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The French platform workers: a thwarted path to the third status

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1. Introduction. 2. The inclination of the French legislator for a third status. 3. The withstand of the French judges. 4. The rallying of the European Commission.

Abstract

In France, the issue of platform workers is the subject of a clear tension between the legislator and the civil judges. A tension that the European Commission, but also the Criminal Court of Paris, participate to feed.

Keyword: Platform; Work; Workers; Gig economy; French labor law; Case law; Legislator; Directive.

1. Introduction.

The French status of professional activity has been the figure of the employee and the contract of employment. Any worker who does not fall under it, is considered to be an independent one. When the proof of the existence of the employment relationship is complicated, difficult or impossible, but the workers' economic and social conditions require the protection typical of the employee, the legislator can decide to extend the social legislation (or part of it) to entire professional categories. These provisions are included in the seventh part of the French Labour Code. It imposes the enforcement of the labour law for travellers representing ushers, professional journalists, performing artists and even models.

In France, platform workers like delivery man or drivers carry out their activities under a micro-business entrepreneurial legal regime. However, the legislator had to intervene to start building a status including a certain number of rights associated with formal professional

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activity. We can find the provisions in the Labour Code but, this time, they are not really aimed to guarantee to these workers a status of employee, or to ensure their access to most of the social rights despite their independent status... On the contrary, they are aimed at circumventing the employment status, to grant to these workers very few rights and to assert their self-employed status. Arguably, since this first step in 2016,[1] by successive strikes, French law has been moving towards a third status for platforms workers: as a subordinate one like in case of as formal employees (somehow even more), but without the full autonomy and decision-making capacity of the self-employed ones.

However, for French judges, there is no ambiguity in this regard: platform workers are bogus self-employed and should be classified as employees. Yet, the government persists in locking them into the qualification of self-employed workers, and thus, to legitimize the fraudulent approach of the digital labour platforms.[2] The recent initiative of the European Commission should put the brakes on this drift with a Proposal of directive establishing a presumption of employment relationship.

Let's come to the inclination of the French legislator for a third status (1) despite the withstand of the judges (2), which will certainly be thwarted by the rallying of the European Commission to the judges' position (3).

2. The inclination of the French legislator for a third status.

The Law of August 8, 2016[3] is the one which brings platform workers into the Labour Code to better remove them the status of employee. It grants to the platform workers the right to strike, the freedom of association, but also the insurance against work accidents (which favours "private" insurers over social protection for employees)[4]. In doing so, the law relies on the vocabulary used by the platforms, by mentioning "*workers using a networking platform"*. However, delivery or transportation platforms are not just "networking" platforms as they do not limit themselves to an intermediary role. In particular, they carry out activities which they develop and control in an end-to-end basis (prices, development of the activity, control of productive behaviour…). As the European Court of Justice stated in the Elite Taxi ruling against Uber: the digital connection is only accessory to a main service (in this case: transport).[5]

[1] Loi n° 2016-1088 du 8 août 2016 relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels, JORF n°0184 du 9 août 2016.
[2] Jeammaud A., *Uber – Deliveroo. Le retour de la fraude à la loi?*, in *Semaine sociale Lamy*, 1802, 2018, 43-46.
[3] *See* nt. (1).
[4] Article L. 7342-2
[5] CJEU Case C-434/15, *Asociación Profesional Elite Taxi contro Uber Systems Spain SL*, 20 december. 2017. *See* Bonneville P., Broussy E., Cassagnabère H., Gänser C., *Chronique de jurisprudence de la CJUE*, in *Ajda*, 2018, 329; Nourissat C., *Note sous CJUE, 20 déc. 2017, Asociación Profesional Elite Taxi, aff. C-434/15*, in *Journal du droit international*, 2, 2018, 689; Gomes B., *Les plateformes en droit social. L'apport de l'arrêt Elite Taxi contre Uber*, in *Revue du droit du travail*, févr., 2018, 250; Martucci F., *Concurrences*, in *Revue des droit de la concurrence*, 2018, 183; Grozdanovski L., *L'opportunité d'un régime spécifique en droit de l'Union européenne relatif à l'économie collaborative*, in Turmo A. (ed.)., *Ubérisation et économie collaborative: évolutions récentes dans l'Union européenne et ses Etats membres*, 2020, Paris: Éditions Panthéon-Assas; Simon P., *Uber saisi par le droit du marché intérieur*, in Turmo A (ed.)., *Ubérisation*

The highest French court in private law and its chamber dedicated to the labour disputes (the Social Chamber of the Cour de Cassation) has already ruled twice on this issue (*infra)*, and granted all social rights to platform workers by reclassifying their service contract into an employment contract. However, apparently this will not limit the desire of the French legislator to remove platforms workers from the employment status in favour of a third status.

