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CONTEMPORARY FORMS OF WORK WITH A DIGITAL FEATURE IN PRIVATE INTERNATIONAL LAW*

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ABSTRACT

Digitalization has enabled the rapid development of the gig economy and changed the entire paradigm in such a way that through digitalization people are increasingly achieving their primary employment. As a result, there is a frequent occurrence of the phenomenon of digital nomads and platform workers. Although initially conceived as freelance jobs, in certain cases, the legal relationships of digital nomads or platform workers take on the characteristics of an employment relationship. To circumvent fiscal and labour obligations, digital nomads or platform workers are often defined in contracts as self-employed individuals or independent contractors, resulting in a deprivation of labour rights. Consequently, a challenge arises for European private international law in terms of the correct characterization regarding the legal relationship and, subsequently, the application of the appropriate conflict of law rule to determine the applicable law.

Keywords: *applicable law, characterization, digitalization, digital nomads, platform work, private international law*

1. INTRODUCTION

The development of information and communication technologies has caused changes in various spheres of social life. The exception to the above is not even the field of work in which digitalization has contributed to a paradigm shift in labour

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relations with the emergence of atypical forms of work. Although the gig economy as a phenomenon has been present for a long time, due to the flexibility of the contractual conditions for both contracting parties, it has taken on a completely new dimension with digitalization. This new dimension of the gig economy is most evident in the field of digital labour platforms, which use digital technologies to connect workers and clients to perform individual tasks, that is on a per task basis.[1] Parallel to that, also with ubiquitous digitization, the phenomenon of digital nomads is also developing, but with the essential feature of international mobility of service providers.

In this sense, the emergence of platform workers and digital nomads presents new challenges to private international law. The key problem is the proper characterization of the legal relationship between platform workers / digital nomads and the other contracting party. Is it an employment relationship or some other contractual relationship? Namely, the work of digital nomads/platform workers can be characterized as an employment relationship or the work of a self-employed person. However, in the gig economy it is common practice to classify workers as service providers rather than employees in contracts.[2] According to the European Commission's estimate, in 2021 more than 28 million people worked for digital work platforms, and it is estimated that by 2025 that number will reach 43 million people. [3] However, the European Commission also estimates that at least 5.5 million people are misclassified as "self-employed".[4] As a result of the aforementioned misclassification, "self-employed" persons are deprived of numerous labour rights inherent in European legal tradition that they would have enjoyed if their status had been properly classified as an employment relationship.

Besides proper characterization, an additional challenge encountered in private international law pertains to the localization of legal relationships with international element. This challenge is particularly pronounced when dealing with platform workers and digital nomads, wherein a notable characteristic is their mobility facilitated by digital technologies. Consequently, these individuals can carry out their work from various locations worldwide, changing them frequently. Hence,

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1 Van Calster, G., *Of giggers and digital nomads – what role for the HCCH in developing a regulatory regime for highly mobile international employees*, in: John, T., Gulati, R., Köhler, B. (eds.), The Elgar Companion to the Hague Conference on Private International Law, Edward Elgar Publishing, Cheltenham and Northampton, 2020, p. 464.

2 *Ibid.*

3 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Better working conditions for a stronger social Europe: harnessing the full benefits of digitalisation for the future of work COM/2021/761 final, pp. 5-6.

4 *Ibid.*

it is of importance to localize the legal relationships involving platform workers/ digital nomads and determine the actual seat (*situs*) of such relationships. This is essential for the correct determination of the applicable law, considering that these individuals have the ability to frequently change their work locations.

Therefore, it arises as a research question, under what assumptions can platform workers and digital nomads be considered employees in the sense of European private international law (EU PIL)? Accordingly, this contribution aims to: 1) determine the legal status of platform workers and digital nomads in accordance with the EU PIL; and 2) determine applicable law for legal relationships involving platform workers and digital nomads, under the hypothesis that it is an employment relationship.

To address the aforementioned issues and achieve the research objectives, this contribution will first define the concepts of platform work and digital nomadism. In the subsequent step, the characterization of legal relationships involving platform workers and digital nomads will be examined to determine the conditions under which they can be classified as employees within the context of EU PIL. Lastly, this contribution will consider questions pertaining to applicable law for legal relationships involving platform workers and digital nomads, assuming that they involve individual employment contracts.

Certainly, matters of jurisdiction in disputes involving platform workers or digital nomads are also deserving of attention. However, given the scope of this topic, questions of jurisdiction will be addressed in future research, while this contribution primarily focuses on issues related to applicable law.

2. DEFINING THE CONCEPTS OF PLATFORM WORKERS AND DIGITAL NOMADS

The emergence of platform work signifies a novel form of labour, whereby digital infrastructure facilitates the connection between the demand and supply of specific services, while also organizing their execution through platform guidelines and user feedback.[5] Moreover, algorithmic governance plays an increasingly ubiquitous role in terms of a substitute for conventional supervision by the employer.[6] The fundamental characterization of platform workers is considered from the perspective of the location of their work. Thus, platform workers are distinguished

[5] Aloisi, A., *Platform Work in the EU: Lessons learned, legal developments and challenges ahead*, European Commission, Brussels, 2020, p. 1.

[6] *Ibid.*

based on whether they perform offline activities or online activities.[7] Offline activities of platform workers pertain to providing on-demand services through an application, typically involving services such as transportation, delivery, or household work. These activities, however, require work to be carried out in a physical or geographically specific location.[8] On the other hand, platform workers engaged in online activities perform their work exclusively within a virtual environment, irrespective of the geographical location of their work. This category of work is commonly referred to as „crowdwork".[9]

In the context of EU PIL and platform work, according to *Vukorepa*, the following typology of performing platform work with a cross-border element is possible: 1) the platform worker performs work from one Member State for the platform or a user in another Member State; 2) the platform worker physically relocates to another Member State; and 3) the platform worker is simultaneously employed in multiple Member States.[10] In general, based on their function, two types of digital platforms can be distinguished. The first category of digital platforms is those that provide information society services.[11] The function of such platforms is solely to mediate between users, i.e., between service providers and service recipients.[12] In simplified terms, the platform fulfills its purpose by connecting the service provider and the service recipient, who then directly enter into a contract.[13] The opposite category of digital platforms is those platforms that, in addition to their mediating function, also perform additional functions such as payment process-

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7 Boto, J. M. M., *Collective Bargaining and the Gig Economy: Reality and Possibilities*, in: Boto, J. M. M. and Brameshuber, E. (eds), Collective Bargaining and the Gig Economy, Hart Publishing, Oxford, 2022, pp. 3-4.

8 Weiss, M., *The platform economy. Tha main challenges for labour law.*, in: Mella Mendez, L. (ed.), Regulating the Platform Economy. International Perspectives on New Forms of Work, Routledge, Oxon and New York, 2020, p. 12.

9 Boto, *op. cit.*, note 7, pp. 3-4.

10 Vukorepa, I., *Prekogranični platformski rad: zagonetke za slobodu kretanja radnika i koordinaciju sustava socijalne sigurnosti*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 70, No. 4, 2020, pp. 489-490.

11 According to art. 1(1)(b) of the Directive (EU) 2015/1535 of the European parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification), that kind of service is normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

12 Tereszkiewicz, P., *Digital Platforms: Regulation and Liability in EU Law*, in: DiMatteo, L. A., Cannarsa, M., and Poncibò, C. (eds) The Cambridge Handbook of Smart Contracts, Blockchain Technology and Digital Platforms, Cambridge University Press, Cambridge, 2019, p. 146.

