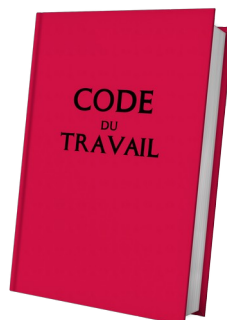


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THE REPRESSION OF ILLEGAL WORK CHALLENGED BY FALSE SELF-EMPLOYMENT

An interministerial "anti-fraud" committee devoted to the fight against illegal work met on 11 March 2022 and presented the results of the National Plan to Combat Illegal Work 2019-2021, as well as the first orientations for the 2022-2024 plan. The latter pointed out the development of fraud related to "false" self-employment, particularly through networking platforms.

The balance between the status of self-employed and that of employee¹ is now in turmoil in the light of the development of the "gig economy" »². This context brings to the fore an old question: where to draw the line between wage labour and self-employment? This question might seem trivial if it did not bring with it its share of social, economic and legal consequences. Beyond the issue of labour law, it is also a whole social security system that conditions the qualification of the worker, hence the temptation for companies to falsely use workers declared as self-employed to escape social and regulatory "constraints", which are just as much protection from the worker's point of view. These frauds can be apprehended from the angle and under the legal classification of illegal work. Yet, where does one draw the line between the lawful and the illicit? Once the practice is hypothetically identified as illegal work, to what extent can the existing repressive apparatus act? It is to these two intrinsically linked questions that this article opts to shed light, by examining to what extent the situation of a "false" self-employed person can be identified and fall under the classification of illegal work (I), before questioning the effectiveness of the repressive apparatus to deal with these situations (II).

I) The "false" self-employment notion caught up by the concept of illegal work

A multifaceted criminal offence. The offence of illegal employment pursues several aims, the main ones being to punish employers who violate employees' rights, distort fair competition with virtuous companies, and flout the social contract established with the State. Some companies will conceal, in whole or in part, salaried jobs and activities to reduce their costs, thus allowing them competitive costs to the detriment of the social rights of workers and the State.

At the criminal level, the offence of concealed work can take two main forms: concealment of activity³ and the concealment of salaried employment⁴. Whist the self-employed person may be targeted by the first form as the perpetrator of the

1 Case law traditionally holds that an employee is one who is bound by a relationship of subordination characterized by the performance of work under the authority of an employer who has the power to give orders and directives, to control the execution of the latter and to sanction the shortcomings of their subordinate. (V. Soc. 13 Nov. 1996; Dr. soc. 1996. 1067, note Dupeyroux).

2 This Anglo-Saxon expression aims at describing the development of a labour market characterized by the prevalence of short-term contracts or freelance work, generally managed through digital platforms (such as Uber, Airbnb). On this topic: V. GANDINI Alessandro (2019), « *Labour process theory and the gig economy* », *Human Relations*, vol. 72, n° 6, p. 1 039-1 056.

3 As defined in Articles L 8221-3 and 4 of the Labour Code as the undertaking "for profit of an activity of production, processing, repair or provision of services or the performance of commercial acts by any person who (...) [has not made a compulsory registration, social or tax declaration, or] has availed himself of the provisions applicable to the secondment of employees when the employer carries out his activities in the State of origin.) [has not made a compulsory registration, social security or tax declaration, or] has availed himself of provisions applicable to the posting of employees where the employer of the latter carries out in the State in whose territory he is established activities relating solely to internal or administrative management, or where his activity is carried out in the national territory on a regular, stable and continuous basis".

4 Pursuant to Articles L 8221-5 and following to the Labour Code.

offence (by not registering them or failing to undertake mandatory social and tax declarations, for example), they may also find themselves in a position of subordination with the main client and be a victim of illegal work by concealing salaried employment. In this respect, it should be noted that user companies may be held criminally liable if it is established that they knowingly resorted to the service of a person performing concealed work (Article L 8221-1, 3° of the Labour Code).

