

Ekaterine Kardava*

Summing of Worker’s Working Times with different Employers by an Employee – as an Infringement of Freedom of Parallel Employment and Illegal Processing of Personal Data

In the modern labor market, parallel employment of a person in different businesses is an opportunity to mitigate the economic dependence on only one employer and manage own welfare life. In 2019, the EU Labor Directive 2019/1125 on Transparent and Predictable Working Conditions, legally strengthened the freedom of an employee to work with different employers in case of will. Restriction of this freedom is allowed only in reasonable and precisely defined cases.

The article explains the legal norm of the Labor Code of Georgia regulating parallel employment. Some wrong Georgian practices between competitors (employers) are criticized. In order to use the norm in a uniform and good sense, in order to understand the real purpose of parallel labor freedom, the models of European legal regulations, the provisions of 2019/1125 directive, and various laws/norms of Georgia are synchronized and analysed.

Keywords: *Parallel Employment, Labour, Competition, EU, Directive, Labour Code of Georgia.*

1. Introduction

Millions of employees in the European Union (hereinafter – the EU) are bound by a contractual provision – not to work with another employer (non-compete clauses). Employees are fully dependent on sole employer. This form of exploitation has been paid attention by the European Commission and the issue has become subject to special regulation by Directive 2019/1125.¹ Employees, in case of they wish, should have the opportunity to work more, find other jobs, improve their welfare, receive other income/remuneration than from only one employer. The results of the study show that only a small number of people in Europe (zero-hour/on-demand contract workers) are able to work in parallel, because of the fact that they are bound by excessively restrictive/prohibitive contractual conditions.²

* Doctor of Law, Associated (Affiliated) Professor of the Caucasus University, Professor of the Gori State Teaching University, Visiting Lecturer at Ivane Javakhishvili Tbilisi State University Faculty of Law.

¹ *Georgiou D.*, The New EU Directive on Transparent and Predictable Working Conditions in the Context of New Forms of Employment, *European Journal of Industrial Relations*, <<https://journals.sagepub.com/doi/full/10.1177/09596801211043717>> [14.11.2022].

² Commission Staff Working Document, Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on Transparent and Predictable Working Conditions in the European Union, European Commission, 21/12/2017, 70, 204-205, <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017SC0478&from=EN>> [14.11.2022].

According to Directive 2019/1125 on Transparent and Predictable Working Conditions³, parallel employment⁴ cannot be prohibited. Limitation of parallel work with another employer is allowed only in reasonably exceptional and foreseeable cases.

The Labor Code of Georgia (hereinafter – Labour Code) regulates the aspects of parallel work. But there is no consensus on the uniform interpretation of norms. In order to make a healthy and proper use of norms and avoid excessively restrictive practices, it is important to study two legal aspects:

1. When (by what criteria) the freedom of parallel work will be restricted?
2. Is it permissible for an employer to combine the working hours of the employee with other/different employers?

In order to research the above-mentioned issues (and answer the questions), the article reviews the relevant provisions of the EU Directive 2019/1125, the legal regulation models of some EU member states, and the legal norms of Georgia.

Via using methods of description, formal-legal, analysis and synchronization, by this article, the author offers such an interpretation of Labour Code norms, which will serve the development of the theory and practice of Georgian labor law, will not worsen the work conditions of employees (the weak part of the contract) and, at the same time, will protect the employer's economic interests in the field of competition.

2. EU Labour Law and European National Legal Regulations on Parallel Employment

According to the Annex XXX of the Association Agreement⁵ Georgia should meet the obligation of transposition of the EU directive 91/533 into national legislation. Currently, this directive is annulled⁶ and based on the Dynamic Approximation principle⁷, Georgia is obliged to approximate the new 2019/1125 directive on Transparent and Predictable Working Conditions.⁸ According to article 9 of the directive:

³ Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on Transparent and Predictable Working Conditions in the European Union, <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1152&from=EN>> [14.11.2022].

⁴ In some sources/literature it is named as Second Job.

⁵ Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, 27.06.2014, <[https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:22014A0830\(02\)](https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:22014A0830(02))> [14.11.2022].

⁶ *Kardava E.*, Interpretation of the Trial Labour in Georgian Case Law and EU Directive 2019/1125, Case Law Analysis, № 1, Caucasus University, 2021, 30 (in Georgian).

