Employment and Self-Employment in Platform Work

French report

Since the 2010s, digital networking tools have profoundly transformed the professional space. While this intermediary work is far from being a novelty, the development of information and communication technologies has accelerated the emergence of new players: the digital platforms. In 2014, the platform economy was worth 15 billion dollars worldwide. By 2025, it could reach 335 billion dollars. This exponentially growing economy covers multiple realities, ranging from the sharing economy to the exchange of market goods and services.

While the platformisation movement has initially remained concentrated in a few sectors, it is set to expand. In its 2021 report, the ILO estimated that "the number of digital work platforms has increased fivefold over the past decade" worldwide. In France, digital platforms allow for a growth in jobs created of 7% per year. Also, more broadly, platformisation is set to affect more and more companies, regardless of their size, in the years to come.

The notion of platform workers can refer to highly skilled freelancers who possess high-demand skills and can work on demand. At the other end of the spectrum, it also includes workers in low-paying activities such as bicycle delivery. Net earnings are generally above the minimum wage per hour, but the workers concerned do not necessarily manage, when they wish, to do enough work to ensure a decent income.

These platforms are defined in French law in Article L. 111-7 of the Consumer Code:

I.- "An online platform operator is any natural or legal person offering, on a professional basis, whether paid or not, an online public communication service based on:

1° The classification or referencing, by means of computer algorithms, of content, goods or services offered or put online by third parties ;

2° Or the bringing together of several parties with a view to the sale of a good, the provision of a service or the exchange or sharing of a content, good or service.

This definition reflects the diversity of activities that these platforms offer. Behind the disparity of the models, there are common characteristics. From an economic point of view, the platform is a pivotal player in a multi-sided market whose relationships it organises without intervening in production. In other words, the platform brings together several sides of a market, for example a buyer and a seller, without determining the price of the goods exchanged. From a legal point of view, French law considers platforms to be intermediaries for establishing relationships. Finally, according to a so-called "socio-technical" approach, the digital platform can be defined as an entity structured by an algorithm that brings together supply and demand and organises the activity.

In addition to the development of digital technology, some platforms have taken advantage of a second economic factor: the 2008 crisis and the precariousness of jobs. They then offered to sell their labour force to individuals, initially outside the framework of labour law. We have identified four categories of work platforms :

- Organised service operators who structure the provision of standardised services by professionals, such as Uber for individual transport of people;

- jobbing platforms that offer home services for individuals, such as SuperMano for DIY;

- Freelance platforms that match offers and requests for non-standard services, often qualified, such as Malt;

- Micro-work platforms that match supply and demand for dematerialised micro-tasks, the two parties often being located in different countries. The dominant company in this market is Amazon Mechanical Turk.

Among all these platforms, those of organised services that provide standardised services delivered by professionals, particularly in the mobility sectors (VTC driving or delivery of goods by two-wheeled vehicle), are the most visible and crystallise the debate on the status of workers.

Indeed, platformisation has had a particularly strong effect on taxis and VTCs, accelerated by the gradual digitisation of the profession with online orders and payments in particular. These are also the jobs that have contributed most to the growth in the number of business start-ups

in France since 2018. In fact, micro-businesses registered in the "transport and storage" category increased by 80.5% in 2018.
Regarding micro-work, the number of casual micro-workers in France is estimated at 260,000 in 2018. Quantifying the phenomenon of platform work is particularly complicated because of the difficulty of defining, on the one hand, the platforms concerned and, on the other, the individuals who are considered to be their workers. However, in a context of increased flexibility in employment, it is likely that platforms as a channel for the distribution of labour will grow in importance. However, these new entities raise major issues that regulators often struggle to grasp.

Despite the media attention, self-employed workers using a digital platform to carry out their activity represent a tiny proportion (around 1%) of the employed population, i.e. around 15,000 regulars and 266,000 casuals in 2019. Among them, a large proportion has another professional activity or is studying. Working via a platform is therefore often a complementary activity.

This new form of self-employment is nevertheless growing and the evolution of the number of micro-entrepreneurs in the transport sector gives an indication of the development of these activities.

However, this statutory independence is gradually being called into question.

Indeed, protest movements have taken shape for several reasons. Platform workers operate in a grey area between self-employment and employment. Thus, the majority of platform workers are deprived of the rights, protections and guarantees normally associated with the status of worker. Added to this uncertainty linked to their status is the extreme deterioration of working conditions. Indeed, platform work is poorly paid, with long and unstable working hours. In addition, social protection is weak or even non-existent. A review of the literature also highlights the mental health risks incurred by these workers: physical and social isolation; the hardship of algorithmic management combined with permanent digital surveillance; and the suffering linked to the ephemeral nature of a job that at the same time appears to have no limits.

Thus, in French law, several questions arise: are work platforms employers? Should platform workers be considered as workers? How should the role of algorithms in platform activity be considered? How can we reconcile macro-economic opportunities and individual protection against risks?

These questions are all the more important as they could concern a significant proportion of the workforce in the years to come. The issue is to allow platformisation while protecting the workers concerned.

The emergence of digital networking platforms has given a new sharpness to the relatively classic question of the borderline between salaried employment and self-employment. Until now, the legislator has not intervened to settle this question and has left the judges to apply a well-established case law consisting of searching, in concreto , for indications that a subordination link constituting an worker relationship exists.

Thus, several decisions have been handed down by the Court of Cassation concerning the relationship between these digital work platforms and delivery drivers or VTC drivers:

- On 28 November 2018, the Court of Cassation requalified the relationship between Take Eat Easy and one of its delivery drivers as a contract of employment,

- On 4 March 2020, the Court of Cassation requalified the relationship between Uber and one of its drivers as a contract of employment,

- On 19 April 2022, following an investigation by the labour inspectorate leading to the opening of a criminal case, Deliveroo France was fined 375,000 euros, the maximum penalty provided for; in addition, prison sentences were imposed on three former directors of the company. This judgment creates a jurisprudence recognising the link of subordination between platforms and workers.

- On 25 January 2023, the Court of Cassation confirmed its ruling of 4 March 2020,

- On 15 March 2023, the Court of Cassation confirmed the existence of subordination links with regard to affiliated VTC drivers

Establishing a presumption of non-salaried status for all workers using a platform would lead to the validation of strategies to circumvent labour law to the detriment of workers. On the other hand, qualifying, by law, as workers workers who remain free to organise their work without being subject to a power of direction on the part of the matchmaking platform would raise a number of legal problems that would be difficult to resolve. Moreover, salaried status does not appear to be a demand shared by the majority of the workers concerned.

I. The relationship of subordination: a presumption of employment

Since the beginning of the 20th century, the existence or non-existence of an employment contract has been based on the essential criterion of the worker's subordination to France, Sweden, and other countries oscillating between self-employed and salaried qualifications.

