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SOCIAL SECURITY OF POSTED WORKERS AND PLATFORM WORKERS – SELECTED CHALLENGES

Online Workshop "Practical Questions arising from the implementation of Regulation 883/2004 on the Coordination of Social Security Systems"

of the DAAD University Partnership Project between the Fulda University of Applied Sciences and Aristotle University of Thessaloniki

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25 June 2021

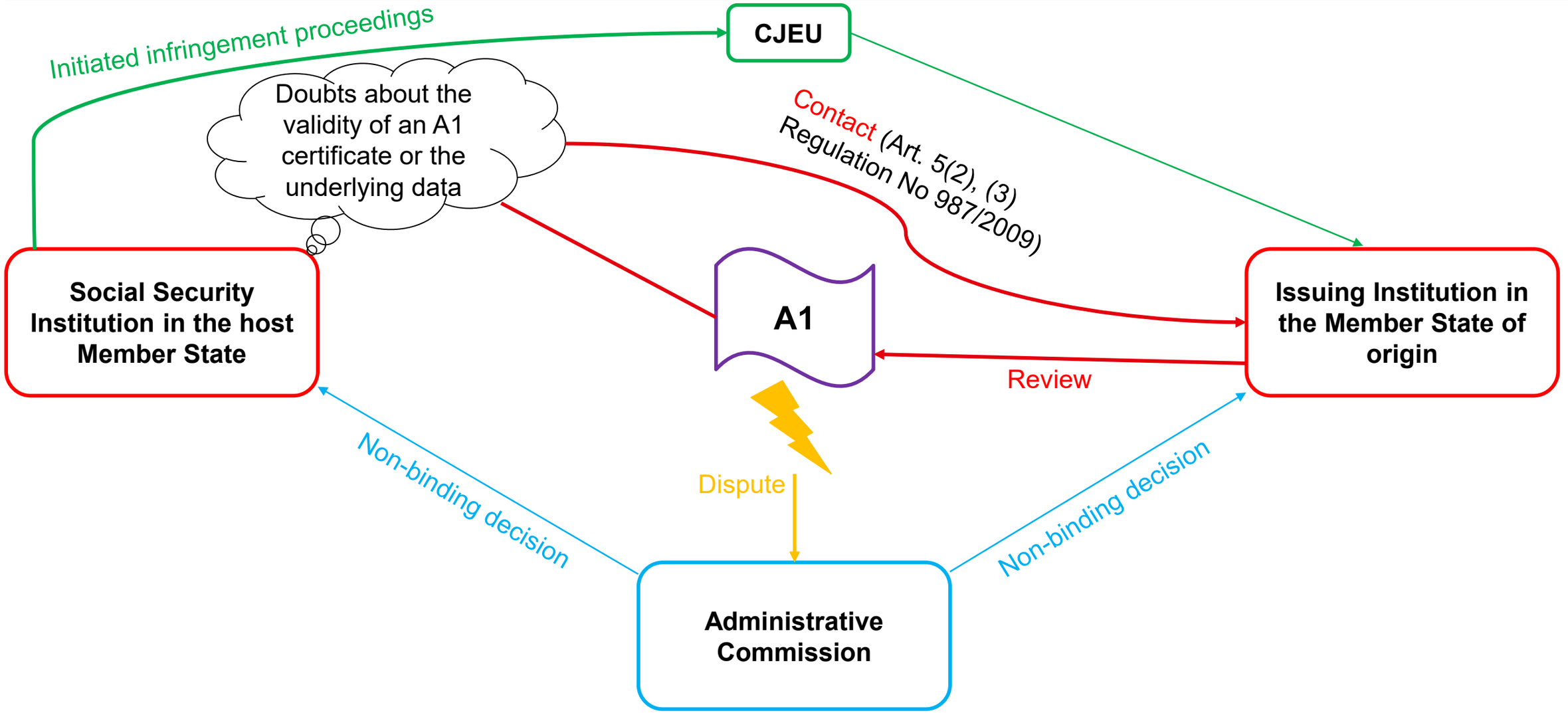
A. COORDINATION OF SOCIAL SECURITY SYSTEMS IN TERMS OF POSTING OF WORKERS

A. Social security of posted workers

The problem of the strict binding nature of A1 certificates

- General principle: A worker who works in another Member State is also subject to the social security rules of that Member State (Article 11(3)(a) of Regulation No 883/2004)
- Exception for temporary posting of workers: The Worker continues to be subject to the social security system of his or her Member State of origin (Article 12(1) of Regulation No 883/2004)
- Legal effect of A1 certificates
  - Legal presumption that the worker is covered by social security in the issuing State and binds the social security institutions of the host Member State (Art. 5(1) Regulation No 987/2009)
    → Objective: avoid double or multiple insurance
  - A1 certificates are strictly binding as long as the documents have not been cancelled by the issuing institution, even if Regulation No. 883/2004 is clearly not applicable
  - The only exception: If an A1 certificate is proven to have been obtained by fraud, a court of the host Member State may disregard it unless the issuing institution carries out a review of the certificate within a reasonable time

A. Social security of posted workers



A. Social security of posted workers

The problem of the impracticable procedure for cancelling A1 certificates

- Criticism:
  - Decisions of the Administrative Commission do not affect the legal effect of A1 certificates
  - Partly very long duration of proceedings
  - Postings usually only last a few months, but the clarification procedure is usually much longer → Workers are then already back in their States of origin, which makes it difficult to enforce the law
- COM(2016) 815 final:
  - The issuing institution must review an A1 certificate within 25 working days
  - In case of fraud, the revocation must be made retroactively
