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Sécurité sociale

Sender

**Commission Administrative de règlement de la relation
de travail (CRT) - Francophone Chamber**

Centre Administratif Botanique - FinanceTower
Boulevard du Jardin Botanique 50 bte 135, 1000 Brussels

Recipient: X

File n°: 187 - FR - 20200707

Unilateral request

Claimant: X

**Request for qualification of the working
relationship**

Having regard to Article 329 of the Program Law (I) of December 27, 2006 ;

Having regard to Article 338, §1 of the Program Law (I), which provides that: "The Chambers of the Commission referred to in Article 329 have the task of making decisions on the classification of a given employment relationship [...]";

Having regard to the Royal Decree of 12 June 2019 on the composition of the Administrative Commission for the Regulation of the Employment Relationship ;

Given the presence of the majority of the members of the chamber of the Administrative Commission for the Settlement of the Employment Relationship ;

Having regard to the application submitted on 7 July 2020 ;

Having regard to the documents filed at the time of the filing of the application, namely the application form and its annexes numbered 1 to 10, namely :

- the proxy given by X to its representative, Z ;
- the "*Master Car Rental Agreement with Driver (LVC)*" ;
- a written argument concerning the criteria of presumptions provided for in article 337/5 § 1 of the law ;
- a written argument concerning the general criteria ;
- "*Manage your driving time. Stay safe behind the wheel*" (document published by Y) ;
- an example of a specific agreement relating to a move of January 20, 2020 ;
- a description of the "*Partner Protection*" insurance underwritten by Y ;
- a presentation and the general conditions of Y Pro ;
- "*How to keep your access to the Y application*" and "*Y Community Charter*" (documents published by Y);
- the decision of the French Court of Cassation of March 4, 2020.

Having regard to the additional documents sent by e-mail dated September 11, 2020, with the new framework agreement concluded between X and W on July 25, 2020;

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Whereas X appeared on September 17, 2020, assisted by Z;

Having regard to the additional documents transmitted by e-mail dated September 21, 2020 following the questions of the commission of September 18, 2020, namely :

- the "*limousine operator*" authorization issued to X by Bruxelles Mobilité ;
- the written reply of 21 September 2020 to the committee's questions;

Having regard to the written answer of 2 October 2020 to the Committee's questions of 24 and 25 September 2020 and its annexes, namely :

- a copy of the "*contract for the provision of services*" that Y BV1, a company incorporated under Dutch law, concludes with independent companies specialising in the provision of transport services (the "Customer"),
- the "*Driver Appendix to the Service Delivery Contract*",
- the "*Additional Conditions to the Service Delivery Contract*" (updated to July 12, 2020).

The **Administrative Commission** for the Regulation of Labor Relations, composed of :

- Mr. Jérôme MARTENS, adviser at the Labour Court of Liège, President;
- Mrs. Géraldine ELFATHI, representative of the FPS Social Security, General Directorate for the Self-Employed, Substitute Member ;
- Mrs. Anne ZIMMERMANN, representative of the Federal Public Service Employment, effective member ;
- Mrs. Marie-Hélène VRIELINCK, representative of the ONSS, Effective Member ;
- Mrs. Doris MULOMBE, representative of the NISSE, effective member ;

After considering the request for settlement of the employment relationship submitted to it, the Commission shall **decide by majority vote** ;

That the decision is given on the basis only of the situation described in the application form referred to above and the documents attached thereto;

I. BACKGROUND

In the application form sent to the commission on July 7, 2020, X explains that he is "*VTC driver for platform Y. His co-contractor is the ASBL W (BCE n° ***) (...). "Y" is the name of the application used to receive requests for races, allocate them to drivers, communicate with them,... More generally, "Y" is also the name used vis-à-vis third parties to designate the activity carried out by the ASBL W, as shown in particular by the website ***, which includes information [for both customers and drivers](#)*".

