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Platform work and the notion of 'employee' under the German legal System: possible consequences at a systematic level

Platform work and the notion of 'employee' under the German legal System: possible consequences at a systematic level

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Key words: platform work; notion of 'employee'; external determination of the working activity (*fremdbestimmt*); hetero-direction (*Weisungsgebundenheit*).

Massima: L'obbligo di attenersi alle direttive impartite dal datore di lavoro, caratteristico di un rapporto di lavoro subordinato, può risultare dalla definizione dettagliata delle obbligazioni di fare del lavoratore formalizzate nel contratto o dal concreto atteggiarsi del rapporto tra le parti laddove l'autonomia del lavoratore di organizzare la prestazione dovuta sia fortemente limitata. In particolare, i vincoli determinati da una struttura organizzativa creata dal datore di lavoro possono essere sufficienti e idonei ad indurre il lavoratore a comportarsi secondo le aspettative e le esigenze del datore di lavoro, senza che questi impartisca direttive concrete e puntuali.

Abstract: An obligation to follow instructions, which is characteristic of an employment relationship, could also result from a detailed legal arrangement or the implementation of the contract which severely restricts the freedom of the worker to organise and provide the owed service. In particular, the actual constraints due to an organisational structure created by the employer could also be suitable to induce the employee to behave as desired without the employer issuing concrete and direct instructions.

1. Introduction.

The ruling of the Federal Labour Court (*Bundesarbeitsgericht*, hereinafter, 'BAG') of 1 December 2020[1] contains new statements on the question on under which conditions a contractual relationship between a platform and a so called 'crowdworker' can constitute an employment relationship. From a systematic point of view, the ruling is of absolute interest, as the BAG focuses on the characteristic of the "external determination" (*fremdbestimmt*) that the platform exercise on the overall performance of the worker, instead of focusing solely on the classic criterion of the worker being bound by the instructions and directives (*Weisungen*) given by the employer in terms of content, location and time of the working activity. In particular, the BAG concludes that the platform indeed directs the worker's activity through the design and combination of the assignments according to its employment needs, without the need to provide for specific instructions.

[1] BAG, 1. December 2020 – 9 AZR 102/20, NZA 2021, 552.

The present article provides for a comment on the BAG case No. 9 AZR 102/20 of 1 December 2020 and is structured as follows. First, the notion of 'employee' under the German legal system is described and briefly discussed under Section 2, followed by a presentation of the facts of the case and the previous decisions of the lower courts (part 3); subsequently, the arguments for the BAG's decision are presented in detail (part 4). This is followed by an overall assessment and evaluation from a systematic perspective (part 5).

2. Preliminary remarks: the notion of 'employee' under the German labour law.

German labour law does not know a unique notion of 'employee' universally valid for the purpose of the application of the different labour regulations, which are scattered across many laws located in different sources.

In the German Civil Code ("BGB"), the chapter on contracts of employment (sections 611 et seq. BGB) contains several provisions on the regulation of the employment relationship. Other labour laws also apply to employees and employment relationships. The scope of application of those laws often vary, and go from broad definitions, that might include further categories on the side of employees,[2] to narrower ones[3]. Still, till 2017, none of these laws ever defined what is meant by an "employment contract".

This changed on April 1, 2017, when the Law amending the Temporary Employment Act and other laws (*Gesetz zur Änderung des Arbeitnehmerüberlassungsgesetzes und anderer Gesetze)* of February 21, 2017[4] amended Article 611 BGB. Ever since, section 611*a* BGB contains a definition of the employment contract.