The social chamber of the Court of Cassation considered that it was not possible to deviate from this now traditional definition, which is regularly repeated, and refused to adopt the criterion of economic dependence suggested by certain authors and relatively by European courts.
It maintained its classic case law according to which the relationship of subordination breaks down into three elements:

- the power to give instructions;
- the power to control its execution;
- the power to sanction non-compliance with the instructions given … integration into an organized service as a complement.

All this allows, by analyzing the situation of the parties, to conclude an employment contract

Some seek to base labour relations on a legal form other than that of the employment contract. French judges, whenever they have the opportunity, remind those who seek to forget that the qualification of the contract does not depend on the will of the parties or one of them, even imposed on the other, but on the reality of their situation and, even in the context of digital technologies, of their legal relationships. As soon as there is subordination, the

relationship must be reclassified as an employment contract. (Cass. soc., March 4, 2020, no. 19-13316)
Regarding the labour inspector, a decision of November 30, 2022, the administrative court of Paris annulled the decision of the labour inspectorate refusing, at the request of a union of drivers working for the company Uber, to implement a control for acts of concealed work and health and safety malfunctions. Platform workers are therefore not excluded from the scope of labour inspection. This is important because the role of the labour inspectorate is fundamental in the constitution of the evidentiary elements which make it possible, following a possible control, to establish the offence of concealed work with regard to the activities of the digital platforms. (T. corr. Paris, 31st ch., 19 Apr. 2022, Deliveroo).

Digital service platforms have systematized and attempted to standardize the use of self-employment instead of salaried employment status, which is still the norm in most European countries. Their economic model is based on the circumvention, by contractors, of salaried employment status.

The first step was the presumption of non-salaried work established in France by the law of modernization of the economy of August 4, 2008

The French legal framework is particularly favourable to digital platforms with less social dialogue in this area and minimal social responsibility for self-employed workers. These standards set limits to the possibilities of requalification, for the benefit of workers, of their commercial contract into an employment contract.
In France, even before the favourable legislative changes implemented since 2016, the platforms seized on the status of self-employed entrepreneur, who has become a micro-entrepreneur, which immediately places its holder under the self-employed worker regime and is accompanied by a legal presumption of non-salaried work established by the law of modernization of the economy of August 4, 2008.
This presumption of non-employment, provided for in Article L.8221-6, I of the labour Code, establishes the presumption that there is no employment contract between a self-employed worker registered in the trades directory or in the register Trade and Companies (RCS) and its client. These provisions are a real boon for electronic networking platforms.

This presumption of non-employment of the self-employed posed by the French labour Code is a simple presumption which can be reversed after providing solid proof before the judge. Indeed, this presumption is rebuttable if it is established that the self-employed person is in fact placed in a permanent legal subordination relationship with respect to the client (article L. 8221-6 of the labour Code). To reverse the presumption, the worker must seize the civil judge to request the reclassification of the employment relationship into an employment contract. It is this logic that is a question of reversing by establishing a legal presumption of wage employment for platform workers. This is one of the challenges of the proposal for a directive of the European Parliament and of the Council of December 9, 2021, on the improvement of working conditions in the context of work via a platform.

The question of the professional status of platform workers is therefore a major issue for workers. Indeed, it is the existence of wage labour and the employment contract that depends on the very possibility of labour law conceived as a normative device for the protection of the worker. Because it is subordination that gives rights to workers: the right to social protection against accidents at work, unemployment, sickness and old age, the right to collective guarantees, to representation, to unionization and, more generally, the right to benefit from the protective provisions provided for by law, regulations and collective agreements (protection against abusive termination of the employment relationship, minimum wage, paid leave, rest and break times, maximum working hours, etc.) or protections against harassment and discrimination. The self-employed worker is subject to the constraints of wage labour while enjoying very weak or even non-existent social protection.

This situation has devastating consequences for workers. The precariousness of their status and their economic dependence forces them to accept very degraded conditions of employment and remuneration. We are even witnessing an escalation of exploitation, in particular through the practices of subcontracting user accounts to undocumented workers or asylum seekers. Because there is no room for negotiation possible between a platform worker and his client. Once economic dependence is established, it is not uncommon for the principal to modify the rules of the game and for the price of the services to be revised downwards.

In fact, it is the existence or not of a relationship of subordination which determines the professional status of the worker.

It is up to the judge to determine in the last instance the professional status of platform workers. To this end, the judge will look at whether a relationship of subordination exists between the worker and the platform, a relationship characterized by case law as the performance of work under the authority of an employer who has the power to give orders and directives, to control their execution and to sanction the breaches of his subordinate
To determine whether these criteria are met, the judge uses the technique of the cluster of clues. In accordance with the "principle of the primacy of the facts" of European law, this assessment is made on a case-by-case basis by examining the factual conditions under which the activity is carried out, independently of the will expressed by the parties and of the name they gave at their convention.

Even when there is a presumption of non-employment or independence of the workers, it is therefore the criterion of subordination which determines the professional status of the worker. And it is up to the judiciary to decide, in the last instance, on the recognition of the existence of an employment relationship. This is what the Constitutional Council recalled in particular by censoring, by decision of December 20, 2019, certain provisions of the 2019 mobility orientation law which authorized the platforms to set rules that in fact fell within the domain of the law. These provisions would in fact have enabled platform operators "to fix themselves, in a charter, the elements of their relationship with self-employed workers which cannot be retained by the judge to characterize the existence of a legal subordination and, consequently, the existence of a contract of employment".

In Europe, several court decisions have recognized the status of workers for independent workers on digital platforms after analyzing the real conditions of the activity of these workers. In France in particular, several judgments of the social chamber of the Court of Cassation have led to a requalification of the relationship of self-employed workers with platforms in employment relationships. Thus, under the terms of a judgment of November 28, 2018, known as the Take Eat Easy judgment, the social chamber of the Court of Cassation considered, censuring the reasoning of the Paris Court of Appeal, that the existence of a power direction and control of the performance of the service characterized a relationship of subordination between the deliverers and the meal delivery platform.
In a judgment of March 4, 2020, known as the Uber judgment, the Court considered, confirming this time a decision of the Paris Court of Appeal of January 10, 2019, that the self-employed status of a driver was "fictitious".

It had in fact been noted by the judges that the driver was integrated into a transport service through the use of which he could not constitute any clientele of his own, that he could not freely set his prices, determined by means of algorithms, nor the conditions of exercise of its transport service, entirely governed by the principal. The monitoring of compliance with the platform's directives was accompanied by direct or indirect sanctions: a bonus-malus system encouraging acceptance of races or staying connected without a time limit, restriction or deactivation of access to the application in case of low race acceptance rate, loss of access to the account or temporary disconnection from the application in the event of race cancellations or reports of "problematic behaviour", downward "price corrections" applied by the platform when the driver does not take the route considered "efficient" and imposed by the algorithm... Clues characterizing the existence of a relationship of subordination and making it possible to reverse the presumption of non-salaried work in article L. 8221-6 I of the aforementioned labour Code.

