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Employment relations via the web with international elements: Issues and proposals as to the applicable law and determination of jurisdiction in light of EU rules and principles

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Abstract

The article addresses the issues of which, from the EU perspective, are the applicable law and the competent courts in respect of employment contracts/relationships performed via the web and characterised by international elements. The study adopts a legal-regulatory approach, focusing, on one hand, on the issues related to the applicable law and, on the other hand, on those concerning the determination of the competent courts in respect of employment contracts/relationships performed via the web and characterised by international elements. The article outlines the possible detrimental effects on the weaker party of the contractual relationship, deriving from the application of the current connecting factors based on EU rules and regulations, in respect of the applicable law and the competent courts. The article considers only the EU legal framework, but suggests an evolutionary interpretation of EU law, aimed at preserving the anti-dumping *rationale* underlying the legal regime governing the applicable law and investigates the potential of collective redress mechanisms.

Keywords

Web-based workers, employment contracts with international elements, applicable law, competent courts

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1. The issue

The aim of this paper is to explore the question of the applicable law and the competent court within the European Union (EU) in the case of contracts/relationships for work performed via the web and characterised by international elements.

The first thing to note is that the category of web-based work includes not only that now classic type of work resulting from the technological revolution of the 1970s, known as teleworking, in which workers provide their services via the internet and at the same time maintaining a long-term relationship with an employer; but also the new type of work resulting from the emergence of the so-called gig economy, known as crowdworking, in which workers perform via IT platforms activities of short or very short duration for multiple and changing recipients[1]. The best-known example of crowdwork is Amazon Mechanical Turk, a digital platform based in the USA, which offers its customers services via the internet (e.g. classifying photograph archives, categorising documents, translations etc.), at low cost, since the work is carried out in the form of micro-tasks (gigs) by workers selected by an algorithm (crowdworkers).

Clearly, crowdwork raises many issues for the employment lawyer – including, first and foremost, that of identifying who the actual employer is: the platform or the final recipient of the service. For the purposes of this analysis, the key point relates to the fact that, like teleworkers, crowdworkers can provide their services to counterparts located in other countries, working 'remotely', i.e. without the need to physically move from their country of origin. From this it follows that their contract (and relationship) may be characterised by international elements.

On closer inspection this is by no means a new situation, given that working remotely has for some time been possible through older technologies (for example, the case of call centre workers, who perform their work via the telephone). It is, however, clear that the internet, which enables the instant transmission of a huge quantity of data of the most varied nature (written texts, recordings/voice communications, videos, photographs, graphs, numbers, etc.), facilitates and vastly increases the activities that can be performed in this way. This is borne out by the fact that, as many empirical studies report, web-based work is a rapidly growing phenomenon[2].

Hence the importance of the two issues on which the present work will focus.

As is well known, in order to identify the applicable law in the case of an employment contract with international elements, the EU long since identified special connecting factors with respect to

1. For a description of the phenomenon, see for example A. Aloisi, *Il lavoro 'a chiamata' e le piattaforme online della collaborative economy: nozioni e tipi legali in cerca di tutele*, in *Labour & Law Issues*, 2/2016.
2. For estimates of the number of workers involved in the gig economy in Europe: A. Pesole, M.C. Urzì Brancati, E. Fernandez-Macias, F. Biagi, I. Gonzales Vazquez, *Platform workers in Europe,* Joint Research Centre (JRC) Report, 2018; U. Huws, N.H. Spencer, D.S. Syrdal, K. Holts, *Work in the European Gig Economy*, FEPS, UNI Europa and University of Hertfordshire, 2017; European Parliament-Directorate General for Internal Policy, *The Social Protection of Workers in the Platform Economy*, Study for the EMPL Committee, November 2017. For estimates of the numbers in the USA: L.F. Katz, A.B. Krueger, *The rise and nature of alternative work arrangements in the United States, 1995-2015*, in *ILR Review* [Internet], 2019; B. Farrel, F. Greig, *The online platform economy: has growth peaked?*, JP Morgan Institute, 2016; B.J. Robles, M. McGee, *Exploring Online and Offline Informal Work: Findings from the Enterprising and Informal Work Activities (EIWA) Survey*, Finance and Economic Discussion Series 2016-89, Washington: Board of Governors of the Federal Reserve System, 2016; Buston-Masteller, Aspen Institute and Time, *The On-Demand Economy Survey*, 2016.

the principle of free choice of the parties, which applies to contracts in general. Key among these is the 'habitual place of work', which today – thanks to Court of Justice (CJEU) rulings – represents the central criterion for ascertaining both the applicable law (EC Reg. 593/2008, hereinafter Rome I) and the competent court (EC Reg. 1215/2012, hereinafter Brussels I bis).

With regard to web-based workers, the problem that therefore arises is in the first place to understand whether the notion of 'habitual place of work' accepted by the legislation on the subject of applicable law and jurisdiction provides adequate answers; or whether, instead, the criterion requires further interpretation through recourse to other rules or principles already present in the system; or, finally, if there remains no alternative but to call for intervention by the EU legislator.

The complexity of the issues under discussion, which relate to distinct, albeit related, juridical sub-systems, led the authors to dedicate separate attention, first to the subject of identifying the applicable law (§§ 2-6), and then to the problem of identifying the competent court (§§ 7-12).

2. A necessary premise: what is meant by 'individual employment contract'

Before going any further, a clarification is necessary. Since regulations concerning both the applicable law (Rome I, Art. 8), and competent court (Brussels I bis, Art. 20) limit their field of application to the 'individual employment contract', the discussion that follows can only hold if it proceeds from the assumption that the single contract (and relationship) taken into consideration can be qualified as such. We must therefore first clarify what is meant by 'individual employment contract'.

In this regard, the majority interpretation[3] considers that the notion cannot depend on the decisions of individual national systems, at the risk of fragmenting the legal framework, but that it should refer to the broad notion of the employed person developed by the CJEU in applying TFEU Article 45[4], and based on the performance by the worker of an activity which firstly has an significant economic value, and secondly is subject to some form of directive control.

If we accept this notion of 'individual employment contract' as (dependent) employment contract[5], then all contracts in which the directive control of the employer is present fall within the range of application of the two Regulations, regardless of the intensity with which the control is

3. See for example S. Giubboni, *Diritti e solidarietà in Europa,* Il Mulino Bologna, 2012, 98 *et seq*.; Id, *Diritto del lavoro europeo. Una introduzione critica*, Il Mulino Bologna, 2017, 131 *et seq*.
4. As from CJEU 2 July 1986, C-66/85, *Lawrie-Blum*, point 17, with formula consolidated in subsequent case law.
5. It should, however, be noted that according to another opinion (see for example G. Orlandini, *Il rapporto di lavoro con elementi di internazionalità,* in *WP CSDLE 'Massimo D'Antona'.it*, 137/2012, para. 3), the rationale of the two Regulations should lead to the inclusion in the notion of 'individual employment contract' of 'economically dependent self-employment contracts' – in which therefore any form of directive power is absent in a technical-juridical sense – such as hetero-organised work in Italy (Art. 2 Legislative Decree. 81/2015, see Turin Court of Appeal 4 February 2019, no. 26, in *Rivista Italiana di Diritto del Lavoro*, 2019, II, 350 *et seq*. with note by M.T. Carinci, *Il lavoro eterorganizzato si fa strada . . . . sulle ruote dei riders di Foodora*. Rome Law Court, 6 May 2019); or 'economically dependent self-employed work in Spain' TRADE (Art. 11 Estatuto del Trabajo Autonomo, Ley 20/2007) (J. Cruz Villalon, *Il lavoro autonomo economicamente dipendente in Spagna*, in *Diritti Lavori Mercati*, 2013, II, 287 *et seq*.); or 'quasi-employment in Germany' (§ 12 I no. 1 TGV) (W. Daubler, T. Klebe, *Crowdwork: datore di lavoro in fuga?,* in *Giornale di Diritto del Lavoro e Relazioni Industriali*, 2016, 471 *et seq*.).

exercised (ongoing, precise and specific orders or broad, general guidelines; instructions related to the content, or to the times and locations, of the work activity); and regardless of the method of explanation and/or transmission (this also includes the directions produced by algorithm and transmitted via the web).