The employment contract is a subcategory of the service contract and is characterised by the degree of "personal dependence" of the obligated person. Pursuant to section 611a(1) BGB, an employee is obliged by the employment contract to perform work *in personal dependence* (*persönliche Abhängigkeit*), bound by instructions (*Weisungen*) and external determination (*fremdbestimmt*) (sentence 1). The employer's prerogative to issue instructions may extend to the content, the performance, the time and place of the working activity (sentence 2). A person is bound by instructions if he or she is not essentially free to organise his or her work and to determine his or her working hours (sentence 3). The degree of personal dependence also depends on the nature of the activity (sentence 4). In order to determine whether a contract of employment exists, an overall assessment of all circumstances must be made (sentence 5). If the actual implementation of the contractual relationship shows that it shall be deemed as an employment relationship, the formal designation of the contract made by the parties when signing the contract itself is irrelevant (sentence 6). In essence, this definition represents a formalisation into a written law of the case law developed over time by the BAG.[5]

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2 For example, section 5 of the Labour Court Act ("ArbGG") and section 12a of the Collective Bargaining Act ("TVG") extend the scope of the respective law to "persons similar to employees" (*arbeitnehmerähnliche Personen*). On the notion of *arbeitnehmerähnliche Personen*, see Gramano, Arbeitnehmerähnliche personen *e collaboratori coordinati e continuativi: ai confini della subordinazione. un confronto tra le tecniche di tutela in Italia e Germania*, in *ADL*, 4, 2021, p. 57 et seq.

3 For example, the Works Constitution Act ("BetrVG") does not cover executive employees (*leitende Angestellte*), see section 5 BetrVG.

4 Federal Gazette (BGBl.) I, p. 258.

5 Cf. RegE BT-Drs. 18/9232 pp. 31; Preis, Sub *BGB, § 611a para. 9*, in *Erfurter Kommentar zum Arbeitsrecht*, 21st edition 2021.

In the following, two elements are explained more into details.

2.1 The requirement of 'being bound by instructions' ("*Weisungsgebundenheit*") under section 611a(1) sentence 3 BGB.

Usually, a working obligation is contractually determined in the employment contract only in rather generic terms or under a framework of activities; the exact content of the obligation is than concretised by the exercise of the employer's prerogative to issue instructions and directives. Such prerogative has already been defined in more detail in the Trade, Commerce and Industry Code ("GewO").[6] Pursuant to section 106, sentence 1, GewO, the employer may determine the content, place and time of work performance at his or her reasonable discretion, insofar as these working conditions do not contravene what is already regulated by the employment contract, provisions of a works agreement, an applicable collective bargaining agreement or statutory provisions. However, being bound by instructions can also result – as section 611a(1) sentence 3 BGB shows – from a detailed legal contractual arrangement or actual implementation of the contract that severely restricts the freedom to organise the performance of the owed service by the worker.[7]

Being bound by instructions within the meaning of section 611a(1), sentence 3, BGB requires that the employee is not "essentially free" to organise his or her work. For example, time constraints or the obligation to meet certain deadlines for the completion of the assigned tasks are not in themselves an essential characteristic of an employment relationship. Dates for the completion of work may also be set for a freelancer without this resulting in the typical employee being bound by time instructions. In addition, a client has the right to give instructions to a freelancer regarding the work result.[8] However, instructions to a self-employed person are typically result-oriented (*sachbezogen*). In contrast, the right to issue instructions under an employment contract is person-related and process- and procedure-oriented (*personenbezogen, ablauf- und verfahrensorientiert*).[9] This is illustrated, for example, by a decision of the BAG of 25 September 2013. In the underlying case, the employer attempted to circumvent labour law by making the core components of an instruction appear as single pieces of work (*Werk*).[10] The BAG nevertheless ascertained the existence of an employment relationship because the work process was "pre-structured" by binding instructions: if the services to be rendered by the contractor are based on the respective needs of the client, this may also be an indication against a relationship based on a contract of work (*Werkvertrag*) and in favour of a relationship based on a contract of employment if the content, performance, time, duration and place of the activity are also decided by the alleged principal or according to the alleged principal organisational needs.[11]

