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Federal Supreme Court Decision in the Uber Case

Recently, the Federal Supreme Court issued a decision in the Uber case. Whilst this verdict partially clarifies some questions and leads to more legal certainty, other essential questions (still) remain unanswered.

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The Federal Supreme Court confirms the Decision of the Lower Court

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Uber Pop drivers are still not considered employees of Uber Switzerland GmbH. The core question – whether or not they are to be regarded as self-employed or employed – remains unanswered. In its decision of 29 March 2021[1], the Federal Supreme Court confirms the Social Insurance Court of the Canton of Zurich's verdict of 16 September 2020 which states that Uber Switzerland GmbH is not obliged to pay social security contributions for Uber Pop drivers.

Background

The Social Insurance Institution of the Canton of Zurich (Compensation Office) stated in its order of 16 August 2019 that Uber Pop drivers are considered gainful employees of the Netherland based Uber group company, Rasier Operations B.V., and that Uber Switzerland GmbH shall be responsible for social security contribution payments as a group entity on its behalf. Furthermore, the Compensation Office obliged Rasier Operations B.V. as employer and/or Uber Switzerland GmbH as responsible party to pay social security contributions including ancillary costs adding up to more than CHF 4 million as well as default interest of approximately CHF 990,000 for the year 2014. In response to the objection raised against this order by Rasier Operations B.V. and Uber Switzerland GmbH, the Compensation Office partially reconsidered its order and slightly reduced the social security contributions and default interest as stated in its decision on objection of 3 March 2020, but otherwise rejected the objection.

Rasier Operations B.V. and Uber Switzerland GmbH lodged a joint appeal with the Social Insurance Court of the Canton of Zurich against this decision on objection. The Social Insurance Court decided to deal separately with the appeal of Rasier Operations B.V. and Uber Switzerland GmbH and split the joint appeal. In its judgment of 16 September 2020, the Social Insurance Court ruled in favor of Uber Switzerland GmbH to the extent that it overturned the decision on objection of the Compensation Office of 3 March 2020 as far as Uber Switzerland GmbH is concerned. The Social Insurance Court determined that Uber Switzerland GmbH is not liable for any social security contributions.

The Compensation Office appealed against this decision of the Social Insurance Court with the Federal Supreme Court and requested in its main claim that the decision of the lower court be set aside and the objection decision of 3 March 2020 be confirmed.

Uber Switzerland GmbH is not considered as Employer

Whether or not Uber Switzerland GmbH was the employer of the Uber Pop drivers was not subject of the proceedings. The Compensation Office had never suggested this. In its initial order, the Compensation Office had already qualified the Rasier Operation B.V. as actual employer. Therefore, the conclusion of the lower court that Uber Switzerland GmbH was not the employer of the Uber Pop drivers was binding to the Federal Supreme Court and no further examination was required.

The Federal Supreme Court merely, but nevertheless, had to examine the question of whether Uber Switzerland GmbH as an affiliated entity of Rasier Operations B.V. is obliged to pay social security contributions on behalf of the actual employer.

Considerations of the Federal Supreme Court

The Federal Supreme Court's considerations' starting point is based on Art. 12 para. 2 Old-Age and Survivors Insurance Act (OASIA). This article stipulates that all employers who have a formal establishment in Switzerland or who employ compulsorily insured persons in their household are liable for social security contributions. Based on this, the Federal Supreme Court considered that the obligation to pay contributions is exclusively linked to the actual employer and any branch office or actual formal establishment of the employer, but not to any affiliated separate legal entities. The Federal Supreme Court particularly pointed out that this provision does not create multiple obligors to pay contributions beyond the actual legal entity.

Obviously, Uber Switzerland GmbH has its own legal entity separate from the one of Rasier Operations B.V. It is also evident to the Federal Supreme Court that the Uber Pop drivers were never contractually employed by Uber Switzerland GmbH; and therefore, they are not to be qualified as employees of Uber Switzerland GmbH. According to the Federal Supreme Court, the current legal situation does not provide any scope for creating a factual establishment of the actual employer. The legal independence of legal entities must be respected, except if the structure is used abusively. This does not seem to be the case of the structure used by Uber.

Rasier Operations B.V., and not Uber Switzerland GmbH, is the actual employer of the Uber Pop drivers. As solely the employer (including any formal branch office or establishment of such legal entity) is obliged to pay contributions, the Federal Supreme Court shares the opinion that the question whether Uber Switzerland GmbH is to be considered as a de facto establishment of Rasier Operations B.V. may remain open as not relevant for the case. Either way, according to the Federal Supreme Court and to Art. 12 para. 2 OASIA, Uber Switzerland GmbH cannot be held liable for contribution payments as it is neither the actual employer nor a formal establishment.

Open Questions

The Federal Supreme Court clearly expressed that in the in this case the focus lies on Uber Pop's service. Uber Pop offers a "cost-covering driver service" which is no longer available in Switzerland. Given this background, the Federal Supreme Court even questioned whether the services of Uber Pop drivers can be regarded as a gainful employment according to the OASIA.

The question whether the Uber Pop service can be considered as a gainful employment and if so, would fall into the category of employment or self-employment was also left unanswered. Finally, the Federal Supreme Court left open the question of the status of Rasier Operations B.V. as a possible employer given the pending cases in cantonal courts.

Conclusion

Although important questions regarding the social security treatment of Uber drivers in particular and platform work in general remain unanswered, the Federal Supreme Court clarifies an important sub-question in this dispute. It strictly follows the principle that only the employer is obliged to pay social security contributions and clearly rejects the transfer of this obligation to other group companies.

This is only logical: Uber Switzerland GmbH only provided marketing services and local support for various companies belonging to the group controlled by Uber International Holding B.V. There was no direct contractual relationship between the Uber Pop drivers and Uber Switzerland GmbH. The Federal Supreme Court's decision clarifies that the corporate law relationships must be observed, also from a social security law perspective.

The decision of the Federal Supreme Court leads to more legal certainty. The fact that social security authorities must consider the legal independence of subsidiaries provides more security for companies and their structuring in an international context.

Endnotes

1 9C_692/2020 dated 29 March 2021 (to be published as leading case).

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