13 Gruber-Risak, M., *Classification of Platform Workers: A Scholarly Perspective*, in: Gyulavári, T. and Menegatti, E. (eds), Decent Work in the Digital Age, European and Comparative Perspectives, Hart Publishing, Oxford, 2022, p. 86.

ing and monitoring of the services provided by the service provider.[14] In this case, a tripartite legal relationship arises between the platform worker, the platform, and the end user.[15] In the context of platform workers in legal situations with international characteristics, this contribution will consider the second category of digital platforms. In such a tripartite relationship, attention is drawn to the specific relationship between the platform worker and the platform itself, given the supervision exercised by the platform over the worker's activities. This raises a legal question of whether the platform worker is truly a self-employed individual who autonomously makes decisions about how to conduct their business activities, as often classified by the contracting parties, or whether the platform worker is an employee of the digital platform, regardless of the classification of the legal relationship between the contracting parties.[16]

On the other hand, the concept of digital nomads may or may not align with the characteristics of platform workers. The concept of digital nomads can be simplest defined as a lifestyle that combines the advantages of modern information and communication technologies with continuous mobility worldwide.[17] Thanks to a combination of gig work and digital platforms, digital nomads work in various locations around the world.[18] For digital nomads, a stable Internet connection is crucial, as they typically deliver their work results, performed from various parts of the world, via the Internet.[19] In the context of private international law, it is characteristic of the concept of digital nomads that they work, either as employees or self-employed individuals, from the country where they are temporarily located for an employer or client located in another country, rather than in the host country.[20] It is incorrect to equate digital nomads who are in an employment relationship with an employer in another country solely because they perform their work in a different country from where the employer is located. In the case of posted workers, the initiative for work in another country always comes from the employer with a strictly limited duration, representing temporary work in

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14 Tereszkiewicz, *op. cit.*, note 12, p. 146-147.

15 Gruber-Risak, *op. cit.*, note 13, p. 86.

16 Weiss, *op. cit.*, note 8, pp. 12-13.

17 Chevtaeva, E., Denizci-Guillet, B., *Digital nomads' lifestyles and coworkation*, Journal of Destination Marketing & Management, Vol. 21, 2021.

18 Richter, S. and Richter, A., *Digital Nomads*, Business & Information Systems Engineering, Vol. 62, 2020, p. 79.

19 Brown, N., *Law, Jurisdiction and the Digital Nomad: Why we need more appropriate mechanisms for determining sovereignty over disputes*, Computer Law Review International, Vol. 16, No. 2, 2015, p. 38.

20 Bruurs, S., *Digital Nomads and the Rome I Regulation: An Overview*, Global Workplace Law & Policy, 2022, p. 2, [https://global-workplace-law-and-policy.kluwerlawonline.com/2022/12/14/digital-nomads-and-the-rome-i-regulation-an-overview/], Accessed: 15 April 2023

the host country.[21] Of course, in the case of an employment relationship, digital nomadism will only be possible if the employee and the employer agree on the freedom to choose the place of work, meaning that the physical presence of the employee at a specific location determined by the employer is not expected. When choosing their location, digital nomads typically opt for exotic destinations or even combine stays in one country during the winter months with stays in another country during the summer months.[22] It should be noted that it would be incorrect to equate digital nomads with tourists. Digital nomads continuously balance between professional productivity and travel.[23]

Given the observed phenomenon of digital nomads, many European and other countries have introduced digital nomad visas that allow digital nomads and their family members to have a longer lawful stay of a temporary nature in the host country. However, typically, these visas do not grant access to the domestic labour market because digital nomads are expected to carry out remote work using digital technology.[24] As a result, various legal definitions of digital nomads can be found in different legislations. For example, Croatian immigration law defines digital nomads as third-country nationals (non-EU citizens) who are employed or perform work through communication technology for a company or their own company that is not registered in Croatia.[25] An additional requirement under Croatian law is that digital nomads do not provide services to employers in Croatia.[26] A similar legal definition can be found in Spanish law, which refers to digital nomads as „international teleworkers". The only difference compared to the previous definition under Croatian law is that in Spain, digital nomads who engage in professional activities are authorized to work for companies located in Spain as long as that work does not exceed 20% of the total professional activity of the digital nomad.[27]

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21 *Ibid.*

22 Nash, C. *et al*, *Digital Nomads Beyond the Buzzword: Defining Digital Nomadic Work and Use of Digital Technologies*, in: Chowdhury, G., *et al* (eds.), Transforming Digital Worlds. iConference 2018. Lecture Notes in Computer Science, Vol. 10766, Springer, Cham, 2018, p. 213.

23 *Ibid.*

24 Bruurs, *op. cit.,* note 20, p. 3.

25 Art. 3 para. 1 subpara. 43 of the Crotian Immigration Act, Official Gazette No. 133/20, 114/22, 151/22.

26 *Ibid.*

27 Art. 74 bis of Law 28/2022 for the promotion of the ecosystem of emerging companies, Official Gazette No. 306.

3. CHARACTERIZATION OF THE INDIVIDUAL EMPLOYMENT CONTRACT IN EUROPEAN PRIVATE INTERNATIONAL LAW

The characterization of a specific legal relationship in private international law is of fundamental importance. Characterization requires that the facts characteristic of a particular legal relationship be categorized into one of the legal categories in order to correctly apply conflict of law rules and, consequently, the relevant substantive law.[28] Individual employment contracts fall under the protective categories of legal relationships for which specific rules on jurisdiction and the determination of applicable law are prescribed. The purpose of such rules is to protect employees as the weaker party in an asymmetric legal relationship, thus implementing the principle of the protection of the weaker party, as one of the fundamental principles of EU PIL for contractual relationships.[29] The fundamental rules of EU PIL concerning the protection of employees as the weaker party are contained in Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations[30] (hereinafter: Rome I Regulation) and Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[31] (hereinafter: Brussels I Recast Regulation). Although the Rome I and Brussels I Recast Regulations provide more favorable rules in favor of employees for determining applicable law and the competent court for individual employment contracts, these regulations do not include a specific legal definition of individual employment contracts, employees, or employers. The concept of an individual employment contract is of equivalent scope under the Rome I Regulation and the Brussels I Recast Regulation.[32]

The Court of Justice of the European Union (CJEU) has considered the concept of an individual employment contract in several PIL cases. As essential characteristics of an employment relationship, for the purposes of applying provisions on individual employment contracts, the CJEU has established the following:

[28] Van Calster, G., *European Private International Law*, Hart Publishing, Oxford and Oregon, 2013, pp. 5-6.; *See also:* Sajko, K., *Međunarodno privatno pravo*, Narodne novine, Zagreb, 2009, p. 177.

[29] Babić, D. A. and Zgrabljić Rotar, D., *Mjerodavno pravo za ugovorne odnose*, in: Josipović, T. (ed.), Privatno pravo Europske unije – Posebni dio, Narodne novine, Zagreb, 2022, p. 220.

[30] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177.

[31] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L 351.

[32] Recital No. 7 of the Rome I Regulation.

1) the establishment of a long-term connection that partially places the worker within the organizational framework of the employer; and 2) the fact that one person, over a certain period of time, performs tasks for another person according to their instructions, in exchange for remuneration.[33] Identical characteristics of an employment relationship, in terms of the hierarchical relationship between the employer and the employee, the existence of subordination, and the presence of remuneration as consideration, have been established in other CJEU cases where the interpretation of secondary EU legislation was at issue.[34]

Furthermore, as previously mentioned, contracts entered into between platform workers/digital nomads and other contracting parties often contain a contractual clause that classifies service providers as self-employed individuals or independent contractors. This raises the question of whether such a contractual clause restrains a different classification of service providers under EU PIL. Such provisions do not prevent a different characterization of the legal relationship under EU law and consequently under EU PIL. This stance has been adopted by the CJEU, explaining that the formal classification of workers as self-employed individuals under national law does not preclude the classification of individuals as workers if their independence is solely conceptual.[35]

It is also worth noting that the characterization of a specific legal relationship as an employment relationship within the framework of EU PIL does not depend on the formal conclusion of a contract. The fact that the contracting parties have not formally entered into a contract does not affect the existence of an employment relationship under EU PIL, and therefore does not exclude the application of rules determining the applicable law and jurisdiction for individual employment contracts.[36] The impact of the absence of a formally concluded employment contract and the legal consequences thereof are assessed in accordance with the applicable substantive law to which conflict of law rules refer. Therefore, the concept of an individual employment contract in the context of PIL characterization of legal relationships involving platform workers/digital nomads should be interpreted autonomously in light of the case law of the CJEU, independent of national le-

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33 Case 266/85 Hassan Shenavai v Klaus Kreischer [1987] ECLI:EU:C:1987:11, para. 16.; Case C-47/14 *Holterman Ferho Exploitatie BV and Others v F.L.F. Spies von Büllesheim* [2015] ECLI:EU:C:2015:574, para. 41.

34 See: Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* [2014] ECLI:EU:C:2014:2411; Case C-692/19 *B v Yodel Delivery Network Ltd* [2020] ECLI:EU:C:2020:288.