The French criminal jurisdiction has also recently taken up the subject. Thus, for example, the correctional chamber of the Paris court imposed on a famous meal delivery platform the maximum criminal fine of 375,000 euros for the offence of concealed work by concealment of salaried employment. The court considered that the platform had misappropriated, between 2015 and 2017, the self-employed status of its deliverers to employ them at a lower cost by setting up a legal framework that did not correspond to the professional exercise of the deliverers. On the 1st September 2022, the Paris court ordered the platform to pay the tax administration, a civil party to the proceedings, the arrears of unpaid social security contributions amounting to 9.7 million euros. euros.

II. The absence of flexibility and social protection on Platform Work

However, like the previous discussions, it does not address the incompatibility of current legislative rules on working hours for future platform workers, whether via a third-party organisation or through judicial requalification, with the immediacy of platform activity, which also corresponds to the fact that for many of their workers, this is a secondary activity, carried out according to atypical and irregular hours.

Legislative reform would therefore seem to be necessary to provide for more flexible working time regulations for platform workers, along the lines of those that exist, for example, for sales representatives, so that the salaried status of certain workers is compatible with their activity. More broadly, as a result of the increasing digitalisation of work, many employers and workers are now faced with more mobile and asynchronous work, which also corresponds to changes in lifestyles, making it necessary to take account of more fragmented, unpredictable and ultimately freer working time. Beyond platform workers alone, it is both workers and French companies that would benefit if the regulation of working time became that of today's work and tomorrow's jobs.

Subsequently, the Executive Order No. 2021-484 of 21 April 2021 on the representation of self-employed workers using platforms for their activity and the conditions for exercising this representation was adopted.
This executive Order aims to respond to certain problems raised by the Frouin report

A bill on the control of the algorithmic organisation of work was tabled on 29 March 2023

Article 1 of the proposed law includes employers' decisions taken using technological means among those falling within their management powers. It provides for the content of decisions to be made more accessible and for workers to be informed of the reasons for decisions affecting them. It allows the worker to request that a new decision be taken by a human being following an appeal against a decision resulting from the use of algorithms.
Article 2 aims to ensure that the principle of non-discrimination is respected in the use of algorithms.

III. Presentation of the French trade union ecosystem

a. State of play of collective relations law in France for platform workers

The law on collective relations in France refers to the legal framework governing the relationships between employers and workers or their representatives in the context of collective bargaining and representation.

Under French law, workers have the right to form and join trade unions, and these unions have the right to negotiate collective bargaining agreements with employers. These agreements cover a range of issues, including wages, working conditions, and benefits.

In addition, French law requires employers to consult with worker representatives on a range of issues, including major organizational changes, health and safety policies, and training programs. worker representatives can include union representatives, works councils, and health and safety committees.

The law also provides for the right to strike, subject to certain procedural requirements, and prohibits employers from discriminating against workers based on their union membership or activities.

Overall, the law on collective relations in France reflects a strong tradition of labour rights and union representation and is designed to promote collabouration and dialogue between employers and workers in the workplace.

But the problem will arise from the fact that this right only applies to workers and employers, to people who have this status. That does not apply to many people, especially platform workers.

b. An overview of French trade unionism

Trade unions, as we know them today, were authorised after 1884 (Waldeck Rousseau Law). They were subsequently banned during the Vichy regime and reinstated on 1944 (Executive Order of 27 July 1944), with the return of trade union freedoms.

If they want to be able to negotiate agreements and have sufficient weight to enable decisions that they consider useful to be implemented, trade union organisations must be representative at the appropriate bargaining level. They must meet several cumulative legal criteria to be considered representative, like respecting republican values, financial transparency, and one of the most important: the size on their membership, their “audience” (L. 2121-1 Labour code).

France has several major trade unions, each with its history, ideology, and approach to labour relations. Here are some of the key differences between them :

- CGT (General Confederation of labour): The CGT is the largest and oldest trade union in France, with a strong focus on social justice and workers' rights. It is traditionally associated with the Communist Party and has a reputation for militancy and direct action, including strikes and protests.

- CFDT (French Democratic Confederation of labour): The CFDT is a center-left trade union that emphasizes negotiation and compromise with employers. It is the largest union in France.

- FO (Workers' Force): FO is a trade union that places a strong emphasis on workers' autonomy and independence. It is known for its anti-communist stance, which is the main reason why they split from the CGT.

- CFE-CGC (French Confederation of Management - General Confederation of Executives): The CFE-CGC is a trade union that represents managers and executives in both the private and public sectors. It is known for its pragmatism and its focus on professional issues rather than political ideology.

- CFTC (French Confederation of Christian Workers): The CFTC is a trade union with Christian roots that emphasizes social justice and solidarity. It is known for its focus on the dignity of work and its opposition to social exclusion.

These five unions are the ones that are representative and can negotiate agreements at the industry and national levels (Order of 28 July 2021 establishing the list of trade union organisations recognised as representative at national and interprofessional level).

c. <u>The platform worker's movement</u>

In terms of trade unions, some of the major French unions, such as the CGT and CFDT, have started to organize and represent platform workers. At the same time, certain local associations have been set up. For exemple, we have the « Collectif des coursiers de Lille Métropole » (CCLM) or « le Collectif des Livreurs Autonomes de Paris » (CLAP) in France. Similarly, many much more informal organizations have developed, notably on social networks like Facebook with the group « Collectif Coursier » which is some information page.

However, unionization rates among platform workers in France are still relatively low, in part due to the decentralized and precarious nature of platform work. Many platform workers are classified as self-employed or independent contractors, which makes it more difficult to organize them and negotiate collective bargaining agreements. Additionally, some platform companies have been accused of using anti-union tactics to discourage workers from organizing.

But there are several reasons why platform workers may not join unions, especially in France, including:

- Geographical fragmentation: Platform workers are often spread out across different regions and work on multiple platforms, which can make it more difficult for them to organize collectively.

- Precarious working conditions: Many platform workers work long hours without access to basic labour protections such as health insurance or paid time off. These precarious working conditions can make it more difficult for workers to engage in union organizing efforts.

- Fear of retaliation: Platform companies often have significant power over their workers and may retaliate against workers who attempt to organize or join unions. This can make workers hesitant to engage in union organizing efforts for fear of losing their jobs or facing other forms of retaliation.

- Lack of knowledge: Some platform workers may not be aware of their rights or the benefits of union membership and may not know how to get involved with union organizing efforts.