Under the heading "*specify the reasons for your request*", he explains that he "*wanted to be a self-employed driver, which he was in the past (craftsman - cab in France)*", but that "*within the framework of his working relationship with platform Y, he does not however feel that he is exercising his work as a self-employed person, because of the working conditions imposed on him. It therefore seems to him that this employment relationship is in fact a salaried employment relationship.* »

X asks the committee to rule on the nature of this working relationship.

X carries out its activity with its own car and has a "*limousine operator permit*" issued by the Brussels Region (Brussels Mobility). He is registered at the ECB as a natural person.

The working relationship on which he is referring the matter to the commission began with the conclusion of a "*Master Car Rental Agreement with Driver (LVC)*" entered into on November 21, 2019 between him

¹ Y BV has its registered office ***, registered with the Amsterdam Chamber of Commerce under the number ***.

(referred to as "*the Partner*") and the ASBL W2 (referred to as "*the Client*"), having its registered office ***. This contract was followed by a second identical framework contract signed on July 25, 2020.

The purpose of this framework contract is "*to determine the practical terms and conditions under which the Partner undertakes to provide the Transport Services to the Customer and Users*". It provides for the Partner to make the vehicle described in the contract available to the Customer.

Point 2 of the framework agreement sets out its duration, which runs from December 4, 2019 to August 12, 2020 (first framework agreement) and from August 12, 2020 to August 12, 2021 (second framework agreement), and also specifies :

"During the term of this Master Agreement, the Parties shall accumulate Transportation Services for a minimum of three (3) hours aggregated over the entire term of this Master Agreement. This is the only circumstance in which a car rental with driver is legally permitted. The minimum duration of three (3) hours may be split in time. Transportation Services must not be for a duration of three (3) hours.

(3) consecutive hours. For the avoidance of doubt, Transport Services shall mean the time actually spent by a User with whom the Partner has been in contact on board the vehicle provided by the Partner. »

According to the preamble of the Framework Agreement, the purpose of Platform W ("*the Customer*") is "*to represent the interests of its member members (the "Users") who are concerned about mobility and wish to adopt alternative modes of urban transport, in particular by means of application-type software installed in smart phones equipped with GPS systems (such as application Y, for example) enabling them to be put in contact with transport service providers (...)*". »

The "*Partner*" (X) is presented there as a company operating an LVC activity within the meaning of articles 16 and following of the order of 27 April 1995 and wishing to provide transport services to the "*Users*", the latter being presented as "*adherent members*" of "*the Customer*" (platform W).

The regional regulations³ to which reference is made provide, in particular, for car rental services with driver :

- that the vehicle can only be placed at the service of a specific individual or legal entity under a written contract,
- that the duration of the service must be at least 3 hours and respect a minimum rate of 90%. € EXCL. VAT,
- that the vehicle may not be on the public highway unless it has been rented in advance at the company's head office,
- that the rental agreement must expressly state the duration of the service, which must be at least 3 hours, with the clarification that this is the only circumstance in which a car rental with driver is legally permitted.⁴

The operator of a chauffeured car rental service must have a Business Number.⁵ He must prove his affiliation with a social insurance fund for self-employed workers and be in order to pay contributions⁶.

It seems that each passenger-user referred to in the framework contract must agree to become a member of the W when he orders a race for the first time via the Y application.⁷

The preamble of the framework agreement also specifies that "*the Partner has concluded a Service Provision Agreement with Y BV, under which and subject to compliance with certain conditions, it and its drivers have access to the Y application enabling them to contact Users*". » X a

² Named W in the remainder of this decision.

³ See the Ordinance of the Brussels-Capital Region of April 27, 1995 relating to cab services and car rental services with driver, art. 17, § 1, 4° and 5°, and the Decree of the Government of the Brussels-Capital Region of March 20, 2008 fixing the minimum rates applicable to car rental services with driver.

⁴ Art. 79, § 1, 3° of the decree of the Government of the Brussels-Capital Region of March 29, 2007 relating to cab services and car rental services with driver.

