as they provide service on randomness principle, without any preliminarily defined hours, they do not receive fixed salary, which does not create characteristics of labour relation, *De Stefano V., Durri I., Stylogiannis, C., Wouters M., Platform Work and the Employment Relationship, ILO Working Paper 27, Geneva, 2021, 32.*

²¹ *Ibid.*

²² It must be noted that in 2016 by the El Khomri Act the French legislator gave collective rights to platform workers approximately with the same amount as persons employed under the labour contract. See *Daugareilh I., The Legal Status of Platform Workers in France, Comparative Labour Law and Policy Journal, 41(2), 2020, 412.*

²³ *De Stefano V., Durri I., Stylogiannis, C., Wouters M., Platform Work and the Employment Relationship, ILO Working Paper 27, Geneva, 2021, 32.*

²⁴ *Bellomo S., Ferraro F. (eds.), Modern Forms of Work, A European Comparative Study, Roma, 2020, 23.*

approved the decision of the Appellate Court of Paris from January 2019, which was related to consideration of Uber drivers as employees.²⁵

In Spain platforms categorically are against conclusion of employment contracts.²⁶ The Spanish Court has studied issue of flexible work schedule profoundly and has concluded that the schedule is not an obstacle for qualifying relation as labour relation. Moreover, in case of Glovo couriers, during performance of an order, choice of time is limited.²⁷ According to the Court decision, necessity of points' system which is used by application and which is based on the rating of customers, is revealed when there is a need for service in peak hours. If couriers cannot work during peak hours, their rating points decrease, and this refrains them from having access to orders in conditions of maximal demand from customers.²⁸ Therefore, possibility to choose time for performing delivery existing theoretically is sharply different from the real freedom.²⁹ Based on the Court decision, Glovo couriers are also employed in the conditions when they do not have fixed work schedule, preliminarily defined rules when to take work leave, etc. It is important that Court underlined the fact that Glovo controls work schedule of employees, which is expressed in variable remuneration and imposing rating and evaluation system.³⁰ If an employee desires to be paid more, he/she must work during high demand, which is possible only resulting from evaluation.³¹

Netherlands suggests other example for illustrating the fact that flexible work schedule is not inconsistent with labour relation. In July 2018 the Court of Amsterdam has rules that Deliveroo couriers are self-employed because of their flexible work schedule. In the view of the Court, the fact that top couriers have advantage with regard to certain part of time, does not limit less successful couriers to reserve the order, which they may perform after successful couriers. According to the Court, this occasion does not fulfill the element of subordination prescribed in the Civil Code of Netherlands. In July 2019 other Court of First Instance in Amsterdam shared this decision.³² According to its substantiation, Deliveroo factually restricts right of couriers to choose working time. Couriers are bound by labour contract, despite the fact that they exercise high degree of freedom. The

²⁵ *De Stefano V., Durri I., Stylogiannis, C., Wouters M.*, Platform Work and the Employment Relationship, ILO Working Paper 27, Geneva, 2021, 32.

²⁶ The most acceptable format of cooperation for platforms is to classify persons as economically independent self-employees. In their view, this is the most flexible form, which is admissible for both sides. *Rodríguez-Piñero Royo M.*, Platforms and Platform Work in Spanish Industrial Relations, Comparative Labor Law & Policy Journal 41, Issue 2, 2020, 461.

²⁷ In Georgia, Glovo has concluded service contracts with couriers as individual entrepreneurs and manages relations allegedly on equal basis. The tariffs are decreased unilaterally without giving any prior information to couriers.

²⁸ The role of digital labour platforms in transforming the world of work, World Employment and Social Outlook, International Labour Office, Geneva, 2021, 177, <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_771749.pdf> [23.09.2021].

²⁹ *Rodríguez-Piñero Royo M.*, Platforms and Platform Work in Spanish Industrial Relations, Comparative Labor Law & Policy Journal 41, Issue 2, 2020, 470.

³⁰ *De Stefano V., Durri I., Stylogiannis, C., Wouters M.*, Platform Work and the Employment Relationship, ILO Working Paper 27, Geneva, 2021, 33.

³¹ Ibid.