Overall, while progress has been made in terms of union representation for platform workers in France, there is still a long way to go to ensure that these workers have access to the same rights and protections as traditional workers.

d. The actions of the French state at the legislative level

Here, we must mention the Executive Order N°2021-484 of April 21, 2021, which lays the foundations for collective relations for platform workers. It introduces three new chapters into the labour Code, which are dedicated to workers using an electronic platform

for matchmaking. The first chapter deals with sectoral social dialogue, the second chapter covers platform social dialogue, and the third chapter pertains to the establishment of a dedicated public administrative body for these issues: the "Authority for the Social Relations of Employment Platforms". It is placed under the supervision of the Ministry of labour and the Ministry of Transport and is responsible for organizing national-level elections for representatives of workers using platforms, determining the list of representative organizations, managing the financing of training, compensation, and protection of workers' representatives.

However, this law has some significant problems. Currently, there is no provision for organizing the representation of platforms. Similarly, these texts apply only to platform workers engaged in driving a passenger transport vehicle or delivering goods using a motorized or non-motorized two- or three-wheeled vehicle. In addition, the legislature will need to establish an effective collective bargaining right that is compatible with the prohibition of anticompetitive agreements. Indeed, this regime applies here because it is not a question of an employment relationship but of a purely commercial relationship between two independent entities.

This independence is one of the problems that can be seen in these specific standards: by increasingly distancing the standards applicable to platform workers from those of the common law for workers, it is easy to see a legislative intent not to recognize them as having this protective status.

If you must remember only one thing: the French legislator is trying to establish collective bargaining and real tools for the pursuit of various rights of platform workers. Platform workers tend to come together more and more, and demonstrate more and more for their rights, especially their access to social security. However, not everyone wants to become an worker and have the same constraints imposed on those affected by this status.
This has a real impact because several VTC (chauffeur-driven tourism vehicles) driver's unions and platforms have agreed to impose a minimum income of 7.65 € per run, starting from 1 February. However, this decision is far from unanimous among the sector's trade unions, where social dialogue is still in its infancy.

In addition, agreements were signed between the social partners on 20 April 2023 :

The first agreement sets out the conditions for suspending and deactivating accounts, the second establishes a minimum hourly income of €11.75, and the third sets out the social agenda for the year 2023.

The second agreement sets out the conditions under which platforms can terminate their commercial relations with the self-employed workers they use.

The third will be an agreement that will provide a framework for the resources allocated to collective bargaining in this area.

IV. The necessity of a Directive in France

The proposal for a directive on the improvement of working conditions in the context of work via a platform was eagerly awaited. It continues the work of building a new regulation of platforms and, more broadly, of the digital world. This proposal lays out a framework that is both permissive and restrictive, accompanying a certain type of platform work. Above all, it establishes a presumption of employment. These legal advances are an opportunity to think and rethink the statutes and rights of platform workers to identify a new boom and a new inflexion of labour law in the digital age.
By means of a presumption of salaried employment, the European Commission seeks to flush out what have been called bogus self-employed or even legally self-employed and economically dependent.

The notion of "minimum rights", which appears in Articles 1-2 and 10 of the proposal for a directive, has the advantage of being in line with the upgrading of social rights and digital rights that are being developed, both at European and international level. A set of standards is gradually taking shape.

However, if the objective of the directive is to guarantee decent working conditions for all those whose income depends on this work model or to provide "help for the false self-employed", the question remains as to how these suggestions for qualifications will be implemented by the national judge, who will ultimately be the only one to decide in the light

of European impulses, but also and above all in application of national law and jurisprudence, which vary greatly from one country to another

Furthermore, platforms are encouraged to take responsibility for the social protection of these self-employed workers themselves, since it is stated that "the choice of platforms, whether purely voluntary or in agreement with the persons concerned, to pay self-employed persons working on the platform for social protection or insurance in the event of an accident at work or other, training or similar benefits, should not be considered as a decisive factor in identifying the existence of an employment relationship". This proposal can be understood as an encouragement to platforms to protect their workers, but also as a recognition of the disengagement of the state.

On the whole, this project is very interesting, because it renews European social law to create a digital social law. Some see it as equalising the treatment of different employment statuses with plans by the European Commission to encourage the inclusion of self-employment.

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Elements in attachment :

· Cour de cassation (2020) « reclassification of the contractual relationship between Uber and a driver as an employment contract »

· Cour de cassation (2020) « Explanatory note to the Uber ruling »

COUR DE CASSATION

EXPLANATORY NOTE TO THE UBER RULING

Ruling n°374 – 4 march 2020 (Appeal n° 19-13.316)

This is the second decision rendered by the Labour Chamber of the Court of Cassation concerning platforms workers, following the ruling handed down in the *Take Eat Easy* case (Soc., 28 November 2018, Appeal n° 17-20.079, published).

The company Uber BV uses a digital platform and an application establishing contacts between clients and ride-hailing drivers working as independent contractors in view of urban transportation.

After a driver's account was permanently closed by Uber BV, the driver brought the case before the industrial tribunal calling for the contractual relations to be reclassified as a contract of employment. The Court of Appeal reversed the decision and ruled that the partnership agreement signed between the driver and Uber BV was a contract of employment. It referred the case before the industrial tribunal for a ruling on the merits of the driver's claims for indemnities, retroactive payment of salaries, compensatory damages for non-compliance with maximum working hours, concealed labour, and dismissal without real and serious grounds.

According to established case law, the existence of a salaried employment relationship does not depend on the will expressed by the parties or on the name they have given to their agreement, but on the factual conditions under which the business activity is carried out (Soc., 17 April 1991, appeal n° 88 40.121, Bull. V n 200; Soc., 19 December 2000, appeal n° 98 40.572, Bull. V, n° 437; Soc. 9 May 2001, Appeal n° 98 46.158, Bull. V, n 155).

Translated from the French original

The Court of Cassation inferred from this, in the above-mentioned *Take Eat Easy* ruling, that the provisions of Article L. 8221 6 of the French Labour Code, according to which natural persons, in the performance of the activity calling for persons to be filed in the registers or directories listed in this text, are presumed not to be bound with the principal by a contract of employment, establish only a simple presumption which may be reversed when such persons provide services under terms and conditions placing them in a relationship of permanent legal subordination with regard to the principal. This solution is reiterated in the Uber ruling of 4 March 2020.

With regard to the criterion of salaried employment, the case law of the Labour Chamber of the Court of Cassation has been established since the Société Générale ruling of 13 November 1996 (Soc.., 13 November 1996, Appeal n° 94 13.187, Bull. V n° 386) according to which: *"The relationship of subordination is characterised by the performance of a job under the authority of an employer who has the power to give orders and instructions, to oversee performance thereof, and to sanction the subordinate for any breaches; Working within an organised service may indicate a relationship of subordination when the employer unilaterally determines the terms and conditions for performing the job".*

In the ruling handed down on 4 March 2020, the Labour Chamber considered that it was not possible to depart from this now traditional definition and refused to adopt the criterion of economic dependence suggested by certain authors.