It is therefore important for the interpreter to understand how to legally frame the web-based work contract, which means analysing the specific characteristics of each individual legal relationship taken into consideration. Generally speaking, the problem of definition appears to be more difficult with regard to crowdworkers than for telework: verifying in practice the existence of directive control in fact appears easier when the worker maintains a relationship over time with the counterparty (as happens in teleworking), whereas it appears more difficult when, as a result of the high level of parcelling out of the tasks (typical of crowdwork) the juridical relationship between the parties (regardless of whether it is with the platform or with the subject benefiting from the activity) is of short or very short duration[6].

However, since empirical research shows that very often crowdworkers are subjected by means of algorithms to pervasive powers of management and control by the platform and/or by the recipients of the service[7], we consider that the classification of crowdworkers as employees in the sense affirmed by CJEU case law may in fact be valid in many instances.

For this reason, from here onwards the discussion will be conducted on the assumption that, generally speaking, the contract of web-based workers – teleworkers and crowdworkers – is attributable (via analysis of the specific case) to the broad notion of the 'individual employment contract' (as employee) referred to in Rome I and Brussels I bis.

Section I

3. The law applicable to web-based workers: the centrality of the 'habitual place of work' and its anti-dumping function

We will now analyse the first of the two problems under discussion, that is, what law is applicable in the EU to contracts/relationships of web-based workers who, without moving from their country of origin, work for an employer located in a different country.

6. The question of the legal classification of the crowdworker contract has not yet been addressed by case law in Europe. On the other hand, several claims have been filed in the USA, including a class action against CrowdFlower (which ended however in a settlement, see *Otey v. Crowdflower, Inc. et Others*, No. 3:12-v-05524-JST (N.D. Cal. 2013) in http://www.leagle.com/decision/In%20FDCO%2020130618A76; J. Berg, M. Furren, E. Armon, U. Rani, M. Six Silbermann, *Digital Labour Platforms and the Future of Work: Towards Decent Work in the Online World*, ILO, Geneva, 2018, 13. See also M.A. Cherry, W.R. Poster *Crowdwork, Corporate Social Responsibility, and Fair Labor Practices*, in *Legal Studies Research Paper Series*, 8/2016, Saint Louis University School of Law; M. Cherry, A. Aloisi, *'Dependent Contractors' in the Gig Economy: A Comparative Approach*, in *American University Law Review*, 66/2017, 635.
7. V. De Stefano *The Rise of the 'Just-in-Time Workforce': On-Demand Work, Crowd Work and Labour Protection in the 'Gig-Economy'*, ILO, Geneva, 2016; J. Berg, M. Furren, E. Armon, U. Rani, M. Six Silbermann, op. cit., p. 104; A.F. Schmidt, *Digital Labour Markets in the Platform Economy. Mapping the Political Challenge of Crowd Work and Gig Work*, a Project by FES, 2017, for an incisive description of the actual working conditions of crowdworkers.

As already mentioned, in terms of the applicable law for employment contracts with international elements, the principal reference standard today[8] is Rome I, Art. 8[9], which establishes special connecting factors in this respect, derogating from those generally provided for in contractual matters. The picture is then completed by the subsequent Article 9 of the same Regulation, which defines a corrective mechanism to the operation of Article 8.

It must be pointed out here that the two rules cited above – like the Regulation itself as a whole (see Article 2) – are universal in nature, that is, they are aimed at resolving all conflicts of law, whatever their outcome (applying the rules of a Member State or of a Third State). The interpretation of those rules must, however, take into account two sets of principles and the balancing of those principles: the principle of labour protection, on the one hand, promoted within the EU by Rome I (see § 3); and the principle of free of competition, on the other, which being the heart of the EU Treaties, permeates the system in which Rome I itself operates. Since the 'weight' of the two principles – as will become clearer later - is not uniform outside and within the EU[10], we will deal separately with the two hypotheses that appear most critical from the point of view of the EU system: that of the worker located in a Third Country who operates via the web for an employer located in an EU Member State (see § 4); and that of the worker located in an EU Member State who performs activities via the web for an employer located in another Member State (see § 5).

First of all, however, we need to examine the rules established by Art. 8 Rome I, and their rationale.

As is known, the provision in question establishes four connecting factors: the first, general and valid for all contracts (see Art. 3 Rome I), is that of the free choice of the parties; in the absence of choice by the parties the secondary criteria are: 1) the 'habitual place of work' i.e. the place 'in which or, failing that, from which the employee habitually carries out his/her work in performance of the employment contract'; 2) the location of the office where the worker is engaged, but only if the 'habitual place of work' is not identifiable; 3) the place with respect to which, from the 'overall circumstances', it appears that the contract has the 'closest connection'.

That said, it must be pointed out that on closer examination even in the case in which the parties do in fact avail themselves of the possibility of choice, the secondary criteria mentioned above are nevertheless still of central importance. That same Art. 8 declares that, irrespective of any choice of the parties, the connecting factor can never deprive the worker of the protection guaranteed by the mandatory provisions of the law applicable to the relationship in the absence of choice[11]. Thus, the three secondary criteria mentioned above (i.e. those that identify the applicable law in the absence of choice) become central.

8. It is important to note that Art. 8 Rome I replicates with minimal modifications the provisions of its immediate 'progenitor' – i.e. Art. 6 of the Rome Convention of 1980 applicable to contractual obligations (on which, see for example M. Magnani, *Il diritto applicabile ai rapporti di lavoro con elementi di internazionalità tra legge e contratti collettivi*, in *Quaderni di Diritto del Lavoro e Relazioni Industriali*, 1998, 73 *et seq*) – and is also drafted in terms that are broadly similar to the rule concerning jurisdiction (Art. 21 Brussels I bis) and its antecedents (Art. 19 Reg. 44/2001 Brussels I; Art. 5, point 1, Brussels Convention of 1968). The substantially identical content of Art. 8 Rome I, its immediate 'progenitor' and the rules on jurisdiction allow the principles established by the CJEU with reference to the other normative sources cited above to extend to Art. 8.
9. A.A.H. van Hoek, *Private international law: an appropriate means to regulate transnational employment in the European Union?*, in *ELR*, Nov. 2014, no. 3.
10. That is, when comparing the legal systems of Member States and Third States or the systems of different Member States with one another.
11. The mandatory rules are those 'provisions that cannot be derogated from by agreement' (Art. 8 Rome I) or rather, 'which can only be waived for the benefit of the worker' (Recital 35 Rome I).

In light of the above, it can readily be seen that 'habitual place of work' represents in law the pre-eminent factor, given that it is the first criterion[12] to apply in order to identify both the applicable law in the absence of choice by the parties, and the mandatory rules that are in any case applicable even where there is choice.

It does not end there, however. The CJEU has intervened over time to reinforce the primacy of the 'habitual place of work' (the current text of Art. 8 is in fact the fruit of this case law).[13] Indeed, the Court has progressively broadened the meaning of 'habitual place of work' to the detriment of the other criteria, first stating that it is not identified with the 'sole' place of employment, but with the 'predominant' one from a qualitative point of view[14] – i.e. the place where the worker carries out the 'essential' part of his/her duties[15] – or, alternatively, from a quantitative point of view;[16] subsequently ruling that it can also be identified with the place from which the worker leaves and to which s/he returns after assignments, in which s/he receives orders and instructions and where the work tools are situated.[17] Thus expanded, the 'habitual place of work' has also become the criterion used in order to identify the applicable law for peripatetic workers, i.e. those workers who constantly operate in different places (such as managers who often move from one country to another; personnel working on board ships; flight attendants and airline pilots).