³² Ibid.

degree of dependence on Deliveroo is highly significant, rather than the independence of couriers.³³ In the decision of February 2021 the Appellate Court has ruled that only circumstance which indicates to self-employment of couriers may be their freedom to organize work.³⁴ However, in the view of the Court this flexibility is not inconsistent with labour relations between Deliveroo and its couriers. The argument of Deliveroo, that self-employment is strengthened by the possibility of couriers to connect to application by their own desire and work, anytime, has not changed the position of the Court.³⁵

Some countries remain devoted to the opinion that the essential term of labour contract is existence of mutual obligation. The principle of mutual obligation is specifically followed by the United Kingdom. With regard to Uber (*Uber BV and others v. Aslam and others*, 19 February 2021) by the decision of the Supreme Court of the United Kingdom,³⁶ freedom of Uber drivers whether to work or not work at all, does not oblige them to be in the labour relation with the person they work for. In Germany the Munich Land Court underlined the condition that the framework agreement, rules and terms of platform (application), which does not create obligation to perform work, may not be considered as labour contract.³⁷ This degree of independence with regard to the working time is absolutely unusual for labour relations. This decision was overruled by Federal Labour Court, which considered the abovementioned relation as labour relation. With regard to the flexible schedule of courier, it has noted that even though the courier has choice to agree or not to work, in combination with other elements such as detailed instructions, this became ground for the court to qualify relation as labour one.³⁸ Similar platform in France, Clic and Walk, was also considered as employer.³⁹

3.2. Control Through Technologies

Control of the performed work by the employer is the main characteristic of labour relation.⁴⁰ The options of platform to implement control over its workers through technologies such as: algorithms, evaluation systems and geolocation tools, is an important element in numerous Court decisions considering such type of work as labour contract.⁴¹

³³ *De Stefano V., Durri I., Stylogiannis, C., Wouters M.*, Platform Work and the Employment Relationship, ILO Working Paper 27, Geneva, 2021, 33.

³⁴ Ibid.

³⁵ It must be noted that in Netherlands persons have possibility to conclude collective contracts even in case of service contracts, which is controversial with regard to CJEU practice, which does not give this right to others than employees. See *Gundt N.*, The Netherlands: Trying to Solve 21st Century Challenges by Using 20st Century Concepts, *Comparative Labour Law and Policy Journal*, 41(2), 2020, 481.

³⁶ *Uber BV and others v. Aslam and others*, UK, The Supreme Court of UK, 2021, <<https://www.supremecourt.uk/cases/docs/uksc-2019-0029-judgment.pdf>> [10.10.2021].

³⁷ *De Stefano V., Durri I., Stylogiannis, C., Wouters M.*, Platform Work and the Employment Relationship, ILO Working Paper 27, Geneva, 2021, 34.

³⁸ Ibid.

³⁹ In this case the important argument was the existence of instructions for couriers and oversight in line with these instructions, Cour d'appel de Douai du, 2020, N°19/00137, *De Stefano V., Durri I., Stylogiannis, C., Wouters M.*, Platform Work and the Employment Relationship, ILO Working Paper 27, Geneva, 2021, 34.

⁴⁰ In the civil law jurisdiction, it corresponds to the element of subordination.

⁴¹ In the Republic of Korea the Ministry of Employment and Labour in 2019 considered food delivery service company “Yogiyo” couriers as persons employed under the labour contract, *De Stefano V., Durri I.*,

In the case *Asociacion Profesional Elite Taxi v. Uber Systems Spain SL*⁴² in 2017 the Court of Justice of the European Union (CJEU) has made explanation with regard to the application of national transport regulations, that Uber taxi service is transportation service by using digital technologies. The decision also discusses the control element implemented by the company with relation to drivers. The company implements control over selected drivers in the process of service provision, when they perform particular order.⁴³ The company not only determines maximum amount of price through its application, but also ensures issuance of bonuses. The application also has function of rating – to give advantage to drivers having better results and expel drivers having improper evaluation.⁴⁴