Indeed, the Court of Justice of the European Union, both on the ground of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time and on the ground of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, decides that the notion of worker referred to in these two Community texts is an autonomous notion, i.e. defined by European Union law itself, and whose definition does not refer to the national law of each Member State (cf. in particular CJEU, 14 October 2010, *Union syndicale Solidaires* Isère, C-428/09; CJEU, 7 April 2011, Dieter May, C-519/09; CJEU, 26 March 2015, Fenoll, C-316/13; cf. also Article 3 of the above-mentioned Directive 89/391). It is to be noted that the definition of worker given by the Court of Justice is similar to that of the Labour Chamber since the Société Générale ruling, i.e. the relationship of subordination criterion (CJEU, Fenoll judgment, 26 March 2015, cited above).

Furthermore, in its decision n° 2019-794 DC of 20 December 2019, in which the Constitutional Council partially censured Article 44 of the French Law on the orientation of mobility insofar as it ruled out the power of the courts to reclassify the employment relationship of a platform worker as an employment contract, the Constitutional Council referred to the criterion of legal subordination on several occasions (see paragraphs 25 and 28).

Without in any way altering the case law established since the Société Générale ruling of 1996, the Court of Cassation approved the Court of Appeal's decision to reclassify the employment relationship between a ride-hailing driver and Uber BV as a contract of employment.

Indeed, the criterion for the relationship of subordination test consists of three elements:

- the power to give instructions

- the power to supervise performance thereof

- the power to sanction non-compliance with instructions given.

As for self-employed work, it is characterised by the following elements: the possibility of building up one's own clientele, the freedom to set one's own tariffs, the freedom to set the terms and conditions for providing the service.

However, the Court of Appeal noted in particular that:

(1) the driver has joined a transport service created and entirely organised by that company, a service which exists only thanks to this platform, through the use of which the driver does not constitute a proprietary clientele, does not freely set his fares or determine the terms and conditions for conducting his/her transportation business;

(2) the driver is required to follow a particular route which he is not free to choose and for which fares adjustments are applied if the driver does not follow that route;

(3) the final destination of the journey is sometimes not known to the driver, who is not really free to choose, as a self-employed driver would, the journey which befits him/her or not;

(4) the company has the right to temporarily disconnect the driver from its application as of three refusals of rides and the driver may lose access to his account in the event that an order cancellation rate is exceeded or in case of reports of *"problematic behaviour".*

The Court of Cassation therefore approved the Court of Appeal for having deducted from all these elements the performance of work under the authority of an employer who has the power to give orders and instructions, to oversee performance thereof and to sanction breaches, and for having ruled that the driver's self-employed status was therefore fictitious.

In this case, the existence of a relationship of subordination when the ride-hailing driver connects to the Uber application is thus recognized, the Court of Cassation having ruled out taking into consideration the fact that the driver has no obligation to connect and that no sanction exists in the event of the absence of connections for any length of time (unlike what existed in the *Take Eat Easy* application). Indeed, the Court of Justice of the European Union holds that the qualification of *"self-employed service provider"* given by national law does not exclude that a person must be qualified as a *"worker",* within the meaning of Union law, if that person's independence is merely fictitious, thus disguising a genuine employment relationship (CJEU,13 January 2004, Allonby, C 256/01, point 71; CJEU, 4 December 2014, C 413/13, FNV Kunsten Informatie en Media, point 35) and that the fact that there is no obligation on workers to accept a shift is irrelevant in the context in question (CJEU, 13 January 2004, Allonby, cited above, point 72).

While an intermediate scheme between salaried employees and self-employed workers exists in some European countries, such as in the United Kingdom (the *"workers"* scheme: an intermediate scheme between *"employees"* and *"self-employed workers"*) and in Italy (contracts of *"collaborazione coordinata e continuativa", "collaborazione a progetto"*), French law has only two statuses: that of self-employed persons and that of salaried employee.

reclassification of the contractual relationship between Uber and a driver as an employment contract

04/03/2020

Ruling n° 374 of 4 march 2020 (19-13.316) - Cour de cassation (Court of Cassation) - Social Chamber - ECLI:FR:CCAS:2020:SO00374

Reversal

Only the french version is authentic

1°/ ***The company Uber Franc****e, a French simplified single shareholder company,*

2°/ ***The company Uber BV****, a company under foreign law with its headquarters in The Netherlands, Have lodged appeal n° S 19-13.316 against the ruling handed down on 10 January 2019 by the Paris Court of Appeal (Pôle 6, Chamber 2) in the dispute between the foregoing companies and* ***Mr. A… X…****, domiciled at …, defendant in these appellate proceedings,*

***Voluntary Intervention** : the trade union Confédération générale du travail-Force ouvrière (CGT-FO), headquartered at .... In support of their appeal, the appellants cite the sole ground of appeal appended to this ruling.*

The case was communicated to the Public Prosecutor.

Based on the report by Ms. Valéry, Referendary Counselor, the written observations submitted by SCP Célice, Texidor, Périer, attorney representing the companies Uber France and Uber BV, by SCP Ortscheidt, attorney representing Mr. X..., by Me Haas, attorney representing CGT-FO, the pleadings by Mes Célice, Ortscheidt and the pleadings by Me Haas, as well as the opinion presented by Ms. Courcol-Bouchard, First Public Prosecutor, after public hearings on 13 February 2020 in the presence of Mr. Cathala, President, Ms. Valéry, Referendary Counselor Rapporteur, Mr. Huglo, Senior Magistrate, Ms. Farthouat-Danon, Mr. Schamber, Ms. Leprieur, Mr. Maron, Ms. Aubert-Monpeyssen, Mrs. Rinuy, Pion, Ricour, Pietton, Mses. Cavrois, Pécaut-Rivolier, trial judges, Ms. Depelley, Mr. David, Ms. Chamley-Coulet, Referendary Counselors, Ms. Courcol-Bouchard, First Advocate General, and Ms. Piquot, Clerk. In compliance with article R. 431-5 of the French Judiciary Organisation Code The Labour Chamber of the Court of Cassation composed of the President and Trial Judges mentioned above, handed down this ruling after deliberations in accordance with the law.

Facts and Procedure

1. According to the ruling under appeal (Paris, 10 January 2019), Mr. X..., bound by contract to the Dutch company Uber BV pursuant to signing a partnership registration form, has worked as a driver using Uber's digital platform since 12 October 2016, after leasing a vehicle from a Uber partner and filing with the SIRENE registry as an independent contractor, listed under the activity passenger transport by taxi.

2. Uber BV permanently deactivated his account on the platform as of April 2017.

3. Mr. X... petitioned the industrial tribunal with a request to reclassify his contractual relations with Uber as an employment contract, and lodged claims for retroactive salary payments and termination indemnities.

