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Headquarters: **Madrid**
Section: **991**
Date: **09/25/2020**
Appeal No.: **4746/2019**
Resolution No.: **805/2020**
Procedure: **Appeal for the unification of doctrine.**
Speaker: **JUAN MOLINS GARCIA-ATANCE**
Type of Resolution: **Judgment**

Case rulings: **STSJM6611/2019,**
**STS 2924/2020**



UNIFICATION DOCTRINE/4746/2019

**T R I B U N A L S U P P E R E M O**

**Social Chamber PLENO**

***Ruling No. 805/2020***

Sentencing date: 09/25/2020

Type of proceeding: UNIFICATION OF DOCTRINE

Proceeding number: 4746/2019 Ruling/Agreement:

Voting and Judgment Date: 09/23/2020

Speaker: His Excellency Mr. Juan Molins García-Atance Origin:

T. S. J. MADRID SOCIAL SEC. 4

Counsel for the Administration of Justice: Ms. María Jesús Escudero Cinca Transcribed by: MCP Note:

UNIFICATION OF DOCTRINE No.: 4746/2019

Speaker: H.E. Mr. Juan Molins García-Atance

Counsel to the Administration of Justice: Ms. María Jesús Escudero Cinca

**SUPREME COURT**

**Labor Chamber PLENO**

**Ruling No. 805/2020**

Honorable Mr. and Honorable

Ms. and Hon. Sols.

Ms. María Luisa Segoviano Astaburuaga Ms.

Rosa María Virolés Piñol

Mrs. María Lourdes Arastey Sahún

D. Antonio V. Sempere Navarro

Mr. Ángel Blasco Pellicer

D. Sebastián Moralo Gallego Ms.

María Luz García Paredes

Ms. Concepción Rosario Ureste García

Mr. Juan Molins García-Atance

D. Ricardo Bodas Martín

D. Ignacio



Garcia-Perrote Escartín

In Madrid, on September 25, 2020.

This Chamber has heard the appeal for the unification of doctrine filed by the lawyer Mr. Luis Suaréz Machota, in the name and on behalf of the worker Mr. Desiderio ., against the judgment handed down by the Social Chamber of the High Court of Justice of Madrid, on September 19, 2019, in appeal for review No. 195/2019, filed against the judgment dated September 3, 2018, handed down by the Social Court number 39 of Madrid, in proceedings No. 1353/2017, joined with proceedings 205/2018, Social Court number 13 of Madrid and with proceedings 417/2018, Social Court number 17 of Madrid, pursued at the request of D. Desiderio . against the company Glovoapp23 SL, with the participation of the Public Prosecutor's Office.

The company Glovoapp23 SL appeared as appellant, represented and assisted by counsel D. Ricardo Oleart Godía.

Mr. Juan Molins García-Atance has been the rapporteur.

## FACTUAL BACKGROUND

**FIRST -** On September 3, 2018, the 39th Social Court of Madrid, issued the following sentence**:** "DISMISSING the claim filed by Mr. Desiderio against the company GLOVO APP 23, S.L. regarding tacit dismissal, I must absolve and ABSOLVE said defendant of all the claims brought against it.

DISMISSING the claim filed by Mr. Desiderio against the company GLOVO APP 23, S.L. for indemnified termination of the employment contract, I must absolve and ABSOLVE said defendant of all claims brought against it.

DISMISSING the claim filed by Mr. Desiderio against the company GLOVO APP 23, SL for express dismissal, I must absolve and ABSOLVE said defendant of all the claims brought against it".

**SECOND.-** That in the aforementioned sentence and as proven facts the following are declared:

"FIRST.- The plaintiff, Mr. Desiderio ., signed with the defendant GLOVO APP 23, S.L on September 8, 2015 a contract for the provision of professional services for the performance of errands, orders, or microtasks as a self-employed worker, with the conditions reflejan in document number 4 of the plaintiff's branch of evidence which, given its length, is given as reproduced.

The plaintiff was registered in the Special Regime for Self-Employed Workers of the Social Security on 01/09/2015, paying since that date the corresponding contributions. (Document number 5 of the Respondent's branch of evidence).

SECOND.- Prior communication of the worker of 20/06/2016 on the receipt of more than 75% of his income from said Company, the parties entered into a contract for the performance of professional activity as an economically dependent self-employed worker, with the content that is refleja in document number 5 of the claimant's branch of evidence, which is reproduced.

THIRD. The company GLOVO APP 23, S.L (hereinafter, GLOVO), is a start-up incorporated on September 9, 2014 whose corporate purpose is the exploitation of computer applications of errand services with the power to purchase goods on behalf of others, acting as a commission agent, as well as the performance of the activity of intermediary in the contracting of road transport of goods as a transport agency, freight forwarder, warehouseman or logistics operator. (Simple note of the defendant in the Commercial Registry provided as document number 14 of the plaintiff's branch of evidence).

GLOVO is a technology company whose main activity is the development and management of IT platforms through which, by means of a mobile application or web page, local businesses located in the main capitals of Spain, Italy, France, Portugal, Argentina, Peru, Chile and Bolivia are able to

offer its products through the application (APP) and, where appropriate, if the final consumers so request, intermediate in the transport and delivery of the products to the final customer.

Through the platform different local merchants with whom GLOVO may maintain commercial agreements, offer a series of products and services. The final consumer can request the purchase of such products through a mandate that confirms a third party using the GLOVO platform and paying the cost of the product and transportation, and GLOVO makes available a delivery driver who goes to the establishment, acquires the product, and takes it to its destination. It is also possible to request only the transport of goods from one point to another, without the purchase of the goods.

This is a four-way express delivery



*on-demand* intermediation platform that facilitates contact between people who need help with their errands or shopping, local businesses or stores and carriers or delivery drivers willing to carry out the order, who are called 'glovers'.

The Company is financially supported by the commercial agreements it enters into with establishments, stores and stores, not by what the users pay it for the errands. (Undisputed facts and accredited through document number 14 of the plaintiff's exhibit, and through the expert opinions provided by the defendant as documents numbers 78 to 80 of its exhibit, ratified in the act of the Hearing by their authors).

FOURTH.- The activity to be carried out by the plaintiff was managed through the Company's APP, and communications between the parties were carried out by e-mail.

The plaintiff had to carry out the errands or orders previously offered to him by the defendant following the following system: Prior reservation of the time slot in which he wished to work, the actor activated the self-assignment position (available) on his cell phone and from then on orders (slots) began to come in according to his time slot and geographic area. The delivery person had to accept the order, which could be done automatically or manually. In the first mode (AA), the platform assigned an automatic delivery of errands that the worker could reject manually. In the manual mode (MA), the platform does not assign the order to the delivery person, but it is the delivery person who has to select which of the available deliveries to make. Once the order has been accepted, the delivery person must carry out the order in the manner requested by the customer, contacting the customer directly. If he had any doubts about how to carry out the order, he had to contact the customer to solve them.

The order allocation system in the automatic allocation system is performed telematically by the GLOVO algorithm, following a cost-benefit function that searches for the best possible order-delivery combination that minimizes the sum of costs.

The worker could reject an order previously accepted in the middle of the execution, in which case the order was reassigned to another deliveryman in the same area without penalty. (Expert opinion provided by the defendant as Document number 78 of its evidence and ratified by the expert in the act of the trial).

FIFTH.- The actor's remuneration system consisted of the payment of an amount ordered in the terms set out in the prices and rates attached to his contract as Annex I, to which was added another amount for mileage and waiting time. The price of the 'glovo sencillo' paid by the customer was €2.75, of which the deliveryman received €2.50. The rest of the price was kept by GLOVO as a commission for the intermediation.

The system for charging for services was carried out on a fortnightly basis, with the actor sending the Company the invoice for the services performed in each period together with the corresponding VAT. The invoices were drawn up by GLOVO and sent to the employee for approval and conformity. The amount was then paid by bank transfer. (Document block number I of the plaintiff's evidence).

In the period from October 2016 to October 2017 the worker received disparate amounts for the performance of errands or 'glovos' in the terms reflejan in the invoices provided by both parties to the proceedings, totaling the sum of what was received during in that year 18,184.08 euros.

SIXTH,- The worker decided the starting and ending time of his working day, as well as the activity he carried out during the same, selecting the orders he wanted to carry out and rejecting those he did not want to. He was not obliged to carry out a certain number of orders, nor to be active for a minimum number of hours per day or per week, nor did the Company indicate the errands to be carried out or when he had to begin or end his working day. If he was not placed in the 'self-assignment' position, no orders came in. He could reject an order mid-performance without penalty. In fact the actor rejected previously accepted orders on eight occasions during the period July through October 2017

(document number 66 of the Respondent's evidence, and expert report provided by the Respondent as document number 78) without suffering any unfavorable consequences and without its score being lowered for this reason. (Comparison of the dates of reassignment of orders with the scores obtained during the following days).