The broad meaning now attributed to 'place of work' inevitably renders marginal the subsidiary criterion of the 'engaging place of business,[18] which the CJEU has in fact consistently interpreted in a restrictive way as the place where the stable premises of the company that set up the procedure for conclusion of the contract is located.[19] Therefore, the formal notion of 'engaging place of business' accepted by the Court means that all aspects relating to the management of the work relationship remain extraneous to it (e.g. the place where orders are issued), as they are already subsumed in the criterion of 'habitual place of work' (which, as we have stated, is also identified with the place where the worker receives the employer's instructions).[20]

12. A presumptive criterion, as will be discussed further on in the text.
13. The rulings of the CJEU, as mentioned, refer both to the Rome Convention and to the Conventional and Regulatory provisions, which are virtually the same in terms of jurisdiction, and anticipated the current text of Art. 8 Rome I, which precisely reflects those guidelines.
14. CJEU 14 September 2017, C-168/16 *Moreno Oscar* and C-169/16, *Nogueira*, point 58; CJEU 15 March 2011, C-29/10, *Koelzsch*. As demonstrated, for example, by the presence in a given area of an office in which the worker prepares and organises the activity, see CJEU 13 July 1993, C-125/92, *Mulox*.
15. Generally speaking, the 'habitual place of work' is identified as the place where the worker carries out the 'essential' part of his/her duties, that is, *the most important part* of them (CJEU 14 September 2017, C-168/16 *Moreno Oscar* and C-169/16, *Nogueira*, point 59). However, the 'essential' part of the duties may be denoted by the longer time dedicated to them (CJEU 15 March 2011, C-29/10, *Koelzsch*), as evidenced by an overwhelming percentage of work time dedicated to organising the activity, in an office located in one State (CJEU 9 January 1997, C-383/95, *Rutten*). Principles reiterated by CJEU 27 February 2002, C- 37/00, *Weber*.
16. CJEU 27 February 2002, C-37/00, *Weber.*
17. CJEU 14 September 2017, C-168/16 *Moreno Oscar* e C-169/16, *Nogueira.* On the question of the 'place of work' of flight personnel, however, there are still conflicts in national law, even after the CJEU's ruling: Court of Appeal of 's-Hertogenbosch 5 July 2018, and Court of Administration of Justice-Government Autonomous Community of Valencia, Appeal 003364/2017, 2 January 2018, no. 33.
18. For critical considerations on the usefulness of this connecting factor, U. Grusic, *Should the connecting factor of the 'engaging place of business' be abolished in the European Private International Law?*, in *Int. Comp. Law Quarterly*, vol. 62, January 2013, 173 *et seq.*
19. For example, published the recruitment advertisement or conducted the job interview.
20. CJEU 15 December 2011, C-384/10, *Voogsgeerd*, point 61.

The last criterion stipulated by Art. 8 Rome I, namely the one related to the country with which the contract presents the 'closest connection', also appears marginal compared to that of habitual place of work.

Indeed, this criterion, which despite being last on the list is, as will promptly be stated, not least in hierarchy, must be used only with extreme moderation.

The CJEU clarified first of all that Art. 8 places a mere presumption *iuris tantum* in favour of 'habitual place of work' (and secondary to 'engaging place of business') as the place that constitutes the 'centre of gravity' of the contract, which may therefore be overridden when from the 'circumstances as a whole' a closer connection of the contract with another country emerges[21] (providing some indications that the judge may use for this).[22] The factor of 'closest connection' therefore authorises each of the parties to prove that the contract is 'more integrated' in the economic and social context of a different country from the one in which a worker 'habitually works' and therefore that this other country is the real 'centre of gravity of the relationship'.

However, interpretation[23] has rightly urged judges to use the criterion of closest connection most sparingly: to override the presumption in favour of 'habitual place of work' requires rigorous demonstration of the existence of significant, unequivocal and above all 'non-manipulable' evidence on the part of the employer that the 'centre of gravity' of the relationship is in another country; this could put the choice of applicable law back into the employer's hands, thus negating all the CJEU case law so far described. It therefore seems reasonable to conclude that the criterion in question can have extremely limited application, most likely only when the parties have a common country of origin.[24]

Having summarised the connecting factors, their content and their interrelationships, we will now turn to the question of the overall rationale underlying them.[25]

In this regard, the CJEU has repeatedly stated that the criteria are intended to protect the worker as the 'weaker party' in the relationship.[26] This is in a certain sense true: they constitute limits to the principle of free choice and therefore prevent the employer from imposing the applicable law on the worker.

21. CJEU 12 September 2013, C-64/12, *Schlecker*.
22. CJEU 12 September 2013, C-64/12, *Schlecker*, point 41, such as: the language in which the contract is drawn up or a reference contained in it to binding provisions of a given national law; the nationality of the parties; the worker's place of residence; the place where the worker pays taxes and the social security system in which s/he is registered.
23. On this subject, in consideration of the uncertainties it would give rise to, see F. Seatzu, *La legge applicabile ai contratti individuali di lavoro nel Regolamento 'Roma I'*, in N. Boschiero (a cura di*), La nuova disciplina comunitaria della legge applicabile ai contratti (Roma I)*, Giappichelli, Torino, 2009, 353 *et seq.*
24. M. Houwerzijl, A. van Hoek, *Where do the mobile workers belong, according to Rome I and (E)PWD?* in H. Verschueren (ed.), *Residence, employment and social rights of mobile persons: on how EU law defines where they belong*, Social Europe Series, vol. 36, Cambridge, Intersentia, 2016, 234; A.A.H van Hoek, *op cit*., para. 3.3.3.
25. M. Houwerzijl, A. van Hoek, op. cit., 215 *et seq.*
26. CJEU 15 March 2011, C-29/10, *Koelzsch* points 40 and 42; CJEU 15 December 2011, C-384/10, *Voogsgeerd* point 35. Cfr. also the Report by Giuliano and Lagarde, in OJ 1980 C 282, 1 who state that Art. 6 of the Rome Conv. (of which Art. 8 Rome I is the 'heir') was conceived to 'apply a more appropriate law for matters in which the interests of one of the contracting parties are not the same as those of the other, and at the same time to secure thereby more adequate protection for the party who from the socio-economic point of view is regarded as the weaker in the contractual relationship'.

At the same time, however, they are not an expression of the principle of *favour* in a strict sense, because they do not necessarily lead to the application of the law that is most protective for the worker.[27]

Rather, the connecting factor of 'habitual place of work' expresses a 'principle of proximity', because it selects the law within whose system the relationship 'gravitates', i.e. the country in which the worker 'performs his/her economic and social duties'.[28] This 'principle of proximity' also lies at the heart of the criterion of 'closest connection',[29] which is why the CJEU places it on an equal level with 'habitual place of work' (by virtue of the presumptive mechanism already described).

From the worker's perspective, therefore, the 'place of work' is designated to select the 'closest', and thus more 'appropriate', law (as being the one most familiar and known to him/her).

Instead, from the perspective of the judicial system constituting the 'centre of gravity' of the relationship, the 'place of work' criterion prevents the deployment of those rules – less protective for the worker (with rules *in melius* always being accepted) – that the employer would otherwise be able to impose.

A clear anti-dumping function thus emerges from the system,[30] progressively reinforced by CJEU case law through the expansion of the concept of 'habitual place of work'.[31]

The parallel restriction of the notion of 'engaging place of business', intended to remove from the employer sheer unilateral choice of the law applicable,[32] is consistent with this interpretation, as is the very limited space granted to the criterion of 'closest connection'.

4. First scenario: the law applicable to web-based workers located in a Third Country. Possible recourse to 'overriding mandatory provisions'

Having outlined in detail the system's fundamental components, we will now address the question posed at the beginning: in the EU judicial system, what is the law applicable to employment contracts for web-based workers who operate from a non-EU country?