6 Preis (Fn. 5), Sub *GewO, section 106, para. 1*, in *Erfurter Kommentar zum Arbeitsrecht*, 21st edition 2021.
7 BAG, 19 November 1997 – 5 AZR 653/96, NZA 1998, 364.
8 BAG, 14 March 2007 – 5 AZR 499/06, NZA-RR 2007, 424 para. 30.
9 BAG, 27 June 2017 – 9 AZR 133/16, in BeckRS 2017, 145967 para. 28.
10 A contract of work (*Werkvertrag*) within the meaning of Section 631 BGB means a contract where the contractor is obliged to produce a specific piece of work while in the case of a service contract (*Dienstvertrag* and its subcategory, the employment contract) the person who promises services is "only" obliged to perform the promised services.
11 BAG, 25 September 2013 – 10 AZR 282/12, NZA 2013, 1348 para. 17.

2.2 Consideration of the specific nature of the activity under section 611a(1) sentence 4 BGB.

Furthermore, according to section 611a(1), sentence 4, BGB, the nature of the activity must also be taken into account when assessing whether the degree of the personal dependency required for the existence of an employment relationship has been reached. Traditionally, in the opinion of the BAG, the type of service and the affiliation of the activity to a certain occupational profile can influence the underlying type of contract just as much as the organisation of the work to be performed.[12] This approach of the case law of the BAG seems to largely diverge from the approach developed by the Italian case law and repeatedly confirmed by the *Corte di Cassazione*. Indeed, Italian courts are firm in saying that the nature of the working activity is *per se* extraneous to the operation of classification of the relationship, as any human activity economically relevant can be performed either under an employment contract, either under a contract of service (as a self-employed person).[13] Instead, according to the German case law, while some activities can be performed both in the context of an employment relationship and in the context of another legal relationship, others are usually performed only in the context of an employment relationship. In the case of subordinate, simple work, there is more of a personal dependency than in the case of more intellectual work,[14] which is also relevant in the decision discussed here.

3. Facts and decisions of the lower courts.

In the case at hand, the proceeding is based on the following facts: the defendant was a web-based crowdsourcing company ("platform"). It arranged microjobs from its clients to workers via its online platform (indirect crowdsourcing). The microjobs included, *inter alia*, controlling the presentation of branded products in retail outlets and at petrol stations.

The plaintiff worked for the platform on the basis of a framework agreement, according to which he was given access to remunerated individual tasks for which he could apply. The worker was shown available tasks within a radius of 50 km from his location via the app's GPS tracking. If an order was accepted by the plaintiff, the service had to be carried out within two hours; otherwise, the order would be reassigned via the app.

The app offered jobs automatically according to a rating system: by successfully completing tasks, the worker could improve his position in the platform's internal ranking and thus secure access to higher-paid job offers; in other words, he could advance to higher "levels" through "experience points". The plaintiff undertook 2,987 jobs in 11 months. He reached level 15 and could therefore take on 15 jobs at the same time. In total, he worked for the platform for an average of about 20 hours per week and thus achieved an average monthly income of about EUR 1,750.

In April 2018, the platform informed the worker by email about its decision not to offer him any more jobs and to deactivate the account in order to avoid future disagreements.

12 BAG, 23 April1980 – 5 AZR 426/79, AP BGB § 611 Abhängigkeit Nr. 34.
13 *Ex multis* Cass. 11 October 2017, n. 23846.
14 BAG, 30 September 1998 – 5 AZR 563/97, NZA 1999, 374.

Thereupon, the plaintiff filed an action before the Labour Court of Munich for a declaration of the invalidity of the termination on the grounds that an employment relationship existed between the parties.[15]

Both the first-instance Labour Court ("ArbG") of Munich and the second-instance Higher Labour Court ("LAG") of Munich dismissed the action and denied the worker's status as an employee.[16] According to their view, neither the basic agreement nor the individual performed jobs had created a relationship of personal dependency between the parties. In particular, the creation of a strong pressure on the worker to push him to accept and perform more and more tasks by "triggering human play instincts", which could be explained in terms of motivation psychology, was not recognised as a decisive argument by the courts in the direction of the existence of an employment relationship because of a lack of significant pressure. Furthermore, in the view of the courts, the plaintiff was not subject to the instructions of the platform and was not integrated into its business organisation.