The control exercised by the company, which is depicted in the financial motivation based on the evaluation of passengers, gives possibility for better management of drivers, rather than direct control of employer over employees based on formal commands in case of similar orders.⁴⁵ The control exercised from the side of clients makes platform workers “hyper dependent employees” in comparison to traditional employees.⁴⁶ By introducing rating system platform gives a managerial evaluation function to client, which in case of companies alike Uber, where there are fixed tariffs and standardized service, the reputational system is used for excluding nonprofessionals from the application.⁴⁷

However, there are reasons why it is impossible to consider Uber as employer in accordance to national law. The taxi companies, for instance in Brussels, have sued Uber that it must be prohibited because of violation of transport legislation. While deliberating on this case the Court assessed drivers as self-employed persons. Moreover, it made distinction between Deliveroo couriers, who were considered as employees.⁴⁸ When comparing these two subjects, the Court noted that Uber drivers have transport license in comparison to Deliveroo couriers. Besides, while in case of couriers, geolocation probably only serves to the aim that client may see where is the order, for taxi drivers – geolocation is necessary for functioning. Not only taxi driver is relocated but also is the client, therefore may we say or not that Uber exercises control over the client as well? The above-mentioned

Stylogiannis, C., Wouters M., Platform Work and the Employment Relationship, ILO Working Paper 27, Geneva, 2021, 35.

⁴² *Asociacion Profesional Elite Taxi v. Uber Systems Spain SL, (CJEU), 2017, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62015CJ0434#t-ECR_62015CJ0434_EN_01-E0001> [10.10.2021].*

⁴³ *De Stefano V., Durri I., Stylogiannis, C., Wouters M., Platform Work and the Employment Relationship, ILO Working Paper 27, Geneva, 2021, 35.*

⁴⁴ When the work is performed online, reputation and positive rating obtains a huge significance. See *Moore P. V., The Mirror for (Artificial) Intelligence: In Whose Reflection? Comparative Labor Law & Policy Journal, 41(1), 2019, 64.*

⁴⁵ *De Stefano V., Durri I., Stylogiannis, C., Wouters M., Platform Work and the Employment Relationship, ILO Working Paper 27, Geneva, 2021, 35.*

⁴⁶ *Rodríguez-Piñero Royo M., Platforms and Platform Work in Spanish Industrial Relations, Comparative Labor Law & Policy Journal 41, Issue 2, 2020, 470.*

⁴⁷ *Berg J., Protecting Workers in the Digital Age: Technology, Outsourcing, and the Growing Precariousness of Work, Comparative Labor Law & Policy Journal 41, no.1, 2019, 83.*

⁴⁸ The Administrative Commission of Belgium conferred status of employees to the Deliveroo’s couriers, see *De Stefano V., Durri I., Stylogiannis, C., Wouters M., Platform Work and the Employment Relationship, ILO Working Paper 27, Geneva, 2021, 35.*

is needed only for mutual connection to the application. In this decision the argument of the court is that if passengers are not controlled hierarchically, then the drivers also may not be subject to control hierarchically.⁴⁹

In New Zealand, in the case *Arachchige v. Raiser New Zealand Ltd & Uber BV* (December 2020) the Oakland Labour Court has ruled that Uber driver is an independent contractor.⁵⁰ Along with other arguments the Court has established that work of drivers is not managed and neither controlled by the company, the only thing is that drivers use Uber brand. In addition, the court has noted that this decision was based on mostly interpretation of significant facts.⁵¹

The Cassation Court of France also underlined the component of geolocation, when it overruled the decision of the Appellate Court with regard to “Take it Easy” platform. By reasoning of the Cassation Court, when the company uses platform and application for connection with the customer, it is interested in and sees the location in real time in order to find out how many kilometers are there to reach the customer, hence considering all these, its possibility to use sanctions towards driver does not leave this relation only in the framework of legal construction of independent contractor.⁵² All the more, when there are three elements of subordination in place (giving instruction, control and sanctioning), which unconditionally gives to relation a nature of labour contract.⁵³ In the more later case the Cassation Court of France approved Uber’s control considering the determination of price, taking order and surveillance function over the route through algorithm.⁵⁴ Various platforms uses financial sanctions towards persons for improper performance of work, which is characteristic to labour relations.⁵⁵ The Supreme Tribunal of Madrid (2019) has noted that with the geolocation system Glovo exercises effective and continuous control over the activity of courier.⁵⁶ The reward system dependent on the evaluation of customer is the undisputable proof of labour contract.