A difficult qualification. However, establishing the existence of an infringement in the case of a duly registered worker is not easy, as evidenced by recent debates on so-called self-employed workers of platforms such as Uber or Deliveroo⁵. The first step requires to establish the perpetrator's status as an employer⁶. To this end, it will be required to prove the existence of a relationship of legal subordination, bearing that the will expressed by the parties or the designation they have given to the agreement binding the two parties does not influence the legal classification, which depends solely on the factual circumstances in which the activity of the workers is carried out⁷. This could be the case for a self-employed person⁸, an associate⁹, a trainee or even a volunteer who would be placed in the exact position of an employee paid for work performed under a relationship of subordination.

Yet, how can one provide evidence for this situation? The process is all the more complex as the Labour Code establishes several presumptions of non-salaried employment for natural persons registered in certain registers, including the Trade and Companies Register (RCS)¹⁰. Additionally, the Labour Code backs this presumption by another one by stating that "*a self-employed worker is presumed to be one whose working conditions are defined exclusively by himself or by the contract defining them with his client*".

A reachable demonstration. These presumptions may, however, be rebutted by demonstrating the existence of a relationship of legal subordination. The trial courts interpret the matter on a case-by-case basis, considering a set of converging weak signals: the freedom to determine one's working hours, one's rest days, the existence of an on-call period system, the possibility for the sponsor to impose sanctions¹¹, a situation of legal and economic dependence of the victim, precise instructions as to the performance of the task, being required to obtain an agreement to take leave¹², a total dependence in the organization and execution of the tasks¹³...

Once this link has been established, it will still be necessary to establish that the contractor has intentionally avoided fulfilling one of the obligations incumbent on the employer mentioned by the law (declaration prior to hiring, submission of a pay slip mentioning the exact number of hours worked and keeping a duplicate, recurrent compulsory declarations to tax and social security bodies)¹⁴.

It should also be noted that in the case of concealed work, it is necessary to establish an element of intent with regards to the author, in respect of which the case-law does not seem to be excessively demanding, generally considering that the accused, by reason of his professional status, cannot ignore the obligations incumbent on them¹⁵.

To conclude on the fraudulent use of a self-employed status to conceal a salaried job; whilst it seems difficult to characterize because of the presumptions of non-salaried work, it is nevertheless accessible in that the case law goes further than examining the contract that unites the two parties. Then remains to assess how effective the means and tools of repression can be to identify and punish fraudsters.

5 On this topic: Quel avenir pour les plateformes après le rapport Frouin ? *Droit social*, dossier « Protection sociale et économie de plateforme », juillet-août 2021.

6 Regardless of whether it is a company, an individual or an association.

7 This statement is the result of unchallenged case law: see Cass. Ass. Plén., 4 mars 1983, n° 81-15290.

8 For example, the Criminal Chamber has ruled that an employer who makes his former employees work under the status of auto-entrepreneur, under conditions that place them in a permanent legal subordination relationship to him, is guilty of concealed work. Crim. 15 Dec. 2015, No. 14-85.638.

9 In this respect, it has been ruled, for example, that a lawyer on a self-employed contract must prove that, having expressed the desire to develop a personal clientele, he was prevented from doing so because of the conditions under which he carried out his activity. Crim. 15 March 2016, no. 14-85.328.

10 Article L 8221-6 of the Labour Code provides that the presumption exists for "1° Natural persons registered in the trade and company register, the trade register, the register of commercial agents or with the unions for the collection of social security and family allowance contributions for the collection of family allowance contributions.

2° Natural persons registered in the register of road passenger transport companies, who carry out school transport as provided for in Article L. 214-18 of the Education Code or transport on demand in accordance with Article 29 of Act No. 82-1153 of 30 December 1982.

3° The directors of legal persons registered with the RCS and their employees;"

11 Soc. 28 nov. 2018, n° 17-20.079 P.

12 Soc. 22 mars 2006: JCP S 2006. 1423, note Puigelier.

13 Civ. 2e, 28 nov. 2019, n° 18-15.333 ; See the decision of the Court of Justice of Paris condemning the company Deliveroo for concealed work, the court having noted "*a fictitious legal arrangement that does not correspond to the reality of the professional exercise of the deliverers*" (TJ de Paris, 19 avril 2022).

