

The Legal Status of Crowdworkers under German Law

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'The Gig Economy – Challenges for Labour Law'

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Reference

This presentation is based on:

Waas, B. (2017) 'Crowdwork in Germany' in Waas, Liebman, Lyubarsky and Kezuka (eds), *Crowdwork - A Comparative Law Perspective* (HSI Schriftenreihe - Volume 22: 142-186).



Agenda

Qualification of crowdworkers under German law – possible categories and the respective protection level

- The status of employee
- The status of employee-like person
- The status of homemaker

Future pathways

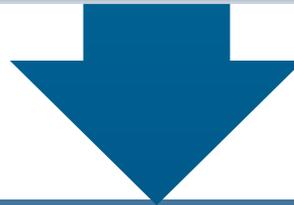
- The Homework Act as a ‘Model for Regulation’

The legal status of employee (1)

The concept of employee under German law

Employment contract requires the provision of dependent services

This dependence usually manifests itself in such a way that the employee is subjected to the instructions of another



Case law lays down the so-called typological method for qualifying specific legal relationships

Qualification of a contract depends on the 'overall picture'

The 'overall picture'

Personal dependence

- Employment relationship only differs from the legal relation of a freelance worker 'by the degree of personal dependence (...) in which the service provider finds himself'
- The extent of possible subservience to instructions is thus crucial for determination of personal dependence, but is only one of several distinctive features

Organisational dependence

- Integration into a business of another
- Dependence on the work organisation established by someone else and uses its instruments/equipment
- Requirement to collaborate with others

Qualification based on a risk assessment

- Existence or nonexistence of entrepreneurial risk
- Anyone who voluntarily bears this risk qualifies as self-employed
- Federal Labour Court is reluctant to apply this approach however

The legal status of employee (3)

The crowdworker – an employee of the crowdsourcer?

Problem: in the relationship between the crowdsourcer and the crowdworker the existence of a contract is often explicitly excluded

- Can the principle of so-called transgression of legal form (*Rechtsformverfehlung*) be applied in that case?
- No:
 - according to this principle an erroneous contract choice can be corrected
 - but the fact that the parties did not want to conclude a contract cannot be disregarded

Are there any indications for the existence of an employment relationship based on 'traditional' evidence?

Monitoring of performance:

- Platforms often monitor the performance of crowdworkers, or compare it to the performance of another crowdworker
- This aspect of control points towards the existence of an employment relationship
- Problem: Is that also true for the performance of microtasks?

Determination or pre-programming:

- Back to personal dependence?
- A sufficient level of subordination could be determined, when it could be said that it suffices when the conduct of the person providing services is already determined to a high degree in the contractual agreement.
- Is a parallel to the 'exercised right to instruct' justified?

Could the development of 'new' indicators contribute to the qualification of employment relationships?

Rating / disciplining:

- Many platforms provide the possibility to rate the crowdworker's services
- It is argued that this provides the possibility of 'disciplining', which affects her/his potential to carry out tasks in the future
- BUT:
 - 1) the possibility to rate the crowdworker is afforded after the services have been provided,
 - 2) the limitations for the prospects of concluding further contracts rather lead to an economic dependence, but not personal dependence,
 - 3) the 'disciplining effect' of ratings is not more pronounced than that of contractual penalties, which are often found outside employment relationships

How to deal with microtasks?

Is the existence of an employment relationship excluded because of the short-term nature of the work?

- Unclear on which requirement a minimum duration of an employment relationship could be based

Can the element of personal dependence even be present in these cases?

- Yes
- It is about the dependence during the performance of services
- However, it can be said that the extent of dependence decreases the shorter the duration of the task

The legal status of employee (7)

Platform and crowdsourcer as (joint) employers?

Possibilities under German law

- Joint status of employer involving several persons possible
-> so-called uniform employment relationship involving several employers
- Result: all are, e.g., liable for the payment of remuneration as joint and several debtors
- There is no requirement that the employers are part of the same group of companies etc. - a general associative of employers can be sufficient if it prevents the relationships from being treated separately
- A legal relationship in this regard can be based on the interpretation of the contract, OR be the result of imperative legal values of objective law

Boundaries under German law

- As regards the joint employer status of the crowdsourcer and the platform, this is not really a viable foundation, at least as long as it is unclear which imperative legal values indicate the existence of such a relationship

Challenges to the applicability of labour law provisions

Permanence and continuity

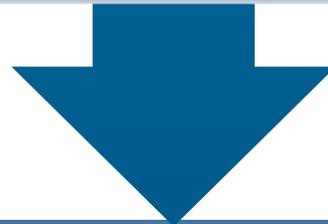
- Many labour law provisions require a certain continuity of the relationship - in the sense that they respond to risks that arise because of the permanence of these relationships or are very closely associated with this aspect
- E.g. Section 616, sentence 1 of the Civil Code
- Many labour law regulations can also only be sensibly applied if a certain continuity of the contractual relationship exists
- E.g., the continued remuneration in case of sickness, or the leave entitlement

Section 12a subs. 1 of the Act on Collective Bargaining Agreements

- Employee-like persons are persons who are “economically dependent and in need of social protection comparable to an employee (...), work on the basis of a contract of service or a contract for work and services for other persons, perform the services they are obliged to perform personally and essentially without collaboration with employees and a) predominantly work for one person or b) on average, more than half of the total remuneration they are entitled to for the performance of work is paid by one person”.