35 Case C-256/01 *Debra Allonby v Accrington & Rossendale College* [2004] ECLI:EU:C:2004:18, para. 71. See also: Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* [2014] ECLI:EU:C:2014:2411, para. 35.

36 Case C-603/17 *Peter Bosworth and Colin Hurley v Arcadia Petroleum Limited and Others* [2019] ECLI:EU:C:2019:310, para. 27.

gal concepts, to ensure uniform application of EU PIL sources and predictability across all EU Member States.[37]

In the context of atypical forms of work with digital characteristics, the significance of determining the legal status of platform workers or digital nomads will be influenced by the relationship of the other contracting party in terms of control over the performance of work and its results.[38] In the context of digital platforms, such control is commonly exercised through reviews, where the end-user of the service assesses their satisfaction with the provided service.[39] Based on these reviews, as well as other predetermined parameters, the digital platform, through algorithmic management, makes crucial decisions that impact the position of the platform workers and conditions of their work.[40] Therefore, the control of the employer over the employee in the digitalized world takes on an entirely new dimension compared to the traditional employer's supervision over the quality and efficiency of an employee's work. Although platforms, in order to minimize legal and fiscal obligations, consider themselves strictly as intermediaries, the control they exert over the work of platform workers through algorithmic management and rating systems can be seen as a modern substitute for traditional subordination, which is a fundamental characteristic of an employment relationship.[41]

In the *Yodel*[42] case, which originally does not fall within the scope of EU PIL, the CJEU established a series of criteria to make a negative distinction between the concept of a self-employed person and the concept of a worker. The underlying assumptions for determining a genuinely self-employed person are that the person's independence is not fictitious, and there is no relationship of subordination.[43] If these assumptions are met, then a self-employed person cannot be classified as a worker, provided that the person is also discretionarily authorized: 1) to use subcontractors or substitutes to perform the service which he/she has undertaken to provide; 2) to accept or not accept the various tasks offered by his/her putative employer, or unilaterally set the maximum number of those tasks; 3) to provide his/her services to any third party, including direct competitors of the putative

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37 Van Calster, *op. cit.*, note 1, p. 475.

38 De Stefano, V., *Introduction: Crowdsourcing, the Gig-Economy and the Law*, Comparative Labor Law & Policy Journal, Vol. 37, No. 3, 2016, p. 4.

39 *Ibid*.

40 Bjelinski Radić, I., *Kritička promišljanja o prijedlogu Direktive o poboljšanju radnih uvjeta platformskih radnika*, Zbornik Pravnog fakulteta u Zagrebu, Vol.72, No. 6, 2022, p. 1472.

41 Naumowicz, K., *Some remarks to the legal status of platform workers in the light of the latest European jurisprudence*, Studia Z Zakresu Prawa Pracy I Polityki Społecznej, Vol. 28, No. 3, 2021, p. 179.

42 Case C-692/19 *B v Yodel Delivery Network Ltd* [2020] ECLI:EU:C:2020:288.

43 *Ibid.,* para. 45.

employer; and 4) to fix his/her own hours of 'work' within certain parameters and to tailor his/her time to suit his/her personal convenience rather than solely the interests of the putative employer.[44]

Considering the disparity of legal relationships with the performance of work with digital features, the characterizaton of legal relations within the framework of EU PIL might be facilitated in the future by the Directive of the European parliament and of the Council on improving working conditions in platform work (hereinafter: Platform Work Directive)[45]. The mentioned Directive is the result of the European Commission's recognition of the complexity of correctly determining the labour status of platform workers, as well as the phenomenon of false self-employment.[46] Consequently, an incorrect labour classification of the legal relationship, where one of the parties is a person working through a platform, can have consequences such as depriving that person of labour protections and other rights within the social security system.[47] The general aim of the Directive on platform work is to improve working conditions and social rights for individuals working through "digital labour platforms"[48].[49] This overarching goal should be achieved through the realization of the following specific objectives: 1) ensuring the appropriate employment status for individuals working through platforms based on their actual relationship with the platform; 2) ensuring fairness, transparency, and accountability in algorithmic management by platforms; and 3) increasing transparency, traceability, and awareness of developments in platform work while enhancing the enforcement of rules for all individuals, including those working cross-border through digital labour platforms.[50]

Ratione materiae, the Platform Work Directive establishes minimum rights that apply to individuals working in the EU through platforms, including those with employment contracts or considered to have employment contracts, or those in an employment relationship under national law, collective agreements, or practices

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44 *Ibid.*

45 Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work [2021] COM/2021/762 final.

46 Bjelinski Radić, *op. cit.*, note 40, p. 1472.

47 *Ibid.*

48 Pursuant to Art. 2(1)(1) of the Platform Work Directive, a digital labour platform is defined as „any natural or legal person providing a commercial service which meets all of the following requirements: (a) it is provided, at least in part, at a distance through electronic means, such as a website or a mobile application; (b) it is provided at the request of a recipient of the service; (c) it involves, as a necessary and essential component, the organisation of work performed by individuals, irrespective of whether that work is performed online or in a certain location".

49 Platform Work Directive., p. 3.

50 *Ibid.*

applicable in the Member States, taking into account the CJEU's jurisprudence.[51] *Ratione persone*, the Platform Work Directive applies to all individuals performing platform work, regardless of how their relationship is classified between the contracting parties.[52] In terms of territorial scope, the Platform Work Directive applies to digital labour platforms that organize work through platforms performed in the EU, irrespective of the location of their registered office and the law otherwise applicable.[53]

In the context of the discussion on the characterization of the legal relationship, it is important to note that the Platform Work Directive introduces a legal presumption of the existence of an employment relationship between the person working through a platform and the digital labour platform that supervises the work.[54] To achieve this presumption, the Platform Work Directive sets out a series of indicators that establish the platform's control over the person working through the platform. In defining these indicators, the European Commission was clearly inspired by the CJEU's decision in the *Yodel*[55] case.[56]

According to the Platform Work Directive, it is considered that there is control by the digital labour platform over the person working through the platform if at least two of the following conditions are met:

a) *„effectively determining, or setting upper limits for the level of remuneration;*

b) requiring the person performing platform work to respect specific binding rules with regard to appearance, conduct towards the recipient of the service or performance of the work;

c) supervising the performance of work or verifying the quality of the results of the work including by electronic means;

d) effectively restricting the freedom, including through sanctions, to organise one's work, in particular the discretion to choose one's working hours or periods of absence, to accept or to refuse tasks or to use subcontractors or substitutes;

e) effectively restricting the possibility to build a client base or to perform work for any third party".[57]

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[51] Art. 1(2) of the Platform Work Directive.

[52] Ratti, L., *A Long Road Towards the Regulation of Platform Work in the EU*, in: Boto, J. M. M. and Brameshuber, E. (eds), Collective Bargaining and the Gig Economy, Hart Publishing, Oxford, 2022, p. 50.

[53] Art. 1(3) of the Platform Work Directive.

[54] *Ibid.*, Art. 4(1).

[55] See *supra* notes no. 41-43.

[56] Bjelinski Radić, *op. cit.*, note 40, p. 1480.

[57] Art. 4(2) of the Platform Work Directive.

The legal presumption of the existence of an employment relationship is rebuttable, and the possibility of rebuttal can be exercised by both, the digital labour platform and the person working through the platform, in judicial and/or administrative proceedings.[58] In case the presumption of an employment relationship is challenged by the digital labour platform, it is worth noting that, in line with the principle *in favorem laboratoris*, the burden of proof lies with the digital labour platform.[59]

When the Platform Work Directive comes into effect, it will become an integral part of European substantive law and will consequently be implemented into the national legislation of EU Member States. Therefore, the question arises as to whether the conditions for establishing the legal presumption can serve as indicators for characterizing contractual relationships as individual employment contracts in which the parties are platform workers, as well as digital nomads if they work through a platform, in the context of EU PIL? The answer to this question should be affirmative. Indeed, in several cases, the CJEU has interpreted the term „employee" in the context of EU PIL in light of other Union legislative acts. In the *Holterman* case, the CJEU took the position that when determining the concept of an employee in the context of EU PIL, one should take into account the features of the term "worker" in accordance with primary and secondary EU law, referring to certain directives in the field of European labour law.[60]

Furthermore, in the proposal for the Platform Work Directive, it is stated that it applies to digital labour platforms that organize work through platforms performed in the Union, regardless of the place of business establishment of the platform and regardless of the law that would otherwise apply.[61] From this, it is evident that the exclusive criterion for the application of the provisions of the Platform Work Directive is that the work is carried out within the EU. Therefore, when characterizing legal relationships under EU PIL that involve platform work, a systematic interpretation of EU law should be applied, starting from the mentioned presumption, and at the conflict of laws level, characterize the legal relationship as an employment relationship. Additionally, the Platform Work Directive emphasizes that the legal presumption of the existence of an employment relationship applies in all relevant administrative and legal proceedings, and competent authorities are authorized to rely on such a legal presumption.[62]

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[58] *Ibid.,* Art. 5(1).