SEVENTH.- The Company has established a scoring system for 'glovers', classifying them into three categories: beginner, junior and senior. If a delivery person has not accepted any service for more than three months, the Company may decide to downgrade him/her. (Clause four of the service contract).

The ranking system used by GLOVO has had two different versions: the fidelity version, which was used until July 2017, and the *excellence* version, used from that date onwards.

In both systems, the delivery driver's score is based on three factors: the final customer's assessment, the efficiency demonstrated in the completion of the most recent orders, and the performance of services during the hours of greatest demand, known by the Company as 'diamond hours'. The maximum score that can be obtained is 5 points.

There is a penalty of 0.3 points each time a delivery person is not operational in the time slot previously reserved by him. If the unavailability is due to a justified cause, there is a procedure to communicate it and justify the cause, avoiding the penalizing effect.

(Expert opinion provided by the defendant as Document number 78 of its evidence and ratified by its author in the act of the Judgment, and documents numbers 8 and 9 of the employee's evidence).

The highest scoring delivery drivers are given preferential access to incoming services or errands.

During the period from 03/03/2016 to 25/10/2017 (date of the last service performed by the plaintiff) the scores obtained by the latter are as reflejan in document number 62 of the defendant's branch of evidence, which is hereby reproduced).

EIGHTH.- The plaintiff had the right to interrupt his activity for 18 working days a year, with both parties agreeing on the period of enjoyment. (Clause five of the TRADE self-employed contract).

The worker was not obliged to justify his absences from the service to the Respondent, having only to communicate them in advance. This was the case during the days 05/03/2017, 12/04/2017 and 17/04/2017 (folios numbers 63 to 65 of the Respondent's branch of evidence).

NINTH.- The contract signed by the litigants states that there is no exclusivity agreement, and the worker is free to contract with third parties to carry out any type of activity with the only limit of respecting the percentage of his income coming from GLOVO in order to continue to hold the condition of TRADE of the latter.

The plaintiff assumed responsibility for the good finish of the service (charging it only if it completed it to the customer's satisfaction), and assumed against the user (end customer) any damage or loss that the products or goods might suffer during transport. If he had to buy products for the user, he used a credit card provided by GLOVO APP, specifically the one reflejada in document number 6 of the worker's proof branch.

TENTH.- While the worker was performing his activity, he was permanently located by means of a GPS geolocator with which the kilometers he traveled in each service were recorded, being able to freely choose the route to follow to each destination.

ELEVENTH.- For the exercise of his activity, the plaintiff used a motorcycle and a cell phone of his property, assuming all the expenses inherent to its use. (Undisputed facts).

TWELFTH.- On 19/10/2017 the plaintiff communicated by email to the defendant: " I do not *feel well, I have fifebre, I'm going to stay at home, will you take away today's slots?* ", answered the Company " Desiderio ., Done!"

On 10/20/2017 the claimant communicated again: " I am still *sick at home, take off today's slots as soon as possible so that another colleague can work. I hope to be able to work tomorrow. Best regards."* The Respondent replied: " Done*".*

On 10/21/2017 the actor continues to communicate: " I am still *sick with flu..I can't work. Remove me please the hours of today Saturday and tomorrow Sunday October 21 and 22*". The Company replies: " Desiderio ., done! "

During October 24 and 25, the worker returned to his usual activity, placing a total of 9 orders on each day (Document number 58 of the Respondent's evidence). On October 27, the worker communicates again: "*Hello, I'm sick, I'm not feeling well, I'm going to work today, Friday the 27th, please take the slots away from me*".

On October 31, the Respondent replied: "Desiderio*, sorry for the delay in responding. We have not been able to solve it in time. We will work to improve our errors*

(Block of documents number 9 of the plaintiff's exhibit, and documents numbers 58 and 67 to 72 of the defendant's exhibit).

The claimant remained in a situation of



'temporary disability due to common contingencies from 10/25/2017 to 10/27/2017. (Document number 9 of the branch of evidence of said party).

THIRTEENTH.- On 10/18/2017 the worker's score was 4.8 points; on October 21, it was only 1 point; on October 24, 4.2 points; on October 25 (last day he worked), 5 points. (Document number 62 of the Respondent's exhibit).

FOURTEENTH.- On 17/11/2017 the worker filed a first conciliation paper before the SMAC, afirming that his relationship with the defendant was of an employment nature and that he had been tacitly dismissed on 19/10/2017 as a consequence of his absence due to illness, having not received work since that date.

FIFTEENTH.- On 27/11/2017 the plaintiff sent a Burofax to the defendant with the content that is refleja in document number 10 of the branch of evidence of the first, which we consider reproduced.

The Company replied to said Burofax by letter dated 12/12/2017 in the terms reflejan in document number 1 1 of the

employee's branch of evidence, which is also given as reproduced.

SIXTEENTH.- On 05/12/2017 the plaintiff filed the first lawsuit for tacit dismissal against the Company, requesting that the dismissal be declared null and void for having been adopted in violation of his fundamental right to non-discrimination on the grounds of health, requesting that the defendant be ordered to pay him a compensation of 10,000 euros for the damages caused.

SEVENTH.- During the months of November and December 2017 and January and February 2018 the worker did not perform any service. (Undisputed fact).

On 02/15/2018 she filed a second conciliation paper before the SMAC requesting the indemnified termination of her contract with the defendant for lack of occupation and effective and non-payment of the agreed salary since October 2017, again afirming that the previous breaches were a consequence of her absences due to illness during October 21 to 25, 2017.

The lawsuit promoting the extinctive action was filed on 02/23/2018.

EIGHTEENTH.- On 09/03/2018 the worker replied to a corporate communication from the Company saying: DO NOT SEND MORE INFORMATION PLEASE. THANK YOU.

(Document number 73 of the Respondent's exhibit).

NINETEENTH.- On 14/03/2018 the Company sent an email to the plaintiff with the following content: "Dear *collaborator: We hereby inform you that in accordance with the provisions of the seventh clause of the service contract signed with Glovo, and due to your own will, the collaboration with Glovo is terminated for all purposes within 24 hours from this communication. We also remind you that once the material paid by you according to the contract signed is returned, we will return the deposit deposited by you after the review of the same (...)* ". The worker replied to said communication by email of 15/03/2018 in the following terms:

"Inappreciable *company: You must be confused because I have not given any notice of termination to Glovoapp23, but I have filed a lawsuit for the social court to terminate my employment contract with you for your serious modification and breach, ex article 50 ET. Consequently I understand that despite your twisted letter, you terminate what you call the collaboration with Glovo, which I call pure and simple work, so I will take legal action*". TWENTY-FIFTH.- On 12/04/2018 the plaintiff filed a paper of conciliation before the SMAC acting for dismissal (express), requesting that such decision be declared null and void for having been adopted with violation of his fundamental rights to non-discrimination by Tazón of health and the guarantee of indemnity, also claiming the payment of compensation in the amount of 12,000 euros, all this after recognition of the labor nature of the link maintained with the defendant that he considered masked under the modality of self-employment."

**THIRD - An** appeal was filed against the above judgment by the legal representation of Mr. Desiderio, and the Social Division of the High Court of Justice of Madrid issued a judgment on September 19, 2019, in which the following ruling is stated: "Dismissing the appeal filed by the legal representation of Mr. Desiderio. , against the judgment issued by the Social Court No. 39 of Madrid, dated September three, two thousand eighteen, by virtue of the lawsuit filed by the appellant against the company GLOVO APP 23 S.L. and the Public Prosecutor's Office, regarding Dismissal, we confirm the aforementioned decision. Without costs."



**FOURTH -** Against the judgment of the Social Chamber of the High Court of Justice of Madrid, the present appeal for the unification of doctrine was filed by the legal representation of Mr. Desiderio, which was formalized by means of a brief based on the contradiction of the appealed judgment with the one issued by the Social Chamber of the High Court of Justice of Asturias, on July 25, 2019, appeal 1143/2019.

**FIFTH.- The** appeal was admitted for processing and having been challenged by the appealed party, the proceedings were passed to the Public Prosecutor's Office for a report, which was issued in the sense of considering the appeal to be admissible. By order of September 3, 2020 and given the characteristics of the legal issue raised and its transcendence, it was agreed that it would be debated by the Chamber in Plenary, in accordance with the provisions of article 197 of the Organic Law of the Judiciary, and the present appeal was scheduled for voting and ruling on September 23, 2020, summoning all the Judges of this Chamber in Plenary, on which date it took place.