Employee-like persons are self-employed

The element of personal dependence that characterises employment relationships is replaced by the element of economic dependence



Economic dependence ...

... is usually given when the employee's livelihood is dependent on the utilisation of her/his labour and on the income s/he receives from the tasks s/he carries out for the contractual partner

Economic dependence

S/he can work for several clients if s/he predominantly works for one of them and the ensuing remuneration represents a decisive part of her/his livelihood

The social status must be equivalent to that of an employee in terms of the need for protection

The legal status of employee-like person (4)

The crowdworker – an employee-like person?

Crowdworkers are often committed to a single platform in practice

... contributing to qualifying as an employee-like person, if the income of the crowdworker is derived from an existing contractual relationship between the crowdworker and the platform



Crowdworkers regularly perform services for very different firms

... leading to difficulties in proving economic dependence on one firm



German law recognises the possibility of pooling several independent clients to represent one single client

... not leading further when a crowdworker works for several firms via the platform

The legal status of employee-like person (5)

Applicable provisions

Employee-like persons
are anyway only entitled to a minor share
of the rights of employees

No protection against
dismissal, but entitlement
to paid annual leave, and
applicability of safety at
work regulations and anti-
discrimination laws

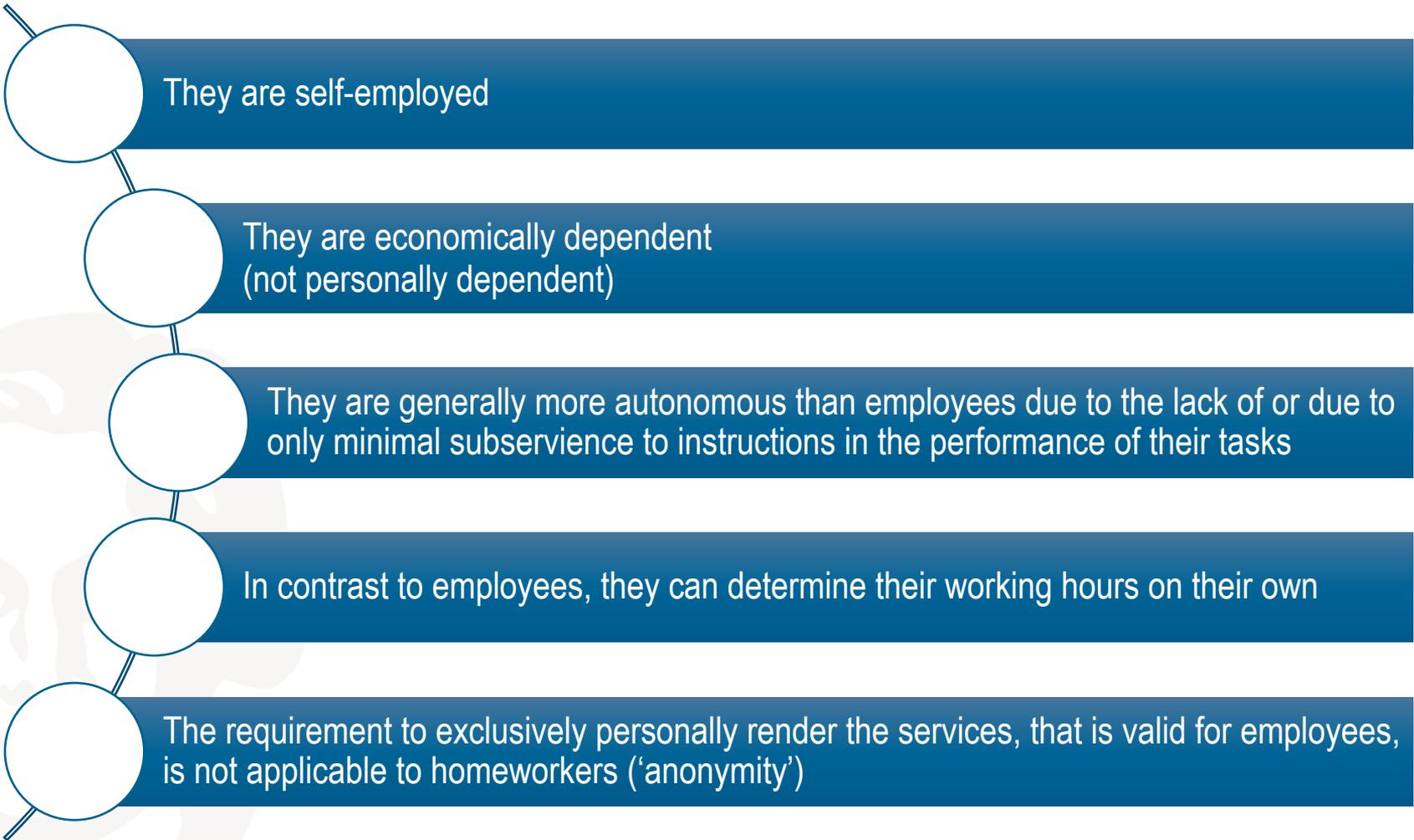
It is discussed whether they
benefit from limitations of
liability