⁵ Article 91 of the decree of the Government of the Brussels-Capital Region of March 29, 2007 relating to cab services and car rental services with driver.

⁶ https://mobilite-mobiliteit.brussels/sites/default/files/note_relative_aux_demandes_dautorisation.pdf

⁷ See the Articles of Association of the W, points 3.1.3. and 3.4.2. (MB, November 29, 2019); see also the judgment of the Tribunal de l'entreprise francophone de Bruxelles of January 16, 2019, RG n° A/18/02920, p. 9.

produces this "*Service Provision Agreement*" (updated September 22, 2015) as well as two other documents entitled "*Driver Schedule to the Service Provision Agreement*" (updated September 22, 2015) and "*Additional Conditions to the Service Provision Agreement*" (updated July 12, 2020). In these documents, where the name of X does not appear anywhere, the parties are presented as being, on the one hand, "*an independent company specializing in the provision of transport services*", referred to as "*the Customer*", and on the other hand, Y BV, a company incorporated under Dutch law that presents itself as a technology service provider that does not provide transport services.

Concerning these documents, X specifies :

- that they are rather like general conditions and are generic and impersonal documents in which the name does not appear (the first two date from 2015, before the beginning of its activity);
- that he did not sign these documents as he did for the master agreement with W but had to approve them by simply pressing an "I accept" button in order to use application Y; he refers to the preamble of the "additional conditions" where it is stated :
"By clicking "Yes, I Accept" or by continuing to use the Driver Application after the Effective Date, you agree to comply with these Additional Terms",
- that he or she did not receive paper or even electronic versions of these documents that he or she had to approve in order to use the application, and that he or she gained access to them by searching in his or her Y account and requesting them from Y.

In addition to the framework agreement between X and W and the contract for the provision of services concluded with Y, it is also provided (in the framework agreement) that each transport service ordered by a user and accepted by the partner will give rise to a "*specific contract*" generated automatically and containing the date, time and starting point of each journey and an estimate of its cost.

X produces an example of a specific contract (appendix 6) generated on the occasion of a race carried out on January 20, 2020 on the territory of the city of Brussels and lasting 10 minutes. This document includes the statement that "*the trip for which this agreement is concluded is part of a set of trips that have a total duration of at least 3 hours and 90 euros (indexed if applicable). This is the only circumstance for which car rental with driver is legally permitted. The duration of 3 hours may not be consecutive. It may also be split in time. Transportation services need not be contracted for a duration of three (3) consecutive hours.* »

Concerning the articulation of these different contracts, the framework contract provides for :

- that each specific contract will constitute an amendment to this Master Agreement,
- that the framework agreement will automatically terminate if the contract for the provision of services concluded between the Partner and Y BV comes to an end.

II. EXAMINATION OF THE APPLICATION

According to article 331 of the Program Law (I) of December 27, 2006, "Without being able to contravene public order, good morals and mandatory laws, the parties freely choose the nature of their employment relationship, the effective performance of which must be in accordance with the nature of the relationship. Priority is to be given to the qualification that proves to be effective if it excludes the legal qualification chosen by the parties. »

Section 332 of this program act states : "Either when the execution of the employment relationship reveals the meeting of sufficient elements incompatible with the qualification given by the parties to the employment relationship, assessed in accordance with the provisions of the present law and its decrees or when the qualification given by the parties to the employment relationship does not correspond to the nature of the presumed employment relationship, in accordance with chapter V/1 and this presumption is not reversed, there will be a requalification of the employment relationship and application of the corresponding social security regime (...). »

§ 1. Application of the presumption (article 337/2, § 1, of the programme law (I) of 27 December 2006)

It follows from article 337/1, § 1, 3°, of the program law that a mechanism of presumption is applicable to employment relationships which are in the context of the transport of persons for third parties. This is indeed the case of the employment relationship at issue here insofar as X undertakes to provide transport services with regard to contracting parties (W and Y BV) whose intervention is not limited to putting a driver and users in contact but determines the conditions of the contractual relationship between the driver and the beneficiaries of the services⁸.