⁷ See, article 418 of the Association Agreement and its interpretation in the following sources: *Kardava E.*, Georgian Labour Law Reform in terms of Requirements of European Integration and Association Agreement, dissertation, Tbilisi State University, 2018, 21-36, <http://press.tsu.ge/data/image_db_innova/Eka%20Kardava.pdf> [14.11.2022] (in Georgian); *Kardava E.*, Legal Approximation – Guidline Principles, the Parliament of Georgia, association “European Time”, Friedrich Ebert Stiftung, 2017, <<https://web-api.parliament.ge/storage/files/shares/sascavlo-centri/resursi/booklet-legal-approximation-26-11-17.pdf>> [14.11.2022] (in Georgian).

⁸ Directive (EU) 2019/1152 Of the European Parliament and of the Council of 20 June 2019 on Transparent and Predictable Working Conditions in the European Union, <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1152&from=EN>> [14.11.2022].

1. Member States shall ensure that an employer neither prohibits a worker from taking up employment with other employers, outside the work schedule established with that employer, nor subjects a worker to adverse treatment for doing so.
2. Member States may lay down conditions for the use of incompatibility restrictions by employers, on the basis of objective grounds, such as health and safety, the protection of business confidentiality, the integrity of the public service or the avoidance of conflicts of interests.

The EU adopted a new directive in 2019. Annulled Directive 91/533/EEC has been repealed with effect from 1 August 2022. So, from this date, the new directive's provisions are applicable. During this period, EU member states had the obligation to transpose the directive into national law. In 2027, the European Commission will prepare a first report and examine the impact of the new norms on micro, small and medium-sized enterprises and, where necessary, propose further legislative amendments.

The explanatory note of the 2019/1125 directive mentions that the modern labor market is characterized by non-standard/atypical labor relations, where more transparency and information are necessary. This also applies to parallel employment.⁹

Based on new directive, Employment Protection Act of **Sweden** was amended in 2022, according to which:¹⁰

- *The employer is not allowed to prohibit the employee to work with another employer during the employment period.*
- *However, a restriction is allowed if, 1. Working with another employer damages the performance of duties; 2. The other employer is a competitor of the employer and this causes harm to the employer; or 3. The employer is harmed in other ways.*
- *An employer must not put an employee at a disadvantage on the grounds that she/he works for another employer.*

According to the Employment Contracts Act of **Estonia** (which was amended in 2022 as well)¹¹:

- *An employer may not prohibit an employee from working for another employer, unless the parties have concluded an agreement on a restraint of trade clause.*
- *Under an agreement on a restraint of trade clause an employee assumes the obligation not to work for the employer's competitor or not to engage in the same economic or professional activity as the employer.*
- *An agreement on a restraint of trade clause may be entered into if it is necessary for protecting the employer's special economic interest, in maintenance of confidentiality of which the employer has a legitimate interest, especially if the employment relationship*

⁹ Explanatory Memorandum for the Proposal for a Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work, European Commission, 2021, 5.

¹⁰ Article 6i, Lag (1982:80) om anställningsskydd (Employment Protection Act of Sweden), consolidated, 2022.

¹¹ Article 23, 24, Employment Contracts Act of Republic of Estonia, Consolidated version of 2022, <<https://www.riigiteataja.ee/en/eli/ee/520062016003/consolide/current>> [14.11.2022].

allows an employee to become acquainted with the employer's clients or access the employer's production and business secret, and the use of this knowledge may harm the employer considerably.

- *A restraint of trade clause must be delimited reasonably and recognisably for the employee in terms of space, time and objects.*
- *An agreement entered into in breach of the requirements provided in this section is void.*

According to the **Lithuania** Labour Code:¹²

- *The parties to an employment contract may agree that for a certain period of time, the employee will not perform certain job activities under an employment contract with another employer and will also not engage in independent commercial or industrial activities related to the functions of the job if these activities are in direct competition with the activities of the employer. This agreement may be concluded during the period of validity of the employment contract and/or after the employment contract has expired.*
- *Non-compete agreements may only be concluded with employees who have special knowledge or skills which can be applied at an enterprise, institution or organisation that is in competition with the employer, or in starting individual activities, thus harming the employer.*
- *A non-compete agreement must define the work or professional activities prohibited for the employee, the amount of non-compete compensation due to the employee, the non-compete territory, and the period of validity of the non-compete agreement.*