4. The decision and the arguments of the BAG.

As is customary with judgments of the BAG, the reasoning (*Entscheidungsgründe*) of the present ruling is preceded by general statements in which the legal principles applied are presented in abstract terms, detached from the individual case. After the presentation of the (very) general principles already described in part 2, the BAG deals with the characteristic of external determination. According to the BAG, the concepts of being bound by instructions and external determination are closely connected and partly overlap. As a rule, an activity that is bound by instructions is at the same time an activity of external determination. The obligation to follow instructions is the narrower criterion that essentially characterises the type of contract, which is also defined in more detail by section 611a(1) sentences 2 to 4 of the BGB.

The criterion of external determination, on the other hand, covers, in particular, constellations deviating from the normal type of employment contract. It is particularly evident in the integration of the employee into the employer's work organisation.[17] Actual constraints due to an organisational structure created by the employer are also suitable to induce the employee to behave in the desired manner without concrete instructions having to be issued for this purpose.[18] Thus, an employment relationship is to be assumed if the principal is in a position to "decisively control" the type and scope of employment and thus has the planning security typical of an employment relationship. However, this is not always the case if a worker repeatedly accepts – freely and self-determined – offered assignments. A long-term and continuous cooperation does not in itself lead to a personal

15 It should be mentioned here that, under German law, a notice of termination sent by email does not comply with the required written form of the notice of termination according to section 623 BGB.

16 ArbG München, 20 February 2019 – 19 Ca 6915/18, in BeckRS 2019, 37646; LAG München, 4 December 2019 – 8 Sa 146/19, NZA 2020, 316.

17 BAG, 1 December 2020 (Fn. 1). The characteristic of "integration into the business" had already been recognised by the BAG earlier (see BAG, 17 January 2006 – 9 AZR 61/05, in NJOZ 2006, 3821 para. 11). So far, however, it was unclear how the BAG would locate this after April 2017.

18 BAG, 1 December 2020 (Fn. 1), para. 36 with reference to *Schubert*, "Crowdworker – Arbeitnehmer, arbeitnehmerähnliche Person oder Selbständiger", in RdA 2020, 248, 251.

dependence, but at most to an economic dependence, which in itself cannot constitute an employment relationship.[19]

Rather, for the assumption of an employment relationship, the principal must have taken organisational measures by which the contractor – even if not directly instructed, but nevertheless indirectly directed – is encouraged to continuously accept work orders and to personally complete them within a certain time frame according to precise specifications. In this way, personal dependence within the meaning of section 611a BGB could also be given by a platform's incentive system. Personal dependency does not already exist due to a company concept that aims to continuously fall back on a fixed group of workers and to – *de facto* – perpetuate the cooperation with them. However, a *de facto* planning certainty, as in the case of the use of own personnel, could result from the fact that the worker is instructed via the app provided by the principal to continuously accept a certain order contingent according to detailed specifications of the crowdsourcing company.

On this basis, the BAG partially repealed the previous decisions on the case. It considered the dismissal to be effective, which is why the appeal brought by the worker was dismissed. However, unlike the lower courts, the BAG qualified the plaintiff as an employee.

First of all, the BAG agrees with the lower courts that the framework contractual agreement alone did not establish an employment relationship between the parties. It formally does not oblige any party to perform or fulfil an obligation, as it merely forms the framework for contracts to be individually concluded in single cases. However, the BAG assessed differently the nature of the single agreements on the performance of the micro-tasks – i.e. the offer of a micro-task by the platform and the acceptance of the worker via the app. The BAG names three arguments for the existence of an employment contract. Firstly, according to the single contract signed time by time for the performance of each task, the plaintiff was obliged to provide the services in person. Secondly, the activity owed was simple in nature and its performance was predetermined in terms of content. Thirdly, the specific use of the app as a means of external determination in the awarding of the contract was "of particular importance".