Twice indeed, the legislator has tried to establish "social charters" to *"secure the platforms against the risk of reclassification"*.[6] Instead of social rights, the labour platforms granted to the workers a set of "guarantees". Twice, the scheme was censored by the Supreme Court (Conseil Constitutionnel), in particular the texts deprived the judges of their reclassification competence.[7] However, the path to the third status continues.

A social dialogue authority was thus created by an ordinance of April 21, 2021: the authority for social relations of employment platforms (autorité des relations sociales des plateformes d'emploi – ARPE). It is a special authority that reflects the desire not to apply collective labour law to digital labour platforms. The ARPE is assigned the following missions: organize the national election of representatives of "independent" platform workers; finance their training, compensation, and protection against the risk of discrimination; support the development of social dialogue and monitor the activity of digital work platforms; ensure the payment of compensation to self-employed workers to compensate for the loss of turnover related to the exercise of their mandate. The election of workers' representatives takes place this week.

Recently, the social security finance bill (art. 50) incorporated a complementary social protection into the field of competence of social dialogue. This new step towards the third status provoked the ire of some delivery men and drivers' unions. In particular, the general secretary of the INV des chauffeurs VTC union (union of platform drivers) considers that "ARPE is a mock regulation" which generates social dependency and is enforced by rider, which is "immoral". He concludes saying "the third status is coming".[8] Yet, French judges are very pretty clear about it: platform workers are employees.

et économie collaborative: évolutions récentes dans l'Union européenne et ses Etats membres, Éditions Panthéon-Assas, Paris, 2020.

[6] « L'objet de cet amendement est de réguler socialement les plateformes de la mobilité, c'est-à-dire celles réalisant des prestations de transport avec des véhicules avec chauffeurs (VTC) ainsi que des prestations de livraison. [Il s'agit de] garantir des droits renforcés aux travailleurs indépendants de ce secteur, tout en sécurisant le modèle économique de ces plateformes », Ass. nat., 29 mai 2019, LOM – n° 1974, sous-amendement 3494.

[7] Gomes B., *Constitutionnalité de la "charte sociale" des plateformes de "mise en relation": censure subtile, effets majeurs*, in *Revue de Droit du Travail*, 1, 2020, 42.

[8] *See* https://twitter.com/BENALIBrahim20/status/1469756242201563140.

3. The withstand of the French judges.[9]

The persistent intervention of the French legislator can be explained by the insistence of the French judges in classifying the relationship between drivers, deliverymen and the platforms as employment relations.

In the first case, handed down on 28 November 2018,[10] the judges analysed how digital tools were used by the delivery platform TAKE EAT EASY to show the existence of a power of direction and sanction. The decision states that *"the application was equipped with a geolocation system enabling the company to monitor the courier's position in real time and to record the total number of kilometres travelled by them and, on the other hand, that Take Eat Easy had the power to sanction the courier"*.[11]

Subsequently, there were other decisions ruled on requalification, further underpinning the power analysis. In the UBER rulings of the Paris Court of Appeal and the *Cour de Cassation*, the judges used other clues, enriching the forensic analysis. Indeed, in the Uber ruling of March 4, 2020,[12] the *Cour de Cassation* stated, as the Court of Appeal had done before, the economic dependence of the driver. The judges pointed out that the platform had the "*faculty to temporarily disconnect the driver from its application as of three refusals of journeys and that the driver may lose access to his account in case of exceeding a rate of cancellation of orders or reports of "problematic behaviour", which characterises the existence of a link of authority"*. By publishing its decision in three languages (French, English and Spanish), with a lot of notes and press releases, the social chamber of the Court intended to send a clear message both at national and European level. A message which seems to be heard by the European Commission (*see below*).

One month ago, on 19 April 2022, the Paris Criminal Court found Deliveroo France guilty of the offence of concealed work and fined it €375,000. Two of its directors and an operational director were also sentenced for the offence of concealed work and complicity to prison sentences and a suspended ban on running companies. The judge referred to a "fictitious legal cover", and excluded work platforms from the scope of the 2016 law, recalling in passing that *"the alleged benevolence of the executive power cannot in itself have a normative*

[9] Michel S., *L'article 44 de la LOM versus les arrêts Take Eat Easy et Uber*, in *Jurisprudence sociale Lamy*, 494, 2020, 3; Gomes B., Sachs T., *The Battle between the Legislator and Judges Over Platform Worker Accountability: The French Case*, in Carinci M. T., Dorssemont F. (eds.), *Platform Work in Europe. Towards Harmonisation?*, Intersentia, Belgium, 2021, 83 ff.