If, in the absence of contrary provisions, we refer also in this case to Art. 8 Rome I, it is clear that the primary connecting factor of 'habitual place of work' always leads to the application of the law of the country in which the worker is physically located. This is in fact – according to CJEU case law – the place 'in which' the employee works: where s/he carries out *not only* the 'essential' part *but the whole* of his/her activity; where s/he receives the employer's instructions.

27. On this subject CJEU 12 September 2013, C-64/12, *Schlecker* point 34. For example, R. Clerici, *Quale favor per il lavoratore nel Regolamento Roma I*, in G. Venturini, S. Bariatti (a cura di), *Nuovi strumenti del diritto internazionale privato, Liber amicorum Fausto Pocar*, Giuffrè, Milano, 2009, 224-226.
28. CJEU 15 March 2011, C-29/10, *Koelzsch* point 42.
29. CJEU 12 September 2013, C-64/12, *Schlecker*, points 35-38 and the criteria indicated therein.
30. E. De Gotzen, *The EU Private International Law of Employment: can it be a possible shift toward more labour protection in Europe?,* in M. Borracetti (ed.), *Exploitation and Legal Protection of Migrant Workers, Labour Migration in Europe*, Volume II, Palgrave Macmillan, 2018, p. 45 *et seq.*; M. Houwerzijl, A. van Hoek, op. cit., 218.
31. The 'habitual place of work' also has the function of guaranteeing the predictability and stability of the law applicable to the relationship: CJEU 12 September 2013, C-64/12, *Schlecker* point 35.
32. U. Grusic, op. cit., p. 188 *et seq.* which, however, considers that despite this restrictive interpretation not all hypotheses of abuse or *'law-shopping'* are averted, and therefore proposes that the connecting factor of 'place of establishment of the employer' should be abolished.

Nor does the criterion of 'closest connection', which may in some cases determine the application of the law of the common 'place of origin' of the parties, help to avoid this outcome.

It follows that with regard to web-based workers, the anti-dumping function underlying Art. 8 Rome I is reduced to zero:[33] the technology always makes it possible for the employer to choose the least expensive worker, who, all else being equal, will clearly be the one located in the country that guarantees the least protective laws.

This is clearly a totally unsatisfactory outcome, which calls for urgent correction through EU legislative intervention to amend the provisions of Rome I to that end.

However, we believe that even with the legislation as it stands that outcome can be corrected, at least in certain cases, by adopting the line of argument that follows. We are aware that the suggestion can provide only a partial solution to the problem, but it can nonetheless be considered a useful hypothesis not only in and of itself, but also in the (to be hoped for) perspective *de iure condendo*.

As indicated, the discussion will be conducted focusing first on the case of web-based workers located in a Third Country (in this paragraph) and then on that of web-based workers located in an EU Member State (§ 5).

Which path of interpretation then could be followed in order to preserve the anti-dumping function underlying the criteria laid down in Art. 8 Rome I in the case of web-based workers located outside the EU?

As will be demonstrated in the second part of this article, workers who perform their activities (by whatever means, including via the web) for employers located in the territory of an EU Member State may always choose to petition the jurisdiction of the employer's domicile (see section II). This is necessarily an expensive option – so the possibility of filing class actions would be very helpful (see § 10) –, but one that the worker, with trade union support, can always exercise.

In this case, Art. 9 Rome I provides a corrective mechanism to the application of the factors referred to in Art. 8: the court must, 'whatever the law applicable to the relationship', in any case apply the 'overriding mandatory provisions' of the law of jurisdiction, i.e. those 'provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation'.

There is agreement in the literature on the fact that 'overriding mandatory provisions' (or super-imperative norms) constitute a more restricted sub-category than the 'mandatory provisions' of the applicable law under Art. 8 Rome I,[34] in that they are distinguished not only by their mandatory nature but also by the fact that they have the precise purpose of preserving the fundamental characteristics of the political, economic and social structure of the country of jurisdiction. Their distinctive character therefore prevents them from including in their scope the entire body of employment law provisions of the country of jurisdiction.[35] Only some of the employment law regulations of the country of jurisdiction fall under the category of 'overriding mandatory provisions'.

33. Considerations on this issue can be found in the Commission's 2003 Green Paper *Green paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation,* COM (2002) 654 final, para. 3.2.10.
34. Recital 37 Rome I.
35. *Contra* W. Deubler, T. Klebe, *Crowdwork: datore di lavoro in fuga?,* in *Giornale di Diritto del Lavoro e Relazioni Industriali*, 2016, 492.

Which ones they are, however, is not identified by the law, which specifies only their fundamental character. Their identification is the responsibility of the judge, who must discern them through reference to all the rules in force, both of the State and of the EU:[36] the rules that derive from the constitutional requirements of the State of jurisdiction and the legal provisions that are their implementation; the rules that derive from the fundamental acts of the Union (Treaties and Charter of Fundamental Rights of the EU) and from the Directives that dictate standards of protection that apply throughout the EU.

It is widely accepted that 'overriding mandatory provisions' should include, first and foremost, the rules governing those fundamental rights that safeguard the political and social structure of the State of jurisdiction, such as: the right to strike, the freedom to organise trade unions and collective bargaining, the prohibition of discrimination, the freedom of expression including in the workplace, etc. These are the rights common to the constitutional traditions of the Member States and today solemnly recognised also by the EU Charter of Fundamental Rights.

We share the view of a part of the literature[37] in considering that an essential reference point for identifying the 'overriding mandatory provisions' must include[38] the mandatory rules of the State of jurisdiction concerning the subjects listed by the Directive on the matter of the posting of workers (Dir. 96/71/EC, amended by Dir. 2018/957/EU,[39] hereinafter PWD). If it is true that the PWD is not *directly* applicable to the present case, whether because it is destined to operate only within the EU, or because it concerns only a temporary change of workplace ('posting'), nonetheless the rules it establishes may be considered *indirectly* relevant, in that a closer look reveals they fall within the 'overriding mandatory provisions' of the State of jurisdiction under Art. 9 Rome I.

Indeed, the PWD complements and corrects the employment law subsystem of private international law precisely in order to preserve the essential features of its anti-dumping function and thus guarantee the fundamental nucleus of the economic and social structure of the host State.

That the PWD complements the employment law system of private international law, confirming the system that underlies it, is evident. Both the PWD and Rome I set forth explicitly[40] that in the case of posting, Art. 8 Rome I continues to apply and therefore, in the first place, the principal connecting factor of 'habitual place of work', which in the case of posting leads to application of

36. *Cf.* N. Boschiero, *I limiti al principio di autonomia posti dalle norme generali del Regolamento Roma I*, in *Ead.* (a cura di), *La nuova disciplina comunitaria della legge applicabile alle obbligazioni contrattuali,* Giappichelli, Torino, 2009, 67 *et seq.*

37. M. Houwerzijl, A. van Hoek, *Where do mobile workers belong according to Rome I and the (E)PWD?*, op. cit., 222 *et seq*. For further reference see G. Orlandini, *La legge applicabile ai rapporti di lavoro tra ordine pubblico economico e deregolamentazione del mercato del lavoro nazionale,* in L. Corazza, R. Romei (a cura di), *Diritto del lavoro in trasformazione*, Il Mulino, Bologna, 2014, 266 *et seq.*

38. An important, but not exclusive, reference point, G. Orlandini, *Il rapporto di lavoro con elementi di internazionalità, cit.,* part II, para. 1. See note 41 below with reference to the laws regarding dismissal. There are, however, conflicting opinions on this point: while the doctrine of private international law tends to identify the rules of application necessary in the field of employment law with reference to the Directive (M.V. Polak, *'Laborum Dulce Leninem'?* Jurisdiction and Choice of Law Aspects of Employment Contracts, in J. Meeusen *et al*, *Enforcement of International Contracts in the European Union,* Intersentia, Antwerp-Oxford, 328), the employment doctrine is more prudent (see S. Krebber, *Conflicts of Laws in Employment in Europe,* in *Comparative Labour Law and Policy Journal,* 2000, 353).