## LEGAL BASIS

**FIRST.- 1.** In this unificatory appeal, two different issues are raised:

1) Whether there was an employment relationship between the plaintiff, who had provided services as a delivery driver for the company Glovoapp23 SL (hereinafter Glovo), and this company.

2) Whether the appealed judgment was contradictory and inconsistent in resolving the plea of appeal relating to the actions for dismissal and termination of the employment contract after denying the existence of an employment relationship. The appellant argues that, if there is no employment contract, the court is prohibited from ruling on the aforementioned issues.

**2.** The judgment issued by the Social Court number 39 of Madrid on September 3, 2018, proceeding 1353/2017, denied the existence of an employment relationship between Glovo and the plaintiff, afirmó that the plaintiff had the status of economically dependent self-employed worker (TRADE) and dismissed the accumulated claims of tacit dismissal, indemnified termination of the employment contract and express dismissal. The plaintiff appealed against this decision. The judgment issued by the High Court of Justice of Madrid on September 19, 2019, appeal 195/2019, denied the existence of an employment relationship between the parties. It then explained that the judgment of instance has three dismissal pronouncements, relating to the actions of tacit dismissal, indemnified termination of the employment contract by will of the worker and express dismissal. The High Court of Justice of Madrid concluded that only the tacit dismissal was being contested in the appeal. And it argued that after the alleged tacit dismissal of the plaintiff (occurred on October 21, 2017) he provided his professional services for Glovo on October 24 and 25, 2017, so it rejects that there was a tacit dismissal. Therefore, it dismissed the appeal, confirming the lower court's decision.

**3.** The plaintiff filed an appeal in cassation for the unification of doctrine invoking as a contrasting judgment the one issued by the Superior Court of Justice of Asturias on July 25, 2019, appeal 1143/2019. The appellant raises two grounds. In the first one, it states that there was an employment relationship between the parties. In the second, it alleges that the judgment issued by the High Court of Justice was inconsistent when analyzing the validity or invalidity of the actions for dismissal and termination of the employment contract because if there is no employment relationship, the Court should not rule on the aforementioned issues.

**4.** The challenge brief of the unification appeal filed by the defendant company:

1) It alleges the lack of contradiction between the appealed judgment and the contrasting judgment, arguing that the cause of action, the facts and the claims formulated in one and the other litigation are different.

2) It maintains that the appeal is lacking in content for the purposes of appeal.

3) It denies that the challenged sentence incurs in legal violations.

4) It requests that this Court refer a question to the Court of Justice of the European Union (hereinafter referred to as the CJEU) for a preliminary ruling.

The Public Prosecutor's Office reported in favor of declaring the cassation appeal for the unification of doctrine admissible.

**1. First of all**, we must examine the procedural requirement of contradiction required by Article 219 of the Law Regulating the Social Jurisdiction (hereinafter LRJS) in relation to the first ground of appeal. Such contradiction does not arise from an abstract comparison of doctrines regardless of the identity of the controversies, but from an opposition of concrete pronouncements relied upon in substantially identical conflicts (for all, judgments of the Supreme Court of September 10, 2019, appeal 2491/2018; November 6, 2019, appeal 1221/2017 and November 12, 2019, appeal 529/2017).



**2.** The appellant invokes as contrast judgment the one issued by the High Court of Justice of Asturias on July 25, 2019, appeal 1143/2019. Both in the appealed judgment and in the referential judgment, the plaintiffs provided services for the same company (Glovo), in the same digital platform and using the App of that company. Both entered into TRADE contracts. They provided services as delivery drivers. Their work system consisted of the applicants selecting a time slot, activating their availability on their cell phone and from then on orders began to come in, which they accepted automatically or manually. The order allocation system was carried out telematically by Glovo's algorithm. The selection of time slots depended on the worker's rating. The worker rating system was made to depend on the

eficiency demonstrated in the completion of the most recent orders, the performance of the services during peak hours and the rating of the final customer. The actors were geolocated during the provision of services. The remuneration system consisted in the payment of an amount per order, to which another amount was added for mileage and waiting time. Invoices were prepared by Glovo. The worker provided the cell phone and the motorcycle. In the appealed judgment, two actions for tacit dismissal, indemnified termination of the employment contract and express dismissal had been brought together. An action for compensation for damages had also been brought. In the contrasting judgment, an action for dismissal had been brought.

**3.** Based on the aforementioned facts, the appealed judgment denies the existence of an employment contract and argues that the TRADE contract is in accordance with the law. It then examines a plea in law focused on the action of tacit dismissal, arguing that the appellant only contests such tacit dismissal, having acquired firmeza the dismissal ruling of the lower court with respect to the remaining actions. And it argues that after the alleged tacit dismissal the plaintiff provided his services for Glovo, so the appeal is dismissed in its entirety, confirming the lower court's decision, which had dismissed the claims for dismissal and compensated termination of the employment contract.

**4.** On the contrary, the referential sentence declares the labor nature of the provision of services, confirming the sentence of the lower court, which had declared the dismissal unjustified. There are differences between the two judgments. In the appealed one, three proceedings were joined, in which an action for tacit dismissal, another for indemnified termination of the employment contract and a third for express dismissal were brought, also joining an action for compensation for damages. In the reference case, only a dismissal claim was tried. However, the triple identity of art. 219 of the LRJS is present as regards the dismissal action brought in both lawsuits.

There are also discrepancies when it comes to specifying the form of rendering of services. But these are specific factual differences resulting from the different evidentiary activity and the different assessment of the evidence in each lawsuit, which do not undermine the substantial identity of facts, grounds and claims in both proceedings required by art. 219 of the LRJS: two delivery drivers of the same company who provided services under similar conditions, challenge the termination of their contracts, claiming that they are employment relationships, which is denied by the employer. The appealed judgment denies the existence of an employment contract and confirms the dismissal of the dismissal claim. On the contrary, the contrasting judgment holds that the definitive notes of the employment relationship do confirm the declaration of unfairness of the dismissal, so that the procedural requirement of contradiction that makes the appeal for the unification of doctrine in relation to the first ground of appeal is met.

**THIRD.- 1.** In the appeal for a unification appeal, the appellant alleges that the appeal does not contain a plea of appeal, arguing that the claim filed by the appellant consists of reversing the appealed judgment, ordering the proceedings to be sent to the Social Court so that, in view of the decision of this Chamber classifying the relationship as an employment relationship, it may try the actions brought. The appellant argues that such request is improper for a unification appeal and that this claim tries to ignore that the judgments of the lower court and the appeal court give an answer to the disputed issue.

**2.** This Chamber has reiterated that the institutional function of the appeal for the unification of doctrine is to ensure the uniform application of the legal system by the judicial bodies of the social order. Hence, in accordance with the provisions of art. 225.4 of the LRJS, appeals in cassation for the unification of doctrine that lack housekeeping content may be inadmissible, that is, those filed against judgments whose decisions coincide with the doctrine ruled by this Chamber of the SC ( judgments of the SC of January 15, 2014, appeal 909/2013; February 10, 2015, appeal 125/2014 and March 4, 2020, appeal 3041/2017, among others).



**3.** This unificatory appeal is not subject to the ground of inadmissibility consisting of the lack of appeal content, since it raises an issue that has not been resolved by this Chamber, there being contradictory pronouncements of the Superior Courts of Justice that require the unificatory intervention of this Court.

The specific *petition of* the present unification appeal, consisting in the judgment appealed being annulled, ordering the proceedings to be sent to the Social Court so that it may try the actions brought, does not imply that it is an appeal lacking in cassation content, for which reason there is no procedural obstacle that prevents this Court from examining it.

**FOURTH.- 1.** In the appeal for annulment of the unification appeal, it is requested that a preliminary ruling be made to the CJEU. This procedural party maintains that the disputed controversy constitutes an issue of European dimension that affects the freedom of establishment and freedom to provide services contained in Articles 49 and 56

of the Treaty on the Functioning of the European Union (hereinafter TFEU); as well as the fundamental rights to professional freedom and freedom to conduct a business in Articles 15 and 16 of the Charter of Fundamental Rights of the European Union. In addition, the defendant considers that the issue in question affects the concept of worker in European Union Law. Therefore, it requests that this Chamber raise this question for a preliminary ruling in order to ensure the useful effect of that law, to ensure the uniform application of Union law and in the general interest of the question under consideration.