[59] *Ibid.*, Art. 5(2).

[60] Case C-47/14 *Holterman Ferho Exploitatie BV and Others v F.L.F. Spies von Büllesheim* [2015] ECLI:EU:C:2015:574, paras. 41-42.

[61] Art. 1(3) of the Platform Work Directive.

[62] Art. 4(1) of the Platform Work Directive.

In conclusion, an additional reason for applying the indicators of the existence of an employment relationship from the Platform Work Directive in terms of conflict of law characterization can be argued using the teleological method of interpreting EU law. The Treaty on the Functioning of the European Union, as one of its objectives in the field of social policy, defines the improvement of working conditions for workers.[63] The Platform Work Directive, at the substantive level, contributes to the protection of workers in the context of modern forms of work through digital labour platforms by introducing a presumption of the existence of an employment relationship, thereby achieving protection for workers as the weaker contracting party. Therefore, for consistency in the interpretation of EU law and to achieve the objectives of social policy, special conflict-of-law rules for individual employment contracts should also be applied, and the indicators from the Platform Work Directive should be considered in characterizing the employment relationships of platform workers.

4. APPLICABLE LAW

As previously mentioned, the Rome I Regulation provides special conflict of law rules for individual employment contracts with the aim of protecting workers as the weaker party in the contract. The reason for having special conflict of law rules for individual employment contracts lies in the vulnerability of employees due to their specific position in relation to the employer. In general contract law, parties are considered equal, which is expressed through the principle of coordination. On the other hand, in employment relationships, the principle of subordination comes into play. Under EU PIL, an employee is considered to be in a legally vulnerable position due to information asymmetry regarding the content of the applicable law.[64] Additionally, the vulnerability of employees can be attributed to economic and social subordination. Most employees depend on their work as the primary source of income, and employment contributes significantly to an individual's personal and societal fulfillment.[65]

The concept of "applicable law" under the Rome I Regulation refers to any law indicated by the conflict of law rule, regardless of whether it is the law of an EU Member State.[66] Therefore, it is possible in certain legal situations for the appli-

[63] Art. 151(1) of the Treaty on the Functioning of the European Union [2012] OJ C 326.

[64] Rühl, G., *The Protection of Weaker Parties in the Private International Law of the European Union: A Portrait of Inconsistency and Conceptual Truancy*, Journal of Private International Law, Vol.10, No. 3, 2014, pp. 343-344.

[65] *Ibid.*, pp. 344-355.

[66] Art. 2 of the Rome I Regulation.

cable law to be the law of a third country (non-EU). This is crucial in the context of platform workers and digital nomads, given the mobility that these atypical forms of work offer. Such a broad, *erga omnes* reach of the Rome I Regulation in private international law is referred to as the principle of universal application.[67]

In determining the applicable law for individual employment contracts, it is important to distinguish between subjective and objective applicable law. Subjective applicable law for individual employment contracts is the law chosen by the parties (*lex autonomiae*).[68] In cases where there is no party choice of applicable law or such a choice is invalid, objective applicable law is applied. Also, objectively applicable law is applied in cases where there is a party's choice of applicable law, but this chosen law provides the employee with a lower level of protection compared to the mandatory provisions of objectively applicable law.[69] When determining the objective applicable law, there are several steps. First and foremost, the objective applicable law is the law of the country where, or from which, the employee habitually carries out his work based on the contract (*lex loci laboris*).[70] If it is impossible to determine such a location, the objective applicable law becomes the law of the country of the engaging business.[71] However, regardless of these two previously mentioned objective connecting factors, the Rome I Regulation for individual employment contracts also includes an escape clause. This means that if, from all the circumstances of the case, it is clear that the individual employment contract is closely connected with a country other than the country where the employee habitually carries out his/her work or the country where the place of business is located, then the law of that other country shall apply.[72]

Before discussing the previously mentioned rules for determining the applicable law in the context of platform workers and digital nomads, it is important to note that there are contracts that will not be characterized as individual employment contracts within the meaning of EU PIL. For such general contracts, the general rules for determining the applicable law under the Rome I Regulation apply. This means that in the context of platform workers and digital nomads, legal relationships will be assessed according to the chosen law, and subsidiarily, according to the law of the country where the service provider has their habitual residence.[73]

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67 Sajko, *op. cit.*, note 28, p. 61.; *See also:* Art. 2 of the Rome I Regulation.

68 Art. 8(1) of the Rome I Regulation.

69 See *infra* note 78.

70 Rome I Regulation, Art. 8(2).

71 *Ibid.*, Art. 8(3).

72 *Ibid.*, Art. 8(4).

73 Cherry, M. A., *A Global System of Work, A Global System of Regulation?: Crowdwork and Conflicts of Law*, Tulane Law Review, Vol. 94, 2019, p. 36.

If the legal relationship in question cannot be characterized as a service contract, then it falls under the law of the country where the party who performs the characteristic performance has their habitual residence.[74] Additionally, in this case, the escape clause is present.[75]

4.1. Choice of law (*lex autonomiae*)

Considering that party autonomy is a fundamental principle in contemporary private law, the European legislator, through the Rome I Regulation, allows the parties to an individual employment contract to choose the law that will be applicable to their legal relationship.[76] However, such a choice of law by the parties is not unlimited.[77] In order to protect employees as the weaker party, the Rome I Regulation prescribes that the parties' choice of law cannot deprive the employee of the protection provided by mandatory provisions of the objectively applicable law that would have been applicable if the parties had not made a choice of law.[78]

In the context of platform workers who exclusively work in an online environment and digital nomads, choosing the applicable law would be the most desirable solution due to potential difficulties in localizing the place of work or changes in the work location. Such a choice of applicable law introduces predictability and stability into the legal relationship between the platform worker or digital nomad and the employer.[79] However, regardless of the chosen law, even if the initiative came from the employer, platform workers and digital nomads will always be guaranteed the protection of mandatory provisions of the objectively applicable law.[80]

In this regard, the court must first determine the law that would have been applicable if no choice of law had been made and determine the mandatory provisions from that law.[81] Then, in the next step, the court compares the level of protection that the employee enjoys based on those provisions with the level of protection

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74 *Ibid.*

75 Art. 4(3)(4) of the Rome I Regulation.

76 Kunda, I., *Međunarodnoprivatnopravni odnosi*, in: Mišćenić, E. (ed.), Europsko privatno pravo. Posebni dio., Školska knjiga, Zagreb, 2021, pp. 523-524.

77 Staudinger, A., *Article 8: Individual employment contracts*, in: Ferrari, F. (ed), Rome I Regulation, Pocket Commentary, Sellier European Law Publishers, Munich, 2015, p. 297.