The nine criteria used for the application of the presumption are listed in article 337/2, § 1, of the above-mentioned program law.

According to Article 337/2, § 3, specific criteria may however be provided for one or more sectors of activity. These criteria replace or supplement the criteria referred to in paragraph 1. A Royal Decree of 29 October 2013⁹ in implementation of this Article 337/2, § 3, of the Program Law has provided for specific criteria applicable to employment relationships that fall within the scope of the performance of chauffeur-driven car rental activities.

According to Article 1 of this order, "company" means a company licensed to operate a cab service, a collective cab service or a hire-driver service issued by the competent authority under which the transportation is provided. »

Neither the ASBL W nor Y being holders of the exploitation license referred to in this article, this Royal Decree does not apply. Therefore, the presumption criteria listed in article 337/2, § 1 of the aforementioned program law apply.

This article states

Art. 337/2. 1 § 1. The employment relationships referred to in Art. 337/1, are presumed, until proof to the contrary, to be performed within the bonds of a contract of employment, when an analysis of the employment relationship shows that more than half of the following criteria are met:

- a) Failing this, the executing party shall bear any financial or economic risk, as is the case, in particular, in the event of a failure on the part of the person carrying out the work:
 - in the absence of substantial personal investment in the company with equity capital, or,
 - in the absence of a personal and substantial participation in the company's gains and losses;
- b) Failure on the part of the person carrying out the work to assume responsibility and decision-making power concerning the financial means of the company on the part of the person carrying out the work;
- c) Failing this, the person carrying out the work has no power of decision regarding the company's purchasing policy;
- d) Failing this, the person carrying out the work has no decision-making power regarding the company's pricing policy, unless the prices are legally fixed;
- e) Failure to meet an obligation of results regarding the agreed work;
- f) the guarantee of the payment of a fixed indemnity whatever the results of the company or the volume of the services provided by the person carrying out the work;

⁸ Cf. infra; see CJEU, 20 December 2017, *Asociación Profesional Elite Taxi*, aff. C-434/15, §§ 38-40.

⁹ Royal Decree of October 29, 2013 in implementation of this Article 337/2, § 3, of the Program Law (I) of December 27, 2006 regarding the nature of the employment relationships that fall within the scope of the execution of the activities that fall within the scope of the joint subcommission for cabs and the joint commission for transport and logistics, only for the activities of car rental with driver and collective cabs.

g) not to be the employer of personnel recruited personally and freely or not to have the possibility to hire personnel or to be replaced for the execution of the agreed work;

h) not to appear as a company to other people or to its co-contractor or to work mainly or habitually for one co-contractor;

i) work in premises that are not owned or rented or with equipment made available, financed or guaranteed by the contracting party.

§ Where it appears that more than half of the criteria referred to in paragraph 1 are not met, the employment relationship is rebuttably presumed to be a contract of self-employment.

This presumption may be overturned by any means of law and in particular on the basis of the general criteria laid down in this law. »

With regard to criteria a) to d), the Commission notes that :

- that X takes no financial or economic risk within W / Y;
- that it has no responsibility or decision-making power concerning the financial means of the W / Y;
- that it has no decision-making power regarding the purchasing policy of the W / Y ;
- it has no decision-making power regarding pricing policy: races are priced unilaterally and exclusively by Y and X has no bargaining power whatsoever.

Concerning criterion e), X considers that he is not bound by obligations of result with respect to Y (number of races to be completed, duration of races, ...) but only by an obligation of means. The fact of having to provide a specific service to the customer is not, in his view, sufficient to generate an obligation of result.

Given the variable schedules and especially the variable number of races that can be offered to X when he is connected to the application, it cannot be considered that he would be required to ensure a given number of races per week. What is imposed on him is to be available to run races when they occur and to run these races as quickly as possible. This is an obligation of means.