39. Dir. 2014/67/EU (the so-called Enforcement Directive, EPWD) did not amend Dir. 96/71/EC, but stipulated rules to ensure its full application.

40. Art. 23 and Recital 34 Rome I; PWD Preamble point 10.

the law of the worker's country of origin. Posting is by its very nature temporary and therefore does not determine any change in the worker's 'habitual place of work', which therefore is and remains his/her country of origin.

However the PWD immediately supplements and corrects that criterion, requiring that prevalence be given to that part of the mandatory provisions of the host country (i.e. the 'temporary place of work', rather than the 'habitual place of work') relating to a list of a specific series of subjects, which have a significant impact on the labour costs of posted workers,[41] with the aim of protecting the internal market from the downward competition of 'external' workers recruited at lower cost.

It is clear that the PWD shares the same anti-dumping objective that underpins Art. 8 Rome I.

However, the PWD does not require the application to the posted worker of all the employment law provisions of the country of posting, but only that part – relating to the subjects listed and subject to mandatory provisions effective *erga omnes* – selected by the EU legislator as being considered essential to preserve the fundamental economic and social structure of the host State.[42]

The objective shared by the PWD and Art. 9 Rome I (i.e. to preserve the fundamental characteristics of the economic and social system of the host State) therefore explains why the rules of the country of jurisdiction relating to the subjects listed in the PWD should integrate the 'overriding mandatory provisions' under Art. 9 Rome I. The PWD ultimately standardises the irreducible minimum rules in the law of the country of jurisdiction which must, in any case, be applied whatever law is applicable to the relationship.

The reasoning thus far conducted already allows, with the legislation as it stands, web-based workers located in a Third Country who decide to file a claim with an EU court to benefit from the application of a significant body of safeguards specific to the law of the country of jurisdiction, thus guaranteeing the preservation of the fundamental characteristics of the economic and social system, both of the EU as a whole, and of the individual Member States with respect to downward competition from Third Countries. This 'protective' outcome, however, does not necessarily penalise the labour market of Third Countries in whose territory the web-based workers are located. Empirical studies have shown, in fact, that web-based work (and work on digital platforms in particular) is currently failing to have an effective positive impact on the economy of developing countries: the sector often employs more highly educated workers, in whom the country's public system has invested heavily to create a growth engine, but instead ends up side-lining them in repetitive and non-creative tasks, to the impoverishment of their professional skills; remuneration remains relatively low, preventing any positive multiplying effects on the economy of the country of origin[43] and actually increases the economic gap compared to more developed countries.

41. This list includes, *inter alia*: a) maximum work periods and minimum rest periods; b) minimum duration of paid annual leave; c) remuneration, including overtime; d) health and safety; e) protection of maternity; f) protection of child labour, etc . . . (cf. Art. 3, para. 1 PWD). Note that currently the PWD explicitly excludes dismissal provisions from its scope. But it should be noted in this regard that the principle of 'justification' and 'adequate protection' is now provided for by the EU Charter of Fundamental Rights (Art. 30). This confirms the fact – as stated in the text – that the rules of the state of jurisdiction on the matters listed by the PWD constitute only one (albeit the main one) of the reference parameters for identifying the 'overriding mandatory provisions'.
42. M. Pallini, *Art. 56 TFUE*, in E. Ales, M. Bell, O Deinert, S. Robin-Oliver (eds.), *International and European Labour Law, Article-by-Article Commentary*, Baden-Baden, C.H.-Beck-Hart-Nomos, 2018, 83 *et seq*. for further references.
43. Cf. J. Berg, M. Furren, E. Armon, U. Rani, M. Six Silbermann, *Digital Labour Platforms and the Future of Work: Towards Decent Work in the Online World,* cit., 88 *et seq*.

Ultimately the interpretative path illustrated could have a positive impact across the board, leading to an improvement in the treatment of a section of the workers involved in the global economy (web-based workers located in a Third Country).

We now come to the question of whether the same reasoning can be applied in the consideration of web-based workers located in an EU Member State.

5. Second scenario: the law applicable to web-based workers located in an EU Member State. The need for intervention by the EU legislator

We are aware that the interpretative proposal put forward in the previous paragraph may run into serious obstacles when applied to web-based workers located in an EU Member State, on account of the extremely restrictive scope attributed to the PWD by the CJEU within the internal market and the pre-eminence and, on the other hand, of the principle of freedom of competition compared to the need to protect the individual legal systems of Member States from social dumping.

In fact, as is known, between 2007 and 2008 – in the so-called '*Laval* quartet'[44] – the Court took a favourable stance towards the free provision of services within the internal market, thus restricting the scope of Member States to protect their national labour market. In particular, in the *Commission v. Luxembourg* ruling the CJEU arrived at the decision that the protection guaranteed by the PWD in the subjects listed therein – to be considered mandatory – constitutes not the minimum, but the maximum protection that can be assured by the host State to the posted worker.

In this interpretation, the PWD is no longer a tool for the protection of the internal labour market of each Member State, but the means that (to some extent) legitimates regulative competition among Member States in order to promote full integration of the single European market.

It is evident that in the face of such an 'unbalanced' reading by the Court in favour of economic freedoms it is extremely difficult to imagine that the principles of the PWD may be interpretatively extended, by means of Art. 9 Rome I, to workers within the EU but who fall outside the scope of mandatory application of the Directive, in that they work via the web in their country of origin.

Moreover, it is today the job of the CJEU to interpret not only the PWD, but also the provisions of private international law, which, having been transposed into an EU Regulation, are now EU law.

It is true that in subsequent years the CJEU has somewhat 'softened' its position[45] and, above all, that the text currently in force of the PWD (as amended by Dir. 2018/957/EU) improves the regulatory framework in the direction of a more effective curb on social dumping.[46] It should however be noted that in many respects the solutions offered by the PWD are still a compromise.

It is therefore problematic for the CJEU to extend within the context of the EU the proposed interpretative path of Art. 9 Rome I (see § 4). To achieve that result the CJEU should change its case law orientation.

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44. CJEU 18 December 2007, C- 341/05, *Laval*; CJEU 11 December 2007, C-438/05, *Viking*; CJEU 3 April 2008, C-346/06, *Ruffert*; CJEU 18 June 2008, C-319/06, *Commission v. Luxemburg.*
45. Cf. CJEU 11 February 2015, C-396/13, *Ammattiliitto.*
46. For example, explicitly conceding full importance to fundamental rights, such as: the right to strike, freedom of association and collective bargaining (see Art. 1, point 1-bis); adopting a broad notion of remuneration, not simply minimum wages (Art. 3); including in the reference sources not only collective agreements with effect *erga omnes ex lege*, but also those with effect *erga omnes de facto* since they are applied by all businesses in a given sector (Art. 3, para. 8).

However, it is not the task of the CJEU but of the EU legislator to determine the balancing point between the two fundamental principles recognised by the Treaty and potentially in conflict with one another – economic freedom on the one hand and employment protection on the other –, establishing accordingly the extent of competition possible among the employment law systems of Member States.

In our view, therefore, web-based work located within the EU territory would require intervention by the EU legislator to establish the minimum levels of protection for workers throughout the EU, irrespective of the place 'in which' they physically work (perhaps with specific reference to the subjects detailed by the PWD). In this case, web-based work could represent a first *corpus* of EU employment law.

6. Preliminary conclusions

The discussion so far conducted with regard to the issue of the law applicable to web-based workers has brought us to diverse conclusions.