With regard to the first point – the obligation of personal performance – the BAG states that according to the General Terms and Conditions of the platform, neither the worker could transfer the user account set up for him to another subject, nor could several user accounts be created for the same person. The sharing of the personal account is explicitly considered by the platform as "misuse or fraud" and a "violation of the terms of use". Since the orders were to be processed via the app and thus via the individual user account, the worker – as provided for in the basic agreement – could not have the accepted orders carried out by third parties; rather, he was required to carry out the tasks personally.

In addition, the BAG stated that the activities were of a simple nature and that, for this reason alone, the legal relationship was already *close to* an employment one. The worker could not essentially freely organise his activity due to the strict requirements of the

19 BAG, 1 December 2020 (Fn. 1), para. 36 with reference to BAG, 20 January 2010 – 5 AZR 99/09, NJOZ 2011, 88, para. 22.

platform regarding the performance of the simple tasks incumbent on him. He had to carry out these tasks via the online platform with the support of the app, where it was specified to him individually how he had to carry out the activity and which work steps he had to perform. There was only minimal "organizational flexibility" (*Gestaltungsspielraum*).

Furthermore, the employment conditions unilaterally stipulated via the app were designed in such a way that the user (i.e. the worker) – if willing to perform the activities in an economically reasonable way – had to regularly accept orders over a longer period of time and work through predetermined work processes in detail. If the worker agrees to this form of employment by concluding the framework agreement, registering on the platform and using it, the platform directs the worker's behaviour by tailoring and combining the orders according to its organisational needs, without specific instructions being necessary. This resulted in the external determination of the activity.

More specifically, the BAG reasoned as follows. Firstly, it is in fact to be assumed that there are "order bundles" and not individual orders. The platform did not pass on the tasks assigned to it unchanged to the "subcontractors", but divided them into microjobs in order to subsequently enable their combination via the "crowd" into user-related order bundles. Only the combination and actual processing of several microjobs would enable the user to have a "profitable occupation". In order to be allowed to perform such activities, the user would have to "yield" to the "influence of the app". The number of orders to be accepted at the same time, and thus the possibility of putting together a route to fulfil several orders and thus effectively earning an hourly wage that justified the effort of driving to destinations within a radius of up to 50 km depended on the level achieved in the rating system. The function of the app was thus not geared towards the awarding of individual jobs by an independent worker, but aimed at a – from the platform's point of view – "self-executing, automated disposition of tasks" to trained employees available for this purpose. The attractiveness of the portfolio of offers that can be viewed by the individual worker is determined by the content and the cut of the jobs offered at a certain point in time and thus by the platform. This organisation of the platform work prompted the worker acting "economically" in his or her own interest to constantly check the offer situation and to keep himself or herself ready for service in order to be able to use a favourable offer situation arising for him or her on the basis of his or her filter settings (location, level, time window).

Secondly, the platform specifically uses the incentive function of this rating system to induce the worker to continuously perform activities in the district of his usual place of residence. The platform itself described the "level system" as the "gamification part of the app". The platform 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. At the same time, it delays the (too) fast advancement to a higher level by a time window regularly limited to two hours, within which the orders have to be processed from the time they are taken over.

As assumed by the BAG, the focus of the platform was not on the individual microjobs, but on a resulting continuing obligation. The long-term and continuous employment of

the worker led to a "combination of the individual jobs into a uniform (open-ended) employment relationship". A uniform contractual relationship could also be established by concordant conclusive conduct[20] if the parties had exchanged services and remuneration by mutual agreement over a legally significant period of time. This expressed their concurring intention to be bound to each other by an employment contract for the services actually rendered. In the present case, the actual contractual practice showed that the legal relationship was not directed towards the completion of individual small orders but towards the continuous processing of bundles of orders. The bundling of individual orders, which was implied in the division into microjobs and the level system and which was necessary for an economic execution of the contract, precluded the parties from considering each individual microjob accepted as a fixed-term employment relationship. A legally isolated consideration of each of the 2,978 orders completed by the worker in a period of eleven months alone would disregard the fact that the platform had geared its business model towards the steady employment of workers and that the worker was also recognisably interested in steady employment. Therefore, an employment relationship existed upon the receipt of the notice of termination.