**2.** National courts whose decisions are not subject to any appeal under national law are not subject to an unconditional obligation to refer the question to the CJEU for a preliminary ruling.The CJEU states that "the procedure laid down by Article 267 TFEU is an instrument of cooperation between the Court of Justice and the national courts, by means of which the Court of Justice provides the national courts with the elements of interpretation of European Union law which they require for the resolution of the dispute which they are called upon to resolve ....] in the absence of any judicial remedy under national law against the decision of a court, the latter is, in principle, under an obligation, where a question of interpretation of EU law is raised before it, to refer the question to the Court of Justice, in accordance with Article 267 TFEU" ( judgment of the CJEU of 20 December 2017, C-322/16, Global Starnet case, paragraph 24). However, the Supreme Court is not obliged to refer a question for a preliminary ruling when it "finds that the question referred is not relevant, that the provision of EU law in question has already been interpreted by the Court of Justice or that the correct application of EU law is so obvious that it leaves no room for reasonable doubt, the existence of such a possibility must be assessed in the light of the specific features of Union law, the particular difficulties of its interpretation and the risk of divergences of case-law within the Union" ( judgment of the CJEU of 30 January 2019, C-587/17, paragraph 77 and those cited therein).

**3.** In the case in question, in which it is debated whether the defining characteristics of the employment contract between a Glovo delivery driver and that company are present, there are no reasonable doubts as to the application of European Union law that justify a reference for a preliminary ruling to the Court of Justice of the European Union. The qualification of the plaintiff's legal relationship as an employment contract does not entail a restriction of the freedoms of establishment and freedom to provide services guaranteed by the Union Treaties, nor does it infringe the fundamental rights to freedom to pursue a trade or profession and freedom to conduct a business under Articles 15 and 16 of the Charter of Fundamental Rights of the European Union. In the opinion of this Court, the questions for preliminary rulings requested by this court are based on assumptions that do not correspond to the actual provision of services carried out by the plaintiff, and therefore it is not appropriate to refer the matter to the CJEU for a preliminary ruling.

**FIFTH - 1.** The CJEU issued an order on 22 April 2020, Case C-692/19, in response to a reference for a preliminary ruling from a Watford Court concerning the legal qualification of the relationship of a carrier with a parcel delivery company. In that order the CJEU rules that Directive 2003/88/EC concerning certain aspects of the organization of working time must be interpreted as excluding from being considered a "worker" for the purposes of that directive, a person engaged by his prospective employer under a service agreement which stipulates that he is an independent employer, if that person has powers:

- to use subcontractors or substitutes to perform the service it has undertaken to provide;

- to accept or not to accept the various tasks offered by their alleged employer, or to unilaterally establish the maximum number of such tasks;

- provide their services to any third party, including direct competitors of the putative employer: and

- fix their own "working" hours within certain parameters and adapt their time to their personal convenience rather than solely the interests of the supposed employer.

The CJEU



establishes two qualifications:

1) Let that person's independence not appear fictitious.

2) That it is not possible to establish the existence of a relationship of subordination between that person and his alleged employer. It is for the referring court, taking into account all relevant factors relating to that person and to the economic activity carried out by him, to qualify that person's occupational status under Directive 2003/88.

**2.** The aforementioned order was issued in accordance with Article 99 of the Rules of Procedure of the CJEU, which provides:

"Where a question referred for a preliminary ruling is identical to a question on which the Court has already ruled,

where the answer to such a question may be clearly deduced from the case-law or where the answer to the question referred for a preliminary ruling does not give rise to any reasonable doubt, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order. »

**3.** As the above-mentioned order was issued under Article 99 of the Rules of Procedure of the CJEU, this implies that the CJEU merely reproduced previous case law or that it concluded that there was no reasonable doubt. That CJEU decision establishes a safeguard: the non-application of Directive 2003/88/EC is excluded where the independence of the service provider appears fictitious and where there is a relationship of subordination between that person and his alleged employer, which is for the national court to determine.

Consequently, if it is concluded that the plaintiff's independence was merely apparent and there really existed a subordination of the plaintiff to Glovo, the cited order of the CJEU will not prevent the calification of the employment relationship for such purposes.

The aforementioned order of the CJEU shows that no question should be referred for a preliminary ruling in this case. The dispute is to determine whether there is subordination between the plaintiff and Glovo and must be resolved by this national court by assessing the specific circumstances of the case in question, without there being any reasonable doubt as to the interpretation of European Union law.

**SIXTH. 1.** The first ground of the unification appeal alleges infringement of Articles 1.1 and 1.3.g) of the Workers' Statute (hereinafter ET), as well as the jurisprudential doctrine established in the judgments of the SC of February 26, 1986, December 19, 2005 and January 22, 2008 in relation to Article 8 of the ET and Articles 1 and 11 of Law 20/2007, of July 11, on the Statute of Self-Employment (hereinafter LETA), alleging that the definitive notes of the employment relationship are present.

**2.** Art. 1.1 of the ET states: "This law shall apply to workers who voluntarily render their paid services for the account of others and within the scope of organization and management of another person, natural or legal, called employer or entrepreneur."

**3.** Art. 11.2 of the LETA provides:

"For the performance of the economic or professional activity as an economically dependent self-employed worker, the latter must simultaneously meet the following conditions:

a) Not to be in charge of employees or to contract or subcontract part or all of the activity to third parties [...].

b) Not to carry out its activity in an undifferentiated manner with workers who provide services under any type of labor contract on behalf of the client.

c) To have its own productive infrastructure and material, necessary for the exercise of the activity and independent from those of its client, when they are economically relevant in such activity.

d) To develop its activity with its own organizational criteria, without prejudice to the technical indications it may receive from its client.

e) To receive an economic consideration based on the result of its activity, in accordance with the agreement with the client and assuming the risk and risk of the same".

**SEVENTH.- 1.** The legal concept of employee requires that there is a voluntary, paid, external and dependent provision of services (art. 1.1 of the ET). Reiterated jurisprudential doctrine holds that dependence and ajenidad are the essential elements that definen the employment contract [for all, judgments of the SC (Plenary) of January 24, 2018, appeals 3595/2015 and 3394/2015; February 8, 2018, appeal 3389/2015; and October 29, 2019, appeal 1338/2017]. Dependence and alienage are abstract concepts that are manifested differently depending on the activity and the mode of



production and that are closely related to each other.

**2.** Since the creation of labor law up to the present time, we have witnessed an evolution of the dependency-subordination requirement. The SC ruling of May 11, 1979 already qualified this requirement, explaining that "dependence does not imply absolute subordination, but only the insertion in the governing, organizational and disciplinary circle of the company". In the post-industrial society the note of dependence has flexibilized. Technological innovations have led to the establishment of digitalized control systems for the provision of services. The existence of a new productive reality makes it necessary to adapt the notes of dependence and alienation to the social reality of the time in which the rules must be applied ( art. 3.1 of the Civil Code). In practice, due to the difficulty involved in assessing the presence of the definitive elements of the employment relationship in doubtful cases, in order to determine whether they are present, the indicative technique is used, identifying the favorable and contrary indications

to the existence of an employment contract and deciding whether or not the employment relationship is present in the specific case. This Court has stated that "The qualification of the relationship as an employment relationship must be made in each case according to the existing evidence, assessing mainly the margin of autonomy enjoyed by the person providing the service" (SC judgment of January 20, 2015, appeal 587/2014).

The Court of Justice of the European Communities, in its judgment of 13 January 2004, C-256/01, Allonby case, applied the principle of equal pay for male and female workers for equal work or work of equal value. A college had dismissed teachers employed on an hourly basis, using teachers paid on an hourly basis through a company operating as an agency and offering them the possibility of registering with it as self-employed persons to provide teaching services in continuing education centers. The Court explained that the concept of "worker" within the meaning of Art. 141.1 of the Treaty establishing the European Community refers to "a person who performs, for a specified period, for another person and under his direction, certain services for which he receives remuneration". The Court argued, "As regards teachers who are required, vis-à-vis an intermediary undertaking, to perform a specific provision of services in an educational establishment, it is appropriate to analyse in particular the extent to which their freedom to determine their hours, their place of work and the content of their work is restricted. The fact that such persons are not obliged to accept a specific provision of services has no bearing in this context (see, to that effect, on the subject of freedom of movement for workers, Raulin, cited above, paragraphs 9 and 10)". Consequently, although the teacher was not obliged to accept a specific provision of services, this did not prevent her from being a worker for the purposes of the principle of equal pay for male and female workers.

