

SOCIAL SECURITY COORDINATION AND PLATFORM WORK

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PLATFORM WORK AND SOCIAL SECURITY COORDINATION: A TOPIC OF CONCERN

EU Employment and Social Affairs ministers recognised the cross-border dimension of platform work in December 2020.

The European Commission has noted potential difficulties concerning cross-border situations of platform work as it regards:

- Tracing **where** platform work is performed.
- Uncertainty on **employment status**.
- Higher risk of **non-compliance** and **undeclared work**.

PLATFORM WORK AND SOCIAL SECURITY COORDINATION: FRAMING THE DISCUSSION

Uncertain interpretation of provisions for the determination of the legislation applicable to situations of non-standard work.

Key elements of the conflict rules	Non-standard features that may challenge these key elements
Employment status	Self-employment/hybrid categories
Location where work is exercised	Telework, crowdwork
Amount of work performed	Flexible/unstable employment
Registered office of the employer	Unclear employer
Residence	High mobility, work outside the EU

Platform work **combines** many non-standard features (and adds some new ones), resulting in **similar and new** challenges.

POTENTIAL ISSUES IN THE APPLICATION OF THE CONFLICT RULES TO PLATFORM WORKERS

Potential issues concerning:

- The uncertainty on platform workers’ employment status
- The assessment of where work is exercised
- The notions of ‘substantial’ and ‘marginal’ activities
 - General issues in the assessment of the relevant amount of work
 - ‘Marginal activities’
 - ‘Substantial activities’
- Identifying employers’ registered office or place of business
 - Identification of the employer
 - Identification of the registered office or place of business
- Residence
- Gaps in platform workers’ social security in the competent Member State

Potential avenues for the future

POTENTIAL ISSUES RESULTING FROM THE UNCERTAINTY ON PLATFORM WORKERS' EMPLOYMENT STATUS

The conflict rules rely on the applicable national legislation to define employment status, while there is uncertainty concerning:

- **Platform workers' employment status at the national level** (e.g. diverse judicial decisions, hybrid categories).
- **The potential impact of employment status reclassifications on the (retroactive) determination of the legislation applicable to platform workers.**

POTENTIAL ISSUES IN ASSESSING WHERE WORK IS EXERCISED

‘**Location**’ is “the place where, in practical terms, the person concerned carries out the actions connected with the activity” (*Partena*).

Potential challenges in situations with **no fixed location** (e.g. teleworkers, digital nomads, crowdworkers):

- Possibility of **sudden changes** in the legislation applicable.
- Risk of discrimination of workers (e.g. based on their country of residence).

POTENTIAL ISSUES IN INTERPRETING THE MEANING OF ‘SUBSTANTIAL’ AND ‘MARGINAL’ ACTIVITIES

General issues in the assessment of the relevant amount of work

- The situation taken into account for the assessment under Art. 13 Reg. 883/04 is the one **projected for the following 12 months** (Art. 14(10) Reg. 987/09). Employment history may be also considered (practical guide).
- Requirement of **normal** performance of activities in multiple MS.
- **Continuation** of legislation applicable in on-demand work.
- Flexibility in the assessment during the Covid-19 pandemic.

Platform work is characterised by its **lack of foreseeability** and its workers’ sometimes **inconsistent** employment history.

POTENTIAL ISSUES IN INTERPRETING THE MEANING OF ‘SUBSTANTIAL’ AND ‘MARGINAL’ ACTIVITIES

‘Marginal activities’

Practical guide: Permanent activities that are **insignificant** in terms of economic return or time. Indicators:

- **Less than 5%** of all **working time and/or remuneration**.
- **Nature** of the activities (e.g. second occupation).

Challenges brought by platform work: Potential **high mobility** and **easiness of access to work** enabled by platforms (e.g. GlovoPass).

POTENTIAL ISSUES IN INTERPRETING THE MEANING OF ‘SUBSTANTIAL’ AND ‘MARGINAL’ ACTIVITIES

‘Substantial activities’

Art. 14(8) Reg. 987/09:

- A **quantitatively** substantial part of all activities.
- Indicator: A share of at least 25% of all **remuneration and/or working time** (plus turnover, number of services and/or income in case of self-employed activities) in the framework of an **overall assessment**.

Challenges brought by platform work: Lack of foreseeability, **work fragmentation** and risk of **undeclared (digital) work**.

POTENTIAL ISSUES IN LOCATING THE EMPLOYER'S REGISTERED OFFICE OR PLACE OF BUSINESS

Identification of the employer

The employer is “the entity which actually exercises authority” (AFMB) in practice (*Format*).

Challenges brought by platform work:

- **Contested employment status** of some platform workers.
- Digital labour platforms' often **complex corporate structure**.
- **End-users/recipients** of platforms' services might be considered **employers** under certain circumstances.

POTENTIAL ISSUES IN DETERMINING THE EMPLOYER'S REGISTERED OFFICE OR PLACE OF BUSINESS

Identification of the registered office or place of business

The place “where the **essential decisions** of the undertaking are adopted and where the **functions of its central administration** are carried out” (Art. 14(5a) Reg. 987/09).

Practical guide:

- List of **other potential indicators** (such as the location of administrative staff, recruitment and conclusion of contracts).
- If none of these indicators are enough for an assessment: The legislation of the registered office or place of business in the MS with the closest connection in terms of performance of work.

In platform work, key essential decisions (e.g. those concerning algorithm design, remuneration and hiring) might be exercised in different Member States.

POTENTIAL ISSUES LINKED TO RESIDENCE

Determination of the legislation applicable to persons **residing in a MS** and **performing work outside the EU for a company based in a MS** → Legislation of **MS of residence** (*SF*, Art. 11(3)(e) Reg. 883/04 -as opposed to *Aldewereld*, Reg. 1408/71-).

Platforms are sometimes characterised for their **international expansion** and mergers, as well as for their **centralised decisions** on key aspects (e.g. algorithm design).

Example: A person with permanent residence in Latvia, registered as an employee of the Swedish platform Foodora, and performing work for said platform in Canada.

POTENTIAL ISSUES CONCERNING GAPS IN SOCIAL SECURITY

The conflict rules rely on national legislation to define what is an employed or self-employed activity (*Kits, Franzen II*), which is typically related to some social security schemes' scope.

Differences in social security schemes' scope among Member States may result in situations in which a person is **not** protected concerning certain risks under the legislation of the competent MS, while she/he would be protected under the legislation of the country of residence (see *Bosmann, Franzen, Van den Berg*).

Partial or no social security coverage in certain cases of marginal platform work is allowed in some Member States.

POTENTIAL AVENUES FOR THE FUTURE

Access to platform work data as a result of the proposed Directive on platform work:

- Potential advantages.
- Privacy concerns.
- Potential fit with the Electronic Exchange of Social Security Information and the European Social Security Pass initiatives.

Potential use of **article 16 agreements** (e.g. in case of telework and when there is lack of protection under the law of the competent MS).

Thank you for your attention

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