Section 2 subs. 1, sentence 1 of the Homework Act

- A homemaker "works in a work place of his choosing (own home or business premises of their choosing), alone or with family members (...) for profit-making purposes (...), but surrenders the use of the work results to the directly or indirectly contracting entrepreneur".

The legal status of homemaker (2)

The concept of homemaker under German law



The legal status of homemaker (3)

The concept of homemaker under German law

Economic dependence - Does the income ratio that is fixed in Section 12a of the Act on Collective Bargaining Agreements for employee-like persons need to be applied to homeworkers as well?

Legal literature considers Section 12a not to be generalisable

An analysis of the case law of the Federal Labour Court reveals that verification of economic dependence is not necessarily linked to the requirements stipulated in Section 12a

It can even be demonstrated that economic dependence of a homemaker differs fundamentally from that of an employee-like person

The legal status of homemaker (4)

The protection of homeworkers under German law



Special working time protection

- The volume of work shall be distributed equally among the workers (Section 11 subs. 1 of the Homework Act)

Special regulations on remuneration

- Transparency through the obligation to disclose a list of fees (Section 8 subs. 1 of the Homework Act)

Special attention to collective regulations (Section 17 subs. 1 of the Homework Act)

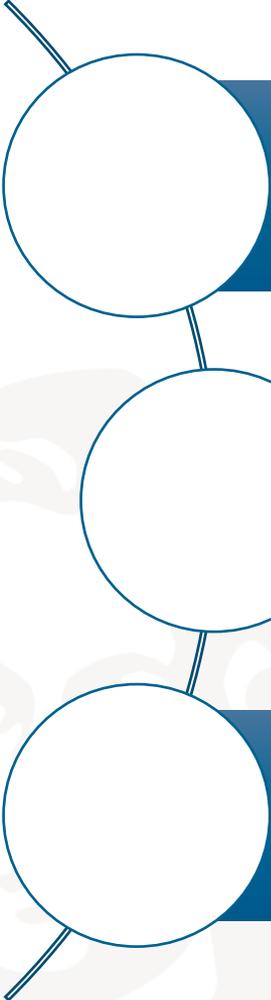
Special protection against dismissal

- Protection of homeworkers from "famishment" (Sections 29a et seq. of the Homework Act)

Principal's obligation to keep lists of all homeworkers s/he employs (Section 6, sentence 1 of the Homework Act)

The legal status of homemaker (5)

The protection of homeworkers under German law



The Works Constitution Act

Sections 10 et seq. of the Act on Continued Remuneration

Sections 2, sentence 2 and 12 of the Federal Vacation Act

The legal status of homemaker (5)

The crowdworker – a homemaker?

Acting "on behalf of" another (Section 2 subs. 1 of the Homework Act)

- Case law recognises that "neither the duration or the amount of work nor the income earned are of significance for the assumption of homeworking"
- BUT hardly debatable that we cannot speak of homeworking if only a single assignment is issued

Establishment of a homeworking relationship does not constitute a commitment to perform work

- In most cases, it might be difficult to claim that a similar legal framework could exist between the crowdsourcer and the crowdworker

Qualification of platforms as 'intermediaries'?

- Section 2 subs. 3 of the Homework Act contains legal definition – "a person who without being an employer passes on work that was assigned by entrepreneurs to homeworkers"
- BUT intermediaries are themselves considered by the Homework Act to potentially be in need of protection

Homeworkers and crowdworkers - shared characteristics:

- certain degree of anonymity
- perform their work in a place of work of their own choosing
- (relatively) free organisation of working time
- performance must be embedded in framework agreements
- no 'company community' exists