In Canada, according to the recent practice, the Ontario Labour Relations Board⁵⁷ has noted that with regard to such platforms as Foodora, technologies represent additional mechanism of control in

⁴⁹ *De Stefano V., Durri I., Stylogiannis, C., Wouters M.*, Platform Work and the Employment Relationship, ILO Working Paper 27, Geneva, 2021, 36.

⁵⁰ *Arachchige v. Raiser New Zealand Ltd & Uber BV*, Auckland Employment Court, 2020, <<https://www.employmentcourt.govt.nz/assets/Documents/Decisions/2020-NZEmpC-230-Arachchige-v-Rasier-NZ-Ltd-and-UBER-BV-Judgment.pdf>> [13.10.2021].

⁵¹ Ibid.

⁵² *De Stefano V., Durri I., Stylogiannis, C., Wouters M.*, Platform Work and the Employment Relationship, ILO Working Paper 27, Geneva, 2021, 36.

⁵³ *Bellomo S., Ferraro F. (ed.)*, Modern Forms of Work, A European Comparative Study, Roma, 2020, 99.

⁵⁴ *De Stefano V., Durri I., Stylogiannis, C., Wouters M.*, Platform Work and the Employment Relationship, ILO Working Paper 27, Geneva, 2021, 36.

⁵⁵ *Berg J.*, Protecting Workers in the Digital Age: Technology, Outsourcing, and the Growing Precariousness of Work, Comparative Labor Law & Policy Journal 41, no.1, 2019, 84.

⁵⁶ *De Stefano V., Durri I., Stylogiannis, C., Wouters M.*, Platform Work and the Employment Relationship, ILO Working Paper 27, Geneva, 2021, 36.

⁵⁷ *Canadian Union of Postal Workers, v Foodora Inc. d.b.a. Foodora*, Ontario Labour Relations Board, 2020, <https://s3.amazonaws.com/tld-documents.llnassets.com/0017000/17948/1346-19-r_foodora-inc-feb-25-2020.pdf> [09.09.2021].

the hands of employer. Using GPS⁵⁸ is extra mechanism for control. Technological algorithm,⁵⁹ GPS, automatic notifications, communication with short textual messages – all these gives possibility to Foodora to control working process with the minimum involvement of human.⁶⁰ In the other case in Pennsylvania⁶¹ (USA) the Appellate Court judges were not certain about whether Uber drivers were not subject to control in accordance with the standards of fair labour.⁶² They outlined the fact that Uber restricts access to application to drivers who have low rating and reduces their work in following hours.⁶³ Regarding the dispute which was related to exercise right to unemployment insurance by the driver, the New-York City Supreme Court established that there was an essential evidence of exercising control over the driver by Uber, which created precondition for presence of labour relations.⁶⁴ Uber controls route through navigation, by means of rating system, if there is improper performance, it reduces the amount of payment for the driver. Uber observes location of car, behavior of the driver, and gives him motivation to create positive environment during travel through award system based on rating.⁶⁵ In the United Kingdom, the Supreme Court granted status of Limb (b type) employee to Uber drivers based on the argument that the rating is used by the Uber only as internal mechanisms for managing performance and as a ground for terminating relations, when the feedback of customer shows that the driver does not comply with standards defined by Uber – which is a classical form of subordination characteristic to labour relations.⁶⁶

3.3. Tools and Other Resources

For determining status of employee, article 13 of the Recommendation takes into consideration supply of the person to whom it offers work with tools, working material, technique. Whether a person carries the logo or uniform of the employer is one of the indicators, which is considered by many

⁵⁸ Global Positioning System.

⁵⁹ Usage of algorithm is followed automatic decision making, without participation of individual, which deprives person from the possibility to decide the issue my means of negotiation and communication. The lack of transparency in this process is also problematic, *Berg J.*, Protecting Workers in the Digital Age: Technology, Outsourcing, and the Growing Precariousness of Work, *Comparative Labor Law & Policy Journal* 41, no.1, 2019, 80.

