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# Document de Travail

## Working Paper

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## Become Independent! The Paradoxical Constraints of France's Auto-Entrepreneur Regime

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## Become Independent! The Paradoxical Constraints of France's Auto-Entrepreneur

### Regime

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|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
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**Key words:** auto-entrepreneur; theory of the firm; combining activities; employment contract; entrepreneurship

**JEL Codes :** L 26, L21, K22.

**Abstract:** *The Law on Economic Modernization of 4 August 2008 introduced a new form of individual entrepreneur, the auto-entrepreneur, the goal being to enhance the competitiveness of the French economy by promoting the entrepreneurial spirit. This paper proposes to discuss the auto-entrepreneur model with reference to the fundamentals of the theory of the firm and the legal variants of the auto-entrepreneur. The argument will be structured around the criterion of independence, and its various interpretations, which will be used to put the auto-entrepreneur model to the test. Three forms of autonomy are given precedence: productive (Section 1), concerning the availability of sufficient financing and material to provide professional services; managerial (Section 2), which measures the ability to assume the risks inherent to business, regarding both interested and third parties; and financial (Section 3), or the chances of earning enough money to subsist upon. The result, underscored in the conclusion to this article, is that the auto-entrepreneur regime appears best adapted as a means of supplementing income from another, unrelated activity or in retirement, which is contrary to every approach to business and enterprise.*

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*“With audacity, one can undertake everything, but one cannot do all.”*  
Napoleon Bonaparte  
*(Maximes de guerre et pensées, 96)*

## **Introduction: the Auto-Entrepreneur Regime and Theories of the Firm**

In an international context characterized by growing interest in new forms of employment (see Audretsch 2007; Bidhe 2008, and Barbier 2002 for a presentation of the relationships between social and employment policies), and by an incessant debate on the relationship between growth, unemployment, and self-employment (Blanchflower 2000), the French government had hoped to innovate by introducing the new “status” of auto-entrepreneur in the Law on Economic Modernization of 4 August 2008.<sup>1</sup> The motives for preferring this particular regime to another can be found in the many public reports delivered to the French government over the course of recent years. Some of these reports highlight the country's entrepreneurial deficit (Chertok et al 2009; Betbèze and Saint Etienne 2006), others note that France's future economic champions have yet to be created, and still others deplore the far too complex and costly administrative formalities that inhibit the creation of new businesses.<sup>2</sup>

Barely enacted, the new regime is already proving very popular. This would seem to vindicate its proponents, those who argued that a long list of candidates was waiting impatiently for the very type of freedom being introduced. The law entered into force on 1 January 2009. Since then, 551,500 individuals have registered, of which 524,000 were accounted active at the end of July 2010. Behind this success, however, lie questions to which numbers alone do not provide a sufficient answer. If, as the reasoning behind the law would seem to indicate, the status of auto-entrepreneur is meant to be a way of testing the sustainability of a business idea, with the intention of developing it into a fully-fledged commercial enterprise, then registration under the regime should be regarded as the first step in the entrepreneurial process described in the literature (Fayolle 2004). So, do those who registered have within themselves the beginnings of true entrepreneurs? And what model of production is really hiding behind the regime?

In order to answer these questions, we must first ascertain the criteria used in

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<sup>1</sup> Loi no 2008-776 du 4 août 2008 de modernisation de l'économie.

<sup>2</sup> The French Ministry of the Economy, Industry and Employment's guide to the auto-entrepreneur regime begins: “The primary objective of the Law on Economic Modernization No. 2008-776 of 4 August 2008 is to contribute to business creation in France by allowing the winds of freedom blow over the French economy.”

specialized economic literature to define an entrepreneurial activity. The assumption of risk, placed foremost by all commentators writing on the subject, in combination with other criteria gives rise to three distinct theories of the firm.

According to the first, an entrepreneur is one who assumes the risk inherent to any economic activity. Cantillon's *Essai sur la nature de commerce en général* published in 1755 is the origin of this idea. He describes the entrepreneur as an individual who buys at a known price in order to sell at an unknown price, “because he cannot foresee the extent of the demand” (Cantillon 2010, p. 75) For Shackle (1921) and Knight (1979), the stress is on risk and remuneration in the form of profit, and on the imagination and speculation which this demands from the entrepreneur. The entrepreneur finds himself playing the role of arbitrator, and thus is one who knows how to discover opportunities for profit, thereby increasing the information available to agents. For her part, Penrose (1959) develops a theory of resources, according to which “the external environment is an “image” in the mind of entrepreneur of the possibilities and restrictions with which he is confronted for it is, after all such an “image” which in fact determines a man’s behavior; whether of “comparative private costs” or adaptability to the environment, as some economists have attempted to do” (1959 p. 21).

The second approach is expressed as an almost elitist conception of the entrepreneur. It is a theory put forward principally by Joseph Schumpeter, who remains emblematic of it: “The carrying out of new combinations we call “enterprise”; the individual whose function is to carry them out we call “entrepreneurs.” (Schumpeter 2004 (1<sup>st</sup> edition, 1935), p. 106). This definition goes beyond the simple exercise of initiative, authority, or risk-taking. Following Jean-Baptiste Say, Schumpeter identifies the specific service rendered by the entrepreneur in bringing together and combining the various factors of production, a definition which excludes a fair number of independent workers.<sup>3</sup> The entrepreneur described by Schumpeter is different from the capitalist, because the entrepreneur does not need to own capital. Moreover, the entrepreneur cannot help but be ephemeral, since the novelty of the combinations he introduces is situated in, and corresponds to, a specific moment in time in the

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<sup>3</sup> “These concepts are at one broader and narrower than the usual. Broader because in the first place we call entrepreneurs not only those “independent businessmen in an exchange economy who are usually designated, but all who actually fulfill the function by which we define the concept, even if they are, as becoming the rule, “dependent” employees of company, like managers, members of board of directors, and so forth, or even if their actual power to perform the entrepreneurial function has any other foundation [...] our concept is narrower than the traditional one in that it does not include all heads of firms or managers or industrialists who merely may operate an established business [...] In the first place our definition agrees with the usual one on the fundamental point of distinguish between “entrepreneurs” and “capitalists” –irrespective of whether the latter are regarded as owners of money, claims to money, or material goods. (Schumpeter, 2004, pp. 74-75).

economic cycle, a point which history serves to justify (Ebner 2003).

Finally, according to the third approach, the need to find resources, transaction costs, and rationality are what guide the entrepreneurial family of economic actors. The starting point of this last approach is contract theory and the theory of the firm, which stresses the interest of entering into long-term contracts when to do so results in lower costs than successive short-term contracts. From there, Coase (1937) goes on to elaborate a theory according to which the entrepreneur is one who contracts over the long-term in order to distribute the risk of resource allocation, notably as regards labor. What follows is a hierarchical vision of the firm, in which an employer is one who controls the work and the manner in which it is performed, while an employee is one who provides services on behalf of the former.