  - The documents on which the decision is based should also be sent within 25 (or in case of urgency within two) working days
  - But: No legal consequences in case of non-compliance with these requirements

A. Social security of posted workers

The problem of the impracticable procedure for cancelling A1 certificates

- Further political debate:
  - Parliament's demand that an A1 certificate must in any case have been applied for before the posting
    → Objection: this would cause unnecessary bureaucracy
    → But: In view of the aim of combating abuse, it should be acceptable to carry a simple confirmation of receipt
  - Commission proposal to allow an exemption for employment abroad in the EU for a maximum of 24 hours
    → Opinion: This also has potential for abuse, as there is no obligation to provide proof of the day of entry

A. Social security of posted workers

The problem of the impracticable procedure for cancelling A1 certificates

- Proposals:
  - Failure to meet the currently proposed deadline for reviewing an A1 certificate should result in the loss of its strict binding effect
  - Decisions of the Administrative Commission might have the force of law, which can be overturned by the CJEU
  - Harmonisation of A1 requirements and EU-wide standards for issuing them
  - Centralisation of the electronic application procedure (European electronic register to simplify the application procedures and control possibilities)

A. Social security of posted workers

The problem of the retroactivity of A1 certificates

- A1 certificates can also be issued retroactively (c.f. CJEU, 30 March 2000 - C-178/97 - *Banks and others*, para. 54)
- The retroactive binding even overrides an earlier contrary decision of the employing state (CJEU, 6 September 2018 - C-527/16 - *Alpenrind and others*)
- Criticism:
  - Incentive to only apply for an A1 certificate retrospectively if they are asked to do so
  - Leads to legal uncertainty in the host Member State
  - It would be problematic if a subsequently issued certificate by another authority (as part of the executive) automatically takes precedence over the legally binding decision of the judiciary with retroactive effect
  - A posted worker may have already claimed benefits on the basis of the previously established social security liability in the host Member State

B. SOCIAL SECURITY OF PLATFORM WORKERS

B. Social Security of platform workers

“Platform work“?