Reviewing the Admissibility of Voluntary Intervention by the Trade Union Confédération générale du travail-Force ouvrière

4. In accordance with articles 327 and 330 of the French Code of Civil Procedure, voluntary interventions are only admitted before the Court of Cassation if they are requested incidentally, in support of a party's claims, and are admissible only if the applicant has an interest in supporting said party so as to safeguard its rights.

5. In view of the fact that the trade union Confédération générale du travail-Force ouvrière adduces no evidence of having any such interest in these litigations, its voluntary intervention is inadmissible.

Reviewing the Ground

Statement of ground

6. Uber France and Uber BV submit that the ruling whereby the contract binding Mr. X... to Uber BV is an employment contract, whereas: "1°/ An employment contract implies that a natural person undertakes to work for the account of another natural person or legal entity against compensation and in a relationship of legal subordination. The agreement entered into by a ride-hailing driver with a digital platform bearing on the provision of an electronic application for establishing relations with potential clients in exchange for payment of service fees does not constitute an employment contract, in cases where said agreement entails no obligation for the driver to work for the digital platform or to remain at its disposal and entails no undertaking liable to force said driver to use the application to conduct his business. In the case at hand, Uber BV claimed that the driver entering into a partnership agreement remains entirely free to connect to

the application or not, to choose the location and the time he/she intends to connect, without informing the platform thereof in advance, and to put an end to the connection at any moment. Uber BV also argued that when the driver chooses to connect to the application, the driver is free to accept, to decline or not to reply to rides proposed thereto through the application and that, although several consecutive refusals may lead to a disconnection from the Application for operational reasons linked to the algorithm's modus operandi, the driver has the possibility of reconnecting at any moment and such temporary disconnection has no impact on the contractual relations between the driver and Uber BV. Uber BV further claimed that the platform is paid for exclusively based on the collection of fees on rides actually made via the application, so that the driver is not obligated by any financial commitment to the platform that might force the driver to use the application. Lastly, Uber BV argued that the partnership agreement and the utilization of the application do not entail any exclusivity obligation for the driver who is free to use other applications simultaneously for establishing relations with the clientele built up through other competing platforms and/or conduct his/her business as a ride-hailing driver and develop a clientele through other means. On this basis, Uber BV arrived at the conclusion that the signing and performance of the contract by Mr. X... did certainly not give rise to any obligation for the latter to work for the platform, and thus the contractual relationship cannot be characterised as an employment contract. Nevertheless, by deeming that the contract binding Mr. X... to Uber BV is an employment contract, without seeking, as it was invited to do, to determine whether the signing and performance of this contract entailed an obligation upon the driver to work for the platform or to stand at the disposal of said platform to perform a job, the Court of Appeal deprived its decisions of any legal ground in view of articles L. 1221-1, L. 1411-1, L. 7341-1 and L. 8221-6 of the French Labour Code.

2°/ Pursuant to article L. 8221-6 of the French Labour Code, the presumption of non-salaried status in order to conduct a business necessitating registration with the employment repertoire is excluded only once it has been established that the registered person provides services to a principal under such terms and conditions that said person is placed in a relationship of permanent legal subordination to the principal. The relationship of subordination is characterised by the performance of a job under the authority of an employer who has the power to give orders and instructions, to supervise performance, and to sanction the subordinate for any shortcomings. Working within an organised service cannot indicate a relationship of subordination unless the employer unilaterally determines the terms and conditions for performing the job. There can be no relationship of permanent legal subordination resulting out of the agreement signed by and between a digital platform and a ride-hailing driver, in cases where the agreement does not entail any authority given to the platform to require that the driver must perform a job for the platform or even that the driver must remain at its disposal for a given period, however long that period might be, or any undertaking likely to obligate the driver to use the application developed by the platform. In the case at hand, there can be no doubt that Mr. X..., who was filed with the employment repertoire as a driver, came within the scope of application of article L. 8221-6 of the French Labour Code. Uber BV argued that the driver who signs a partnership agreement remains entirely free to connect to the application or not, to choose the time and location when and where to connect, without being in any manner obligated to inform the platform thereof in advance, and to disconnect at any moment. Uber BV further contended that when the driver chooses to connect to the application, the driver is free to accept, to decline, or not to reply to proposals for rides made to the driver via the application and that, although several consecutive refusals may lead to a temporary disconnection from the application so as to enable the algorithm to operate smoothly (since requests for rides are proposed to drivers connected sequentially, with preference given to the nearest driver to the passenger), the driver may reconnect at any moment merely by clicking on the application. Uber BV furthermore argued that the signing of a partnership agreement and the utilization of the application do not give rise to any royalty, or to any financial commitment by the driver with regards to Uber BV, which would as such obligate the driver to use the application, and that compensation for the platform is exclusively ensured by collecting fees on rides actually made via the application. Lastly, Uber BV argued that the agreement for the provision of electronic service and utilization of the application did not generate any exclusivity obligation for the driver who was entirely free to simultaneously use other applications for establishing relations with the clientele built up through competing platforms and/or conduct his/her business as a ride-hailing driver and to develop a clientele through other means; by merely stating that "the fact of being able to choose places and hours of work does not exclude a relationship of subordinated work per se", without seeking to determine whether or not these overall factors, leading not to a mere freedom for Mr. X... to choose his hours of work (such as might exist for certain salaried employees), but a total freedom to use the application or not, to connect at the places and times chosen at his full discretion, not to accept rides proposed via the application, and to be free to organise his operations without the application, did not exclude the existence of a relationship of permanent subordination with Uber BV, the Court of

appeal deprived its decision of a legal ground in view of articles L. 1221-1, L. 1411-1, L. 7341-1 and L. 8221-6 of the French Labour Code. 3°/ The Court cannot determine the existence or not of a relationship of legal subordination without taking into consideration all the elements pertaining to the terms and condition of conducting the business as presented by the parties. In the case at hand, Uber BV claimed, without being contradicted, that the driver was not under any obligation or subject to any form of oversight regarding his connections and operations, and the partnership agreement bearing on the utilization of the application did not entail any exclusivity obligation and even expressly recalled that the driver was free to connect and utilise applications for establishing relations with the clientele built up through competing platforms and/or carry out his business as a ride-hailing driver through sources other than the Uber application. By considering that there was a sufficient body of evidence to characterise the existence of a relationship of subordination, without taking into account these decisive factors that may establish that the driver enjoys a freedom in conducting his business – including via the Uber platform - that is incompatible with the existence of a permanent relationship of legal subordination, the Court of Appeal did not put the Court of Cassation in a position to exercise its control and deprived its decision of any legal ground in view of articles L. 1221-1, L. 1411-1, L. 7341-1 and L. 8221-6 of the French Labour Code.