In the case of web-based workers located outside the EU who have recourse to an EU judge, a body of mandatory provisions of the competent court may be applied – through the coordinated reading of Art. 9 Rome I and the PWD –, thus according such workers a treatment that is predictably more protective than that of their country of origin, while at the same time protecting the EU system and individual Member States from the downward competition of Third Countries. By contrast, in the case of web-based workers operating within the EU – due to the narrow scope attributed since 2007 by the CJEU to the PWD within the internal EU market – today the law of 'habitual place of work' under Art. 8 Rome I must apply, i.e. the law of their country of origin.

We consider the latter outcome unsatisfactory and hope that web-based work can constitute the first segment of a uniform EU-wide employment law (perhaps restricted to an essential core of rules, referring for example to the subjects considered by the PWD), averting the risk of different treatment for web-based workers within the EU and thus of downward competition among the employment law systems of Member States.

Having addressed the question concerning the identification of the law applicable to web-based workers presenting elements of internationality, it now remains to focus on the problem related to the identification of the competent court.

Section II

7. The determination of jurisdiction in the Brussels I bis system for transnational employment disputes

In the European context, the determination of the competent court in relation to transnational disputes in the matter of individual employment contracts must be made on the basis of Brussels I bis, which, in section 5, contains some 'special' rules, inspired by the principle of protection of the weaker party of the relationship (the worker).[47] These rules allow the

47. The provisions currently in force are the result of a long and tortuous path, which arrived at Brussels I bis from the 1968 Brussels Convention (which did not provide any), passing through a series of legislative innovations included, first, in the Lugano Convention (1988), then in the Convention of access of Spain and Portugal (1989) and, finally, in Reg. 44/2001. On the special provisions contained in Brussels I bis see U. Magnus, P. Mankowski (eds.), *Brussels I bis*

worker-claimant, who intends to sue the employer domiciled in a Member State, to make use of a plurality of alternative forums. Indeed, according to Art. 21, the connecting factors for identifying the competent courts are: the place of domicile of the employer, or that 'in which' or 'from which' the worker habitually carries out (or carried out) his/her activity;[48] in the alternative, if the employee does not (or did not) habitually carry out his/her work in any one country, the place where the business which engaged the employee is (or was) situated. Finally, in the case of an employer not domiciled in a Member State, the relevant criteria can be the second and the third of the aforementioned ones, or (under Art. 20, para. 2) the place in a Member State where the employer owns a branch, an agency or any other establishment, but only for disputes relating to their exercise. If it is, instead, the employer who intends to sue the worker, Art. 22 gives jurisdiction *only* to the courts of the Member State in whose territory the worker is domiciled.[49] The 'habitual place of work' is undoubtedly the most relevant connecting factor used in practice. In fact, the cases in which it is the worker who takes action against the employer are incomparably more frequent than the opposite scenario.[50] On the other hand, the CJEU, interpreting the legislative text in the sense of the place not only 'in which', but also 'from which', the work is carried out,[51] has, over the years, expanded the notion of 'habitual place of work', ending up including the phenomenon of so-called peripatetic work, i.e. the cases in which the worker carries out his/her activity in more than one jurisdiction. The cases of reference are extremely varied: from workers who, although carrying out their activities in more than one State, have a closer connection with only one of them, due, for example, to the existence therein of an office[52] or of a place to return to after each trip;[53] to the workers who, regardless of a main centre of interest, carry out their activities in ever-changing places.[54]

The extension of the scope of application of the 'habitual place of work' criterion has entailed a simultaneous compression of that of the 'place where the business which engaged the employee is or was situated', considered, moreover, always as residual (and therefore interpreted restrictively). The preference of the CJEU for the 'habitual place of work' serves two objectives of primary

Regulation. Commentary, in *European Commentaries on P.I.L.,* Cologne 2016; U. Grušić, *Jurisdiction in Employment Matters under Brussels I: A Reassessment*, in *Int. Comp. Law Quarterly*, 61, I. 01, 2012, 91 ff.

48. Hereinafter 'habitual place of work'.
49. The parties may derogate from the aforementioned provisions by agreement, but, pursuant to Art. 23, only if the latter is subsequent to the arising of the dispute while, if entered into earlier, only in case it allows the worker to seize additional courts than those referred to in section 5. The 'special' legislation is completed by Art. 22, para. 2 (on counterclaim) and Art. 45, para. 1, point e) i), which allows the refusal of recognition of a judicial decision rendered by an EU judge if that decision conflicts with section 5, but only where the worker is the respondent.
50. In Germany it is estimated that over 95 per cent of employment disputes are initiated by employees and less than 5 per cent by employers.
51. The expression is codified by Brussels I bis at Art. 21, para. 1, point b).
52. Typical example: the sales representative. See CJEU, C-125/92, *Mulox*. See also: CJEU, C-383/95, *Rutten;* CJEU, C-37/100, *Weber*.
53. Typical example: airline pilots and flight attendants. See CJEU, 14 September 2017, C-168/16, *Moreno Oscar* and C-169/16, *Nogueira.* See for an analysis D. Diverio, *Dalla Corte di Giustizia un'importante precisazione sulla giurisdizione delle controversie di lavoro relative al personale di cabina*, in *Rivista Italiana di Diritto del Lavoro*, 2017, 4, pt. 2, 872 ff.
54. Typical example: cooks on cruise ships, see CJEU, C-37/100, *Weber*.

importance at the same time: on one hand, the protection of the worker;[55] on the other hand, the respect for the proximity principle.[56]

8. 'Habitual place of work' in a 'virtual' sense: a possible perspective?

The notion of 'habitual place of work' has so far been conceived with reference to types of activity mostly characterised by a clearly identifiable physical-material element.[57] No references, instead, can be found to wholly or predominantly 'virtual' dimensions of the relationship, towards which, due to the impressive technological development of recent years, the world of work is increasingly moving. It is not surprising, therefore, that, with particular reference to the phenomenon of web-based work (and crowdworking in particular), whose characteristics are outlined above (§ 1), the Regulation contains no specific provisions, nor has the CJEU had the opportunity to rule.

One might thus wonder whether the exclusively virtual nature of the working relationship, mirrored in the equally virtual nature of the object of the activity, determines a de-materialisation of the very place 'in which or from which' the activity is carried out, possibly to the point of identifying it not so much in the place where the worker is physically operating,[58] but *in the platform itself*, which expands from a mere interactive dimension with the employer – through which to communicate, receive instructions and send information – by virtue of its nature, co-essential and qualifying of the working activity, to the rank of 'habitual place' of its implementation.

The need to identify, in the infinite space of the web, an anchorage for the resolution of relevant legal issues, including the identification of the competent court, could however lead to paradoxical results. Since, conventionally, the place of registration of the web platform is deemed the relevant one for detecting its location and its operation, would that place be referred to also for the purpose of identifying the competent court, *sub specie* of the connecting factor for determining the 'habitual place of work?[59] Indeed, this construction is not entirely without grounds. *Mutatis mutandis*, in relation to the issue of 'habitual place of work' for pilots and flight attendants operating on board aircraft, a minority case law view (also in Italy) suggested identifying it – before the clarifying ruling of the CJEU in the *Ryanair* case[60] – in the place of registration of the aircraft. Although the latter criterion represents a 'formal' and easily identifiable anchorage, very often it lacks any close connection with the dispute and the actual location of the itinerant work activity.

However, the reasoning would be unacceptable if applied to the criterion of the 'habitual place of work', because it would be fatally at odds with the rationale and the aims of the European legislation, inspired by the principles of protecting the weaker party of the relationship and of proximity. On the other hand, the place of registration would be subject to the risk of manipulation, being able to be placed, at the discretion of the employer, in non-EU countries, characterised by

55. It is, indeed, the criterion less 'manipulable' by the employer than the alternative ones contemplated by section 5 and, in particular, than that of the place of the engaging business.
56. To the extent that it favours the anchorage of the dispute before the court which shows the closest connection with it.
57. From a subjective point of view (parties of the relationship), from the objective point of view (content of the performance) and from the logistic point of view (place of the activity).
58. In principle attributable to the place where he/she accesses the platform through his/her own device.
59. The place of registration would seem to be the only one, in an exclusively 'virtual' dimension, suitable for establishing a connection with the 'material' reality.
60. For references, see above para. 7.

low or even zero levels of worker protection, with serious prejudice to its procedural position.[61] Finally, adopting this perspective, all the connecting factors would end up overlapping and being interchangeable, leaving the choice of the competent court exclusively in the hands of the employer. In conclusion, the portability of the platform would allow for actual procedural dumping, in addition to favouring phenomena of forum shopping.