Foto: Statoil; Quelle: Handelsblatt

Illustration: imago / Ralph Peters; Quelle: Süddeutsche Zeitung

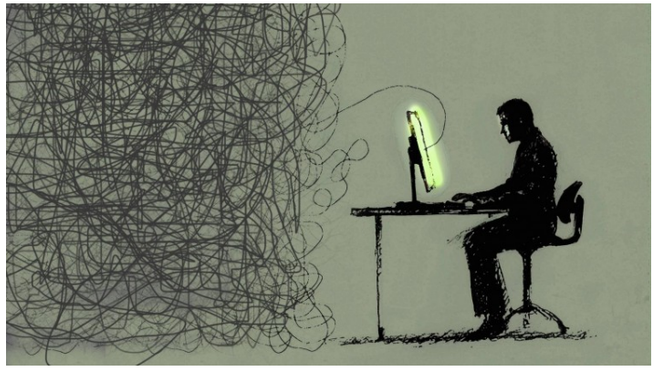


Illustration: imago / Gary Waters; Quelle: Deutschlandfunk

B. Social Security of platform workers

What do these new forms of work mean for the coordinating social security law?

- Work-related social insurance schems with a physical concept of work
- EU coordination rules follow the lex loci laboris principle
- Geographical stability between worker, employer and Member State is no longer guaranteed, which might complicate the coordination of national social security systems
- Gigwork: Fewer problems
- Crowdwork: Often carried out in two or more Member States (Article 13 (2) (a) of Regulation 883/2004) → overall assessment of the circumstances
- No definition of worker or of self-employed persons in the Coordination Regulation
- Competence of the Member State that qualifies a non-standard worker as an employee (Article 13 (3) of Regulation 883/2004)

Literature: *Ulrich Becker / Olga Chaselina* (eds.), Social Law 4.0 – New Approaches for Ensuring and Financing Social Security in the Digital Age, 2021, Publisher: Nomos.

B. Social Security of platform workers

2. Gigwork – The example of Uber

Source: EU-Kommission

B. Social Security of platform workers

2. Gigwork – The example of Uber

London Employment Tribunal of 28 October 2016 – 2202550/2015

- The case: Lawsuit by two Uber drivers for minimum wage and paid annual leave in London
- Judgment of the London Employment Tribunal:
  - „It is not real to regard Uber as working ‚for' the drivers and the only sensible interpretation is that the relationship is the other way around. Uber runs a transportation business. The drivers provide the skilled labour through which the organisation delivers its services and earns its profits" (no. 92)
  - „The Uber driver's working time starts as soon as he is within his territory, has the App switched on and is ready and willing to accept trips and ends as soon as one or more of those conditions ceases to apply." (no. 122)
  - The relevant time for minimum wage is only the time when the driver is „working" when he is carrying a passenger but not otherwise (no. 125)

B. Social Security of platform workers

London Employment Tribunal of 28 October 2016 – 2202550/2015

Considerations of the Court (para. 95):

(1) The contradiction in the Rider Terms between the fact that ULL purports to be the drivers' agent and its assertion of "sole and absolute discretion" to accept or decline bookings.
(2) The fact that Uber interviews and recruits drivers.
(3) The fact that Uber controls the key information (in particular the passenger's surname, contact details and intended destination) and excludes the driver from it.
(4) The fact that Uber requires drivers to accept trips and/or not to cancel trips, and enforces the requirement by logging off drivers who breach those requirements.
(5) The fact that Uber sets the (default) route and the driver departs from it at his peril.
(6) The fact that UBV fixes the fare and the driver cannot agree a higher sum with the passenger. (The supposed freedom to agree a lower fare is obviously nugatory.)
(7) The fact that Uber imposes numerous conditions on drivers (such as the limited choice of acceptable vehicles), instructs drivers as to how to do their work and, in numerous ways, controls them in the performance of their duties.
(8) The fact that Uber subjects drivers through the rating system to what amounts to a performance management/disciplinary procedure.
(9) The fact that Uber determines issues about rebates, sometimes without even involving the driver whose remuneration is liable to be affected.
(10) The guaranteed earnings schemes (albeit now discontinued).
(11) The fact that Uber accepts the risk of loss which, if the drivers were genuinely in business on their own account, would fall upon them.[49]
(12) The fact that Uber handles complaints by passengers, including complaints about the driver.
(13) The fact that Uber reserves the power to amend the drivers' terms unilaterally.