To complete these three models, and following Casson (2005), we consider that the concept of the entrepreneur is complementary to an enlarged theory of the firm, which leads us to affix the three above definitions to the goals which different theories of the firm assign to the entrepreneur.<sup>4</sup> Three common purposes emerge:

1. To serve the market by producing and distributing goods and services according to demand. This is the sole economic justification for the entrepreneur, since no business is able to survive without this as its priority. This presupposes the ability to ensure production by mobilizing the requisite means in terms of capital and labor.
2. To take risks in order to accumulate capital (economies of scale and the search for optimal size) by investing. This implies creating a cash surplus which in turn will be invested in developing current activities or in a new business altogether.
3. In relation to the two other points, and following Friedman, to extract financial earnings from one's activity by creating added value or, in other words, to make profit (Friedman 1970).

Using these objectives as a starting point, we propose to verify, both theoretically and empirically, whether, and to what extent, the auto-entrepreneur regime allows individuals to pursue a truly independent activity. The regime will be evaluated using three criteria for determining whether an activity is independent or not: productive autonomy (Section 1), which implies the availability of sufficient financial and material means to provide

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<sup>4</sup> The junction between the pursuit of a goal by an entrepreneur, on one hand, and market adaptation by a business, on the other, is unified under the Austrian theory of the entrepreneur as put forth by Kirzner (1973). See Witt (1998) for a presentation of the process by which the two were unified.

professional services; managerial autonomy (Section 2), which takes into account the ability to assume business risks, including risks involving third parties; and financial autonomy (Section 3), which measures the ability to earn enough money to live on. We will conclude by underlining that the difference between an auto-entrepreneur and an entrepreneur is not only one of scale, but of nature. In effect, regarding these three criteria, the regime appears to be best adapted as a sideline to support another activity or in retirement, a means of generating supplemental income. This goes against every approach to business and enterprise.

## **1. An Unlikely Autonomy of Production**

The model of production established by the law of 4 August 2008 is simplistic from three points of view: it limits turnover such that the auto-entrepreneur's activity is effectively constrained to certain business sectors (Section 1.1); it checks growth (Section 1.2), and it condemns the auto-entrepreneur to isolation (Section 1.3).

### **1.1 A Framework of Activity Limited by Law**

The regime introduced by the law of 4 August 2008 can be summarized as the right, for certain independent workers, whether said work is their principal or secondary activity, to benefit from simplified tax returns and social security contributions, subject to a maximum turnover.<sup>5</sup> The regime applies to natural persons who begin or are already pursuing, whether as principal or complementary activity, an individual commercial, trade, or professional activity (with the exception of certain activities<sup>6</sup>). The system established by the law does not create a specific status, rather a regime for independent workers pursuing small-scale activities.

In effect, in order to qualify for the auto-entrepreneur regime, the individual business must fall under the micro-enterprise tax regime. In other words, for 2010, turnover must not exceed:

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<sup>5</sup> The regime is only open to entrepreneurs who are part of the fiscal regime for independent workers.

<sup>6</sup> Notable exclusions are: activities subject to VAT on real estate (realtors and real estate agencies, developers, transactions concerning shares in property companies); leasing unfurnished commercial premises; certain commercial or non-commercial activities such as leasing consumer durables.

- i. €80,300 for the sale of merchandise, goods, supplies, or pre-prepared foodstuffs (to take away or be consumed on site), or for the provision of accommodation; or,
- ii. €2,100 for the provision of services categorized as business or professional profit.

Within this limited framework, auto-entrepreneurs benefit from a simplified registration process as well as a simplified method of calculating social security contributions and income tax. Regarding the usual company obligations, auto-entrepreneurs benefit from:

- a simplified micro-enterprise regime (see the comparative table in the Annex);
- an exemption from the obligation to register on the companies registry or the official trades directory;<sup>7</sup>
- a VAT exemption (see the table in the Annex);
- and, optionally, a simplified micro-fiscal regime payment in full discharge of income tax and exoneration from paying business rates for three years from the date of creation (again, see the table in the Annex).

The relatively simple procedures for the creation and taxation of the auto-entrepreneur regime are among those elements most often advanced as incentives for project bearers to register. In fact, the attractive-looking nature of the regime has proved incredibly popular: from the first quarter of 2009 to the end of the second quarter of 2010, 537,900 candidates registered,<sup>8</sup> of which 523,900 were accounted active in July 2010.<sup>9</sup>

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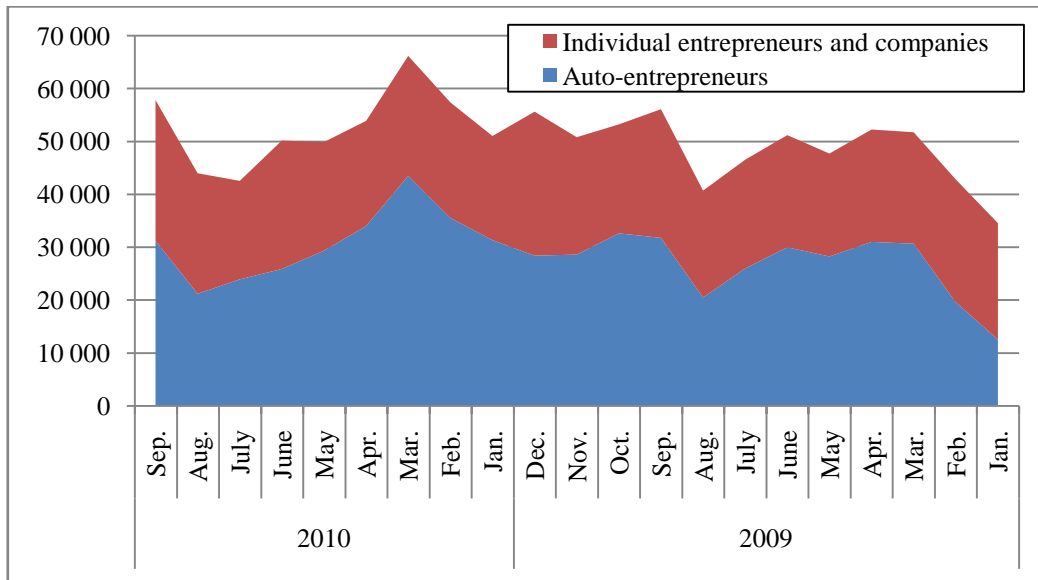
7 In French, these are, respectively, the Registre du commerce et des sociétés and the Répertoire des métiers.

8 It should be specified that from 1 January 2010, new categories of person became eligible for the regime, most notably those already classified as independent workers and certain types of professional, which contributed to a substantial increase in registrations in the first quarter of 2010.

9 ACOSS, 25 August 2010, Table 1: registrations, strike-offs (from register) and active accounts by quarter at the end of July 2010.