According to the **Bulgaria** Labour Code:¹³¹⁴

- *An employee may, outside of working hours, enter into another employment contract with another employer, unless it is limited by an individual employment contract.*
- *Prohibition from working for another employer may be agreed upon only to protect trade confidentiality and/or avoid conflicts of interest.*

As EU member states faced new obligations from 2019, most of them have not yet completed the process of approximation with the new directive.¹⁵ However, the examples presented above are enough to assess **the main features of the formation of the new European practice:**

1. Parallel work with another employer is recognized as a fundamental value and freedom. This, as such (with this content), is directly and obviously declared in both – the directive and the national norms. Only then, in logical continuity, admissibility clauses (on working with another employer) are followed by prohibitive/restrictive clauses.

¹² Article 38, Republic of Lithuania, Law on the Approval, Entry into Force and Implementation of the Labour Code, 14 September 2016, xii-2603.

¹³ Articles 111-112, Labour Code of Republic of Bulgaria, Labour Code, Prom. SG. 26/1 Apr 1986, prom. SG. 27/4 Apr 1986.

¹⁴ Changes to Labour Code, Legal News, KPMG, <<https://home.kpmg/bg/en/home/insights/2022/08/legal-news--changes-to-the-labour-code.html>> [14.11.2022].

¹⁵ Current Status of the Implementation of EU Directive 2019/1152 by Member States, 17.08.2022, <<https://cms.law/en/int/publication/current-status-of-the-implementation-of-eu-directive-2019-1152-by-member-states>> [14.11.2022].

2. Cases of restriction of parallel work are limited. The member states of the EU approach the issue in different ways, but they are united by the principle – clearly and foreseeably define the scope of the restriction. The purpose of the restriction is not general prohibition of working with a competitor (in broad sense), but rather to prohibit the employee from working with a competitor that is harmful or threatens the protection of trade/industrial confidential information.
3. The restriction cannot be permanent and for everyone and in all fields of work. It is limited to specific employees (who have access to employer/industry specific information and therefore possess the skills and knowledge necessary to perform competitively), to a specific time and geographic area. The prohibition applies only in the field where protection is required by the special economic interest of the employer (mainly, where the production process and competition is based on commercial confidential information).
4. Employees, subject to restrictions, enjoy special trust from employers, and restrictions are balanced by contractual guarantees (including compensation/payment).

The regulation of parallel work and the contractual terms on competition protection are controversial in the modern world and still remain debatable. However, practice is developing in the direction that a balance should be achieved between the interests of employers and employees; restrictions are allowed, but the scope of restrictions of employees and compensation aspects are getting more transparent and precise.¹⁶

3. Parallel Employment Regulation in Georgia

Article 16(5) of the Labour Code regulates:

- *An employee's right to be employed for more than one full-time or part-time job may be restricted by an employment agreement if the person who is to be substituted is the employer's competitor.*¹⁷

The content of the above-mentioned article implies that the employee's freedom of labor is protected – to choose a contragent and enter into an employment contract with several employers at full and part-time jobs, except in cases when the employer is a competitor of the employer. However, compared to Directive 2019/1125 and the legal practices of EU countries, a) in Georgian law it is not directly and primarily declared a fundamental standard that parallel work cannot be prohibited and the employer cannot put the employee in a disadvantageous position due to working elsewhere; b) The scope/objectives of restriction of parallel work with the competitor are not detailed.

The wording and structure of the content of the Georgian norm is such that:

1. The top line/main accent has been shifted to the fact of allowing the restriction;
2. It is unlimited and does not make it transparent with which employee, in which field or in what volume the restriction is effective/applicable;

¹⁶ *Farrell C., Non-compete Clauses – Are they still Appropriate?*, 27.07.2021, <<https://parissmith.co.uk/blog/non-compete-clauses/>> [14.11.2022].

¹⁷ Organic Law of Georgia “Labour Code of Georgia”, 75, 27/12/2010.