Concerning criterion f), X states that he has no guarantee of payment, or even of a volume of work. He is paid according to the number of runs.

With respect to criterion g), X is not the employer of personally recruited staff. If the framework contract provides for the possibility for "the Partner" to employ drivers under an employment contract (or as active partners) who would have access to the application Y, X, who carries out his activity as a natural person, does not have the possibility of being replaced for the execution of the agreed work: each driver carries out the races by logging on to his individual account on the application Y and the "Charter Y" specifies that account sharing is not allowed. Failure to comply with this prohibition may result in permanent exclusion from the platform. The terms of use of the Y application exclude any possibility of being replaced.

Concerning criterion h), X explains that he has a business number because it is a condition for being able to work with Y. He can therefore theoretically, because of his affiliation to the ECB, appear as a company vis-à-vis his suppliers (his car dealer) and administrations.

For the rest, as a driver, he does not appear as a company to the users (Y's customers):

- the customer books his trip via the Y application without any direct contact with the driver,
- the customer never chooses his driver (this one being designated by the algorithm),

- he can never agree with the driver to change the route taken but must necessarily go through the application,
- he pays his fare via the application and never to the driver, who can never accept payment from the customer,
- the evaluation of the race and any possible complaints from the client is to be introduced via the Y platform,
- the driver cannot be contacted directly by the customer: even if a passenger forgets a personal item in the vehicle, he must contact Y who will invite the driver to contact him,
- the driver cannot give his contact details to customers and therefore cannot develop his own clientele.

It thus appears that, throughout the duration of the service, the service is paid for by Y, not by X, who only appears as "driver Y" to the customers.

X declares that he works only for Y. His authorization as a "limousine operator" only allows him to provide chauffeur-driven car rental services within the limits set by the above-mentioned regulations (rental of at least 3 hours, invoiced at a minimum of €90, prior rental contract required for access to the public highway). This authorization does not allow him to perform a service similar to that of cab services as he does in the context of his relationship with Y and the W.

Concerning the last criterion (i), X uses his own car and the application provided by Y. He does not work "on the premises" of his co-contractor. As his representative at the hearing explains, however, X operates in a digital work environment governed by the application Y, which is the channel through which he receives his instructions.

In the opinion of the Commission and on the basis of the documents and information provided, 7 criteria can be considered as fulfilled: these are criteria a), b), c), d), e) g) and h).

One criterion could give rise to discussion and warrant further analysis: criterion (f). Finally, criterion (i) does not appear to be fully met if interpreted literally.

The above analysis shows that more than half of the 9 criteria can be considered to be met.

The employment relationship is therefore presumed, until proof to the contrary, to be performed within the bonds of a contract of employment.

§ 2 Application of the general criteria

The presumption of a contract of employment may be reversed by any means of law and in particular on the basis of the general criteria provided for in article 333, § 1^{of} the above-mentioned program law. These criteria are:

- the will of the parties as expressed in their agreement, provided that the agreement is executed in accordance with the provisions of article 331;
- the freedom to organize working time ;
- the freedom to organize work ;
- the possibility of exercising hierarchical control.

1. The will of the parties

X explained that he wanted to be a self-employed driver. The "*Master Car Rental Agreement with Driver (LVC)*" he concluded with W refers to the parties as *partner* and *client*. Although this document does not expressly mention any particular qualification, it is similar to a "chauffeur-driven car rental agreement".

agreement of independent collaboration, and the willingness of the parties seems to have been to work within the framework of such a relationship. This is confirmed by article 13.1. of the "*contract for the provision of services*" drawn up by Y, which provides that the relationship between the parties must be one between independent providers.

2. The freedom to organize working time

X exhibited that he is not bound to any schedule and is free to connect to the Y platform whenever he wishes. However, he does not feel that he has the freedom to organize his working time from the moment he connects to the platform.