**Figure 1**

**New Business Creation between January 2009 and September 2010**



Source: INSEE, November 2010

However, the low caps leave little choice of activity. The auto-enterprise is primarily developing in those areas which are least capital-intensive, where tangible assets and intermediate consumption play a small role. Leading the pack are personal and “intellectual” services, such as consultation, education, and artistic creation. A large number of auto-entrepreneurs in the small business domain also register. Finally, a variety of trade activities are also represented, such as construction workers, beauticians, and personal trainers. Already impeded by the legal constraints limiting turnover, auto-entrepreneurs appear to be primarily isolated workers unable to develop their own labor-capacity.

## 1.2 An Isolation Which Checks Growth

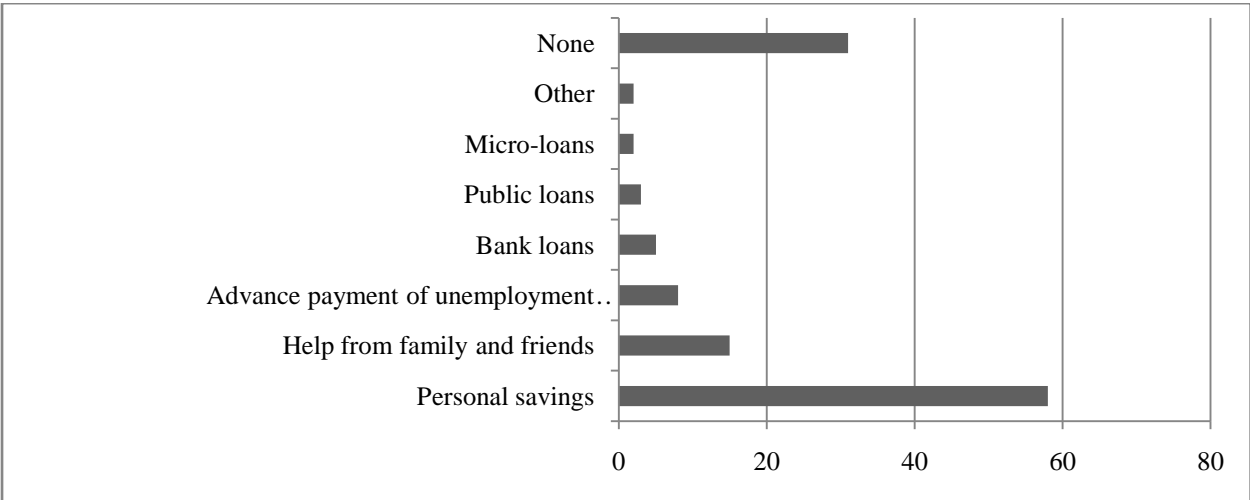
From a strictly economic and organizational point of view, the weakness of the auto-entrepreneur regime is more a problem of isolation than of size. Taking only turnover into account, an auto-entrepreneur's activity is necessarily solitary. Hiring an employee is out of the question, and although recourse to the assisting spouse is possible,<sup>10</sup> the increased productivity that would result would quickly come up against the limit in turnover, which must be complied with in order to continue as part of the regime. The same holds true as regards outsourcing. Even when unable to achieve a given result on his or her own, the low turnover threshold further limits the auto-entrepreneur's recourse to sub-contracting as a

<sup>10</sup> Any person can be granted the status of assisting spouse if they are regularly undertaking a professional activity within the framework of their spouse's activity as an auto-entrepreneur, as long as they are not an employee (assisting spouses are not prevented from being employed by another business).

means of doing so.

The limits to opportunity and barriers to accessing new factors of production are accentuated by the financing constraints inherent to the very small size of business. The excessive risk borne by the borrower, regarding his or her personal assets,<sup>11</sup> combined with credit rationing by lenders, in light of the limited guarantees offered by project bearers,<sup>12</sup> makes the accumulation of capital more difficult. The Ministry of Economy's assessment of the regime after one year indicated that the difficulties related to obtaining credit were mentioned by 15 percent of auto-entrepreneurs; nine percent cited this as their primary problem.

**Figure 2**  
**Sources of Financing for Auto-Entrepreneurs (expressed as percentages)**



*Field: auto-entrepreneurs registered as of June 2010, excluding those who left the regime or pursued their activity under another framework.*  
*Source: ACOSS data from the DGCIS survey of auto-entrepreneurs of June 2010.*  
*\*ACCRES is an exemption from paying social security contributions for a period of one year.*

Underfunding checks the opportunity for growth and, more seriously, increases the risk of failure (Table 1).<sup>13</sup> Given the relative newness of both the regime and the exit

11 Apart from any definition of allocated professional assets such as envisioned by the status of limited liability individual entrepreneur (or EIRL, discussed below), a status open to auto-entrepreneurs, the latter are personally financially liable for their business debts.

12 Order No. 2010-638 of 10 June 2010, amending article L.526-1 of the Commercial Code, provides an exemption to articles 2284 and 2285 of the Civil Code. Natural persons licensed under an official professional register, or pursuing a professional agricultural or independent activity, may declare as “non-seizable” rights over his or her principal residence as well as any developed or undeveloped land not allocated for professional use. Law No. 2010-874 of 27 July 2010 regarding the limited liability independent entrepreneur inserts a section comprising articles L.526-6 to L.526-21 into Chapter VI of Part II of Volume V of the Commercial Code. These provisions allow any individual entrepreneur to allocate a set of business assets as separate from his or her personal assets by means of a declaration on an official register.

13 The multivariate models, such as those presented by Becchetti and Trovatto (2002) attest to the link between a business's capital endowment and its risk of default.

procedures provided for in the law itself, estimating the robustness of the business operations of auto-entrepreneurs by studying the length of involvement in the regime, as one would normally do for companies, is simply not possible. In addition to voluntary exits<sup>14</sup> and exits which operate automatically when the upper thresholds are exceeded,<sup>15</sup> auto-entrepreneurs can also be struck off the register if there is no turnover for a period of 36 calendar months, or 12 consecutive quarters. On 31 July 2010, 27,600 auto-entrepreneurs were struck off, but one can expect the number of “simple” exits, those which occur due to the sustained absence of turnover, to increase given that the regime has only been in operation for 18 months, or half the requisite time.