14 Pursuant to Articles L 8221-5 and 6 of the Labour Code.

15 It should be noted that there is no requirement to prove a special fraudulent intent to conceal the employees or the activity. See Cass. Crim. 20 juin 2017, n° 14-85879.

Particularity of online platform workers. The digital platform economy gives rise to these legal classification difficulties, in a legislative environment that is still struggling to deal effectively with these "in-between" situations, despite the European difficulty dimension¹⁶ and an estimated economic weight of €20 billion annually¹⁷. Given the scale of the phenomenon, the European Commission intends to act with new rules requiring platforms to make available certain information on their activities and the staff to the authorities. In this light, a proposal for a directive is being discussed. It should be providing a list of criteria in order to determine whether the platform constitute an employer¹⁸.

Online platforms also open a field of legal brainstorming around the offence of "*knowingly use*" of illegal work. Although platforms present themselves as mere intermediaries, the consumer remains – on paper – the principal, for whom criminal liability would not also be excluded on the basis of Article L 8221-1, °3. The main difficulty here lies in demonstrating the awareness and willingness to use, even indirectly via the platform, a "false" self-employed person.

An attempted parade has thus emerged when it comes to passenger cars with driver. Drivers are now frequently employees of micro-companies operating via one or more platforms. The fragility and ephemeral nature of these small companies coupled with an additional degree of intermediation opens up other difficulties in the event of default by the employer.

In such situation, and if the employer resemble a shell company, it will not be impossible to engage the criminal liability of the platform, provided a relationship of subordination be demonstrated. In this context, the theory of co-employment could be considered as a way to engage – beyond the only criminal liability – the platform in a situation of solvency¹⁹.

II) Effectiveness of anti- "fraud with self-employed status" tools

Criminal and civil penalties with far-reaching consequences. Once the fraud has been established and recognized judicially, the repressive apparatus available is sufficiently substantial since the offense is punishable by 3 years imprisonment and a fine of 45,000 euros, which can be increased to ten years and 100,000 euros when the offense is committed by an organized gang²⁰. Additional penalties that are very incapacitating in the pursuit of entrepreneurial activity may also be imposed (exclusion from public contracts for a period of five years, confiscation of objects used directly or indirectly to commit the offence or which have been used in connection with it, as well as those which are the proceeds and belong to the convicted person, or the dissemination and display of the conviction, causing an image deficit that could prove damaging).

The unscrupulous employer is, moreover, required to pay the contributions and social benefits charge incumbent to employers, calculated on the sums paid to the persons concerned in respect of the period for which the concealment of salaried employment was established²¹.

The synergy between criminal proceedings and the Union for the Recovery of Social Security Contributions and Family Allowances (URSSAF) makes it possible to strengthen the deterrent effect of the offence, it being specified that if the facts established give rise to the handover of a report to the Public Prosecutor's Office, specific sanctions apply to the amount of the adjustment – including in the case of a lump-sum adjustment, with an increase in the amount of the adjustment of 25% for concealment²².

In addition, the facts establishing the material element of the offence of concealed work constitute, the operative event for the payment of the contributions and contributions due in respect of the adjustment and justify the annulment by the body for the recovery of the measures exempting and reducing them²³.

The employee with a false self-employed status, or any trade union organisation²⁴ interested in taking action, may also request from the employer a lump-sum compensation of 6 months' wages²⁵ which, although it does not constitute a sanction having the character of a punishment in the eyes of the Constitutional Council in that its purpose is to ensure a minimum reparation of the prejudice suffered by the employee as a result of the concealment of work²⁶, still increases the financial cost of the fraud for the employer.

16 See: Italie : Ubérisation. La justice italienne exige la régularisation de plus de 60 000 livreurs. *Libération*, 25 février 2021.