78 Art. 8(1) of the Rome I Regulation.

79 Bruurs, *op. cit.*, note 20, p. 4.

80 Art. 8 of the Rome I Regulation.

81 Joined Cases C-152/20 and C-218/20 *DG and EH v SC Gruber Logistics SRL and Sindicatul Lucrătorilor din Transporturi v SC Samidani Trans SRL* [2021] ECLI:EU:C:2021:600, para. 27.

provided by the chosen law.[82] If the chosen law provides better protection, it is applied.[83] It is important to note that the objectively applicable law must meet two prerequisites to be applied despite the parties' choice of law. First, such provisions must be mandatory in character, and second, they must provide the employee with a higher level of protection than the chosen applicable law.[84] Therefore, mandatory provisions of the objectively applicable law will not be applied if they do not provide the employee with greater protection.[85] In the opposite situation, if the mandatory provisions of the objectively applicable law provide the employee with greater protection, these provisions are primarily applied, followed by other provisions of the chosen law. In this case, the phenomenon known as „law mix" occurs.[86]

Finally, it is important to consider the question of the validity of the choice of law when the applicable law, which will be a common occurrence, is proposed by the employer to the platform worker or digital nomad in the form of a standardized contract. Such a choice of applicable law is not problematic as long as the employee has freely agreed to such a contractual clause. CJEU has taken the position in the case of *SC Grbuer Logistics* that the Rome I Regulation does not prohibit the use of standard contractual clauses that the employer has previously drafted, and that the freedom to choose the law can be exercised by agreeing to such a contractual clause. It is not inherently problematic that the employer has drafted and included such a clause in the contract.[87]

4.2. Habitual place of work (*lex loci laboris*)

As previously mentioned, the objectively applicable law for individual employment contracts is the law of the country where, or from which, the employee habitually performs his work.[88] This connecting factor is primarily applied when the parties have not made a choice of law or when the choice of law is invalid. It is also applied when the mandatory provisions of the law of the country where

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[82] *Ibid.*

[83] *Ibid.*

[84] Sinander, E., *The Role of Foreseeability in Private International Employment Law*, Nordic Journal of Labour Law, Vol. 1, No. 1, 2023, p. 9.

[85] *Ibid.*

[86] Rühl, *op. cit.*, note 64, pp. 352-353.

[87] Joined Cases C-152/20 and C-218/20 *DG and EH v SC Gruber Logistics SRL and Sindicatul Lucrătorilor din Transporturi v SC Samidani Trans SRL*, *op. cit.*, note 81, para. 40.

[88] Art. 8(2) of the Rome I Regulation.

the employee habitually works provide a higher level of protection for the worker compared to the chosen applicable law. [89]

Determining the place of work should not present a significant obstacle in the context of platform workers who perform work at a specific physical location (on-demand; offline), such as delivery jobs, transportation, and household work. However, the situation is somewhat more complex in the context of platform workers whose work is exclusively carried out in an online environment, as well as digital nomads. In these cases, the results of the work are delivered solely in a digital environment (digital platform, cloud, email, etc.), without the need for physical work at a specific location. Since the work of such employees typically involves data entry, the applicable law should be the law of the country where the worker habitually performs data entry because that is where the essential content of the work is carried out. [90] However, in relation to platform workers who exclusively perform their work online, the habitual place of work as a connecting factor might be inappropriate due to the facilitation of social dumping. Specifically, employers from one country may be incentivized to hire platform workers from other countries with lower labour costs or lower levels of employee protection, who would perform online platform work in those countries. In such a scenario, the law of the habitual place of work would constitute the objectively applicable law. This would run contrary to the Rome I Regulation, which, among other things, adopts an anti-dumping approach in determining the applicable law for individual employment contracts.[91]

Furthermore, determining the place of work, in the context of platform workers and digital nomads, becomes more complex when there is a change in the place of work during the duration of the employment contract with the same employer. Especially in the context of the mobility of digital nomads, it is common for them to change the countries from which they work while the employment contract is in effect. In such cases, a change in the place of work as a connecting factor for determining the applicable law occurs. Consequently, such a change in the place of work raises the question of which law is applicable to the specific legal relationship. In terms of private international law, this is referred to as „*conflits mobiles*". [92] In the case of individual employment contracts, such a change is possible be-

[89] See *supra* chapter 4.1.

[90] Staudinger, *op. cit.*, note 77, p. 303.

[91] Bruurs, S., *Cross-border telework in light of the Rome I-Regulation and the Posting of Workers Directive*, European Labour Law Journal, Vol. 0, No. 0, 2023, p. 20.

[92] The rule of conflict of laws remains unchanged, but during the duration of a certain legal relationship, the facts on which the connecting factor is based change, which may result in a change in the applicable law. Only possible with variable connection factors. See: Sajko, *op. cit.*, note 28, p. 248-249.

cause the habitual place of work is a changeable connecting factor. On the other hand, habitual residence as a general connecting factor in the law applicable to contracts is also a changeable connecting factor, but with a significant difference regarding the decisive moment for determining the habitual residence. Namely, it is certainly possible to establish a new habitual residence during the duration of a certain long-term legal relationship, but the decisive moment for determining the habitual residence of the contracting party is temporally fixed to the moment of contract conclusion.[93] Therefore, any subsequent changes in habitual residence are irrelevant. On the other hand, for the habitual place of work, as a connecting factor for the objective applicable law in individual employment contracts, a similar provision does not exist in the Rome I Regulation. It is, therefore, unquestionable that during the duration of a certain employment contract, it is possible to change the habitual places of work, which poses a challenge to courts in determining the applicable law. In the case of platform workers and digital nomads, the habitual place of work, if possible, will be localized based on the main center of actual performance.[94] Accordingly, the habitual place of work will be in the country where the platform worker or digital nomad actually performs the essential content of their work activities.[95] This is further emphasized in the *Koelzsch* case, where the CJEU clarified that the habitual place of work should be considered the country where the employee fulfills the greater part of their obligations towards the employer.[96] However, given the pronounced mobility of digital nomads, as well as platform workers who exclusively work in an online environment, assessing from which country the employee has performed the greater part of their obligations could be challenging. In these forms of work, the achievement of the end result by the employee is usually crucial, while the hours worked are not as relevant as in conventional employment relationships.

The purpose of the „habitual place of work" as a connecting factor is to implement the principle *in favorem laboratoris* because it is believed to be in the employee's interest.[97] However, in the case of non-conventional (digitized) forms of work, the question arises of whether the application of this connecting factor genuinely serves the interests of platform workers and digital nomads. In the case of static platform workers who do not change their country of work, the contribution to

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93 Art. 19(3) of the Rome I Regulation.

94 Staudinger, *op. cit.*, note 77, p. 303.

95 Mota, C. E. and Moreno, G. P., *Article 21* in: Magnus, U. and Mankowski, P. (eds) European Commentaries on Private International Law, ECPIL, Brussels Ibis Regulation, Verlag Dr. Otto Schmidt, Köln, 2016, p. 547.

96 Case C-29/10 *Heiko Koelzsch v État du Grand Duchy of Luxemburg* [2011] ECLI:EU:C:2011:151, para. 50.

97 Sinander, *op. cit.*, note 84, p. 14.

the *in favorem laboratoris* principle is undisputed. However, for mobile platform workers and digital nomads, it is questionable how closely the law of a country where they temporarily reside for only a few months, and then move to another country for a few months, relates to their actual interests. This leads to the conclusion that the „habitual place of work" as a connecting factor is not the most appropriate solution when determining the applicable law for employment relationships in which the contracting parties are digital nomads and mobile platform workers. The inadequacy lies in the fact that in such cases, the purpose of special conflict rules for employment relationships is not achieved, and consequently, the law that is closest and most familiar to the contracting parties is not applied.[98]

4.3. Place of business

In cases where it is impossible to determine the habitual place of work of an employee, the subsidiary applicable law is that of the country where the place of business through which the employee is engaged is located.[99] In contrast to the broad interpretation of the habitual place of work, the place of business as a connecting factor is applied exceptionally, with a narrow interpretation.[100] This rule of conflict of laws was primarily designed for mobile workers, such as international transport workers.[101] It is worth noting that this rule of conflict of laws applies to all employment relationships in which the employee does not work from a single permanent location or when the employee has multiple permanent habitual places of work of equal importance located in different countries.[102] Specifically, the interpretation of this connecting factor was provided by the CJEU in the *Voogsgeerd* case.[103] The Court indicated that the term "engaged" refers exclusively to the conclusion of an employment contract. If a contract is not concluded and there exists a *de facto* employment relationship, then the focus shifts to the establishment of the employment relationship.[104] Relevant circumstances related to the process of concluding an employment contract, or the establishment of an employment relationship, include the place of business that published the job advertisement and the place

[98] Josipović, T., *Privatno pravo Europske unije – Opći dio*, Narodne novine, Zagreb, 2020, p. 103.

[99] Art. 8(3) of the Rome I Regulation.

[100] Merrett, L., *Jurisdiction over Individual Contracts of Employment*, in: Dickinson, A. and Lein, E. (eds), The Brussels I Regulation Recast, Oxford University Press, Oxford, 2015, p. 250.