**Table 1**  
**Initial Budget According to Initiative and Sector**

|                                                   | <b>Auto-Entrepreneur with<br/>Initial Budget (percentage)</b> | <b>Budget Amount<br/>(euros)</b> |
|---------------------------------------------------|---------------------------------------------------------------|----------------------------------|
| Industry                                          | 30                                                            | 4,260                            |
| Construction                                      | 26                                                            | 6,239                            |
| Trade, transport,<br>accommodation, food services | 43                                                            | 12,483                           |
| Information and<br>communications                 | 16                                                            | 3,680                            |
| Business support                                  | 17                                                            | 5,444                            |
| Education, health, social action                  | 8                                                             | 5,899                            |
| Household services                                | 24                                                            | 5,851                            |
| <b>Averages</b>                                   | <b>26</b>                                                     | <b>8,400</b>                     |

*Field: auto-entrepreneurs registered as of June 2010, excluding those who left the regime or pursued their activity under another framework.*

*Source: ACOSS data from the DGCIS survey of auto-entrepreneurs of June 2010.*

### **1.3 The Difficulty of Avoiding Isolation**

In order to bring auto-entrepreneurs out of isolation, many initiatives are beginning to appear that aim at implementing ways of sharing commercial tasks. Groupings of auto-entrepreneurs within national federations or, more recently, within other groups, associations, and other systems of sharing ordering or cross-functional services, is seen as a way of accessing potential clients. It is a question of bringing together several auto-entrepreneurs with complementary activities (for example: gardening, DIY, and personal services; childcare and tutoring; and so on) on the same web site or under “work brokers” in order to facilitate

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<sup>14</sup> Leaving the micro-enterprise regime implies an end to the associated micro-fiscal regime. If an auto-entrepreneur opts for the system of simplified tax returns instead of the micro-enterprise regime, then he or she automatically exits the payment in full discharge of income tax liability regime for the year in which the option is exercised.

<sup>15</sup> These occur either when the turnover thresholds are exceeded or when thresholds applicable to the micro-enterprise regime are exceeded for two years running (even if the latter remain below €8,300 for trading or €4,100 for professions and professional services).

finding and signing deals. For their part, public authorities and organizations which promote and support the regime are trialing ways of grouping together auto-entrepreneurs along the lines of France's Departmental Clubs, not-for-profit associations tailored to the needs of auto-entrepreneurs searching for opportunities or for advice and supervision. These various groupings are not without their dangers, however.

The first risk is fiscal in nature. The tax authorities could effectively consider that two people working together on the same project, in a recurring manner, with the same clients in the same office, are acting as associates. In other words, they could be seen as a *de facto* company, not two auto-entrepreneurs.

The second risk is economic. Quite apart from the fact that the relevant contract could be reclassified as an employment contract, which we will return to, an auto-entrepreneur who establishes select relationships with one or several clients has little chance of showing that he or she is autonomous. Whereas sub-contracting implies either specific know-how (speciality sub-contracting), an ability to handle large-scale mandates within a short time-frame (capacity sub-contracting), or integration in a production network under the control of a lead project manager, an isolated worker under a client's control does nothing more than apply the terms of the contract. Without any autonomy of action, the auto-entrepreneur no longer corresponds to the image of an innovator at the trial stage of a new business.

Applied labor-capacity with limited capital, the auto-entrepreneur becomes nothing more than the entrepreneur of him or herself (Levratto, and Serverin 2009). This form of industrial organization flies in the face of rules regarding the division of labor as an organizational model which increases the productivity of a given activity (Askenazy, and Caroli 2010). Among other things, the limited ability to act contradicts the autonomy of action and decision-making which characterizes business. As a lone individual fulfilling at one and the same time the role of manager,<sup>16</sup> operational staff, and sales representative, the auto-entrepreneur does not correspond to any entrepreneurial forms encountered throughout the history of capitalism. The Austrian school characterizes these forms by the management function, resulting from "quick perception allowing one to seize upon new developments in current operations" (Wieser 1914, p. 324). According to Böhm-Bawerk, entrepreneurial activity is not only a question of management; it also supposes the possession of capital

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<sup>16</sup> The entrepreneur as a company manager is a theme running through the Austrian school, from Wieser's "Führer" (1914) to Schumpeter's leader. "Only a few people have these qualities of leadership and only a few in such a situation, that is a situation which is not itself already a boom. But if one person, or a few, has led the charge with success, many obstacles fall away. Others can follow the first, spurred on by a success, which now seems achievable" (Schumpeter, 2004, pp. 228).

(Salerno 2008). The auto-entrepreneur is without doubt far from the Austrian model of the creative entrepreneur.

## **2. Managerial Autonomy at Risk**

Celebrated as a trademark of the entrepreneurial spirit, risk is a vital legal element of autonomous business activity, no matter the scale or the form. The exposure to risk faced by the auto-entrepreneur, an isolated individual, appears greater than for any other form of independent activity. Not only is the independent status subject to the risk of reclassification (Section 2.1), providing services independently can mean that the auto-entrepreneur bears a professional risk that is disproportionate compared to the risk run by a salaried employee providing the same services (Section 2.2). Finally, as in the case of insolvency, the auto-entrepreneur is backing a business risk with his or her personal assets, a problem which the law of 27 July 2010 creating the status of limited liability individual entrepreneur is attempting to address (Section 2.3).

### **2.1 The Legal Risk of Dependence**

It seems paradoxical to state that the primary risk run by the independent worker is that of dependency. Nevertheless, their very isolation means that manufacturers, more than any other category, are exposed to the risk of dependency on a single client able to dictate the terms of the working relationship, a situation close to that of salaried employment. What is more, the border between independent worker and employee is porous, and the risk becomes having one's business contract reclassified as an employment contract. This last point deserves some clarification. Traditionally, under the French system of civil law, an employment contract is a type of contract for the supply of services, the distinction being one of managerial power. For early authors, "This legal notion of the employment contract, a special form of service supply, corresponds to the way economists define, and the origins they assign to, the wage labor regime. They present it as the product of an evolution which has transformed the primitive, crude bringing together of capital and labor into a more perfect association, one whereby labor finds guaranteed remuneration – the precious stability much sought after by man – and whereby capital wins, for in exchange for taking all the risks of business, it is given exclusive governance" (Sauzet 1890). The French Court of Cassation progressively characterized this dependence as "subordination". First, it defined subordination as the power of the employer "to give orders and directions, to monitor performance, and to

sanction any breaches”.<sup>17</sup> Later, subordination was elaborated from the point of view of employee obligations by adding that it consisted of “the performance of a task under the authority of an employer who has the power to give orders and directions, to monitor performance, and to sanction any breaches by the subordinate”.<sup>18</sup>

In practice, the distinction between wage labor and independent work is not a given, but appears to be the product of an incessant process of classification. Case law has recognized a precedent for the power to reclassify situations of subordination. In one formulation, which has become the standard, the Court of Cassation stated that “the existence of an employment relationship depends neither on the expressed intentions of the parties nor on the title of the contract, but rather on the actual conditions under which the work is being performed”.<sup>19</sup> The main objective of reclassification is to ensure that workers are protected by employment regulations, but it can also be repressive in that it punishes a party intending to circumvent the rules attached to employment contracts.<sup>20</sup> Further, once subordination is established, various authorities must begin collecting the contributions for which they have responsibility, but even before that can happen, they must have the means to undertake in-depth investigations. In light of the multitude of auto-entrepreneurs, the means are far from sufficient to the task, as the deputy director of regulation at ACOSS, the general agency of social security administration,<sup>21</sup> has pointed out (Assemblée Nationale 2010).

The law of 4 August 2008 was intended to ward off the danger of reclassification by extending to the auto-entrepreneur the presumption of non-wage labor given to other independent workers. This presumption was introduced by a law dated 11 February 1994, in order to check the extension of the wage labor category of worker. Repealed briefly, the presumption was re-introduced by the law of 1 August 2003, and is found in article L.8221-6 of the Labor Code.