3. It does not create the balancing statutory guarantees for the protection of the employee.

Despite the problematic/imperfect formulation of the norm and the failure to consider the new European standard, it is a positive case because of the fact that establishes the freedom of parallel work. Now, the main thing is that the purpose of the norm should not be diminished by the non-uniform interpretation and formation of subjective practices.

The goodness/merit of the norm can be undermined by such aspects as the employer's abuse of power and gaining such influence over the employee to start the request of information on labor relations with other employers and the summarize all working hours. This practice is especially used in the educational field in Georgia.

Labor contracts are binding instrument of private relations (under the regulation of Obligation Law as well). Labour contracts integrate only the individual will of two parties. The terms are agreed only between them (employer and employee). According to the Labor Code, the only employer is responsible for labor management (organizational regulation of labor). This is evidenced not only by theory, doctrine and common practice, but also by the fact that in case of violation of the requirements of the Labor Code, the responsibility rests with the employer; labor inspection monitoring is directed to only within the enterprise – how the employer performs labour standards established by law. Thus, the employer's liability is limited to the power which it has over the employees under own industry/enterprise/organization.

Consequently, the employer is entitled to seek and process only the information that is necessary for accountability and performance of established/agreed functions/terms by the employee. This, as well, includes the working time that is spent only within the framework of the employer's disposal. The employer has no right to invade the personal life/space of the employee, break the balance and start unjustified “chasing” – where and why the employee is doing after finishing the working day or performing the duties.¹⁸ **Labor policy – checking the working conditions of employees under any circumstances – is only the prerogative of the government, not the private employer.**

It is a wrong opinion/approach – as if the employer, when requesting the information about the employee's working time with another employer, is taking care of the prevention of fatigue and the health of the employee. The care must be proven by several factors and actions: a) at least reduce the working time or functional load of the employee within the framework of own organization, labor management and individual labour contract; b) spend expenses for determining the state of health of employee and in case of a problem – spend money for his/her treatment; or c) increase the salary in order to compensate and relief the employee's work and conditions issued by working with different and many employers. In fact, no employer takes responsibility for the employee's work with another employer (even in case of overtired)!!! **There is only the request and process of information, without achieving beneficial results.**

Georgia experiences such a practice in the field of education¹⁹: an employer requests from the employee a certificate of only parallel working in another educational institution, not a certificate of

¹⁸ Constitution of Georgia, articles 15(1), 26(1), 24.08.1995.

¹⁹ Authorisation and Accreditation Practices, University Practices in Georgia.

work with any other employers. Such a situation is even more illogical than the above-described false concern/care about the employee's health. The example of Georgia clearly and publicly proves that advocates, judges, politicians, civil servants, persons employed in banking and other commercial sectors work in educational institutions as well. Despite of this fact, the educational institute (employer) is not interested in how many hours employees work with any other employers except educational bodies. Such an approach, based on which the employees are separated, is the unequal treatment without rational and objective justification. Consequently, the comparators (identical employees) are put at a disadvantage compared to the other employees (for example, a lecturer who works at 3 universities is at a disadvantage compared to a lecturer who holds a public position or works at bank sector). The legal standard related to equal treatment is violated.²⁰ This practice cannot be justified even by protecting the interests of the competitor, because it is not legally forbidden for a person to work in different educational institutions as a lecturer.²¹ It is also necessary to take into account the legal nuance that the Labor Code is an organic law of Georgia which has a dominant power over other legislative acts (laws and by-laws) and has the monopolized nature of regulation labor and labour-related issues throughout the territory of Georgia. Even a special law cannot regulate a different approach, which will worsen the conditions of employees and which will promote unjustified restrictions – unjustified competition.

The employment contract and terms of employment relationship in the private sector are personal information of the employee. Thus, when an employer requests certificates from an employee about the work with another employers, it also violates the personal data protection legislation.²² The

²⁰ Articles of Labour Code – 2.3, 4.1, etc.