5. An assessment of the decision.

The BAG classifies the plaintiff as an employee under the assessment that an obligation to follow instructions, which is characteristic of an employment relationship, could also result from a detailed legal arrangement or the actual implementation of the contract which severely restricts the freedom of the worker to provide the owed service. In this context, actual constraints due to an organisational structure created by the employer could also be suitable to induce the employee to behave as desired without the employer issuing concrete and direct instructions.

The further development of the definition of an employee consists in attaching more importance to the characteristic of the external determination (*fremdbestimmt*) of the working conditions, in addition to the typical characteristic of being bound by instructions. The characteristic of being subject to external determination of the working conditions becomes a "safety net" in cases where the employee is not subject to instructions, but the overall circumstances speak for the existence of an employment relationship.

The decision combines the old and the new on the demarcation of the employment contract from the freelance service contract. The BAG took up its earlier case law on the characteristic of the personal provision of services as well as on the indicative effect of simple tasks for the assumption of an employment relationship and applied it to the case. What is new is that the characteristic of "external determination" is filled with more "life". It gains independence as an autonomous criterion to ascertain the existence of an employment relationship.[21] This can be explained by the fact that the BAG probably wanted to set a limit to the circumvention of labour law provisions by "new work" models and therefore had to break new ground for this. Where, in view of the most meticulous specifications for the execution of microjobs and the stringing together of microjobs,

[20] This corresponds to BAG, 9 April 2014 – 10 AZR 590/13, NZA-RR 2014, 522 para. 26; BAG, 17 April 2013 – 10 AZR 272/12, NZA 2013, 903 para. 13

[21] Martina, *Crowdworker: Arbeitnehmer, Heimarbeiter oder Solo-Selbstständige?*, in NZA 2021, 616, 617 and 620.

entrepreneurial skill does not pay off, but one is "subjected" to the app, this is not self-employment but dependent employment.[22] The previously central criterion of whether one is bound by instructions in terms of content, location and time probably did not lead to the "desired" result in the view of the BAG. However, this does not only affect indirect crowdwork relationships such as the one at hand. In other forms of work, too, the place of work is becoming increasingly irrelevant if workers can perform their services anywhere.[23] Integration into the company is also becoming less important, because more and more often expensive operating resources are no longer needed, but the performance is essentially of a mental-communicative nature.[24] The consequence of the "upgrading" of the criterion of external determination to the effect that even recurring individual microjobs can constitute a continuing obligation if there is an "incentive system" to accept more microjobs is far-reaching.[25] It remains to be seen whether the element of external determination can establish personal dependence even in the absence of any obligation to follow instructions.[26] In any case, the existence of an incentive system replaces the characteristic of integration into the employer's business organisation in cases where such integration *per se* cannot be considered.[27] In this respect, it is conceivable that the BAG will transfer its new approach to groups of persons other than platform workers and increasingly focus on actual constraints, such as the travel system in this case, where the employee gives in to the "influence of the app", rather than on the "classic" demarcation criteria of being bound by instructions. [28]

The new line of the BAG has so far been viewed rather critically in German literature. In particular, the motivation/psychological game-playing argumentation has been criticised as an over-extension of the wording of Section 611a(2) BGB.[29] The pressure created by the level system is to be seen solely in the fact that the worker is threatened with termination of the framework agreement at any time. However, it was not sufficient to establish an employment contract and did not result in a personal, but "only" an economic dependency. The majority of the judgement discussions would have found the classification as a person similar to an employee dogmatically more convincing.[30] However, employee-like persons are not covered by the scope of the Dismissal Protection Act. Prior to the decision, there was – as far as can be seen – a nearly unanimous opinion in the literature that, on the basis of the current legal provisions, only a qualification as a person similar to an employee can be considered. [31]