⁶⁰ Canadian Union of Postal Workers, v Foodora Inc. d.b.a. Foodora, Ontario Labour Relations Board, 2020, <https://s3.amazonaws.com/tld-documents.llnassets.com/0017000/17948/1346-19-r_foodora-inc-feb-25-2020.pdf> [09.09.2021].

⁶¹ Ali Razak, Kenan Sabani and Khaldoun Cherdoud v. Uber Technologies, INC., and GEGAN, LLC., United States District Court for the Eastern District of Pennsylvania, 2018, <<https://www.isdc.ch/media/1591/14-razak-v-uber.pdf>> [30.09.2021].

⁶² Ali Razak, Kenan Sabani and Khaldoun Cherdoud v. Uber Technologies, INC., and GEGAN, LLC., United States Court Of Appeals for the Third Circuit, 2020, <<https://law.justia.com/cases/federal/appellate-courts/ca3/18-1944/18-1944-2020-11-05.html>> [01.10.2021].

⁶³ Ibid.

⁶⁴ Colin Lawry v. Uber Technologies, INC, State of New York Supreme court, 2020, <<https://decisions.courts.state.ny.us/ad3/Decisions/2020/530395.pdf>> [14.09.2021].

⁶⁵ Ibid.

⁶⁶ Uber BV and others v. Aslam and others, United kingdom, The Supreme Court of UK, 2021, <<https://www.supremecourt.uk/cases/docs/uksc-2019-0029-judgment.pdf>> [10.10.2021].

courts. In Chile the Court did not consider Uber as employer of drivers because they did not use special uniform. The same approach took place in Australia as well, where the Fair Work Commission decided that as far as worker does not have right to portray the name, logo or colors of company or affiliated with the company on the transportation mean, it hinders the possibility to qualify this relation as labour relation.⁶⁷ Moreover, it must be taken into consideration that the worker must have his/her own car, smart phone and access to navigation, in order to use Partner application. Similar approach is in the USA as well. From the sic factors qualifying labour relation (so-called “Donovan factors”) according to US Fair Labour Standard one of them is the persons investment in tools and equipment necessary for performing work. This factor strengthens arguments in favor of independent contractor. Uber drivers when they purchase their own vehicles, they make important capital investment.⁶⁸

In the case *Joshua Klooger v. Foodora Australia Pty Ltd* the Fair Work Commission of Australia has noted that claimant did not have any substantial investment (installment) in the form of major item, which he/she definitely needed for performing courier work.⁶⁹ Other courts compare the significance of worker’s investment when buying own tools with the technological investment of the company. The Ontario Labour Relations Board defines that necessary tools for providing service may be ensured by the courier, as well as by the company, however the application must be underlined, which represents most important part for providing service and is owned and controlled by Foodora.⁷⁰ The Court in Madrid has evaluated the ownership of tools and noted that it is important to compare essential technological instruments which are in ownership of the defendant (digital platform and application) and relatively less important (courier’s smart phone and motorcycle). The essential in the delivery service for the courier is digital platform and less important – courier’s smartphone or motorcycle.⁷¹ Similar decision was made by the Supreme Court of the United Kingdom in case of Uber.⁷²

3.4. Obligation to Perform Work Personally

The recommendation outlines the obligation to perform work personally among labor relations’ identifying elements. Traditionally for the labour contract personality of employee is essential figure. This issue receives special significance when it relates to performing work through platform. Some

⁶⁷ Mr Michail Kaseris v. Rasier Pacific V.O.F. (U2017/9452), Fair Work Commission, 2017, <<https://pdf.coffee.com/mr-michail-kaseris-v-rasier-pacific-vof--pdf-free.html>> [03.10.2021].

⁶⁸ The opinion of US Department of Labor is the same. They use similar platforms, in order to find job quickly, but the dependence on application is minimal, as far as they can use other network or other competitor application. See *De Stefano V., Durri I., Stylogiannis, C., Wouters M.*, Platform Work and the Employment Relationship, ILO Working Paper 27, Geneva, 2021, 38.

⁶⁹ Joshua Klooger v. Foodora Australia Pty Ltd, Fair Work Commission, 2018, №FWC6836, <<https://www.fwc.gov.au/documents/decisionssigned/html/2018fwc6836.htm>> [10.09.2021].