[10] Cass. soc., 28 nov. 2018, n° 17- 20.079; *See* Gomes B., *Take Eat Easy: une première requalification en faveur des travailleurs des plateformes*, in *Semaine Sociale Lamy*, 1847, 2018, 6; Lokiec P., *De la subordination au contrôle*, in *Semaine Sociale Lamy*, 1847, 2019, 1; Huglo J.-G., *Take Eat Easy: une application classique du lien de subordination*, in *Semaine Sociale Lamy*, 1842-1843, 2018, 3; Dockès E., *Le salariat des plateformes. À propos de l'arrêt TakeEatEasy*, in *Le Droit ouvrier*, 846, 2019, 8.

[11] *Ibid.*

[12] Cass. soc., 4 mars 2020, n° 19-13.316 ; *See* Champeaux F., *Uber rattrapé par la subordination,* in *Semaine Sociale Lamy*, 1925, 2020; Chastagnol G., *Arrêt Uber: une victoire à la Pyrrhus contre les plateformes*, in *Option Droit & Affaires*, 1st April 2020; Loiseau G., *Menace sur le modèle économique des plateformes de mise en relation en ligne*, in *Communication commerce électronique*, 4, 2020; Baeur D., *Kevin Mention avocet qui lutte contre l'ubérisation des services*, in *Petites Affiches*, 24 April 2020; Pasquier T., *L'arrêt Uber - une décision a-disruptive*, in *AJ Contrats d'affaires: concurrence, distribution*, Dalloz, France, 2020, 227-234; Gomes B., *L'arrêt Uber va contraindre les plateformes de travail à changer de modèle*, in *Liaison sociale quotidien, L'actualité*, 18021; Bossu B., *Le chauffeur Uber est bien un salarié*, in *La Semaine Juridique: éedition générale*, 29, 2020, 1373-1377.

value". The deliberation is severe but commensurate with the "*disturbance of economic, social and fiscal public order"*, described as *"major"*, both for workers and the State, as well as for public establishments and social security institutions. This decision may be an additional element to enable the adoption of the proposal for a directive presented by the European Commission.

4. The rallying of the European Commission.

On 9 December 2021 the European Commission published a directive proposal entitled *"improving working conditions in platform work"* [13] which may become a game-changer.

The Commission perfectly takes up in its reasoning the elements that impose the application of labour legislation to the relationship between workers and platforms. It intends to fight against bogus self-employment and the difficulties in qualifying the employment relationship in the case of platform workers. It is also about better defining the border between networking platform (with genuine self-employed who can remain such so) and labour platforms (with workers who should be considered as employees).[14] But above all, the Commission intends *"to ensure that people working through platforms have – or can obtain – the correct employment status in light of their real relationship with the digital labour platform and gain access to the applicable labour and social protection rights"* [15]. This can be achieved by applying a well-known in France principle of primacy of facts that should lead to the correct qualification of the professional status.[16] To determine this, it will be necessary to take into account the use of algorithms in the work organization.[17] The text implements a rebuttable presumption of employment relationship for persons working through digital labour platforms that control certain elements of the work performance (art.4) : determining a level of remuneration, imposing rules of appearance or conduct, supervising the performance of work or verifying the quality of the results of the work; restricting the freedom of the worker, including through sanctions, to organise one's work, in particular the possibility to freely choose one's working hours or periods of absence, to accept or to refuse tasks or to use subcontractors or substitutes, restricting the possibility to build a client base or to perform work for any third party. To trigger the application of the presumption in practice at least two of all the above-mentioned criteria should be fulfilled.

[13] Proposal for a Directive of the European Parliament and of the Council, European Commission, Brussels, 9.12.2021, COM (2021) 762 final, 2021/0414 (COD) on improving working conditions in platform work.
[14] One can read in the document that « Conversely, genuine self-employed people working through platforms will indirectly benefit from more autonomy and independence, as a result of digital labour platforms adapting their practices to avoid any risk of reclassification". By the way, the distinction between what the author designates as "labour platforms" and what are really "networking platforms" is central in her research. We can find this concern in our work, especially in his thesis, Gomes B., *Le droit du travail à l'épreuve des plateformes numériques*, Université Paris Nanterre, 2017, or more specifically in Gomes B., *Le modèle du contrat de travail au défi des plateformes numériques*, in *Le Droit ouvrier*, 854, 2019, 599-604.
[15] *See* nt. (13).
[16] Gomes B., *Les travailleurs des plateformes sont-ils des travailleurs au sens du droit de l'Union?*, in *Semaine sociale Lamy*, 1907, 2020, 12.
[17] Art. 4 ´" supervising the performance of work or verifying the quality of the results of the work including by electronic means", s*ee* nt. (13).

Of course, for now it remains for the European Parliament to decide. However, the position of the Commission, which is oriented in a clear and unambiguous way in the direction taken by French judges (and others all over Europe), could lead the French legislator to back down. To be continued…

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