**2.** The judgment of the CJEU of 20 December 2017, Case C-434/15, Asociación Profesional Élite Taxi, held that Uber's intermediation service which, for remuneration, uses a smartphone app to connect non-professional drivers using their own vehicle with persons wishing to make an urban journey, has to qualify as a "service in the field of transport" for the purposes of Union law and is therefore excluded from the scope of the freedom to provide services in general and of Directives 2006/123/EC on services in the internal market and 2000/31/EC on electronic commerce. The CJEU denied that the company Uber performs an activity of mere intermediation. That company carries out an underlying activity of transport, which it organizes and directs for its own benefit. The CJEU explains that "Uber's intermediation service is based on the selection of non-professional drivers using its own vehicle, to whom that company provides an application without which, on the one hand, those drivers would not be in a position to provide transport services and, on the other hand, persons wishing to make an urban journey would not be able to avail themselves of the services of those drivers. Moreover, Uber exercises a decisive influence on the conditions of the services provided by these drivers. On this last point, it appears in particular that Uber, through the eponymous application, sets at least the maximum price of the ride, that it receives this price from the customer in order to then pay a part to the non-professional driver of the vehicle and that it exercises a certain control over the quality of the vehicles, as well as over the suitability and behavior of the drivers, which in its case may entail the exclusion of the latter.

Consequently, this intermediation service must be considered to be an integral part of an overall service whose main element is a transport service and, therefore, which does not qualify as a transport service.
"information society service" within the meaning of Article 1(2) of Directive 98/34, to which Article 2(a) of Directive 2000/31 refers, but to that of "service in the field of transport" within the meaning of Article 2(2)(d) of Directive 2006/123."

In definitive, Uber did not merely match drivers with users through a computer application but exercised a "decisive influence on the conditions of the services provided by these drivers", exercising "certain control over the quality of the vehicles as well as over the suitability and behavior of the drivers".



**NINTH.- 1.** The jurisprudential criteria for differentiating the employment contract from other ties of a similar nature are as follows [for all, SC judgments of January 24, 2018 (Plenary), appeals 3394/2015 and 3595/2015; February 8, 2018, appeal 3389/2015; and February 4, 2020, appeal 3008/2017]:

1) The factual reality must prevail over the *nomen iuris* because "contracts have the nature that derives from their real binding content, regardless of the legal qualification given to them by the parties; so that at the time of calificating the labor nature or not of a relationship must prevail over the one attributed by the parties, that which derives from the concurrence of the requirements that determine the labor nature and the services actually carried out".

2) In addition to the *rebuttable* presumption of employment that art. 8 of the ET attributes to the existing

relationship between the person who provides a paid service and the person who receives it, art. 1.1 of the ET delimits, from a positive point of view, the employment relationship, classifying as such the provision of services on a voluntary basis when, in addition to such voluntariness, there are three notes that have also been repeatedly highlighted by case law, namely, the fact that the results are not related to the employee, dependence in their performance and the remuneration of the services.

3) The dividing line between the employment contract and other relationships of a similar nature (particularly the performance of work and the leasing of services), regulated by civil or commercial legislation, is not clear either in doctrine or in legislation, or even in social reality. And this is so, because in the service lease contract the outline of the contractual relationship is a generic exchange of obligations and work services with the consideration of a "price" or remuneration for the services, while the work contract is a species of the previous genre, consisting of the exchange of obligations and work services, but in this case dependent, on behalf of others and in exchange for guaranteed remuneration. Consequently, the matter is governed by the purest casuism, so that it is necessary to take into consideration all the circumstances of the case, in order to ascertain whether the notes of alienage, remuneration and dependence are present, in the sense in which these concepts are conceived by the case law.

**2.** This Court has used as an indication of the existence of an employment relationship (SC judgments of January 24, 2018, appeal 3394/2015; February 8, 2018, appeal 3389/2015; and February 4, 2020, appeal 3008/2017) the difference between the very small amount in investment that the worker has to make to be able to develop the entrusted activity (common tools, cell phone or small vehicle) compared to the greater investment made by the principal and delivered to the actor (specialized tool, vehicles for transporting important parts, as well as the knowledge of the facilities to be assembled for which the actor is trained).

**3.** On the contrary, it will be a contract for the lease of services and not an employment relationship when the plaintiff ( SC judgment of January 24, 2018, appeal 3595/2015):

1) It is limited to the practice of specific professional acts.

2) It is not subject to working hours, vacations, orders or instructions.

3) He practices his work with complete freedom; with independence and assumption of entrepreneurial risk.

**TENTH.-** This Court defines dependence or subordination as the integration "in the sphere of organization and management of the employer (i.e., alienation with respect to the organization of the work itself) [...] crystallization of a long jurisprudential development in which it was concluded that the "professional autonomy" essential in certain activities is not opposed to the existence of this note of dependence" (SC judgment of February 19, 2014, appeal 3205/2012). Dependence is the "situation of the worker subject, even in a flexible and non-rigid manner, to the organicist and governing sphere of the company" (for all, judgments of the SC of February 8, 2018, appeal 3389/2015; July 1, 2020, appeal 3585/2018; and July 2, 2020, appeal 5121/2018). That is to say, dependence or subordination is manifiestated through the integration of the workers in the business organization.

The SC explains that there are indicia common to most jobs and others specific to some work activities. The common indicia of dependency are the following:

1) Attendance at the employer's place of work or at the workplace designated by the employer and submission to working hours.

2) The personal performance of the work. Although the employment contract does not exclude the existence in certain services of an exceptional regime of substitutions or substitutions.



3) The insertion of the worker in the work organization of the employer or entrepreneur, who is in charge of scheduling his activity.

4) The absence of the employee's own business organization. **ELEVENTH.- 1.** This Court has considered the following to be common indications of the note of ajenidad (for all, judgments of the SC of February 4, 2020, appeal 3008/2017; July 1, 2020, appeal 3585/2018; and July 2, 2020, appeal 5121/2018):

1) The delivery or placing at the disposal of the employer by the employee of the products produced or services performed.

2) The adoption by the employer and not by the employee of decisions concerning market relations or relations with the public, such as fixing prices or rates, selecting clientele or indicating persons to be served.

3) The fixed or periodic nature of the remuneration for the work.

4) The calculation of the remuneration or of the main items thereof according to a criterion that keeps a certain proportion with the activity rendered, without the risk and without the special profit that characterize the activity of the entrepreneur or the free exercise of the professions.

**2.** The ajenidad concur when the following circumstances concur ( judgments of the SC of January 24, 2018, appeal 3595/2015; February 8, 2018, appeal 3389/2015; and October 29, 2019, appeal 1338/2017):

1) The fruits of labor pass *ab initio* to the company, which assumes the obligation to pay for these services, which are guaranteed.

2) It has not been proven that the plaintiff assumes any entrepreneurial risk whatsoever.

3) Nor has it been proven that it makes an investment in relevant capital goods, since the investment that constitutes an essential element of the contracted activity is delivered directly by the Respondent.

**3.** The third-party nature of the fruits occurs when "the profit derived therefrom -i.e., what the clients pay- enters directly into the assets of the company and not into those of the actors (third-party nature of the fruits and the profit) and the latter will receive their salary, in the form of per unit of work" (SC judgments of October 6, 2010, appeal 2010/2009 and February 19, 2014, appeal 3205/2012).

**4.** This Court has explained that "the non-establishment of remuneration or fixed salary is not a characteristic delimiting element of the employment contract with respect to other figures, given the concept of salary contained in art. 26.1 ET comprising "the totality of the economic perceptions of workers, in money or in kind, for the professional provision of labor services for others, whether they remunerate the actual work, whatever the form of remuneration, or the rest periods computable as work" ( judgments of the SC of 29 December 1999, appeal 1093/1999 and 25 March 2013, appeal 1564/2012).

**TWELFTH:** Regarding workers with their own vehicle, this Court has established the following criteria:

1) The judgment of the SC of February 26, 1986, considered the relationship of messengers who provided the service of receiving packages, for their transport and delivery to the addressees, in accordance with the established rates and were liable for their loss, misplacement, deterioration, theft or robbery when their value did not exceed 20,000 pesetas. The couriers provided services on motorcycles owned by the company, paying the maintenance, fuel and amortization expenses, receiving a per trip charge, unrelated to the price of the transport that was fixed by the company and clients without the intervention of the couriers. The couriers carried company advertisements on their clothing and vehicle. The couriers had to telephone the company daily before ten o'clock in order to receive the order of the trips to be made, being penalized if they were late.

The SC argued: "The dependence, apart from its externalization in the fact that the name of the company is on the clothes and on the vehicle, is also manifested in the need to call the company daily, under penalty of not doing so, to receive the work orders of the day, for which he assumes the obligation to carry them out without any delay or hindrance; the fact that the worker is not subject to a rigorous workday and schedule regime is irrelevant for these purposes. The non-attendance of the plaintiffs at work on all working days is a mere effect of the configuration that the company intends to give to the contract to avoid the qualification of labor, and does not constitute an essential data to determine its true nature, since this business behavior, prevents knowing the causes of non-attendance, which in a properly



regularized employment contract can occur for reasons as justified as permits, leaves, vacations, illness or even intermediate periods of inactivity in discontinuous or part-time contracts. On the other hand, the possibility of combining work in other companies is something that, duly authorized, does not distort the contract, as can be deduced from Articles 5.d) and 21.1 of the Workers' Statute".