4°/ The performance of a partnership agreement bearing on the utilization by a ride-hailing driver of an electronic application for establishing relations with clients implies a possibility for the platform to ensure that the application runs smoothly, that the driver abides by applicable regulations, and to ensure the safety of persons and the quality of the transportation service provided. The possibility for a digital platform to terminate the agreement unilaterally in the event of the driver's serious and repeated breaches of the obligations ensuing from the partnership agreement does not characterise a disciplinary power. In the case at hand, Uber BV claimed that the requirement that the driver should not too frequently cancel rides proposed by the application after accepting these rides is not intended to restrict nor does it lead to restricting the driver's freedom to choose if, when and where the driver gets connected, and to decline rides proposed, but this is necessary so as to guarantee the system's reliability by ensuring a smooth equilibrium between supply and demand. Moreover, Uber BV notes that drivers using the Uber application do not receive any orders or any personalised instructions and that the "fundamental rules" derived from the contractual documents constitute elementary requirements as regards politeness and soft skills, compliance with regulations and to ensure the safety of persons, these rules being inherent to the business conducted by a ride-hailing driver. Under these circumstances, the possibility of terminating the partnership agreement in the event that these obligations are disregarded does by no means entail any disciplinary power, but reflects the possibility for any contractor to terminate a business partnership whenever the terms and conditions thereof are breached by the co-contractor. In considering that Uber BV had the power to impose sanctions upon drivers and this characterises an employment contract, by merely pointing out that a cancelation rate that was too high or that passenger reports of a problematic behaviour by the driver could lead to loss of access to the account, without explaining in what way the requirements imposed for using the application are distinct from requirements that are inherent to the very nature of the business carried out by a ride-hailing driver and inherent to the use of a digital platform for establishing relations, the Court of Appeal deprived its decision of any legal ground in view of articles L. 1221-1, L. 1411-1, L. 7341-1 and L. 8221-6 of the French Labour Code, together with articles L. 3221-1 et al. of the French Transportation Code, and articles 1103 and 1226 of the French Civil Code, as amended by the ordinance of 10 February 2016. 5°/ The mere existence of a possibility stipulated in the agreement for the platform to deactivate or to restrict access to the application cannot in itself characterise supervision over drivers' operations since there is no evidence indicating that any such prerogative would be used to force drivers to connect and to accept the rides proposed to them. By merely asserting that the stipulation in article 2.4 of the agreement, whereby Uber retains the right to deactivate the application or to restrict its use would "lead to inciting drivers to remain connected in the hope of obtaining a ride and thus to remain constantly at the disposal of Uber BV throughout the duration of the connection", whereas, on the one hand, the agreement elsewhere expressly recalls that the driver was free to use the application whenever he wished and to accept or decline the rides proposed and, on the other hand, there is nothing to indicate the existence of any deactivation whatsoever or of any restriction of using the application when a driver does not connect or declines rides, the Court of Appeal deprived its decision of any legal ground in view of articles L. 1221-1, L. 1411-1, L. 7341-1 and L. 8221-6 of the French Labour Code.

6°/ Article 4.4 of the agreement for the provision of services stipulates in particular that "the client and its drivers exclusively retain their individual right to determine when and how long to use the driver application or Uber services" and that "the client and its drivers retain the possibility, through the driver application, to attempt to accept, decline or disregard a request for transportation services via Uber services, or to cancel a request for transportation services

accepted via the driver application, subject to Uber's cancelation policies in force at that time". By truncating article 2.4 in the agreement to determine that this stipulation would "lead to inciting drivers to remain connected in the hope of obtaining a ride and thus to remain constantly at the disposal of Uber BV throughout the duration of the connection", without taking into consideration the clear and precise terms of this stipulation pertaining to the driver's freedom to connect and to decline rides proposed, the Court of Appeal has distorted this contractual stipulation by omission, in violation of articles 1103 and 1192 of the French Civil Code, as amended by the ordinance of 10 February 2016.

7°/ The fact of honouring the client's order, which was accepted by the ride-hailing driver, cannot constitute an indication of the existence of a relationship of subordination between the driver and the digital platform that established relations between the driver and the client. Thus, the fact that a ride-hailing driver who agreed to carry out an exclusive transportation service booked by a client honours the terms of the service booked and cannot carry other passengers as long as the transportation service is still ongoing cannot constitute an indication of subordination with respect to a digital platform. By considering that the prohibition for the driver to carry other passengers while performing a ride booked through the Uber application "negates an essential attribute of the status of a self-employed service-provider", the Court of Appeal relied on an erroneous ground and has violated articles L. 1221-1, L. 1411-1, L. 7341-1 and L. 8221-6 of the French Labour Code, together with article 1103 of the French Civil Code, as amended by the ordinance of 10 February 2016. 8°/ In accordance with the Uber Community Charter, "acts threatening the safety of drivers and passengers" are prohibited, such as "the fact of coming into contact with passengers after a ride without their consent. For instance: the fact of texting, calling or paying a visit to any person present in the vehicle after the ride has ended without that person's consent". In light of this contractual document introduced during the hearings, on the one hand, the prohibition of contacting clients after the ride, so as to uphold safety requirements, does not apply in cases where the client has agreed to be contacted by the driver and, on the other hand, it is by no means forbidden for the driver to give his/her contact details to clients so as to allow them to book a ride with him/her directly without going through the platform. Nevertheless, in considering that by forbidding the driver to contact passengers and to keep passengers' personal data after a ride, Uber BV deprived drivers of "the possibility for a passenger consenting to give his/her contact details to the driver so as to book a future ride outside of the Uber application", the Court of Appeal has distorted the clear and precise terms of the contractual documents introduced during the course of the hearings, in violation of articles 1103, 1189 and 1192 of the French Civil Code, as amended by the ordinance of 10 February 2016. 9°/ Uber BV argued that the provisions laid down in the French Consumer Code prohibit a ride-hailing driver from refusing to perform a ride without legitimate grounds, so that the lack of precise knowledge of the destination might not call the driver's independence into question. In stating that the lack of knowledge of the destination criterion by the driver when called upon to reply to an offer made through the Uber platform prevents the driver from "freely choosing the ride that befits him or not as a self-employed driver would do,", without seeking to determine, as it was called upon to do, whether or not the legal provisions pertaining to refusals to provide services do not prohibit professional drivers from declining rides out of pure convenience, the Court of Appeal deprived its decision of any legal ground in view of articles L. 121-11 and R. 121-13 of the French Consumer Code, together with article L. 8221-6 of the French Labour Code. 10°/ The geo-tracking system inherent to running a digital platform for establishing relations between ride-hailing drivers and potential clients does not characterise a relationship of legal subordination between the drivers and the platform insofar as this system is not intended to oversee drivers' activities and is used merely to put drivers into contact with the nearest client, to ensure the safety of passengers transported and to set the price of the service. By asserting that the geo-tracking system used by the Uber platform is sufficient to establish the existence of supervision over the drivers, "irrespective of the motivations put forward by Uber BV for this geo-tracking", the Court of Appeal deprived its decision of any legal ground in view of articles L. 1221-1, L. 1411-1, L. 7341-1 and L. 8221–6 of the French Labour Code.