⁷⁰ Canadian Union of Postal Workers, v Foodora Inc. d.b.a. Foodora, Ontario Labour Relations Board, 2020, <https://s3.amazonaws.com/tld-documents.lnassets.com/0017000/17948/1346-19-r_foodora-inc-feb-25-2020.pdf> [09.09.2021].

⁷¹ *De Stefano V., Durri I., Stylogiannis, C., Wouters M.*, Platform Work and the Employment Relationship, ILO Working Paper 27, Geneva, 2021, 39.

⁷² Uber BV and others v. Aslam and others, United kingdom, The Supreme Court of UK, 2021, <<https://www.supremecourt.uk/cases/docs/uksc-2019-0029-judgment.pdf>> [10.10.2021].

platforms give possibility to their workers to be substituted by other persons. Those rules and terms which regulate relations between worker and platform, in some occasions regulate the circumstances in case of which they may be substituted with other persons. Whether liability insurance towards third persons is applied to substitute person as well. The obligation of personal performance became arguable topic in Brazil as well. The Brazilian judge decided that Uber drivers are not employed, as far as they may be substituted by others.⁷³ In the United Kingdom the Central Arbitration Committee has noted that Deliveroo couriers really have right to be substituted. As a result, they are not considered as employees in accordance with the Trade Union and Labor relations (Consolidation) Act or Employment Rights Act (1996).⁷⁴ Therefore they are excluded from the majority of employment rights, minimal wage, working hours and antidiscrimination protection is related to so-called Limb (b) status of employee, which is hybrid status between employee and independent contractor. The Supreme Court has shared the decision of the Central Arbitration Committee.⁷⁵ The London Central Employment Tribunal has decided the dispute in favor of employees. The argument was that workers do not really have right to substitute in practice.⁷⁶ This balance between theoretical right to substitute and practice may be found in other countries as well, for example in Spain. The Supreme Court considered term of substitution as a term introduced with the purpose to cover labour contract.⁷⁷ Study of existence of similar substitution in other cases was conducted based on the principle of primacy of facts.

4. Conclusion

As a result of analysis of the work of digital platforms the following necessities were outlined: First of all, it is necessary to determine on the legislative level legal status of persons performing activity through digital platforms. Decision of problem is possible by conclusion of collective agreement, as it was done in France.⁷⁸ Particularly with this tool the obtaining of minimum guarantees of protection happen for this category of persons.

⁷³ *De Stefano V., Durri I., Stylogiannis, C., Wouters M.*, Platform Work and the Employment Relationship, ILO Working Paper 27, Geneva, 2021, 39.

⁷⁴ *IWGB v. RooFoods Limited T/A Deliveroo*, 39, UK CENTRAL ARBITRATION COMMITTEE, 2017, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/663126/Acceptance_Decision.pdf> [23.09.2021].

⁷⁵ *De Stefano V., Durri I., Stylogiannis, C., Wouters M.*, Platform Work and the Employment Relationship, ILO Working Paper 27, Geneva, 2021, 39.

⁷⁶ *Dewhurst v. Citysprint UK Ltd.*, The Central London Employment Tribunal, 2017, <[https://uk.practicallaw.thomsonreuters.com/Link/Document/Blob/I8a926728d7e211e698dc8b09b4f043e0.pdf?targetType=PLC-multimedia&originationContext=document&transitionType=DocumentImage&uniqueId=5ed654bc-6dcb-4947-9112-711982f21728&ppcid=3eac205b77ea4d959e0ee73c08f0541a&contextData=\(sc.Default\)&comp=pluk](https://uk.practicallaw.thomsonreuters.com/Link/Document/Blob/I8a926728d7e211e698dc8b09b4f043e0.pdf?targetType=PLC-multimedia&originationContext=document&transitionType=DocumentImage&uniqueId=5ed654bc-6dcb-4947-9112-711982f21728&ppcid=3eac205b77ea4d959e0ee73c08f0541a&contextData=(sc.Default)&comp=pluk)> [12.10.2021].

