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Reclassification of the contract between a delivery rider and a digital platform: A strong message sent by the Cour de Cassation

In an eagerly awaited judgment handed down on November 28, 2018 that will undoubtedly become a landmark decision[1], the Labor Chamber of the *Cour de Cassation* (French Supreme Court) ruled for the first time on the legal classification of the agreement between a deliverer and a digital platform.

While the majority of the lower courts asked to adjudicate similar cases were reluctant to recognize the existence of an employment relationship, the Labor Chamber curbs such reluctance and bites the bullet: Yes, it is possible to reclassify such agreement as an employment contract if it follows from the factual conditions in which the professional activity is carried out that the existence of a subordination link can be established.

In collaboration with Ambre Dalbes, trainee lawyer

At a time when the number of people working through the intermediary of a digital platform is surging, the question of the legal status of these new workers engaged in the so-called "*sharing economy*"[2] is of the utmost importance. May they be drivers or deliverers for digital platforms like Uber or Deliveroo, are these "uberized" workers really self-employed (i.e. independent workers) or are they more likely potential employees? In other words, can the agreements between these workers and the platforms be reclassified as employment contracts?

The case

The facts of the case involved Take Eat Easy, a company that has been wound up and that used a digital platform and an app. to connect partner restaurants, customers ordering food through the platform, and delivery riders. As per the business model set up by this type of platforms, delivery riders carried out their activity under a self-employed status and the agreement entered into with the company was classified as a services agreement. One of the delivery riders initiated proceedings before the Labor Court to seek the reclassification of his contractual relationship as an employer-employee relationship.

The Paris Labor Court of Appeals dismissed his claim, but the *Cour de Cassation* ultimately ruled otherwise. In order to respond to the question as to whether the existence of an employment relationship was established, it founded its reasoning on an absolutely standard legal basis: It actually merely applied the fundamental basic principles of its case-law, no more, no less.

The legal reasoning

The *Cour de Cassation* first recalled that "*the existence of an employment relationship does neither depend on the will expressed by the parties nor on the designation that the parties have given to their agreement; it depends on the factual circumstances in which the workers exercise their activity*". Therefore, the qualification given by the parties to their agreement and the jargon/terminology that may be used are totally irrelevant. Only the actual conditions in which the agreement is performed matter[3].

The *Cour de Cassation* then recalled that the relationship of subordination, which is the determining factor under French law to assess whether a work relationship is an employer-employee relationship, is characterized by the powers of direction, control and sanction[4]. In other words, in order to determine whether an agreement can be reclassified as an employment contract, it is therefore necessary to analyze if the conditions in which the activity is exercised allow to determine that a power of control, direction and sanction is exercised by the platform operator.

In the case at hand, the existence of such a relationship of subordination was duly established for the Labor Chamber of the *Cour de Cassation*.

The Labor Chamber of the *Cour de Cassation* noted from the findings of the trial judges that "*the app. included a geo-tracking system which enabled the company to monitor the delivery rider's position in real time and to record the total number of kilometers travelled"*, which likely characterized a power of direction and control by Take Eat Easy. The Labor Chamber then noted the existence of a power of sanction, revealed through a system of bonuses and penalties (using of the English world "*strikes*" in the company's internal jargon) attributed to the worker in case he/she failed to fulfill his/her contractual obligations. According to the Dean of the Labor Chamber of the *Cour de Cassation* Mr. Jean-Guy Huglo, this system of sanctions prevails as the determining criterion and reveals alone the relationship of subordination, to the extent that it enables the platform operator to unilaterally terminate the contract without the intervention of a court, just like for a dismissal.

As such, the elements relied upon by the Paris Labor Court of Appeals to reject the reclassification of the

services agreement as an employment contract – e.g. in particular the fact that the worker remained free to choose his/her working days, the number of working days and the time slots during which he/she wished to work, and that he/she was not bound by any exclusivity or non-compete covenant – were absolutely irrelevant.

Under these circumstances, the worker was placed under the subordination of the platform operator Take Eat Easy, which means that he/she was in fact an employee.