Source: http://theconversation.com

B. Social Security of platform workers

3. Crowdworkers as employees?

German Federal Labour Court, 1. December 2020 – 9 AZR 102/20 in the law on protection against dismissal:

Facts of the case:

The platform operator controls the presentation of branded products in retail outlets and petrol stations on behalf of its clients. The control activities themselves are carried out by crowdworkers. Their task is in particular to take photos of the presentation of goods and to answer questions about the advertising of products. On the basis of a "basic agreement" and general terms and conditions, the defendant offers the "microjobs" via an online platform. Via a personally set up account, each user of the online platform can accept jobs without being contractually obliged to do so. If the crowdworker accepts an order, he or she must regularly complete it within two hours according to the platform's detailed specifications. For completed assignments, experience points are credited to the user's account. The system increases the level with the number of completed jobs and allows the acceptance of several jobs at the same time.

The plaintiff most recently completed about 3000 orders for the platform over a period of eleven months before the platform informed him that it would no longer offer him any further orders in order to avoid future disagreements. With his complaint, he wanted to have it established that an employment relationship existed between him and the platform.

B. Social Security of platform workers

3. Crowdworkers as employees?

German Federal Labour Court, 1. December 2020 – 9 AZR 102/20 in the law on protection against dismissal:

“According to § 611a of the German Civil Code (BGB), the status of employee depends on the fact that the employee performs work that is bound by instructions and determined by others in personal dependence. (...) The overall assessment of all circumstances required by law may show that crowdworkers are to be regarded as employees. It speaks for an employment relationship if the client controls the cooperation via the online platform operated by him in such a way that the contractor cannot freely organise his activity in terms of place, time and content as a result. This was the case in the ruling. The plaintiff performed work in a manner typical of an employee, bound by instructions and determined by others in personal dependence. It is true that he was not contractually obliged to accept offers from the defendant. However, the organisational structure of the online platform operated by the defendant was designed so that users registered and trained via an account continuously accepted bundles of simple, step-by-step, contractually specified small orders in order to complete them personally. Only a level in the evaluation system that increases with the number of completed orders enables the users of the online platform to accept several orders at the same time in order to complete them on one route and thus in fact to earn a higher hourly wage. Through this incentive system, the plaintiff was induced to continuously carry out control activities in the district of his usual place of residence.” (Press release of the Federal Labour Court, No. 43/20)

Gamification: *"The defendant thus stimulated the ‘play instinct’ of the users by offering them experience points and the associated benefits with the aim of inducing them to engage in regular activities. (para. 50)*

"The long-term and continuous employment of the plaintiff led to an amalgamation of the individual assignments into a uniform (permanent) employment relationship." (para. 52)

B. Social Security of platform workers

3. Crowdworkers as employees?

Developments at European level:

- European Parliament resolution of 15 June 2017 on a **European Agenda for the collaborative economy** (2017/2003(INI)):
  "Underlines the paramount importance of safeguarding workers' rights in the collaborative services — first and foremost the right of workers to organise, the right of collective bargaining and action, in line with national law and practice; recalls that all workers in the collaborative economy are either employed or self-employed based on the primacy of facts and must be classified accordingly; calls on the Member States and the Commission, in their respective areas of competence, to ensure fair working conditions and adequate legal and social protection for all workers in the collaborative economy, regardless of their status;" (para. 39)
- **Digital Services Act**

Further proposals under discussion:

- Inclusion of all working persons in social security (regardless of their status, at least in relation to solo self-employed persons)
- Concept of "Digital Social Security" (by *Enzo Weber*, https://www.boeckler.de/pdf/p_fofoe_WP_138_2019.pdf)

THANK YOU VERY MUCH FOR YOUR ATTENTION!