Like any other presumption, this one can, of course, be overturned. Article L.8821-6, paragraph II thus provides: “The existence of an employment contract can nevertheless be

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17 Cour de cassation, Assemblée plénière, 4 mars 1983, *Bulletin* de l'Assemblée plénière no. 3, pourvoi no. 81-15.290, 81-11.697.

18 Cour de cassation, Chambre sociale, 13 novembre 1996, *Bulletin* V, no. 386, pourvoi no. 94-13.187.

19 See Cour de cassation, Chambre sociale, 17 avril 1991, *Bulletin* 1991 V, no. 200, p. 122 and 13 juin 1991, *Bulletin* 1991 V, no. 299, p. 182, reclassifying joint enterprise agreements among truck drivers as an employment contracts.

20 “In ruling as it did, that, notwithstanding the designation and classification of the contract in question, in carrying out work under the specific terms of said contract, as well as the associated general conditions, the 'lessee' was in a position of subordination in relation to the 'lessor' and that, as a consequence, behind the so-called lease of a 'taxi' was in fact hiding an employment contract, the Court violated the text of the law” (Jeammaud, 2001).

21 Agence centrale des organismes de sécurité sociale.

established when those persons mentioned in paragraph I of this article provide directly or by way of a third party services to a contracting client in conditions which place said persons in a position of permanent legal subordination in relation to the contracting client”. Nevertheless, there is little chance of the presumption being overturned.

However, applying the criterion of “permanent legal subordination” prohibits an individual operating as an auto-entrepreneur in a secondary capacity from contesting the classification of his or her contract. Moreover, the very law creating the status of auto-entrepreneur also created article L.8221-6-1 of the Labor Code. This article implicitly recognizes that independence may not in fact be total: “An independent worker is presumed to be such when his working conditions are defined exclusively by him or by the contract he has with his client.” This detail, applicable to all independent workers, introduces a measure of management-sharing responsibility without calling the worker's independence into question. A new category is thus created, an oxymoron: a *legally* independent worker subject to *contractual* working conditions dictated by the client.

## 2.2 Professional Risk

There was much discussion surrounding professional standards in regard to individual entrepreneurs, notably by unions particularly wary of the entry of these new competitors into the workforce (Delpech 2010). Nevertheless, verification of professional qualifications is only one aspect of pursuing an independent professional activity. Regardless of their level of professional competence, all independent workers are exposed to the risks generated by their respective activities in regard to both clients and third parties. The question which arises is one of legal standing in the face of these risks.

One might at first think that the question of risk would be addressed through professional liability insurance. Ministerial services are ceaselessly reminding people that auto-entrepreneurs are subject to the obligations imposed on every company director, especially the obligation to take out insurance. In the construction sector, this includes an obligation to take out 10-year coverage for their work.<sup>22</sup> But insurance is not a cure-all for solitary workers. First, there is the cost, which is not accounted for in an economic model based solely on turnover. According to the type of activity, the cost can be very high, so high as to render the activity unprofitable, especially if it is undertaken in a secondary capacity. Further, the expenses generated by poor workmanship or service provision are not covered by liability insurance. Contracts also usually contain clauses excluding certain expenditure,

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<sup>22</sup> Ministerial Answer n°60525, *Journal Officiel de l'Assemblée Nationale*, 10 nov. 2009, p. 10631.

leaving professionals to bear the costs, which can be very high, such as for replacement material, loss of working hours, and transport.

Over and above providing poor-quality services or products, an independent worker is exposed to the risk of price-estimation errors. The worker can then find him or herself obliged to provide a service at a price inferior to the cost price, especially when the type of service implies the provision of follow-up, such as IT services. The entrepreneur must nevertheless honor the contract or risk having it terminated for non-performance and being liable to reimburse any sums paid under it, or even for damages.

Finally, simply by undertaking an activity, the auto-entrepreneur enters into a competitive market. He or she can be faced with charges of unfair competition<sup>23</sup> or selling at an excessively low price (article L.420-5 of the Commercial Code), both of which can give rise to fines or tortuous damages.

It is remarkable that, from a professional risk point of view, an independent worker is in a worse position than a salaried worker pursuing the same activity. In effect, apart from deliberate error,<sup>24</sup> an employee is never personally responsible for any damage caused to others, regardless of the level of autonomy the employee had in performing the service. In certain sectors, the promise of independence given to individual entrepreneurs amounts to a simple shifting of risk from the employer to the worker, but which does not carry any guarantee of managerial autonomy with it.

### **2.3 Business Risk**

With competencies limited to their personal skill-sets, and unable to rely on the traditional division of labor, auto-entrepreneurs present an elevated risk of failure. Further, they risk losing their personal assets, which they have no real means of protecting.

There should be a liquidation procedure available in the event of insolvency, as there is for any other trade or commercial activity. From this point of view, the situation of auto-entrepreneurs is particularly critical. They do not qualify under the over-indebtedness regime as their debts are professional, not personal.<sup>25</sup> If they have not taken the precaution of setting certain assets aside, all of them will be included, a function of the general principle of the

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23 Commerce Cour, Beziers, 19th July. 2010, # Dalloz 2010. 1996, Comment by Delpech.

24 Cour de cassation, Assemblée plénière, 14 décembre 2001, no. 00-82066, *Bulletin* 2001 A.P. no. 17, p.35: “An employee acting in the course of his duties for his employer can still be held personally criminally responsible for an offence which harms another person if he does so deliberately, because at this moment his civil liability in regard to that third person comes into play; it is on this basis which, in ruling as it did, the Court of Appeal legally justified its decision”.

25 Article L.330-1 of the Commercial Code: “Over-indebtedness, of natural persons, is characterized by the manifest impossibility of a debtor in good faith to repay the whole of his debt falling due”.

“unity of patrimony”, inferred from articles 2284 and 2285 of the Civil Code.<sup>26</sup> This principle is the primary obstacle to independent activity, as reformers trying to encourage individuals to register in the regime are well aware. These reformers have been working to reassure candidates by permitting auto-entrepreneurs to exclude certain assets from lenders' general security pledges. The law of 4 August 2008 (as specified by Order No. 2010-638 of 10 June 2010) developed a first layer of protection concerning the principal residence by providing for a declaration of “non-seizability” of “rights over the building which serves as principal residence as well as any developed or undeveloped land not used for professional purposes” (article L.526-1 of the Commercial Code).