²¹ In the EU, the regulation of education policy remains within the competence of the member states. Thus, education regulating legislation is characterized by a national (and not common European) nature. However, European countries have long been trying to establish the European Higher Education Area/EHEA (<<http://www.ehea.info/page-how-does-the-bologna-process-work>> [14.11.2022]) and make the freedom of movement of education between countries more flexible. For this purpose, agreement on three main and fundamental aspects has already been reached (1. three-level education; 2. recognition of qualifications; 3. implementation of a quality assurance system (<<https://education.ec.europa.eu/education-levels/higher-education/inclusive-and-connected-higher-education/bologna-process>> [14.11.2022])). The Bologna process is very important as the governments of European countries try to jointly overcome the contradictions and problems that arise in the common space of higher education. Other countries also participate in the Bologna process. Thus, the Bologna process is an instrument for forum for dialogue with neighboring states in the field of higher education reform (especially the Eastern Partnership countries, Western Balkan countries, Turkey, etc.) The Association Agreement also testifies the fact that the field of education does not fall under the exclusive competencies of the EU: Education policy is presented under Title VI, Chapter 16, Annex XXXII of the Association Agreement. Here: 1. It is defined that Georgia is obliged to approximate with non-mandatory legislation of the EU (recommendations). An exception is Decision 2241/2004/EC of the European Parliament and of the Council of 15 December 2004 on a single Community framework for the transparency of qualifications and competences (Europass). 2. mandatory time-frame is defined for the implementation of obligations. In contrast to the aforementioned and in contrast to the field of education, in the field of labor law, Georgia has the obligation to approximate the EU mandatory and binding legislative acts (directives).

²² Article 1 and others, Georgian Law on Personal Data Protection, 16.01.2012.

employer is abusing his power by forcing the employee to provide personal information. The result of such action can be a negative impact on the employee's freedom of labour, forcing him/her to leave parallel work, worsening the employees' conditions, etc.

The above-mentioned Georgian practice is extremely negative, it is used against the employee with an unjustified and demolishing imbalance. It should not be admissible for employer to restrict the employee's parallel work for various negative motives: manipulation by summarizing all working times with all employers, false care, unnecessary and ineffective processing of personal data, worsen of the employee's work-life balance and conditions, evil demonstration of the employer's power to force the employee to obey. All such actions and practices does not serve development, progress, protection of rights, positive outcomes for employees, and it is morally degrading, it does not carry the purpose of protecting the weak part, it is illegal.

4. Conclusion

The article touched the provisions of the EU Directive 2019/1125 regarding the freedom of parallel work of the employee, the latest legislative innovations of the EU countries regarding the issue, the model of legal regulation of Georgia and some vicious and negative Georgian practices.

The following conclusions were drawn: Georgian legal norm (article 16(5) of the labour code) requires legislative modification taking into account the EU standard or, within the framework of the current wording of the norm, it is essential ennoblement and improvement of practice **taking into account the following cumulative criteria:**

1. The employer may not prohibit the parallel work of the employee with another employer.
2. Limitation of parallel work is allowed in reasonable exceptional cases. Restriction cannot be unlimited. The restriction should not apply to all competitors in a broad sense. The restriction must be justified only by protecting the employer's special economic interests, where it may result in harm or breach of confidentiality.
3. Limitation of parallel work should not be permanent, should not apply to all employees, should not be used in all fields (especially in the field where there are no commercial and confidential information). The restriction must be balanced by offering guarantees to the employee, including compensation/payment.

It should not be allowed the development of such negative practices and such interpretation of legal norms as a result of which **the employer:**

1. Requests and collects information about the employee's working hours with other employers under the pretext of false care or competition. (Such a policy of the employer is not intended for the welfare of the employee or for improvement his/her situation. In fact, the employer neither cares about the health of the employee, nor pays for the summed working hours; the employer neither increases the salary in exchange for reducing work in other businesses, nor increases expenses for other needs of the employee, etc.).
2. Intrudes into the personal life of the employee, gains complete control over him/her (what and where he/she does), forces him/her to share such personal information that is not related to the individual employment contract, performance of duties and accountability

before the employer. This breaks the balance between the parties, which is used aiming to gain excessive influence over the employee, and thus the legal requirements are also violated.

3. Treats employees unequally based on place of employment, selects certain employees in order to request from them the certificates about parallel work and working hours, puts them at a disadvantage in comparison with other identical employees, and thus violates legal standards of equal treatment.

Labor policy – to study/evaluate the working conditions of employees in any workplace – is only the prerogative of the state/government and not of the private employer. If necessary, the labor inspection will investigate the situation of a specific employee. The power of the private employer is limited to the labor management of his own business/institution and the individual labor contract.

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