The commission recalls that, according to the Court of Cassation :

"The freedom to organize working time, which, pursuant to Article 333, paragraph 1, of the Program Law (I) of December 27, 2006, is one of the general criteria for assessing the existence or absence of the relationship of authority required for an employment contract, concerns the question of whether or not independence in the use of time during the working period in which the work is to be performed or the person performing the work must be available in accordance with the agreement between the parties.

The fact that the person performing the work has the freedom to decide whether or not to accept an offer of work from his employer, and that he can, if necessary, refuse it, does not prevent the employer, once he has accepted the work, from disposing of his labor and assigning it in accordance with the provisions of the contract.

The mere fact that he has complete freedom to follow up or not to follow up on the offer of work does not imply that the person performing the work is also free in the organization of his working time once the assignment has been accepted" (Cass., October 18, 2010, R.G. n° S. 10.0023.N).

The freedom to organize working time is limited by the fact that the driver who, once logged into the application, is offered a ride is not informed of the location of the customer (he is informed of the distance to the customer and the duration of the ride to the customer - see screenshot in Appendix 4, p. 2/9) nor of the destination he wants to go to. This information is only provided once the trip has been accepted (or even when the passenger is actually picked up at the destination).

However, X explains that after two refusals of a race proposal, the application asks him to confirm his availability, and after three successive refusals, he is disconnected from the application (even though he has confirmed his availability). The consequences of cancellation when the trip is already accepted (but before the passenger is picked up) are more important because beyond a certain cancellation rate (the determination of which is not known to the drivers) and after a warning, the driver is definitively excluded from the platform.

Given the risk of disconnection in the event of refusal of a race or exclusion from the platform in the event of cancellation of an accepted race, the driver is thus led to have to accept any proposal for a blind race, without being able to assess whether the proposed race, depending on the route to be followed and its duration, is compatible with his availability, and without being able to evaluate the profitability of the proposed race.

This lack of information does not allow the driver to decide freely and with full knowledge of the facts whether or not to accept the service as an independent co-contractor would.

The freedom to organize working hours is therefore more limited than that of a self-employed cab driver who subscribes to a central cab service and who can accept or refuse a trip depending on the size of the company, without the risk of penalties and without losing effective work opportunities.

travel or the time it will involve, or, for example, because he or she feels it is more cost effective to stay where he or she is (for example, near a train station).

3. Freedom of work organization

The service agreement drawn up by Y presents the transport service provider (referred to as "the Customer") and its drivers as being "*solely responsible for determining the most effective, efficient and safe way to perform each of the Transport Services*" (point 2.2.); it is specified that "*the Customer acknowledges and accepts that it has full discretion to carry out its activity independently*" (point 2.4.).

In practice, however, X appears to be totally dispossessed of the organization of his work.

The commission notes that once the race is accepted, the driver must imperatively follow the itinerary indicated by the application and has no leeway as to how the service is performed.

In case of failure to respect the itinerary, if the price of the trip does not correspond to the estimate initially communicated to the passenger, the price of the trip may be "adjusted" a posteriori by Y. The passenger may then obtain a refund of the difference but the driver will only be paid on the basis of the price that had been announced to the client.

Even if the passenger wishes to make a detour or change his route, he must submit his request in application Y, which will send a new instruction to the driver.

The way in which the journey is organized can thus at no time depend on a direct dialogue between the driver and his passenger.

In addition, the price of the trip is set unilaterally by the Y application and is paid directly by the customer on the Y application. The driver cannot directly receive any payment or tip whatsoever. He does not issue an invoice: it is Y that calculates the amounts earned for the various trips and then pays them back to the driver at regular intervals¹⁰.

Such modalities of work organization oblige the driver to provide a fully standardized service and are incompatible with the qualification of an independent work relationship.

4. The possibility of exercising hierarchical control

According to the Service Agreement, Y "*does not control or direct the Customer or its Drivers*" (point 2.4.).