However, it is above all Law No. 2010-658 of 15 June 2010 which has advanced the process of allocation of professional assets for security pledges by announcing the creation of a new status, that of the limited liability individual entrepreneur.<sup>27</sup> Inscribed in article L. 526-6 of the Commercial Code, which will only come into force once a special order is passed,<sup>28</sup> this new status consolidates the process of allocating professional assets. The auto-entrepreneur, who is just a variant of the independent entrepreneur, is most affected by this reform, although just how it will function is unclear. There is much skepticism about reconciling the possibility of obtaining a loan while at the same time limiting the assets lenders have recourse to in the event of default. Nor is amended article L.313-21 of the Commercial Code much cause for optimism; it places an obligation on lenders to inform potential borrowers as to the possibility of a guarantee which excludes personal assets. In effect, allocated assets must include “all goods, rights, obligations and guarantees to which the entrepreneur has title and which are necessary to the performance of his professional activity”, an objective criterion which is not entirely a matter of the entrepreneur's own intentions (Saintourens 2010). In other words, the future auto-entrepreneur is caught between a rock and a hard place, the desire to launch a business while protecting against the inherent risk, a very difficult problem. Such is the trademark of these many legal mechanisms encouraging individual entrepreneurship, formulated with neither precaution nor care for the risks and realities of business.

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26 Article 2284: “Anyone who has made a personal guarantee must honor his commitments, liability for which will fall upon the whole of his assets, both fixed and unfixed”. Article 2285: “A debtor's assets are common surety for his creditors; unless there exists a legitimate cause for doing otherwise, the value shall be divided among the creditors according to the contribution of each”.

27 EIRL, or entrepreneur individuel à responsabilité limitée.

28 The order must adapt the provisions of the Commercial Code regarding companies in difficulty and harmonize the laws regarding security for loans, civil procedure rules for enforcement of debt and the rules applicable to over-indebted individuals.

### 3. An Inaccessible Financial Autonomy

The final question the auto-entrepreneur regime gives rise to, and the most important in terms of personal life, regards earnings. Because the entire regime has been defined in relation to turnover, it is difficult, or even impossible, to generate any disposable income. What it is possible to say, on the basis of quantitative data garnered from surveys of sample groups, is that less than one auto-entrepreneur in two makes any profit. The profit that is made is modest (Section 3.1), which places auto-entrepreneurs in the category of the working poor (Section 3.2).

#### 3.1 Weak Profits, If Any

In spite of the modest turnover envisaged by the law, the thresholds are far from being crossed by these new entrepreneurs. For the year 2009, 155,000 auto-entrepreneurs declared positive turnover at least once, representing €69 million in total turnover as registered by URSSAF, the social and labor public administration, which corresponds to an average annual turnover of €6,300. But these figures obscure significant disparities.

**Table 2**  
**Number of Declarations and Turnover Declared by Quarter up to the End of April 2010**

|                     | <b>Contributors Able to Declare<br/>(active longer than three months and declarations in advance)</b> | <b>Contributors Who Actually Declared (*)</b> | <b>Turnover Declared<br/>(millions of euros)</b> |
|---------------------|-------------------------------------------------------------------------------------------------------|-----------------------------------------------|--------------------------------------------------|
| First quarter 2009  | 25,083                                                                                                | 17,130                                        | 68.3                                             |
| Second quarter 2009 | 84,395                                                                                                | 48,062                                        | 187.2                                            |
| Third quarter 2009  | 171,395                                                                                               | 87,811                                        | 310.9                                            |
| Fourth quarter 2009 | 250,507                                                                                               | 120,078                                       | 403                                              |
| First quarter 2010  | 359,641                                                                                               | 165,273                                       | 521                                              |
| Second quarter 2010 | 436,490                                                                                               | 160,399                                       | 586                                              |

*\*Only auto-entrepreneurs having turnover are required to make a declaration.*

*Source: ACOSS*

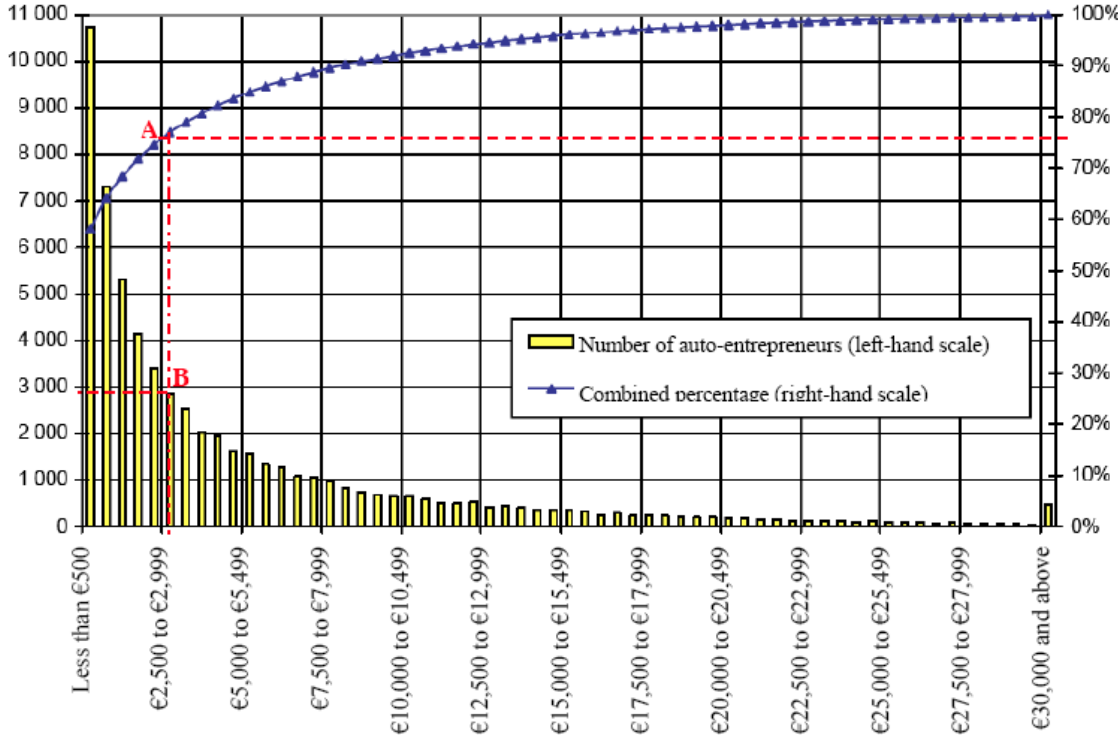
First, the disparity in earnings. Nearly 50 percent of auto-entrepreneurs (among those able declare any turnover at all) had an annual turnover of nil, and approximately 15 percent had an annual turnover of less than €1,000 (Figure 3). At the other end of the spectrum, approximately 500 auto-entrepreneurs exceeded the authorized annual turnover threshold for micro-enterprises.

Again, it must be remembered that these numbers represent turnover. From that, one must deduct social security contributions and intermediate consumption costs. There again, it pays to be cautious when it comes to comparing these numbers against national data

concerning sole traders or average incomes.

An income comparison, after deducting income tax, between sole traders (taxed at 45 percent) and auto-entrepreneurs (21.3 percent) is all the more difficult because the tax base is different: sole traders are taxed on earnings, auto-entrepreneurs on turnover. In other words, auto-entrepreneurs are unable to deduct any expenditure, so are taxed on their entire turnover, an unattractive proposition in sectors requiring significant investment, synonymous with high costs.