⁷⁷ The fact that the substitution of complainants with other persons has never occurred makes the court think that this term is more deceptive and written with the aim to hide existence of labor contract, rather than collateral of the service. *De Stefano V., Durri I., Stylogiannis, C., Wouters M.*, Platform Work and the Employment Relationship, ILO Working Paper 27, Geneva, 2021, 39.

⁷⁸ Awarding possibility to conclude collective contract to self-employed persons gives possibility to start negotiations with the platform in equal conditions, See *Daugareilh I.*, The Legal Status of Platform Workers in France, *Comparative Labour Law and Policy Journal*, 41(2), 2020, 415.

It is critically important for all employees, regardless the content of contractual regulation, to have minimum rights and guarantees. ILO Global Commission on the Future of Work⁷⁹ has underlined existence following universal labour guarantees for all employees: freedom of association and participation in collective contracts, adequate salary,⁸⁰ limited working hours, secure and healthy working environment.⁸¹

Usage of algorithms must have limits and technological systems must be used restrictively, balanced and only with the extent necessary for performance of work.

It is necessary for persons performing work through digital platforms, deriving from specifics of their functions (courier, taxi driver) to ensure adequate insurance package on the expense of the offeror of work.

Bibliography:

1. R198 – Employment Relationship Recommendation, 2006 (No.198), ILO.
2. *Bales R., Mikhelidze A.*, Legal Responses to the Rise of the On-Demand Economy in Georgia and the United States, *Modern Law Journal*, V. I, Book I, 2019, 11 (in Georgian).
3. *Bellomo S., Ferraro F.(eds.)*, *Modern Forms of Work, A European Comparative Study*, Roma, 2020, 23, 35, 99.
4. *Berg J.*, Protecting Workers in the Digital Age: Technology, Outsourcing, and the Growing Precariousness of Work, *Comparative Labor Law & Policy Journal* 41, no.1, 2019, 80, 83-84, 88.
5. *Daugareilh I.*, The Legal Status of Platform Workers in France, *Comparative Labour Law and Policy Journal*, 41(2), 2020, 412, 415.
6. *De Stefano V., Durri I., Stylogiannis, C., Wouters M.*, Platform Work and the Employment Relationship, ILO Working Paper 27, Geneva, 2021, 30-39.
7. *De Stefano V.*, A manifesto to reform the Gig Economy, Institute for Labor Law, 2019, <<http://regulatingforglobalization.com/2019/05/01/a-manifesto-to-reform-the-gig-economy/>> [02.10.2021].
8. *Gundt N.*, The Netherlands: Trying to Solve 21st Century Challenges by Using 20st Century Concepts, *Comparative Labour Law and Policy Journal*, 41(2), 2020, 481.
9. *Hartmann-Cortés K.*, How did a Food Delivery Platform’s Judgement Transform Freedom of Association into a second- class right? *Comparative Labour Law and Policy Journal*, 2021, 3.
10. *Löschnigg G.*, Platform Work in Austria, *Comparative Labour Law&Policy Journal*, 41(2), 2020, 401-402.

⁷⁹ Global Commission on the Future of Work.

⁸⁰ For instance, in Austria there is no legislation regarding the minimal wage. The most important legitimate mean for regulating this issue is collective agreement. The collective agreement regulates 98% of labour relations. However, for concluding collective contract they must have status of employees. See *Löschnigg G.*, Platform Work in Austria, *Comparative Labour Law&Policy Journal*, 41(2), 2020, 401-402.

⁸¹ “...New ways must be found to afford adequate protection to all workers, and that all workers regardless of their contractual arrangement or employment status, must equally enjoy adequate labour protection to ensure humane working conditions for everyone.” *Berg J.*, Protecting Workers in the Digital Age: Technology, Outsourcing, and the Growing Precariousness of Work, *Comparative Labor Law & Policy Journal* 41, no.1, 2019, 88.