Finally, from a German perspective, it should be only briefly mentioned that there have also been fundamental developments in German social law. The Federal Social Court

22 See also *Waltermann*, *Abhängige Beschäftigung in der digitalisierten Arbeitswelt*, in NZA 2021, 297, 300.
23 Häferer, Koops, *Crowdwork als Arbeitnehmer*, in NJW 2021, 1787, 1789.
24 Häferer, Koops, *Crowdwork als Arbeitnehmer*, op. cit., 1789.
25 Martina, *Crowdworker: Arbeitnehmer, Heimarbeiter oder Solo-Selbstständige?*, op. cit., p. 620.
26 Martina, *Crowdworker: Arbeitnehmer, Heimarbeiter oder Solo-Selbstständige?*, op. cit., p. 620.
27 Op. ult. cit.
28 Benkert, *Arbeitnehmerstatus von Crowdworkern*, in NJW-Spezial 2021, 306, 307.
29 Fuhlrott, *Crowdworker ist Arbeitnehmer bei engmaschigen Auftragsvorgaben*, in GWR 2021, 211; Thüsing, Hütter-Brungs, *Crowdworking: Lenkung statt Weisung – Was macht den Arbeitnehmer zum Arbeitnehmer?*, in NZA-RR 2021, 231; 234 f.
30 Thüsing, Hütter-Brungs, *Crowdworking: Lenkung statt Weisung – Was macht den Arbeitnehmer zum Arbeitnehmer?*, op . cit., p. 234 f.; similarly Eckert, Reinbach, *Bundesarbeitsgericht zur Arbeitnehmereigenschaft von Crowdworkern – Auswirkungen auf die Gig Economy?*, in GWR 2021, 45, 47 as well as Köllmann, *Wenn der ‚Spieltrieb' ein Arbeitsverhältnis begründet – Crowdworker können Arbeitnehmer sein*, in SPA 2021, 94, 95.
31 See in particular Däubler, Klebe, *Crowdwork: Die neue Form der Arbeit – Arbeitgeber auf der Flucht?*, in NZA 2015, 1032, 1035; Schubert, *Neue Beschäftigungsformen in der digitalen Wirtschaft – Rückzug des Arbeitsrechts?*, in RdA 2018, 200, 204; the same again on the decision of the LAG München *Schubert*, (Fn. **Error! Bookmark not defined.**), p. 253.

(Bundessozialgericht) recently adopted a broad interpretation of the concept of being bound by instructions within the meaning of section 7(1) sentence 2 of the Social Code IX (SGB IX), according to which services of a higher nature, where there is actually no bound by instructions in the narrower sense (e.g. chief physicians (*Chefärzte*) in hospitals) can also fall under the social law notion of employee if the employer's right to issue instructions is "refined" by a "functionally serving participation in the work process".[32]

It is also not possible at this point to address the key issues paper of the Federal Ministry of Labour and Social Affairs ("BMAS") "Fair Work in the Platform Economy",[33] which provided for new protection rights for solo self-employed persons in the platform economy and, in many places, assumed that platform workers should not be qualified as employees under the current legal framework. On the other hand, the legally non-binding key points paper provided that the BMAS "will introduce" a burden of proof regulation in favour of platform workers, according to which the burden of proof for the non-existence of an employment relationship should be transferred to the platform operator if the platform worker presents indications for the existence of an employment relationship.

[32] BSG, 4 April 2018 – B 12 KR 51/17 B, NZS 2018, 592; BSG, 28 June 2018 – B 12 R 11/18 R, NZS 2019, 303.

[33] BMAS, *Eckpunktepapier Faire Arbeit in der Plattformökonomie*, published 27 November 2020, available at: https://www.bmas.de/SharedDocs/Downloads/DE/Pressemitteilungen/2020/eckpunkte-faire-plattformarbeit.pdf?__blob=publicationFile&v=1.