A French exception, again?

Needless to say, this issue goes beyond French borders and foreign courts are facing similar challenges, even though under different terms.

Should the decision of the *Cour de Cassation* be seen as a French exception, as a conservative stand going against the sharing economy? While the *Cour de Cassation* is the first Supreme Court in Europe that ruled on this issue, its position is in line with that already adopted by a number of foreign courts. It indeed follows the trend set by foreign judges in England (Uber), Spain (Deliveroo), California (Uber) or Australia (Foodora) who have acknowledged that these workers should benefit from protective labor legislations.

A message sent to the lower courts

The lower courts were so far divided on the question as to whether the agreement entered into between the worker and the platform ought to be reclassified as an employment contract and most of them tended to give a negative answer to this question[5]. With this decision, the *Cour de cassation* has paved the way for reclassification, to the extent however that it is apparent from the conditions in which workers of the platform perform their activity that the platform operator exercises a power of direction, control and sanction. This is a strong signal that should not nevertheless in practice lead to systematic reclassifications but rather to case-by-case analyses.

A message sent to the legislator

It should be recalled that under French law, there exist only two statuses: the status as self-employed and the status as employee. In this respect, the decision of the Labor Chamber of the *Cour de Cassation* is merely an application of the existing substantive law, i.e. a choice between available options. However, it is not desirable for the relevant workers and for digital platforms that the issue of the status of digital platform workers be dealt with by the courts on a case-by-case basis. This is perhaps the strong signal sent by the *Cour de Cassation* to the French legislator as this decision can be seen as an inducement to fully tackle this issue for which there are no satisfactory answers yet.

Law of August 8, 2016[6] had certainly introduced in Articles L. 7341-1 *et seq.* of the French Labor Code minimum guarantees to protect this new category of workers. At the time the so-called Bill on Professional Future was discussed[7], the legislator tried include additional provisions that would have given platforms the possibility to set up a social charter in favor of these workers. The purpose of this charter was to afford to workers a higher level or protection while setting aside any risk of reclassification of the contractual

relationship as an employer-employee relationship. Following this unsuccessful attempt[8], the measure reappeared in the General Mobility Bill[9].

The decision of the Labor Chamber of the *Cour de Cassation*, handed down at this stage of the legislative agenda, should prompt the legislator to re-address this issue and to amend the aforementioned Bill in order to contain a risk of reclassification that has now become a reality.

[1] Labor Chamber of the Cour de Cassation, November 28, 2018, n° 17-20.079

[2] In the so-called "sharing economy" "*individuals share or trade goods, services or knowledge in exchange for payment or for no payment at all, through the intermediary of a connecting digital platform" (source: DILA, L'économie collaborative : un nouveau modèle socio-économique : www.vie-publique.fr).*

[3] Labor Chamber of the *Cour de Cassation*, December 19, 2000, n° 98-40.572; Labor Chamber of the *Cour de Cassation*, April 17, 1991, n°88-40.121; Plenary Assembly of the *Cour de Cassation*, March 4, 1983, n° 81-11.647 and 81-15.290.

[4] Citing the following legal ground initially set forth in the Société Générale decision (Labor Chamber of the *Cour de Cassation*, November 13, 1996, n°94-13.187): "*a relationship of subordination is characterized by the performance of work under the authority of an employer which has the power to give orders and directives, to control the performance of work and to sanction the lack of performance of its subordinate*".

[5] On this question, cf. the following article (in French): *A. Fabre, Les travailleurs des plateformes sont-ils des salariés ? Premières réponses frileuses des juges français*, Dr. Soc. 2018, p. 547

[6] Law n°2016-1088 of August 8, 2016 on work, modernization of social dialogue and securing professional careers

[7] Law n°2018-771 of September 5, 2018 on the freedom to choose one's professional future

[8] This provision, considered as a legislative rider, was invalidated by the French Constitutional Council

[9] General Mobility Bill, Doc. Sénat, n°157, November 26, 2018

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