2) The SC ruling of 26 June 1986 attributed an employment nature to the relationship of the owner of a vehicle who had to be there daily, at the time and place fixed, with his vehicle to collect newspapers or printed publications published by the defendant, transporting them and distributing them to the points of sale in accordance with the assigned route. He was responsible for the costs of vehicle maintenance, breakdowns and repairs, fuel, insurance and taxes, and he was also responsible for the contributions to the Special Regime for Self-Employed Workers of the Social Security. This Court explained that the activity involved the delivery and distribution of the defendant's newspapers and publications, concluding that the plaintiff "voluntarily rendered his paid services as an employee and within the

scope of another person's organization".

3) The decision of the SC of February 2, 1988, considered the services of a newspaper deliveryman, who performed the daily task of going to the company's premises at dawn to load newspapers and distribute them to the points of sale on a previously determined route, using a Renault van that he owned.

4) The judgment of the SC of May 3, 1988, considered the employment relationship of a person who carried out the transport and delivery of goods that the company provided him with, which he did on a motorcycle of his own, on which he carried the company's badge, also wearing a uniform that revealed his affiliation to the company, working from 7.15 am to 2 pm, resuming from 4.15 pm until 7 or 8 pm. The actor made a daily fixed route for some entities and not daily for others. Every day the courier phoned his company to receive orders and fill gaps, making occasional deliveries that arose in addition to the non-daily and fixed ones, without remaining inactive at any time.

5) Repeated pronouncements of this Court have recognized the existence of employment contracts in the case of contractors with their own vehicle, arguing that the ownership is unequivocally shown because it is the defendant who incorporates the fruits of the work directly receiving the benefits of this activity, without the actors being "holders of a business organization of their own, but they provide directly and personally their work for the performance of the service. This provision is the fundamental element of the contract, without the nature of this being distorted by the contribution of the vehicle by the worker, since this contribution does not have sufficient economic relevance to convert the exploitation of the vehicle into a defining element of the fundamental purpose of the contract, while the personal activity of the worker is revealed as predominant" (judgment of the SC of October 18, 2006, appeal 3939/2005 and those cited therein).

**THIRTEENTH.-** The defendant emphasizes that the plaintiff had full control of the scope of organization and direction because he freely chose the day and time he wanted to provide services. However, this Court has held that the existence of freedom of schedule does not in any case exclude the existence of an employment contract. The decision of the SC of January 25, 2000, appeal 582/1999, considered the relationship of a cleaner with a community of owners as an employment contract, despite the fact that the worker had freedom of schedule and could be substituted by a third party: "although the subjection to the management of the company and the personal nature of the services rendered may appear to be disguised by the freedom of schedule and the sporadic substitution in the provision of services by family members, these characteristics are not absent in the relationship in question, since the instructions and management of the company appear in the terms of the contract itself, which provides for cleaning in "special circumstances", which must naturally be determined in each case. which naturally has to be determined in each case by the employer and given the nature of the services provided and the employer, the freedom of schedule does not mean absence of submission in the execution of the work to the will of the employer, as the sporadic substitution by relatives does not imply, in the type of work contracted absence of the personal nature of the provision, since this occasional substitution also benefits the employer as shown that it is ordinary character that

accompanies the jobs of urban finca employees in which continuity of service takes precedence over the personal, constant and unexceptional provision of work."

**FOURTEENTH.- 1.** The judgment of the SC of November 16, 2017, appeal 2806/2015, declared the existence of labor relations of the translators and interpreters of an Autonomous Administration that provided services through a computer platform owned by the company awarded the service. The Administration required the services of an interpreter or translator from the company Ofilingua. The call center staff of this company, through a computer application, located the closest translators and interpreters geographically, checked their curriculum vitae and contacted
them by



telephone, informing them. The translator would decide whether or not to come to perform the services. If not, Ofilingua SL would contact another collaborator. On some occasions when the actor had not been able to come personally to provide assistance, his wife or brother had come. The company's employees did not receive any instructions on how to carry out their work. The company had never given training courses, nor did it provide material means for the development of the work, nor did it authorize vacations, leaves, leaves of absence....

**2.** This Court declared the existence of an employment relationship because:

1) The actor assumed the obligation to personally provide translation and interpreting services for Ofilingua SL.

2) Although it did not have a fixed schedule, it was imposed by the needs of the organizations that requested translation and interpreting services from the company, setting the day, time and place where the interpreter had to

go.

3) Apparently, the interpreter enjoyed great freedom to attend or not to attend to provide his services. However, "Although it appears that the interpreter enjoys great freedom to come or not to come to provide his services, it is true that, given the relationship established between the parties, if he does not come, he runs the risk of not being called again".

4) Said activity was performed in exchange for remuneration, receiving a fixed and periodic (monthly) amount determined by the defendant in proportion to the activity rendered.

5) He had to justify the hours he had worked, through the monthly presentation of invoices accompanied by a certification from the judicial body in which he had performed his activity.

6) There is no evidence that the plaintiff had any kind of corporate structure, but on the contrary, he was part of the defendant's work organization.

7) The fact that services were not rendered on a full-time basis or that there is no evidence of exclusivity does not affect the labor nature of the relationship.

8) Nor does the fact that the company did not provide material means to the plaintiff prevent the relationship from being classified as an employment relationship because, given the characteristics of the work he performed -translation and interpretation- it relied primarily on the personal element, with the material means being irrelevant.

9) Sporadic substitution by family members does not imply, in the type of work contracted, the absence of the personal nature of the benefit.

**FIFTEENTH.-** In the case at issue in this case, the judgment under appeal rejects the labor nature of the provision of services, in essence, because it considers that Glovo is a technology company whose activity is limited to intermediation. The aforementioned judgment emphasizes the following:

1) The freedom to choose the time slot in which the actor wishes to work, with fixation of the start and end time of his activity, and even within that period, he may not activate the self-assignment position, although this entails a certain penalty in the scoring system, except for justified causes.

2) The freedom to accept those orders (slots) you wish to place, without having to execute a minimum of them, with the possibility of their rejection even once accepted and even started their execution (without any penalty).

3) The freedom to choose the route to reach the destination fixed by the customer, being the customer and not the defendant company who establishes the characteristics of either the product to be purchased or the delivery method, establishing a direct relationship between the delivery person and the customer.

4) The personal performance by the claimant of the activity without having workers under his charge, providing the scarce material means required for the development of the same, with assumption of the expenses of its use.

5) The affiliation to the Social Security through their registration in the Special Regime for Self-Employed Workers.

6) Remuneration based on the number of services rendered and not fixed per unit of time.

7) The non-existence of an exclusivity agreement.

8) The unnecessary need to justify absences, being sufficient the mere communication, if possible in advance, of their unavailability to carry out the errands or orders.

9) The assumption of the responsibility of the good finish of the service (charging it only if it was finished to the customer's satisfaction) and the assumption in front of the final user/customer of the damages or losses that the product or merchandise could suffer during the transport.



In definitive, the appealed judgment concludes that the plaintiff organized its own activity with total autonomy, without any submission to the governing and organizational business circle, and had the productive infrastructure and its own material necessary for the exercise of the activity, providing the necessary means for its development, being remunerated by virtue of the result achieved in the execution.

Glovo is a company that has developed a computer platform and has entered into agreements with local businesses that offer certain products and services. The final consumer can request the purchase of such products through a mandate that confirms a third party using the Glovo platform, paying the cost of the product and transportation, and

Glovo makes available a delivery person who goes to the establishment and takes the product to its destination. It is also possible to request only the transport of goods from one point to another.

**2.** Both parties to the proceedings entered into a contract for the provision of professional services for the performance of errands, orders or micro-tasks. The plaintiff was registered in the Special Regime for Self-Employed Workers. After notice from the plaintiff, the parties entered into a TRADE contract. His activity was managed through the company's app. The actor indicated the time slot in which he wished to work, activated the self-assignment position (available) on his cell phone and from then on orders (slots) began to come in according to his time slot and geographical area. The delivery person had to accept the order, which could be done automatically or manually. Once the order was accepted, the delivery person had to carry it out in the manner required by the customer, contacting the customer directly. If he had any doubts about how to place the order, he had to contact the customer to solve them. The system of order assignment in the automatic assignment system is carried out telematically by Glovo's algorithm. It is declared proven that the actor could reject an order without any penalty, as well as that the worker decided the start and end time of his working day and the activity he performed during it, selecting the orders he wanted to perform and rejecting those he did not want, being able to reject an order in the middle of execution without suffering any penalty.