On the basis of some recent rulings issued by the CJEU in relation to other situations, but with more than one analogy with those under consideration (harm to individual rights caused through the Internet),[62] it certainly appears more reasonable – and in compliance with the fundamental principles of the matter – to opt for the connecting factor in which the centre of main interests of the weaker party of the relationship is located, until eventually making it coincide with the worker's place of domicile (so-called *forum actoris*).

In any event, leaving aside for the moment such a wholly 'virtual' perspective, at present somewhat controversial, it is appropriate to assess whether, and if so possibly, how, the current European legislation can govern and fit the phenomenon of web-based work in a trans-European dimension, in the dual perspective of identifying the competent judge for cases of web-based workers domiciled in non-EU countries who, however, carry out their activities for an employer domiciled in the EU and, conversely, of web-based workers domiciled in EU countries who carry out their activity for an employer domiciled in countries outside the EU.

9. First scenario: worker via web domiciled in a non-EU country and employer domiciled in the EU

In the first of the scenarios considered, where the claimant is the employer, there is no way to locate judicial proceedings within the EU. Article 22 Brussels I bis is indeed unequivocal in providing, in this case, for the jurisdiction of the courts of the Member State in whose territory the worker is domiciled.[63]

Only in the event of a prorogation clause in favour of an EU court would it be possible for the non-EU worker to be sued there: but these are unusual situations in practice and subject to restrictions in favour of the worker, under Art. 23. In the opposite case, where the web-based worker domiciled outside the EU acts against the employer domiciled in the EU, it is likely that the judicial action will be initiated before the courts of his/her own State, which will decide on jurisdiction according to local conflict rules. If the worker decides in any case to bring an action before an EU court, the latter would certainly be competent on the basis of the criterion set out in

61. In addition to having to file a lawsuit in a non-EU jurisdiction, the worker would risk not being able to avail of many favourable legal provisions (such as overriding mandatory provisions and those of public policy).
62. See the decision of the CJEU, 25 October 2011, in joined cases C 509/09 and C 161/10, *eDate Advertising GmbH e a. contro X e Société Mgn Limited*, where it ruled that the publication of material on the Internet is entirely different from the publication of a text in the press, which is, by definition, territorially circumscribed. Indeed, the contents via web instantly reach an indefinite plurality of users anywhere in the world, making the identification of the *locus commissi delicti* particularly problematic. Finally, the CJEU identified the court of the place of domicile of the harmed person as the competent one for the totality of the damage caused on EU territory. For comments on the decision, see O. Feraci, *Diffamazione internazionale a mezzo Internet: quale foro competente? Alcune considerazioni sulla sentenza eDate,* in *Rivista di Diritto Internazionale,* 2012, p. 461 ff.
63. The same conclusion is reached by applying the domestic conflict-of-laws rules, referred to in Art. 6, par. 1 Reg. 1215/2012.

Art. 21, para. 1, point a)[64] and possibly – but it would be a rather infrequent scenario – on the basis of the criterion referred to in Art. 21, para. 1, point b),[65] but, in this case, only if recruitment took place at an EU-based office. The jurisdiction should instead be excluded if the worker sued the employer before the courts of a Member State, but not in those of his/her domicile.[66] In such a case, the court, in application of the main connecting factor in this matter ('habitual place of work'), could only decline jurisdiction, whenever the place 'where or from which' the worker habitually performs (or has performed) his/her working activity is located outside the EU,[67] except in the case the respondent failed to raise the exception of lack of jurisdiction which, pursuant to Art. 26, would definitively site the case before the court seized.

10. Second scenario: web-based worker domiciled in an EU country and employer domiciled in a non-EU country

In the second of the abovementioned scenarios, the action brought by the employer should, under Art. 22, be filed exclusively with the courts of the worker's domicile. Where the employer acts, instead, before a different court (both in the EU and in a non-EU jurisdiction), net of the admissibility of the action under the local conflict-of-law rules (but only for non-EU jurisdictions), any decision on the merits, made in a State other than that of the worker's domicile, would almost certainly be refused recognition in any Member State, because it would be in contrast with the special rules on jurisdiction referred to in section 5 (Art. 45, para. 1, point e) i)). In the event that the worker based in Europe intends to bring an action against the employer domiciled in a non-EU country, assuming that the option (although possible) to sue the employer before the court of the latter's place of domicile is the least favourable and practiced, it will be precisely the criterion of the place 'in which or from which' the worker habitually carries out his/her activity that will lead to the initiation of judicial proceedings before an EU judge, most likely that of the worker's domicile.[68]

11. The role of trade associations and collective redress

In all cases where the operation of the different connecting factors previously examined required the worker to bring an action in a jurisdiction other than that of his/her domicile, his/her procedural position (and, consequently, the protection of his/her rights) may be affected, since s/he could no longer avail her/himself of the nearest forum. Initiating and dealing with litigation abroad, in fact, often requires not only financial but also informative tools, of which the worker-claimant[69] who acts individually is likely to be lacking. The contractual weakness of workers operating on, and through, the web, in particular, appears even more marked, because, unlike those of a particular

64. Place of domicile of the employer.
65. Place where the business which engaged the employee is or was situated.
66. Or of the place of engagement.
67. In case of peripatetic (i.e. non-resident, but itinerant) web-based worker, the principles set forth by the CJEU (and referred to above at § 7) will apply.
68. In the case of activities carried out from changing places (by hypothesis both intra- and extra-EU), see the principles set forth by the CJEU on 'peripatetic' work (see above § 7).
69. That is, as seen above at § 7, by far the most frequent hypothesis in the context of transnational employment law disputes.

company, they rarely know each other, hardly ever coming into contact personally. This affects the possibility of creating bonds and relationships of trust, which are essential for coordinating joint actions to protect the category.

In relation to disputes in which they are involved, therefore, perhaps more than in other cases, a role of primary importance should be played by trade associations (first and foremost, the trade unions), which can more effectively handle cross-border litigation (see the case of posted workers),[70] also and especially in the context of class actions.[71]

Net of the differences in the respective legal regime, what characterises this mechanism is the fact of allowing a group of subjects ('class'), harmed by contractual and/or extra-contractual violations, to bring[72] against the author of the harmful conduct a single judicial proceeding, which will involve, on behalf of the class, the participation of a single subject (the class representative). This mechanism makes it possible to overcome certain barriers to access to justice and the proliferation of parallel individual proceedings, originating from the same factual circumstances.[73] Within a collective redress, the effects of the decision will be felt by all those who have (spontaneously) joined the action.[74] Finally, this mechanism represents an effective deterrent for companies (incentivised to internalise costs and avoid negligent and/or fraudulent conduct) and, through the containment of administration costs due to economies of scale, an instrument that increases efficiency of the system as a whole.[75]

The Italian legal system has recently regulated the phenomenon with a specific law,[76] not without weaknesses,[77] which does not however contain, as far as it is of interest here, any provision