**Figure 3**  
**Distribution of Auto-Entrepreneurs Pursuing a Service Activity by Turnover in 2009**



Source: ACOSS (2010)  
 Note: approximately 75 percent of auto-entrepreneurs declared an annual turnover equal to or less than €3,000 (A), and nearly 3,000 auto-entrepreneurs are placed in the €2,500 to €3,000 turnover band (B).

Comparing income distribution is hardly any easier. In 2009, the French minimum wage was set at €1,343.77 gross per month,<sup>29</sup> and the average net monthly salary was around €2,000, equal to a median net monthly salary of approximately €1,500. Auto-entrepreneurs involved in providing services<sup>30</sup> yielded average net earnings of €4,000 per quarter,<sup>31</sup> or

29 Based on 151.67 working hours.  
 30 Trade-related activities have been excluded. There is no information regarding the purchasing cost of merchandise, which makes it impossible to calculate margins.  
 31 The rate of social contributions used in our calculations was 20 percent, an average of the effective rates for

approximately €1,330 per month. At first sight, this seems to place auto-entrepreneurs at the same level as minimum wage-earners, but in truth auto-entrepreneurs are far behind: these figures are gross of expenses.

The reality is that these amounts correspond better to an activity meant to generate supplemental income, a possibility expressly provided for in the law, than to a primary, exclusive activity meant to provide financial autonomy. What happens in practice? Statistics culled from the registration forms are not able to give a clear response to this question because they do not distinguish between those operating exclusively as auto-entrepreneurs and those combining the status with another activity. Only the survey data give some clues. After 18 months of the regime, the auto-entrepreneur model is dominated by individuals combining it with another activity: 64 percent of auto-entrepreneurs registered in 2010 were pursuing it as a secondary activity, of which 28 percent were using it to complement salaried employment and 19 percent as a complement to retirement income.<sup>32</sup> So, in two-thirds of cases, the famous enterprising spirit amounts to the search for a second income!

### **3.2 The Risk of Becoming One of the Working Poor**

Simply a convenient method of earning supplemental income, the auto-entrepreneur regime is in contradiction to the characteristically exclusive focus of the entrepreneur on one activity, which theory demands. Further, the regime is consistent with a long series of legal instruments punctuating employment policy in France. Entrepreneurship is presented as a solution to unemployment (Levratto, and Serverin 2009, section 3.2 and 2010) and earning supplemental income as a palliative to low salaries (Bourgeois, and Tavan 2010; Gomel, and Serverin 2009). Seen thus, is the auto-entrepreneur not a consecration of the image of the working poor?

The model is promoted by the texts which followed the law of 4 August 2008. All sorts of measures have been introduced relaxing the rules on combining income-generating activities. For example, the law obliges auto-entrepreneurs to register in an official trade directory, unless the trade activity is complementary to another, principal activity. But Order No. 2010-733 of 29 June 2010 defines the conditions under which the activity will be considered “complementary” very widely (initial training; receiving a pension; receiving salary from employment equivalent to at least half-time; pursuing one or more non-salaried,

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each activity reported in the table in the Annex.

<sup>32</sup> Source: the third edition of *Observatoire de l'Auto-Entrepreneur*, a survey conducted by OpinionWay on behalf of the Union des Auto-Entrepreneurs and the Fondation Le Roch Les Mousquetaires, June 2010.

non-trade activities), as long as the income from the trade activity does not constitute more than half of the individual's combined income from all sources. The same holds true regarding retirement. Recent instruments authorize to a greater and greater extent the combination of pension income with independent or salaried activities.<sup>33</sup> With the planned decrease in pension levels, increased recourse to methods of generating supplementing income is predictable. Today, the government no longer hides the true nature of the auto-entrepreneur regime, presenting it as “a real lifestyle choice, combining freedom, flexibility, an absence of risk and a source of supplemental income”.<sup>34</sup>

**Table 3**  
**Future Activity According to Expectations of the Regime**

|                          |                          | At Time of Becoming an Auto-<br>Entrepreneur (in 2009) |                        | At Time of Survey<br>(June 2010) |                        |
|--------------------------|--------------------------|--------------------------------------------------------|------------------------|----------------------------------|------------------------|
|                          |                          | Entrepreneurial<br>Initiative                          | Supplemental<br>Income | Entrepreneurial<br>Initiative    | Supplemental<br>Income |
| <b>Other activity</b>    |                          | <b>66</b>                                              | <b>74</b>              | <b>19</b>                        | <b>64</b>              |
| of which:                | Private sector employees | 42                                                     | 51                     | 14                               | 43                     |
|                          | Public sector employees  | 9                                                      | 15                     | 4                                | 14                     |
|                          | Independent              | 15                                                     | 8                      | 1                                | 7                      |
| <b>No other activity</b> |                          | <b>34</b>                                              | <b>26</b>              | <b>81</b>                        | <b>36</b>              |
| of which:                | Unemployed               | 19                                                     | 8                      | 15                               | 3                      |
|                          | Retired                  | 1                                                      | 10                     | 1                                | 18                     |
|                          | Students                 | 5                                                      | 4                      | 1                                | 3                      |
|                          | Other                    | 8                                                      | 4                      | 64                               | 12                     |

*Field: auto-entrepreneurs registered as of June 2010, excluding those who left the regime or pursued their activity under another framework.*

*Source: ACOSS data from the DGCIS survey of auto-entrepreneurs of June 2010.*

And auto-entrepreneurs see it in exactly that way. In 40 percent of cases, the regime is considered as a way of generating supplemental income; the exact proportion varies according to the project bearer's initial status and general profile (Table 3).<sup>35</sup> According to the same

33 See, for example: article L.84 of the Civil and Military Pensions Code, modified by Law No. 2008-1330 of 17 December 2008; article L.161-22 modified by the Order of 6 May 2010; the decree of 30 December 2009 regarding combining employment and retirement for salaried employees, tradespeople, storekeepers, professionals, and so on.

34 From a press release dated 9 July 2010 entitled, “Auto-Entrepreneurship: A Real Life Choice”.

35 The registration form for the regime contains a question regarding whether the candidate has another source of income (from employment, retirement, and so on). The Direction générale de la compétitivité, de l'industrie et des services (DGCIS) does not use this information in its 2010 report. The following are therefore listed in the report as auto-entrepreneurs engaged in an entrepreneurial activity: individuals who have no other sources of income, those for whom the auto-entrepreneurial activity is permanent, those who say they would have started a business even if the regime had not been implemented, and, surprisingly, those who wished to test out a business idea while remaining a salaried employee in the hope that the new business would eventually bring in sufficient

source, those over 60 years of age, most often retired, were primarily looking for supplemental income.