**3.** Glovo has established a scoring system for delivery drivers, classifying them into three categories: beginner, junior and senior. If a delivery person has not accepted any service for more than three months, the company may decide to downgrade him or her. The delivery driver's score is based on three factors: the customer's final rating, the efficiency demonstrated in the completion of the most recent orders, and the performance of services during peak hours, known by the Company as "diamond hours". There is a penalty of 0.3 points each time a delivery driver is not operational in the time slot previously booked by him. If the unavailability is due to a justified cause, there is a procedure to communicate it and justify the cause, avoiding the penalizing effect. The deliverymen who have the best score have preference of access to the services or errands that are coming in.There was no exclusivity agreement.

**4.** While the worker was performing his activity he was permanently located through a GPS geolocator with which the kilometers he traveled in each service were recorded, being able to freely choose the route to follow to each destination. The plaintiff carried out his activity with his own motorcycle and cell phone, at his own expense. The judgment under appeal reproduces the contract signed between the plaintiff and the defendant, clause 5.6 of which states: "In the event that an advance payment is required for the start of the activity, an advance payment of 100 euros will be made to the Glover who requests it".

**5.** The remuneration system consisted of the payment of an amount per order plus another amount for mileage and waiting time. The price of the "glovo sencillo" paid by the customer was 2.75 euros, of which the delivery person received 2.50 euros. The rest of the price was kept by Glovo as a commission for the intermediation. The payment for the services was made every two weeks. Glovo prepared the invoices. The plaintiff was only charged for the service if it was completed to the customer's satisfaction. In clause 3.4 of the contract signed by both parties, it is agreed that "In the event that the user is not available at the delivery address to receive the product that is the object of the delivery, the Glover shall be entitled to the

collection of its full fee for the transport service". And in its clause 3.5 it is agreed: "if the order is cancelled once the Glover has accepted it, the Glover shall be entitled to its percentage on half of the service".

It is also considered accredited that the delivery person assumed against the final customer any damage or loss that the products or goods might suffer during transport. If he had to buy products for the user, he used a credit card provided by Glovo.

**SEVENTH.-** The parties to the proceedings entered into a TRADE contract. However, they do not meet the conditions required by art. 11.2 of the LETA to have the status of TRADE:



1) One of them is "To carry out its activity with its own organizational criteria, without prejudice to the technical indications it may receive from its client". The plaintiff did not carry out its activity with its own organizational criteria but strictly subject to those established by Glovo.

2) Another is "To have its own productive infrastructure and material, necessary for the exercise of the activity and independent from those of its client, when they are economically relevant in such activity". The plaintiff only had a motorcycle and a cell phone. These are accessory or complementary means. The essential infrastructure for the exercise of this activity is the software developed by Glovo that puts in contact the stores with the final customers. The aforementioned platform constitutes an essential element for the provision of service. The actor lacked a significant infrastructure of its own that would allow it to operate on its own.

**EIGHTEENTH.- 1.** It is true that in the contract signed by Glovo with the plaintiff there are several elements that, in principle, seem contrary to the existence of an employment contract, such as the ability to refuse customers or services, to choose the time frame in which he will provide services or to combine the work with several platforms.

**2.** Despite this, the theoretical freedom of choice of the time slot was clearly conditioned. It is true that in the proven facts of the case it is stated that the worker could reject orders without penalty. But it is also stated as proven that the deliverymen with the highest scores enjoy preference in access to services or errands (proven fact seven). The scoring system for delivery drivers is based on three factors, one of which is the performance of services during the hours of greatest demand (the so-called "peak hours").
"diamond hours"). The judgment reproduces the contents of document 62 of the defendant's exhibit. It shows the virtually daily oscillations of the plaintiff's score: every day the computer program scored the deliveryman. The plaintiff's performance was evaluated daily. The deliveryman's income depends on whether or not he performs services and how many services he performs. It is declared proven that "the delivery drivers who have the highest scores enjoy preference in access to incoming services or errands".

In practice, this scoring system for each delivery driver conditions his freedom of choice of schedules because if he is not available to provide services in the time slots with the highest demand, his score decreases and with it the possibility that in the future he will be assigned more services and achieve the economic profitability he is looking for, which is equivalent to losing employment and remuneration. In addition, the company penalizes the delivery drivers by not assigning them orders when they are not operating in the reserved slots, unless there is a justified cause duly communicated and accredited.

As a result, delivery drivers compete with each other for the most productive time slots, and there is economic insecurity due to commission-based remuneration without any guarantee of minimum orders, which encourages delivery drivers to try to be available for as long as possible in order to obtain more orders and higher remuneration.

This is a production system characterized by the fact that it does not require compliance with a rigid schedule imposed by the company because the micro-tasks are distributed among a number of delivery drivers who are paid according to the services performed, which guarantees that there are delivery drivers who accept the schedule or service left by the delivery driver who does not want to work.

**3.** The company has established a scoring system that, among other factors, is nurtured by the final customer's valuation. The establishment of control systems of the productive activity based on the valuation of clients constitutes a favorable indication of the existence of an employment contract. Thus, the judgment of the SC of December 29, 1999, appeal 1093/1999, concludes the existence of an employment contract on the basis of a plurality of indications, including the fact that the company had "an inspection service that reviewed, among others, the work performed by the actor and received any complaints that customers might have about its activity".

**NINETEENTH.-** There are other indications in favor of the existence of an employment relationship:

1) The GPS geolocation of the plaintiff while he was performing his activity, recording the kilometers he traveled, is also a relevant indication of dependence insofar as it allows the company to control the performance of the service in real time. Delivery drivers are subject to a permanent control system while performing the service.

2) Glovo did not simply entrust the delivery person to perform a certain service but specified how it should be provided, controlling compliance with the indications through the application. Thus, it was established that the delivery person had to perform the service within the maximum term agreed; it was specified how he had to address the final user; he was forbidden to use corporate badges such as T-shirts, caps, etc.



Consequently, Glovo established instructions addressed to the delivery drivers regarding how to perform the provision of the service. The actor was limited to receiving orders from Glovo pursuant to which he was to pick up each order from a store and take it to the home of a final customer. The performance of this task was subject to the precise rules imposed by the company.

3) Glovo provided the actor with a credit card so that he could purchase products for the user: when a product is purchased to be delivered to the final consumer, the delivery person uses a credit card provided by Glovo. And it was agreed that, if the delivery person needed an advance for the start of the activity, Glovo would make him an advance of €100.

4) Glovo pays a financial compensation for the waiting time. This is the time the delivery person spends at the pick-up location waiting for your order.

5) The TRADE contract signed by both parties specifies thirteen justified causes for termination of the contract by the company consisting of contractual breaches of the delivery person: for continued delay in providing the service; deficient or defective performance of services; verbal or physical offenses to persons providing services for Glovo, users, suppliers or any third party related to Glovo; breach of contractual good faith or abuse of trust in the performance of the duties entrusted .... Some of them, such as the latter, are a literal transcript of the contractual breaches that justify the disciplinary dismissal contained in art. 54 of the ET.

6) Glovo is the only one that has the necessary information for the management of the business system: the participating stores, the orders...

**Twentieth.- 1. Regarding** the requirement of third-party liability, Glovo made all business decisions. The price of the services rendered, the method of payment and the remuneration to the delivery drivers is fixed exclusively by that company. The delivery drivers do not receive their fees directly from the platform's final customers; rather, the price of the service is received by Glovo, which subsequently pays their remuneration to the delivery drivers. This shows that Glovo is not a mere intermediary between end customers and delivery drivers. Neither the stores nor the final consumers to whom the delivery service is provided are customers of the delivery person, but of Glovo.

The financial compensation is paid by Glovo to the delivery person. This company is the one who prepares each of the invoices and then sends them to the deliverymen so that they show their conformity and turn them to the company. That is to say, formally it was the actor who turned his invoice to Glovo so that the company could pay it. But in reality Glovo had prepared it, according to the rates and conditions set by itself, and sent it to the delivery person so that he could turn it over to the company and collect it.

**2.** With respect to the non-ownership of risks, the fact of not being paid for the service if it does not materialize is an obligatory consequence of the remuneration per unit of work. But it does not mean that the worker is responsible for its good fin, assuming the risk and chance of the same. The SC ruling of October 15, 2001, appeal 2283/2000, explains that, when it is agreed that the employee does not receive his commission when the operation is unsuccessful or is cancelled, this does not mean that the employee assumes responsibility for the success of the operations.

However, in the case in question, it is proven that the plaintiff was liable to the user (end customer) for any damage or loss that the products or goods might suffer during transportation. This is an indication contrary to the existence of an employment relationship because normally workers are not liable to the customer for damages or losses of the transported products, without prejudice to the fact that the employer may impose a disciplinary sanction in case of breach of the employment contract.