[101] Pretelli, I., *A focus on platform users as weaker parties*, in: Bonomi, A. and Romano, G. P. (eds), Yearbook of Private International Law – 2020/2021, Vol. 22, Verlag Dr. Otto Schmidt, Köln, 2021, p. 221.

[102] Grušić, U., *The European Private International Law of Employment*, Cambridge University Press, Cambridge, 2015, p. 167.

[103] Case C-384/10 *Jan Voogsgeerd v Navimer SA* [2011] ECLI:EU:C:2011:842.

[104] *Ibid.*, para. 46.

of business that conducted the selection process for potential employees.[105] Given that only circumstances related to the process of concluding an employment contract are considered, other circumstances related to the actual performance of work are entirely irrelevant.[106]

Some authors argue that the place of business through which an employee is engaged could be the most appropriate connecting factor for determining the applicable law in the context of platform workers, particularly to prevent social dumping.[107] This argument may be acceptable in situations where the place of business is within the EU because it provides a high level of labour law protection to employees compared to, for example, the laws of third countries. Furthermore, it ensures fair market competition among employers within the EU because they are obliged to respect comparable labour law and fiscal obligations inherent in the rights of EU Member States arising from the existence of an employment relationship. However, there could hypothetically be a different situation. This would be the case when the place of business is located in a third country, and the habitual place of work cannot be specifically determined. In such a situation, there is a risk of applying the substantive law of the third country, which may provide a lower level of labour law protection to the employee compared to EU states, or even classify the employment relationship with the employee under the law of the third country as a non-employment relationship. Additionally, an argument against the appropriateness of this connecting factor can be seen in the process of concluding contracts or in the establishment of a *de facto* employment relationship. Digital technologies enable fast and straightforward communication and contract formation that does not require the physical presence of both contracting parties, such as in the employer's business premises. Therefore, there is a risk that in such a situation, the employee is not even aware of the country where the place of business through which they are engaged is located, or which law is applicable.

In conclusion, the place of business through which an employee is engaged would not be the most appropriate solution for determining the applicable law for platform workers and digital nomads. The reason for this, as evident from the discussion above, lies in the fact that it does not establish a specific connection between a particular employment relationship and the law of a specific country, and therefore, it does not establish a clear link between the employee and the law of a particular country.[108] Given the lack of a concrete connection between the employment

105 *Ibid.*, para. 50.

106 Staudinger, *op. cit.,* note 77, p. 314.

107 Pretelli, *op. cit.*, note 101, p. 221.

108 Bruurs, *op. cit.,* note 20, p. 5.

relationship and the applicable law based on the place of business, the application of this connecting factor does not serve the purpose of private international law, which aims to apply the law of the country with which the legal relationship has the closest connection. This approach could lead to legal uncertainty and unpredictability in the legal relationship for the employee, which does not contribute to achieving the goals of protecting employees.[109]

4.4. Escape clause

An escape clause allows the court to apply the law of another country, which the court considers to have a closer connection to the specific legal relationship, instead of the law indicated by the conflict of laws rules.[110] Comparing the connecting factor of the habitual place of work and the escape clause, what they have in common is that both are based on the principle of closest connection, which is a fundamental principle of private international law. However, in the case of the habitual place of work, the closest connection is territorially specified, whereas in the case of the escape clause, the court has the authority to, taking into account all the circumstances of the case, apply the law that is closest related to the particular legal relationship and thereby correct the reference to the law of the country that the legislator presumed to be the closest by establishing a link within the conflict of laws rules.[111]

In the context of platform workers and digital nomads, given their high mobility, the escape clause could serve as the most suitable solution for determining the applicable law. This is especially relevant for digital nomads and platform workers whose work is carried out exclusively in a virtual environment, and who may change the country from which they work two or more times during the duration of a single employment contract with the same employer, making the territorial specification of the place of work challenging. For instance, in the *Schlecker* case, the CJEU established a series of indicators that can be used to determine whether a particular employment relationship has a closer connection with another country, different from the one indicated by the aforementioned objective criteria. Relevant indicators include the country where the employee pays taxes, as well as the country where the employee participates in the social security and healthcare system. Additionally, the overall circumstances of the case should be considered,

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[109] Grušić, U., *Should the Connecting Factor of the 'Engaging Place of Business' be Abolished in European Private International Law?*, International & Comparative Law Quarterly, Vol. 62, No. 1, 2013, p. 173.

[110] Župan, M., *Načelo najbliže veze u hrvatskom i europskom međunarodnom privatnom ugovornom pravu*, Pravni fakultet u Rijeci, Rijeka, 2006, p. 27.

[111] Kunda, *op. cit.*, note 76, pp. 509-510 and pp. 519-521.

especially parameters for determining salary or other working conditions.[112] Apart from the indicators mentioned earlier in line with CJEU's case law, other factors such as the worker's citizenship and residence, the method of salary calculation, and the language of the contract and currency of payment could also be considered, albeit exceptionally, in cases where they are atypical.[113]

However, the escape clause is applied restrictively in EU PIL, only in cases where the previously applicable objective connecting factors do not contribute to the principle of the closest connection for a specific legal relationship.[114] The restrictive application of the escape clause means that the court cannot automatically exclude the habitual place of work and apply the escape clause, even if all other circumstances, except for the place of work, point to the law of another country.[115] In other words, courts are obligated to consider all circumstances of the legal relationship as a whole and determine which circumstance is the most significant.[116]

Despite the general restrictiveness, the application of the escape clause concerning individual employment contracts is indeed more flexible in comparison to other escape clauses within the Rome I Regulation. The provision regarding the escape clause in Article 8 of the Rome I Regulation does not include the "manifestly" requirement, as is the case with the escape clause in Article 4(3) of the Rome I Regulation or escape clauses within provisions pertaining to carriage contracts or insurance contracts.[117] Consequently, in the context of individual employment contracts for platform workers or digital nomads, the court would have greater latitude in "bypassing" the prior connecting factors of objectively applicable law if it is evident from all circumstances of the case that the employment contract is more closely connected with the law of another country, without the need to satisfy the manifestly criterion, which represents a more stringent requirement in other escape clauses. Such a designed escape clause pertaining to individual employment contracts significantly contributes to the flexibility in determining the applicable law for the employment relationships of digital nomads or platform workers. Certainly, it is important to emphasize that the absence of the "manifestly" criterion by no means implies that the court is not obligated to provide reasoning based on which indicators it has chosen to apply the law of another country as the appli-

[112] Case C-64/12 *Anton Schlecker v Melitta Josefa Boedeker* [2013] ECLI:EU:C:2013:551, para. 41.

[113] Bruurs, *op. cit.*, note 20, p. 5.

[114] Kunda, *op. cit.*, note 76, pp. 519-520.

[115] Case C-64/12 *Anton Schlecker v Melitta Josefa Boedeker*, *op. cit.,* note 112, para. 40.

[116] *Ibid.,* para. 41.

[117] Arts. 5(3) and 7(2) of the Rome I Regulation.

cable law, rather than the law of the country indicated by the previously applicable objective connecting factors.

To support the argument that the escape clause is the most suitable tool for determining the applicable law in the case of digital nomads, consider a hypothetical example: An employee with habitual residence in an EU Member State works as a digital nomad in several third countries, providing remote work for an EU-based employer. It is difficult to believe that any of the third countries from which the nomad works during a certain period could genuinely represent the seat of the specific employment relationship, and thus, the habitual place of work in terms of territorial specification of the principle of the closest connection. Therefore, as previously mentioned, in the case of highly mobile employees like digital nomads, the escape clause would be the most optimal way to determine the applicable law by taking into account a series of indicators that justify the application of the law of a specific country as the applicable law.[118]

4.5. Overriding mandatory provisions

According to the Rome I Regulation, overriding mandatory provisions are those considered essential for safeguarding a state's public interests, such as its political, social, or economic structure, irrespective of the law that would otherwise be applicable to a contract.[119] These mandatory provisions can be recognized as binding within the jurisdiction where the proceedings are conducted (*lex fori*), but also within the jurisdiction where the obligations arising from the contract were intended to be performed or have already been performed.[120] In general, the characteristic of overriding mandatory provisions is that such binding rules are directly applicable to any situation falling within their scope, regardless of its international nature, and they cannot be circumvented by the choice of law rules.[121] However, with respect to individual employment contracts, the application of overriding mandatory provisions is somewhat limited. This pertains to situations where mandatory provisions of the objective applicable law provide the employee with a higher level of protection compared to overriding mandatory provisions of the forum's law, which also aim to protect employees. In such cases, priority should still be given to the mandatory provisions of the objectively applicable law.[122]

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[118] See *supra* notes 112 and 113.