The combination of increasing numbers of working poor (Clerc 2008), a majority of whom are salaried workers (Concialdi 2008), and of workers in precarious situations (Rigaudiat 2005) whose primary income is not high enough to live on (INSEE 2010, pp. 86-87), would indicate a healthy future for the auto-entrepreneur regime. Backed by the legislature, the government voiced its opposition to the three-year limit on benefiting from the regime. The purported motive of the opposition was the risk of losing the momentum created by the regime's implementation.<sup>36</sup> But the forms of entrepreneurship promised by the law of 4 August 2008 offer few prospects in terms of the managerial responsibility, innovation and accumulation of wealth that, in the end, are the keys to entrepreneurial behavior.

## Conclusion

The aim of this contribution was to confront empirical data to previous reflections on the auto-entrepreneur regime (Levratto, and Serverin 2009). We have come to a double conclusion. From a legal point of view, the regime is in no sense innovative. At best, it is a form of exemption from existing social and fiscal regimes. The auto-entrepreneur is nothing more than an individual entrepreneur with low-level activity. From an economic point of view, it is doubtful whether the regime will have any effect on France's economic competitiveness. Far from constituting the successful enterprises of tomorrow, the overwhelming majority of auto-entrepreneurs are the working poor of today.

And perhaps that is the fate to be shared by workers in those European countries which have adopted a similar regime, such as Poland (“samozatrudnienie”, or self-hire) and Portugal (the “recibos verdes”, named after the payment coupons they use). One aspect common to these new forms of entrepreneur is that they ensure the free movement of these lonesome workers within Europe. Over time, there is a risk that the competition, already being denounced at the national level in France, between firms hiring salaried workers and the new mixes of (technically) independent service providers will become an issue across Europe. The

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income for them to leave their employment (DGCIS 2010).

<sup>36</sup> François Hurel, the father of the regime, opposes the limit as well. In reply to the demands of employer and professional associations that the benefit of the regime be limited to three years, Hurel said: “There are two categories of auto-entrepreneur: those who will always remain in the regime and those who will not, because they will have become entrepreneurs... We have given real hope (to the latter), and it is proving ever more popular with the French. It represents a real opportunity for a certain number of people” (cited in Marini 2010, p.57).

secondment of employees abroad operates within a strict framework. In contrast, European law is largely concerned with ensuring ever greater freedom of movement for individuals and services. Directive 2005/36/CE of 7 September 2005 regarding the recognition of professional qualifications is currently setting the terms of the debate, which were taken up in a report aiming, most notably, at proposing common principles for different forms of professional activity.<sup>37</sup> The debate is not only confined to auto-entrepreneurs, it concerns all entrepreneurs within the EU, and is becoming all the more intense with the decline in stable employment contracts and the corresponding rise in less stable forms of employment. In this regard, auto-entrepreneurship, self-hire, and self-employment are all routes by which a new approach to labor is emerging, prospering in between the cracks in competition and labor law.

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<sup>37</sup> The report is entitled “33 propositions pour une nouvelle dynamique de l'activité libérale” (“33 Measures for a New Professional Dynamic”), and was submitted on 21 January 2010 by Me Brigitte Longuet to Hervé Novelli, State Secretary for Commerce, Trades, Small and Medium-Sized Enterprises, Tourism, Services and Consumption.

## Annex: Thresholds for the Application of the Auto-Entrepreneur Regime as Compared to other Business Types<sup>38</sup>

|                                                          | Auto-Entrepreneur                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | Micro-Enterprise                                                                                                                                                                                                                                                         | Real: “Simplified” or “Normal”                                                                                                                                                          |
|----------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Affected Persons</b>                                  | Any person wishing to pursue a commercial, trade or professional activity. Two cases:<br>1) supplemental income;<br>2) exclusive income-generating activity.                                                                                                                                                                                                                                                                                                                                                  | Trades, commercial and professional activities (with optional membership in an Accredited Management Centre or Association). <sup>39</sup>                                                                                                                               |                                                                                                                                                                                         |
| <b>Annual Thresholds as a Function of Gross Turnover</b> | Service provision and professional income: less than €32,100.<br>Sales (manufacturing, trading) and providing accommodation: less than €80,300.                                                                                                                                                                                                                                                                                                                                                               |                                                                                                                                                                                                                                                                          | Obligatory above these thresholds, optional below them.                                                                                                                                 |
| <b>VAT</b>                                               | No VAT                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                          | VAT (if applicable)                                                                                                                                                                     |
| <b>Income Tax</b>                                        | Payment in full discharge of income tax if household income is below €25,926 per unit: <ul style="list-style-type: none"> <li>• 1 percent of turnover for sales and provision of accommodation;</li> <li>• 1.7 percent for service provision;</li> <li>• 2.2 percent for professional profit.</li> </ul> In the absence of said payment, taxable income to be determined in the same manner as for the micro-enterprise regime.                                                                               | Standard deduction of 71 or 50 percent for charges, applied to turnover: <ul style="list-style-type: none"> <li>• for sales: 29 percent of turnover to declare;</li> <li>• for service provision: 50 percent;</li> <li>• for professional profit: 66 percent.</li> </ul> | Progressive tax scale on profits as shown in the accounts. Taxable profit is increased by 25 percent if the business does not belong to an Accredited Management Centre or Association. |
| <b>Social Security Charges</b>                           | Flat-rate payment in full discharge: <ul style="list-style-type: none"> <li>• 12 percent of turnover for commercial activities;</li> <li>• 21.3 percent for trades and services;</li> <li>• 18.3 percent for professionals whose activity falls under the pension and old age security regime for independent workers;<sup>40</sup></li> <li>• 21.3 percent for service providers classed as professional profit which fall under the social security regime for independent workers.<sup>41</sup></li> </ul> | Calculated on a base equal to: <ul style="list-style-type: none"> <li>• 29 percent of turnover for sales;</li> <li>• 50 percent for service provision;</li> <li>• 66 percent for professional activities.</li> </ul>                                                     | Calculated on the basis of profits as shown in the accounts (joint return for independent professions)                                                                                  |

38 The thresholds for auto-entrepreneurs are exactly the same as those for the micro-enterprise. Thus, in terms of social security contributions, the rates of 13 and 23 percent correspond to the rates charged to micro-enterprises on their revenue. A retailer pays a rate of 45 percent of his or her income. If the retailer is under the micro-enterprise regime, that income corresponds to 29 percent of his or her revenue: the contributions are therefore 45 percent of 29 percent of revenue, or 13 percent. For a service provider, contributions are paid at a rate of 46 percent of a “micro” income of 50 percent of revenue, or an effective rate of 23 percent. These rates now include a portion of income tax since, in the case of a deduction in discharge of personal income tax, the tax rates on income are 1 percent for traders, 1.7 percent for service providers, and 2.2 percent for professionals.

39 Centre de Gestion Agréé and Association de Gestion Agréée, in French.

40 The Caisse Interprofessionnelle de Prévoyance et d'Assurance Vieillesse (CIPAV).

41 The Régime Sociale des Indépendants (RSI).

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