11. *Matcharadze M.*, Rationality of revising the notion of employee taking into account technological progress, *Journal of Law*, №2, 2020, 57 (in Georgian).
12. *Moore P.V.*, The Mirror for (Artificial) Intelligence: In Whose Reflection? *Comparative Labor Law & Policy Journal*, 41(1), 2019, 64.
13. Rodríguez-Piñero Royo M., Platforms and Platform Work in Spanish Industrial Relations, *Comparative Labor Law & Policy Journal* 41, Issue 2, 2020, 448, 452, 454, 461, 470.
14. The role of digital labour platforms in transforming the world of work, *World Employment and Social Outlook*, International Labour Office, Geneva, 2021, 177, <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_771749.pdf> [15.10.2021].
15. *Joshua Klooger v. Foodora Australia Pty Ltd.*, Fair Work Commission, 2018, №FWC6836, <<https://www.fwc.gov.au/documents/decisionsigned/html/2018fwc6836.htm>> [10.09.2021].
16. Unemployment Insurance Appeal Board, New York, 2019, №603938, <<https://uiappeals.ny.gov/system/files/documents/2019/09/603938-appeal-decision.pdf>> [11.10.2021].
17. *Asociacion Profesional Elite Taxi v. Uber Systems Spain SL*, CJEU, 2017, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62015CJ0434#t-ECR_62015CJ0434_EN_01-E0001> [10.10.2021].
18. *Uber BV and others v. Aslam and others*, United kingdom, The Supreme Court of UK, 2021, <<https://www.supremecourt.uk/cases/docs/uksc-2019-0029-judgment.pdf>> [10.10.2021].
19. *Arachchige v. Raiser New Zeland Ltd&Uber BV*, Auckland Employment Court, 2020, <<https://www.employmentcourt.govt.nz/assets/Documents/Decisions/2020-NZEmpC-230-Arachchige-v-Rasier-NZ-Ltd-and-UBER-BV-Judgment.pdf>> [13.10.2021].
20. *Canadian Union of Postal Workers, v Foodora Inc. d.b.a. Foodora*, Ontario Labour Relations Board, 2020, <https://s3.amazonaws.com/tld-documents.lnassets.com/0017000/17948/1346-19-r_foodora-inc-feb-25-2020.pdf> [09.09.2021].
21. *Ali Razak, Kenan Sabani and Khaldoun Cherdoud v. Uber Technologies, INC., and GEGAN, LLC.*, United States District Court for the Eastern District of Pennsylvania, 2018, <<https://www.isdc.ch/media/1591/14-razak-v-uber.pdf>> [30.09.2021].
22. *Mr Michail Kaseris v. Rasier Pacific V.O.F. (U2017/9452)*, Fair Work Commission, 2017, <<https://pdfcoffee.com/mr-michail-kaseris-v-rasier-pacific-vof--pdf-free.html>> [03.10.2021].
23. *IWGB v. RooFoods Limited T/A Deliveroo*, 39, CENTRAL ARBITRATION COMMITTEE, 2017, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/663126/Acceptance_Decision.pdf> [23.09.2021].
24. *Dewhurst v. Citysprint UK Ltd.*, The Central London Employment Tribunal, 2017, <[https://uk.practi callaw.thomsonreuters.com/Link/Document/Blob/I8a926728d7e211e698dc8b09b4f043e0.pdf?targetType=PLC-multimedia&originationContext=document&transitionType=DocumentImage&uniqueId=5ed654bc-6dcb-4947-9112-711982f21728&ppcid=3eac205b77ea4d959e0ee73c08f0541a&contextData=\(sc.Default\)&comp=pluk](https://uk.practi callaw.thomsonreuters.com/Link/Document/Blob/I8a926728d7e211e698dc8b09b4f043e0.pdf?targetType=PLC-multimedia&originationContext=document&transitionType=DocumentImage&uniqueId=5ed654bc-6dcb-4947-9112-711982f21728&ppcid=3eac205b77ea4d959e0ee73c08f0541a&contextData=(sc.Default)&comp=pluk)> [12.10.2021].
25. *Colin Lawry v. Uber Technologies, INC*, State of New York Supreme court, 2020, <<https://decisions.courts.state.ny.us/ad3/Decisions/2020/530395.pdf>> [14.09.2021].
26. *Ali Razak, Kenan Sabani and Khaldoun Cherdoud v. Uber Technologies, INC., and GEGAN, LLC.*, United States Court Of Appeals for the Third Circuit, 2020, <<https://law.justia.com/cases/federal/appellate-courts/ca3/18-1944/18-1944-2020-11-05.html>> [01.10.2021].