In addition, the plaintiff assumed the risk derived from the use of his own motorcycle and cell phone, the costs of which were at his own expense, receiving his remuneration according to the services rendered.

Despite this, in view of the specific circumstances of the provision of services, as described in the preceding legal grounds, it cannot be said that the plaintiff had the special risk-lucracy binomial that characterizes the activity of the employer or the free exercise of professions (judgments of the

SC of February 4, 2020, appeal 3008/2017; July 1, 2020, appeal 3585/2018; and July 2, 2020, appeal 5121/2018).

**3.** Yes, there is an alienation in the fruits because Glovo directly appropriates the result of the work rendered, which redounds to the benefit of said company, which made the fruits of the same its own.

The delivery person had no involvement in the agreements established between Glovo and the stores, nor in the relationship between Glovo and the customers to whom they served the orders. He did not contract with one or the other, limiting himself to providing the service under the conditions imposed by Glovo. It is the company that agrees with the various establishments the prices that they pay and unilaterally sets the rates that the delivery person receives for the errands he carries out, including the additional amounts for mileage and waiting time, in the establishment of which he does not have the slightest participation.



**4.** There was a difference in the means, evidenced by the difference between the economic importance of the digital platform and the material means of the plaintiff: a cell phone and a motorcycle. The essential means of production in this activity are not the cell phone and the deliveryman's motorcycle but the Glovo digital platform, in which restaurants, consumers and deliverymen must register, without which it is not feasible to provide the service. And the actor carried out his activity under a third party's trademark.

**TWENTY-FIRST.- 1.** In definitive, Glovo is not a mere intermediary in the contracting of services between businesses and delivery persons. It is not limited to providing an electronic intermediary service consisting of putting consumers (customers) and real self-employed workers in contact, but it performs a coordination and organization of

the productive service. It is a company that provides messenger and courier services fixing the price and payment conditions of the service, as well as the essential conditions for the provision of such service. And it owns the essential assets for the performance of the activity. For this purpose, it uses delivery drivers who do not have their own autonomous business organization, who provide their service inserted in the employer's work organization, subject to the management and organization of the platform, as evidenced by the fact that Glovo establishes all aspects relating to the form and price of the service of collection and delivery of such products. In other words, both the manner of provision of the service, as well as its price and method of payment are established by Glovo. The company has established instructions that allow it to control the production process. Glovo has established means of control that operate on the activity and not only on the result by means of algorithmic management of the service, delivery person ratings and constant geolocation. The deliveryman neither organizes the productive activity on his own, nor negotiates prices or conditions with the owners of the establishments he serves, nor receives his remuneration from the final customers. The actor had no real capacity to organize his provision of work, lacking autonomy to do so. He was subject to the organizational guidelines fixed by the company. This reveals an exercise of entrepreneurial power in relation to the mode of rendering the service and a control of its execution in real time that evidences the concurrence of the requirement of dependence proper to the employment relationship.

**2.** To provide these services, Glovo uses a computer program that assigns the services according to the rating of each delivery person, which decisively conditions the theoretical freedom to choose schedules and to refuse orders. In addition, Glovo enjoys a power to sanction its delivery drivers for a plurality of different behaviors, which is a manifestation of the employer's managerial power. Through the digital platform, Glovo carries out a real-time control of the provision of the service, without the delivery person being able to perform his task detached from this platform. Because of this, the delivery driver enjoys a very limited autonomy that only reaches secondary issues: what means of transport he uses and what route he follows when making the delivery, so this Court must conclude that the definitive notes of the employment contract between the plaintiff and the defendant company provided for in art. 1.1 of the ET concur, upholding the first ground of the unificating appeal.

**VIGESIMO SEGUNDO.- 1.** The second ground of the appeal for the unification of doctrine alleges that the appealed judgment violates art. 97 of the LRJS. The appellant argues that the lower court judgment was contradictory and inconsistent when analyzing the validity or invalidity of the actions for dismissal and termination of the employment contract because if there is no employment relationship, the Court should not rule on the aforementioned issues. The appellant argues that the Superior Court of Justice committed the same error as the lower court's decision when it considered the plea of appeal challenging the tacit dismissal, arguing that it should not have ruled on the termination of a contract that did not exist. Therefore, this procedural party requests that the appealed judgment be annulled, referring the proceedings to the Labor Court so that, based on the qualification as labor of the relationship between the parties, it may examine the actions subject to trial.

**2.** We have explained that the appealed judgment, after denying the existence of an employment relationship between the parties, further argued that the judgment handed down by the Social Court was based on the following grounds

three dismissal decisions, relating to the actions of tacit dismissal, termination of the employment contract with compensation due to the employee's will and express dismissal. The High Court of Justice of Madrid concluded that the appeal was only against the tacit dismissal. And it argued that after the alleged tacit dismissal of the plaintiff (on October 21, 2017) he rendered his professional services for Glovo on October 24 and 25, 2017, so it rejected that there was a tacit dismissal.

**3.** The appeal for the unification of doctrine requires the procedural presupposition of contradiction, except in cases of manifest lack of



jurisdiction, functional competence of the Chamber, or res judicata (for all, judgments of the SC of December 30, 2013, appeal 930/2013; May 4, 2017, appeal 1201/2015 and September 12, 2018, appeal 607/2017). Therefore, the appellant must identify the contrasting judgment that meets the requirements of art. 219 of the LRJS.

**4.** The appellant has failed to comply with this procedural requirement: it does not identify any referential judgment in relation to the second ground of appeal. In the brief of interposition of the unification appeal, the only contrasting judgment cited is the one issued by the Superior Court of Justice of Asturias on July 25, 2019, which is limited to dismissing the cassation appeal, confirming the judgment of instance, which had declared the dismissal unjustified, without addressing the controversy raised in this second ground of appeal. The consequence is the dismissal of this ground of the unification appeal.

The appealed judgment confirms the judgment issued by the Social Court, which had dismissed the combined claims

for dismissal and indemnified termination of the employment contract. As a general rule, if the judicial body concludes that the relationship is not of an employment nature, it must issue a judgment declaring the lack of jurisdiction of the social order and warning the plaintiff about the jurisdictional order to which the knowledge corresponds ( judgment of the SC of November 26, 2012, appeal 536/2012). However, the appealed judgment considers that the TRADE contract signed by the parties to the proceedings is in accordance with the law, so that the jurisdiction to hear the present case would be attributed to the social order by art. 2.d) of the LRJS in the event that the plaintiff was declared to have the status of TRADE, which is why neither the Social Court nor the High Court of Justice declared the lack of jurisdiction of this jurisdictional order.

**2.** The judgment handed down by the Superior Court of Justice dismisses the appeal for two reasons. Due to the non-existence of an employment relationship between the parties and because the termination of the employment relationship by tacit dismissal is the only one contested in the appeal, the plaintiff having continued to provide his labor services after the alleged tacit dismissal.

The foregoing grounds make it necessary to uphold the first ground of appeal for unification, declaring that the relationship between the parties was of an employment nature. However, this Court must dismiss the second ground of the appeal as no suitable contrasting judgment has been invoked, and therefore, having heard the Public Prosecutor's Office, we partially uphold the appeal for the unification of doctrine. We uphold and partially annul the judgment issued on September 19, 2019 by the Social Chamber of the High Court of Justice of Madrid. We resolve the debate raised in the appeal in the sense of partially upholding said appeal. We partially reverse the lower court judgment, declaring that the relationship between the appellant and the company Glovoapp23 SL was of an employment nature and declaring the firmeza of the judgment issued by the Social Court regarding the dismissal of the claims for tacit dismissal, indemnified termination of the employment contract and express dismissal. Without pronouncement on costs (art. 235 of the LRJS).

## FALLO

For all the foregoing reasons, in the name of the King and by the authority conferred upon it by the Constitution, this Chamber has decided :

1. To uphold in part the appeal for the unification of doctrine filed by the representation of Mr. Desiderio .

2. To cassate and annul in part the judgment handed down on September 19, 2019 by the Social Chamber of the High Court of Justice of Madrid, which resolved the appeal filed by the representation of Mr. Desiderio . against the judgment dated September 3, 2018 handed down by the Social Court number 39 of Madrid in proceeding 1353/2017.

3. To resolve the debate raised in the appeal in the sense of partially upholding the appeal. Revoke in part the judgment of the lower court, declaring that the relationship between the appellant and the company Glovoapp23 SL was of an employment nature and declaring the firmness of the judgment issued by the Social Court regarding the dismissal of the claims for tacit dismissal, indemnified termination of the employment contract and express dismissal. Without pronouncement on costs.

Notify this resolution to the parties and insert it in the legislative collection. It is so agreed and firmed.