In practice, however, as noted by the Commission, application Y requires the driver to follow a specific route, and compliance with this obligation, which may be sanctioned by a unilateral adjustment of the fare (point 4.3. of the service provision contract), is continuously monitored by means of a system for collecting and analysing driver geolocation data (point 2.8. of the service provision contract and point 2.6. of the driver appendix).

A reading of the documents produced by X on October 2, 2020 also shows that precise instructions are given to the driver, who undertakes to ensure that all users are transported directly to the agreed destination, without interruption or unauthorized stops, and not to allow the presence of any other person in the vehicle (point 2.2. of the Driver Annex).

¹⁰ X specifies that Y only makes payment when a certain sum is reached, in order to respect the requirement of a service of at least 3 hours and a minimum of 90 € imposed by the regional regulations relating to car rentals with driver.

It also controls the number of accepted, refused or cancelled journeys, and expressly provides that *"the Driver undertakes, when connected to the Driver Application, to endeavour to accept a substantial proportion of User requests, and if he does not wish to accept requests for User Transport Services for a certain period of time, to disconnect from the Driver Application"* (point 2.4.2. of the Driver Appendix). Y reserves the discretionary right to deactivate or restrict access to the Application, in particular in the event of a breach of the contract for the provision of services or its appendix, in the event of *"an action or omission (...) that causes damage to the brand, reputation or activity of Y or one of its Affiliates, at Y's sole discretion"*, or *"for any other reason, at Y's reasonable discretion"* (point 2.4. of the Service Agreement and point 2.3. of the Driver Schedule).

The driver must also ensure that the average user rating is maintained above the average minimum rating set by Y. If the driver's rating falls below the average minimum rating, the driver will be notified by Y and may be given a limited amount of time to raise the rating. If the driver does not improve his average rating, his access to the platform may be deactivated (point 2.6.2. of the service provision contract and point 2.4.2. of the driver appendix).

This user rating system is described in more detail in the "Y Community Charter"¹¹. This provides that the average rating of the driver, which is established on a rating scale ranging from 1 to 5 stars based on the last 500 races (or less if the driver has completed less than 500 races), must not fall below the minimum rating of 4.65 for YX (4.85 for YBerline). If the average score falls below the threshold of 4.65, several steps are planned before disconnection :

- if the score is close to or below the minimum required score, the driver is repeatedly informed that he may lose access to the application,
- the driver will receive messages containing *"tips"* to improve the quality of his services,
- if the score remains too low, the driver is invited to go to the support center where an agent will help him/her understand customer comments and expectations, with the aim of improving his/her services,
- if, after that, the note is still too low and after a last message, the driver loses access to the application.

This user evaluation of the driver is not used to inform passengers to choose between different drivers based on their average rating. The passenger never chooses his driver, as the driver is designated by the application. The user evaluation is used here as a tool to monitor each driver's performance, encouraging drivers to do their utmost to maintain a high score or risk being excluded from the platform.

The charter also stipulates that if the cancellation rate for races is deemed too high, the driver will receive several warnings and will then be invited to the Y offices to receive explanations and answers to his questions. If the cancellation rate remains above the threshold set by Y, the driver will receive a final warning and his account will then be deactivated.¹²

This charter prohibits drivers from having physical contact with passengers and from using coarse language or inappropriate gestures towards them. In the event of a complaint, an investigation is carried out

¹¹ This "Community Charter" aims to "ensure a safe and enjoyable experience for both drivers and passengers. It "clearly details the behaviours that may cause drivers and passengers to lose access to the Y application. It states that "anyone who creates a Y account must comply with the Y Community Charter" and that failure to comply with this charter may result in loss of access to the Y applications.

¹² With regard to the determination of this threshold, it is only specified that a cancellation rate of less than 5% is considered good.

during which access to the platform may be temporarily prohibited, and this investigation may result in a warning or deactivation.