[119] Art. 9(1) of the Rome I Regulation.

[120] Art. 9 (2)(3) of the Rome I Regulation.

[121] Babić; Zgrabljić Rotar, *op. cit.*, note 29, p. 232. See also Van Calster, *op. cit.*, note 1, p. 471.

[122] Campo Comba, M., *The Law Applicable to Cross-border Contracts involving Weaker Parties in EU Private International Law*, Springer, Cham, 2020, pp. 161-162.

In the context of platform workers and digital nomads, there is a possibility that work may be carried out in a third country (non-EU), while the employer is located in a Member State of the EU. According to the rules of international jurisdiction for individual employment contracts, employees are authorized, *inter alia*, to file a lawsuit against the employer before the court of the Member State where the employer has its domicile. However, they can also file a lawsuit before the court where the branch that employed the worker is located or was located, in cases where the employee does not regularly perform or did not perform his work in the same country.[123] In both of these situations, the competent court of the Member State will apply the rules for determining the applicable law from the Rome I Regulation, and consequently, potentially the substantive law of the third country as the objectively applicable law. The fact that the court of the Member State, according to EU PIL, characterizes a certain contract as an individual employment contract does not necessarily mean that the same characterization will be applied in terms of the applicable substantive law of the third country referred to by the conflict rule. Therefore, it is possible that, according to the substantive law of the third country, the platform worker or digital nomad may be classified as a self-employed individual, or an independent contractor. In such a case, the specific legal relationship will be assessed according to contract law, rather than labour law.

From the above, it raises the question of whether the rebuttable presumption regarding the existence of an employment relationship under the Platform Work Directive, when it comes into effect and is transposed into the national laws of Member States, can be considered a overriding mandatory provision of EU Member State law before whose court the proceedings are taking place. Providing a definitive answer to this question is difficult, as it depends on the specific factual circumstances of each individual case. The overriding nature arises from the text of the Platform Work Directive itself. Article 1(3) of the Platform Work Directive stipulates that *„This Directive applies to digital labour platforms organising platform work performed in the Union, irrespective of their place of establishment and irrespective of the law otherwise applicable“*.[124] From this, it follows that the overriding nature of the provisions of the Platform Work Directive is limited *ratione territorii*, as it is a necessary prerequisite that platform work is carried out within the territory of the Union. On the other hand, in situations where a platform worker or digital nomad performs work through a platform from a third country for an employer in the Union, such a situation falls outside the scope of the Platform Work Directive. Therefore, in such situations, the provisions of the Directive, including

[123] Art. 21(a)(b) of the Brussels I Recast Regulation.

[124] Art. 1(3) of the Platform Work Directive.

the presumption of the existence of an employment relationship, would not initially be considered overriding mandatory provisions. However, this contradicts the proclaimed goals of the Platform Work Directive. As the desired effect of the Platform Work Directive, in addition to improving the transparency of digital platforms' work, the Commission states that not only platform workers but also Member States will benefit directly in terms of increased tax collection and social security contributions. [125] [126]

Indeed, by denying the overriding nature of the Platform Work Directive in situations where platform work is conducted from third countries for an employer in the Union, it would directly benefit employers within the Union to engage workers from third countries with lower levels of protection or individuals with habitual residence within the Union who have chosen to live a nomadic life in various third countries. This would negatively impact the labour market in EU Member States, and such employers would represent unfair competition to employers whose platform workers perform work within the Union. This would also result in labour and fiscal obligations for the employer, thereby increasing business costs.

In the case-law of courts in Member States, there is a different approach to interpreting the purpose of overriding mandatory provisions. German practice and scholars believe that overriding mandatory provisions should at least partially serve to protect the state's interest, while French practice considers that overriding mandatory provisions can also serve to protect individual interests, such as employees.[127] Therefore, it would be reasonable to recognize the effect of the provisions of the Platform Work Directive, when transposed into the national laws of Member States, as overriding mandatory provisions, even in cases where platform work is performed outside the Union. Moreover, Member States are authorized, within the margin of appreciation, to give certain rules the significance of overriding mandatory provisions, if such a rule is based on EU law but exceeds the level of protection required by EU law.[128] Such an application would achieve dual protection of interests, including public interests related to equal market competition and the preservation of labour costs, as well as private interests of employees in terms of better labour protection and working conditions.

[125] Platform Work Directive, p. 14.

[126] The European Commission estimates that Member States could benefit from an increase in taxes and contributions for social protection in the amount of up to EUR 4 billion per year. See *ibid.*, note 125.

[127] Van Bochove, L. M., *Overriding Mandatory Rules as a Vehicle for Weaker Party Protection in European Private International Law*, Erasmus Law Review, No. 3, 2014, pp. 149-150.

[128] *Ibid.*, p. 149.

5. CONCLUDING REMARKS

The development of digital technologies is bringing about changes in various aspects of social life, and the field of work is no exception. The need for additional sources of income and the desire for flexibility in work compared to conventional forms of employment have led to the emergence of digital nomads and platform workers. Given the increasing prevalence of these phenomena and the growing mobility in work facilitated by digital technologies, it is expected that in the future, disputes with international elements involving digital nomads and platform workers as parties will become more common. This poses challenges for EU PIL. The first challenge is the correct characterization of the legal relationship involving platform workers or digital nomads in terms of conflict of laws. This is of paramount importance due to the existence of special rules for determining the applicable law for individual employment contracts, with the aim of protecting employees as the weaker contracting party. Additionally, there is the issue of concealed self-employment aimed at avoiding fiscal and labour regulations. In the conflict of law characterization, in light of the CJEU case-law, only the factual characteristics of a particular relationship should be considered, regardless of the characterization of the legal relationship by the contracting parties. Furthermore, in the context of EU PIL, the dilemma about the characterization of atypical, digital forms of work will be facilitated by the Platform Work Directive, which introduces a presumption of an employment relationship along with several indicators designed specifically for platform work. These indicators will undoubtedly be a useful tool for characterizing the legal relationships of digital nomads who do not necessarily perform work through a specific digital platform but whose work involves other digital elements.

Regarding the determination of the applicable law and for the sake of legal certainty for both contracting parties, the most acceptable solution is for the platform worker or digital nomad and the employer to autonomously choose the applicable law for their legal relationship. In the absence of a choice of law, the legal framework of the Rome I Regulation provides an adequate answer for determining the objectively applicable law. In the case of platform workers who work offline, meaning at a specific physical location, determining the objectively applicable law through the connecting factor of the habitual place of work should not pose significant difficulties. However, for mobile digital nomads and platform workers who work exclusively in an online environment, the escape clause would represent the optimal solution for determining the applicable law. By applying the escape clause, in comparison to other connecting factors for individual employment contracts, the principle of the closest connection is best realized as it contributes to the application of the law that is closest and most familiar to the contracting parties, thereby ensuring the protection of employees as the weaker contracting party.