17 *Améliorer les conditions de travail dans le cadre du travail via une plateforme*, Comm. européenne, décembre 2021.

18 If the platform meets the required criteria, it is legally presumed to be an employer (rebuttable presumption), see Proposal for a Directive COM(2021) 762 final, 9.12.2021.

19 See the founding judgment of the theory of co-employment, Cass. Soc., 13 January 2010, No. 08-15.766.

20 Pursuant to Article L 8224-1 of the Labour Code.

21 See L 8221-6 of the Labour Code.

22 This increase is brought to 40% when the offence of concealment of salaried employment or concealment of activity concerns several employees. See Articles L 243-7-7 and L 244-3 of the Social Security Code.

23 Civ. 2e, 10 Oct. 2013, no. 12-26.123.

24 The mechanism can be activated by trade union organisations without having to justify a mandate from the person concerned. This possibility is intended to protect the interests of the profession concerned and to overcome the misinformation and/or understandable shyness of the concealed employee exposed by an individual action.

25 Provided for in Article L 8223-1 of the C. trav. and recalculated on the basis of the equivalent of the conventional wage.

26 Cons. const. 25 March 2011, QPC.

Administrative penalties. The conviction for undeclared economic activity or concealment of salaried employment will still expose to very dissuasive administrative sanctions, including the ban, for five years, to benefit from certain public aid, and the obligation to repay public aid that has been granted during the 12 months preceding the drawing up of the report; the administrative closure for 3 months of the establishment or the dissolution of the company, if the legal entity was established to commit the facts.

The potential severity of the repressive regime is further reinforced as these sanctions can be combined with each other. The Constitutional Council has also recently validated the constitutionality of the plurality of criminal, civil and administrative sanctions²⁷.

Strengthened investigative resources. Whether the procedure comes from the URSSAF or a partner agency authorized to crackdown on concealed work²⁸, the establishment of an official report of concealed work can give rise to recovery difficulties (situation of organized insolvency, disposal of movable assets, etc.). Although these difficulties are generally less present in the case of the use of "false" self-employed persons than in that of the concealment of activity, it hinders the company's aspirations to a certain durability.

In such cases, the directors of the tax collection agencies are also authorized to immediately take precautionary measures (freezing of assets, in particular bank accounts), without prior authorization from the judge and without having to demonstrate that the collection of contributions is in jeopardy²⁹.

However, procedural precautions will have to be taken by investigators in this situation. It should be recalled that the Court of Cassation was recently able to rule that the hearings carried out by the control officers for the investigation and the establishment of offences relating to illegal work can only be carried out with the consent of the persons heard, even if the people concerned are only being heard in the context of audits³⁰.

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Understanding the scope of the fraud surrounding the "false" self-employed worker appears to be one of the main thrusts of the policy to combat illegal employment. Provided that the procedural subtleties and the elements that make it possible to define the boundary of salaried employment are fully grasped, once the offence has been characterised, it provides access to a repressive panel that acts as a serious deterrent. The level of awareness and training of investigators in the investigation and detection of these situations becomes a critical factor. In this respect, the empowerment of specialised units, be it centralised or decentralised unit, such as the *Office central de lutte contre le travail illégal (OCLTI)*, will be paramount. The same applies to the much-needed synergy development between various State services (police, gendarmerie, labour inspectors and URSSAF in the first instance) and their judicial collaboration, the principle of which has been institutionalised in Article 28 of the Code of Criminal Procedure. The success of the policy to combat these frauds comes at this price.

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²⁷ Cons. Const., 7 oct. 2021, n° 2021-937 QPC.

²⁸ The labour authorities, the police/gendarmerie, the tax authorities, customs authorities, etc., are all authorised and sworn agents for recording these offences, see Art. L 8271-1 et seq. of the Labour Code.

²⁹ Cons. const. 7 oct. 2021, n° 2021-937 QPC.

³⁰ Civ. 2e, 19 sept. 2019, n° 18-19.929 P.