X also points out that if a passenger complains about any aspect of his or her performance, he or she may be subject to preventive disconnection, regardless of whether the complaint is manifestly unfounded. He relates the case of a passenger picked up in Brussels on his way to London who complained that he had to pay for access to the Eurotunnel. This complaint led to an investigation during which X's account was suspended. Y confirmed that the price of the crossing was not included in the fare and had to be paid by the passenger. X nevertheless received a message indicating that "further similar returns could result in the permanent deactivation of (his) account".

It appears from the foregoing that the services provided by X are governed by instructions whose non-observance may give rise to sanctions up to the removal of its access to the application.

Y. This is the case when it deviates from the imposed itinerary, has a rate of refusal or cancellation of races considered too high, obtains an average score of less than 4.65/5 by users, or adopts behaviors prohibited by the Community Charter. X is continuously evaluated by Y (acceptance, refusal and cancellation of races, respect of the itinerary, ...) and by the users, and these evaluations are used by Y as parameters in a largely discretionary decision process that can lead to the final disconnection of the driver. It is also Y that investigates and decides on user complaints, in a very discretionary way.

The commission recalls that the "bond of subordination which is the characteristic of the contract of employment exists as soon as a person can, in fact, exercise his authority over the acts of another person" (Cass, 10 September 2001, R.G. n° S.00.0187.F; Cass. 27 April 1998, R.G. n° S.97.0090.F; Cass. 23 June 1997, R.G. n° S.96.0140F; Cass. 9 January 1995, Pas., 1995, p. 28; Cass. 14 November 1994, Pas. 1994, p. 936; C. trav. Liège, 21 January 1997, J.T.T., 1997, p. 497).

The ability to give instructions, to monitor compliance with them and to exclude a driver from access to the application in the event of non-compliance with these instructions reveals a hierarchical control that is incompatible with the qualification of an independent employment relationship.

§ 3 Conclusion

Both with regard to the presumption established by article 337/2, § 1, of the aforementioned Program Law and the general criteria, the modalities of execution of the employment relationship are incompatible with the qualification of a self-employed employment relationship.

The commission noted above the close links between the various contracts in question: the framework contract between X and W, the specific contracts between Y, the user member of W and X generated at the time of each race and constituting amendments to the framework contract, and finally the contract for the provision of services concluded between X and Y, the existence of which conditions the validity of the framework contract. The commission also noted that the work is entirely paid for by Y and that it is by Y that X is paid.

Under these conditions, given the close links between these various contracts, it is appropriate to consider that the ASBL W and Y BV are both employers of X. It has indeed been held that in order to assess the existence of a contract of employment, it is necessary to consider the reality of the subordination link and to determine who is in fact likely to exercise authority, regardless of the presentation that would have been given of the employment relationship in the contract or in other documents (C. trav. Bruxelles, February 13, 2018, R.G. n° 2015/AB/834).

For **these reasons**, the Administrative Commission considers that the **request for qualification of the employment relationship is admissible and founded** and that the elements submitted to it are incompatible with the qualification of an independent employment relationship.

So decided at the meeting of October 26, 2020.

The President,

Jérôme MARTENS

These decisions are binding on the institutions represented in the Administrative Commission and on the social insurance funds referred to in Article 20 of Royal Decree no. 38, except :

1° when the conditions relating to the execution of the employment relationship and on which the decision was based are modified. In this case, the decision no longer produces its effects from the day of the modification of these conditions;

2° when it appears that the elements to the qualification of the employment relationship that have been provided by the parties have been provided in an incomplete or inaccurate manner. In this case, the decision is deemed never to have existed.

The social security institutions therefore remain empowered to control the maintenance of the elements that formed the basis of the administrative chamber's decision.

In the cases referred to in art. 338, §2, paras. 2 and 3, (decisions rendered on the initiative of a single party), the decisions produce their effects for a period of 3 years.

An appeal against these decisions may be brought before the labor courts by the parties within one month of its notification to them by registered letter sent by post.

The decision becomes final if no appeal is lodged.