REFERENCES

BOOKS AND ARTICLES

1. Aloisi, A., *Platform Work in the EU: Lessons learned, legal developments and challenges ahead,* European Commission, Brussels, 2020
2. Babić, D. A. and Zgrabljić Rotar, D., *Mjerodavno pravo za ugovorne odnose*, in: Josipović, T. (ed.), Privatno pravo Europske unije – Posebni dio, Narodne novine, Zagreb, 2022, pp. 217–232
3. Bjelinski Radić, I., *Kritička promišljanja o prijedlogu Direktive o poboljšanju radnih uvjeta platformskih radnika*, Zbornik Pravnog fakulteta u Zagrebu, Vol.72, No. 6, 2022, pp. 1467-1491
4. Boto, J. M. M., *Collective Bargaining and the Gig Economy: Reality and Possibilities*, in: Boto, J. M. M. and Brameshuber, E. (eds), Collective Bargaining and the Gig Economy, Hart Publishing, Oxford, 2022, pp. 3-18
5. Brown, N., Law, *Jurisdiction and the Digital Nomad: Why we need more appropriate mechanisms for determining sovereignty over disputes*, Computer Law Review International, Vol. 16, No. 2, 2015, pp. 38-43
6. Bruurs, S., *Cross-border telework in light of the Rome I-Regulation and the Posting of Workers Directive*, European Labour Law Journal, Vol. 0, No. 0, 2023, pp. 1-21
7. Campo Comba, M., *The Law Applicable to Cross-border Contracts involving Weaker Parties in EU Private International Law*, Springer, Cham, 2020
8. Cherry, M. A., *A Global System of Work, A Global System of Regulation?: Crowdwork and Conflicts of Law*, Tulane Law Review, Vol. 94, 2019, pp. 1-62
9. De Stefano, V., *Introduction: Crowdsourcing, the Gig-Economy and the Law*, Comparative Labor Law & Policy Journal, Vol. 37, No. 3, 2016, pp. 1-10
10. Gruber-Risak, M., *Classification of Platform Workers: A Scholarly Perspective*, in: Gyulavári, T. and Menegatti, E. (eds), Decent Work in the Digital Age, European and Comparative Perspectives, Hart Publishing, Oxford, 2022, pp. 85-104
11. Grušić, U., *Should the Connecting Factor of the 'Engaging Place of Business' be Abolished in European Private International Law?*, International & Comparative Law Quarterly, Vol. 62, No. 1, 2013, pp. 173-192.
12. Grušić, U., *The European Private International Law of Employment*, Cambridge University Press, Cambridge, 2015
13. Josipović, T., *Privatno pravo Europske unije – Opći dio*, Narodne novine, Zagreb, 2020
14. Kunda, I., *Međunarodnoprivatnopravni odnosi*, in: Mišćenić, E. (ed.), Europsko privatno pravo. Posebni dio., Školska knjiga, Zagreb, 2021, pp. 486–554
15. Merrett, L., *Jurisdiction over Individual Contracts of Employment*, in: Dickinson, A. and Lein, E. (eds), The Brussels I Regulation Recast, Oxford University Press, Oxford, 2015, pp. 239-253
16. Mota, C. E. and Moreno, G. P., *Article 21* in: Magnus, U. and Mankowski, P. (eds) European Commentaries on Private International Law, ECPIL, Brussels Ibis Regulation, Verlag Dr. Otto Schmidt, Köln, 2016, pp. 541-553

17. Nash, C. *et al*, *Digital Nomads Beyond the Buzzword: Defining Digital Nomadic Work and Use of Digital Technologies*, in: Chowdhury, G., *et al* (eds.), Transforming Digital Worlds. iConference 2018. Lecture Notes in Computer Science, Vol. 10766, Springer, Cham, 2018, pp. 207-217
18. Naumowicz, K., *Some remarks to the legal status of platform workers in the light of the latest European jurisprudence*, Studia Z Zakresu Prawa Pracy I Polityki Społecznej, Vol. 28, No. 3, 2021, pp. 177–189
19. Pretelli, I., *A focus on platform users as weaker parties*, in: Bonomi, A. and Romano, G. P. (eds), Yearbook of Private International Law – 2020/2021, Vol. 22, Verlag Dr. Otto Schmidt, Köln, 2021, pp. 201-244
20. Ratti, L., *A Long Road Towards the Regulation of Platform Work in the EU*, in: Boto, J. M. M. and Brameshuber, E. (eds), Collective Bargaining and the Gig Economy, Hart Publishing, Oxford, 2022, pp. 39-59
21. Richter, S. and Richter, A., *Digital Nomads*, Business & Information Systems Engineering, Vol. 62, 2020, pp. 77–81
22. Rühl, G., *The Protection of Weaker Parties in the Private International Law of the European Union: A Portrait of Inconsistency and Conceptual Truancy*, Journal of Private International Law, Vol. 10, No. 3, 2014, pp. 335-358
23. Sajko, K., *Međunarodno privatno pravo*, Narodne novine, Zagreb, 2009
24. Sinander, E., *The Role of Foreseeability in Private International Employment Law*, Nordic Journal of Labour Law, Vol. 1, No. 1, 2023, p. 1-23
25. Staudinger, A., *Article 8: Individual employment contracts,* in: Ferrari, F. (ed), Rome I Regulation, Pocket Commentary, Sellier European Law Publishers, Munich, 2015, pp. 287-320
26. Tereszkiewicz, P., *Digital Platforms: Regulation and Liability in EU Law*, in: DiMatteo, L. A., Cannarsa, M., and Poncibò, C. (eds) The Cambridge Handbook of Smart Contracts, Blockchain Technology and Digital Platforms, Cambridge University Press, Cambridge, 2019, pp. 143–159.
27. Van Bochove, L. M., *Overriding Mandatory Rules as a Vehicle for Weaker Party Protection in European Private International Law*, Erasmus Law Review, No. 3, 2014, pp. 147-156
28. Van Calster, G., *European Private International Law*, Hart Publishing, Oxford and Oregon, 2013
29. Van Calster, G., *Of giggers and digital nomads – what role for the HCCH in developing a regulatory regime for highly mobile international employees,* in: John, T., Gulati, R., Köhler, B. (eds.), The Elgar Companion to the Hague Conference on Private International Law, Edward Elgar Publishing, Cheltenham and Northampton, 2020, pp. 464–478
30. Vukorepa, I., *Prekogranični platformski rad: zagonetke za slobodu kretanja radnika i koordinaciju sustava socijalne sigurnosti*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 70, No. 4, 2020, pp. 481-511
31. Weiss, M., *The platform economy. Tha main challenges for labour law.*, in: Mella Mendez, L. (ed.), Regulatin the Platform Economy. International Perspectives on New Forms of Work, Routledge, Oxon and New York, 2020, pp. 11-20

32. Župan, M., *Načelo najbliže veze u hrvatskom i europskom međunarodnom privatnom ugovornom pravu*, Pravni fakultet u Rijeci, Rijeka, 2006

COURT OF JUSTICE OF THE EUROPEAN UNION

1. Case 266/85 Hassan Shenavai v Klaus Kreischer [1987] ECLI:EU:C:1987:11
2. Case C-256/01 Debra Allonby v Accrington & Rossendale College [2004] ECLI:EU:C:2004:18
3. Case C-29/10 Heiko Koelzsch v État du Grand Duchy of Luxemburg [2011] ECLI:EU:C:2011:151
4. Case C-384/10 Jan Voogsgeerd v Navimer SA [2011] ECLI:EU:C:2011:842
5. Case C-64/12 Anton Schlecker v Melitta Josefa Boedeker [2013] ECLI:EU:C:2013:551
6. Case C-413/13 FNV Kunsten Informatie en Media v Staat der Nederlanden [2014] ECLI:EU:C:2014:2411
7. Case C-47/14 Holterman Ferho Exploitatie BV and Others v F.L.F. Spies von Büllesheim [2015] ECLI:EU:C:2015:574
8. Case C-603/17 Peter Bosworth and Colin Hurley v Arcadia Petroleum Limited and Others [2019] ECLI:EU:C:2019:310
9. Case C-692/19 B v Yodel Delivery Network Ltd [2020] ECLI:EU:C:2020:288
10. Joined Cases C-152/20 and C-218/20 DG and EH v SC Gruber Logistics SRL and Sindicatul Lucrătorilor din Transporturi v SC Samidani Trans SRL [2021] ECLI:EU:C:2021:600

EU LAW

1. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Better working conditions for a stronger social Europe: harnessing the full benefits of digitalisation for the future of work COM/2021/761 final
2. Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326
3. Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services [2015] OJ L 241
4. Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work [2021] COM/2021/762 final
5. Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177
6. Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L 351

LIST OF NATIONAL REGULATIONS AND ACTS

1. Crotian Immigration Act, Official Gazette No. 133/20, 114/22, 151/22
2. Spanish Law 28/2022 for the promotion of the ecosystem of emerging companies, Official Gazette No. 306

WEBSITE REFERENCES

1. Bruurs, S., *Digital Nomads and the Rome I Regulation: An Overview*, Global Workplace Law & Policy, 2022, pp. 1-7, [https://global-workplace-law-and-policy.kluwerlawonline.com/2022/12/14/digital-nomads-and-the-rome-i-regulation-an-overview/], Accessed 15 April 2023