11°/ The fact that a platform for establishing relations via electronic means sets the price of services provided thereby cannot be characterised as an indication of the existence of an employment contract. The mere fact that fares for a transportation service are calculated based on number of kilometres per hour and that the price of the services may be readjusted in the event of passenger claims - if the route chosen by the driver is unduly long and therefore inappropriate - does not constitute an order or an instruction for the performance of the job. By opining the opposite in ruling against it, the Court of Appeal has violated articles L. 1221-1, L. 1411-1 and L. 7341-1 of the French Labour Code, together with articles 1164 and 1165 of the French Civil Code as amended by the ordinance of 10 February 2016.

12°/ Any commitments made to third parties by an independent driver in order to conduct his/her business cannot be construed as indications of a relationship of legal subordination between the driver and a digital platform. By pointing out the fact that while awaiting his registration with the ride-hailing drivers register obtained on 7 December 2016, Mr. X... had conducted his business using the license held by the company Hinter France, a partner of Uber BV, obliging him to generate revenue by connecting to the Uber platform, the Court of Appeal relied on an improper ground to characterise the existence of a relationship of legal subordination with Uber BV, in violation of articles L. 1221-1, L. 1411-1, L. 7341-1 and L. 8221-6 of the French Labour Code, together with article 1199 of the French Civil Code, as amended by the ordinance of 10 February 2016.

Response by the Court

7. In accordance with article L.8221-6 of the French Labour Code, natural persons, when conducting operations necessitating a filing in the registers or repertoires listed in this article, are presumed not to be bound to the principal by an employment contract. Nevertheless, the existence of an employment contract may be established in cases where said persons provide services under terms and conditions placing them in a relationship of permanent legal subordination with regard to the principal.

8. In accordance with the established case law of the Court (Soc., 13 nov. 1996, n° 94-13187, Bull. V n° 386, Société générale), the relationship of legal subordination is characterised by the performance of a job under the authority of an employer who has the power to give orders and instructions, to oversee performance thereof, and to sanction the subordinate for any breaches.

9. In accordance with the aforementioned case law, working within an organised service may constitute an indication of subordination in cases where the employer unilaterally determines the terms and conditions of performing the job. 10. In this respect, the Court of Appeal has ruled that in order to become a “partner” of Uber BV and its eponymous application, Mr. X... was obliged to file with the Trade Register (“Registre des Métiers”). Far from freely deciding on the organisation of his operations, seeking out a clientele, or choosing his suppliers, he thus joined a transportation service set up and entirely organised by Uber BV and which exists only through this platform. The use of this transportation service did not lead to the obtainment of a proprietary client base for Mr. X... who is not free to set his fares or to determine the terms and conditions for conducting his transportation service business which are entirely governed by Uber BV.

11. With regard to the freedom to connect and the freedom to choose working hours, the Court of Appeal held that the fact of being able to choose one’s working days and working hours does not exclude per se a subordinated working relationship, insofar as whenever a driver connects to the Uber platform said driver joins a service organised by Uber BV. 12. With regard to fares, the Court of Appeal has noted that fares are set contractually based on Uber platform’s algorithms using a predictive mechanism. This mechanism imposes a particular route on the driver who has no freedom of choice in this respect, since article 4.3 of the agreement stipulates a possibility of fares adjustments by Uber, notably if the driver chose an “inefficient route”. Mr. X... presented several fares adjustments applied to him by Uber BV and translating the fact that Uber BV gave him instructions and supervised the application.

13. Regarding the terms and conditions for conducting the transportation service business, the Court of Appeal acknowledged that the Uber application oversees the acceptance of ride since Mr. X... asserts – without this assertion being denied - that after three refusals of proposals the message “Are you still there” was sent to him. The Charter invites drivers who do not wish to accept rides to “purely and simply” disconnect. This invitation must be viewed in light of the stipulations under article 2.4 of the agreement, whereby: “Uber also retains the right to deactivate or otherwise restrict access to or the utilisation of the Driver Application or of Uber services by the Client or any of its drivers or for any other reason at Uber’s reasonable discretion”. These stipulations incite drivers to remain connected in the hope of performing a ride and thus to constantly remain at the disposal of Uber BV throughout the duration of the connection, without being able to be actually free to choose the ride that befits them or not as would an independent driver. This is particularly the case as article 2.2 of the agreement stipulates that the driver “shall obtain the user’s destination, either in person at the time of pickup, or from the Driver Application if the user chooses to input the destination via Uber’s mobile Application”.

This implies that the destination criterion, which may render acceptance of a ride conditional, is sometimes unknown to the driver when replying to a request made by the Uber platform. This is confirmed in the bailiff's report drawn up on 13 March 2017 and stating that the driver has only eight seconds to accept the ride proposed thereto. 14. With regards to the power to sanction, in addition to the temporary disconnection as of three ride refusals which Uber recognises, and the fares adjustments applied if the driver chose an "inefficient route", the Court of Appeal held that order cancelation rates set by Uber BV, and which vary for "each city" according to the Uber Community Charter, could be applied to M. X.... Such cancelation rates could lead to loss of access to the account or permanent loss of access to the Uber application in the event of user reports of "problematic behaviour", irrespective of whether or not the allegations were ascertained or their sanctions proportionate to the deed.

15. From all the information outlined above, the Court of Appeal has therefore arrived at the conclusions that Mr. X... held a fictitious status as an independent worker and that Uber BV sent him instructions, supervised performance and exercised the power to sanction, without distorting the terms and conditions of the agreement, and without The Court of Appeal vitiating the ruling in the manner alleged in the pleadings, inoperative in its seventh, ninth, and twelfth branches and has justified its decision according to law.

ON THESE GROUNDS, the Court:

RULES inadmissible the voluntary intervention by the trade union Confédération générale du travail-Force ouvrière; DISMISSES the appeal; Sentences the companies Uber France and Uber BV to pay legal costs; In application of article 700 of the French Code of Civil Procedure, sentences the companies Uber France and Uber BV to pay to Mr. X... the amount of three thousand euros (3000 euros); dismisses the other petitions;

President : Mr Cathala
Reporting Judge : Ms Valéry
Advocate-General : Ms. Courcol-Bouchard,
Lawyers : SCP Célice, Texidor, Périer - SCP Ortscheidt - Me Haas

[redacted]

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Travail

contrat de travail, formation