70. Dir. 2014/67 highlights the role of trade unions in promoting actions on behalf or in support of them (Art. 11, para. 3): see C. Peraro, *Diritto all'azione collettiva in contesti lavorativi transfrontalieri: un diritto sociale fondamentale non ancora coperto dal diritto internazionale privato dell'UE*, in *UNIO - EU Law Journal*, June 2016, Vol. 2, no. 2, 20 ff. See also the case C-396/13, *Ammattiliitto*. For references see B. Hess, *Collective Redress and the Jurisdictional Model of the Brussels I Regulation*, in A. Nuyts, N.E. Hatzimihail (eds.), *Cross-Border Class Actions. The European Way,* Verlag Dr. Otto Schmidt, 2013, 59.
71. The crowdwork phenomenon, as a non-individual, collective contribution mechanism to the generation of a good/final product (see M. Forlivesi, *Interessi collettivi e rappresentanza dei lavoratori del web*, in P. Tullini, *Web e lavoro. Profili evolutivi e di tutela*, Giappichelli, Torino, 2017, 182), indeed appears a fertile terrain for collective actions, as shown by the international praxis: for references see M. Faioli, *Jobs App, gig economy e sindacato*, in *Rivista Giuridica del Lavoro*, 2, 2017, 291-305.
72. At the initiative of each class member – the class representative – and/or of a representative entity or association.
73. This phenomenon, in addition to being debatable in terms of procedural economy, would risk turning into (practical or theoretical) conflicts of judgments, with serious prejudice of legal certainty.
74. The faculty of a potential class member, who does not intend to act collectively, to act individually in order to protect his/her right separately, remains, of course, untouched.
75. See, in this regard, T.S. Ulen, *The Economics of Class Action Litigation*, in J.G, Backhaus, A. Cassone, G.B. Ramello, *The Law and Economics of Class Actions in Europe: Lessons from America*, Cheltenham, UK, Northampton, MA, 2012, 79.
76. See l. 12 April 2019 (whose entry into force is postponed to 12 months from its publication), which increases the scope of subjects potentially entitled to avail of a collective redress mechanism (previously limited only to consumers: see v. A. Giussani, *Il nuovo art. 140-bis c. cons*., in *Rivista di Diritto Processuale*, 2010, 607 *et seq*.). For a comment on the new Italian legislation see G. Scarselli, *La nuova azione di classe di cui alla legge 12 aprile 2019 n. 31,* 07 June 2019, in *www.judicium.it*; G. Mazzaferro, *Brevi riflessioni sul disegno di legge n. 844 (azione di classe) e su alcune proposte di emendamenti,* 18 February 2019, in *www.judicium.it*.
77. In relation to the possibility of joining the class action even after the court's decision to admit the action (potentially prejudicial to the principle of equality of arms) and to the inadequate treatment of the position of the class members, in

on possible cross-border profiles of collective redress.[78] This is a shortcoming common to many European legal systems,[79] which is in stark contrast with the exponential increase in risk, caused by economic globalisation and increasing cross-border trade, that collective interests located in more than one Member State be could affected by violations of EU law.[80]

> Moreover, at European level, despite the remarkable initiative of the EU institutions, to date there is no binding legislative instrument on class actions (or collective redress).[81] Among the EU-related initiatives worth mentioning is, in particular, the Recommendation issued on 11 June 2013,[82] with which the Commission outlined a set of common principles for collective redress mechanisms, with a view to harmonising national procedures and coordinating them in respect of cross-border disputes.
>
> A series of recent Reports and Studies,[83] however, show starkly that the implementation of the provisions of the 2013 Recommendation by Member States has not been at all satisfactory and the current situation is anything but harmonised. The national disciplines diverge, even very strongly, with reference to practically all the procedural profiles of the collective redress mechanisms,[84]

On one hand, this situation, which implies an unequal and discriminatory treatment within the EU of similar situations, risks severely compressing the exercise of rights which, by finding their source in EU law, should instead be able to enjoy the same level of protection.[85] On the other hand, the subjection of those involved in the labour market (first and foremost, companies and enterprises) to different obligations, charges and sanctions, depending on the different collective regime

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particular as regards the right of defence and the right to appeal, see G. Scarselli, *La nuova azione di classe, cit., passim.*

78. Consider, for example, individuals who are not domiciled in Italy and intend to join the action initiated there by an association registered in Italy or in another Member State; or associations that intend to start an action abroad (intra- or extra-EU), on behalf of the interests of a 'local' or 'foreign' class members.
79. Among the few exceptions, see the so-called 2005 German Capital Market Model Case Act.
80. National legislations are limited to referring to Brussels I bis, which, as we will see immediately below, is utterly unfit for this purpose.
81. Names, definitions and qualifications used at national level vary even considerably: the most common ones are collective redress (or actions) and group actions, class actions, test case proceedings or model case proceedings; group litigation orders; popular actions. For further information see D. Fairgrieve, G. Howells, *Collective redress procedures: European debates*, in D. Fairgrieve, E. Lein (eds.), *Extraterritoriality and collective redress*, Oxford University Press, 2012, 15-41; V. C. Hodges, *The Reform of Class and Representative Actions in European Legal Systems. A new Framework for Collective Redress in Europe*, Hart Publishing, Oxford and Portland, 2008, *passim*.
82. On which see A. Stadler, *The Commission's Recommendation on common principles of collective redress and private international law issues*, in *Nederlands Internationaal Privaatrecht*, 2013, No. 4, 483 ff.
83. See the Commission Report of 25 January 2018, COM (2018) 40 final; the Study '*Collective Redress in the Member States of the European Union*', October 2018 - PE 608.829; the Study for the Commission of November 2017, prepared by the BIICL: '*State of collective redress in the EU* (. . .)' JUST/2016/JCOO/FW/CIVI/0099.
84. From the very existence, *tout court*, of mechanisms of collective redress, to their regime, type and structure, in relation to issues such as: scope, categories with *locus standi*, eligibility criteria, available remedies, costs and their allocation and so on.
85. Consider the variable of the different lengths of judicial proceedings (which, in relation to class actions, also has to deal with the cumbersome preliminary admissibility phase of the action). In some legal systems the length is so drawn out as to amount to a substantial denial of justice.

applicable to them,[86] can only be reflected in uneven conduct and strategies, with necessarily diversified economic costs and potential distortions in the functioning of the single market and in fair competition. Finally, the fragmentation of disciplines reduces the effectiveness of law enforcement by national systems against possible abuses of this mechanism.[87] These drawbacks grow exponentially in relation to cross-border disputes. In class or group actions with international profiles,[88] in fact, every procedural aspect is subject to the *lex fori* of the court seized,[89] which, as we have seen, differs significantly from State to State, creating obstacles to access to justice and heavier burdens – compared to domestic litigation – for the subjects involved.[90]

On the other hand, as far as the determination of jurisdiction is concerned, national legislations, which are deficient in this respect, merely refer to Brussels I bis, which, however, having essentially been designed for individual litigation only,[91] does not contain any special jurisdictional rule for collective redress mechanisms.[92] The application of its rules, which can be extended to the cases we are dealing with here only by analogy,[93] makes the bringing of a cross-border collective judicial action extremely problematic, if not impossible.[94] In assessing the admissibility of such actions, in deciding on all procedural issues that may arise during the proceedings,[95] or in deciding whether or not to recognise decisions issued in another Member State at the end of class action

86. For example, an employer domiciled in a State that does not provide for any collective remedy, or which provides only collective injunctive reliefs but not compensation, may be more unscrupulous than its competitor domiciled in a State that has adopted more rigorous and effective collective redress mechanisms, which will act as a deterrent.
87. Of which, more often than the class members, the actual beneficiaries are the true drivers of these actions (associations without the necessary expertise; law firms, funders or other categories of investors), incentivised to start reckless and/or unmeritorious litigation (often assisted by contingency fee agreements), from which they hope to gain a profit in any case.
88. Foreign applicants; harmful conduct with effects in more than one jurisdiction; victims of violations domiciled in different countries.
89. As confirmed by the CJEU in its decision of 12 July 2013, C-396/13, *Ammattiliitto.*
90. Consider, for example, the higher costs, for companies and professionals, relating to the assessment of risks deriving from legal uncertainty and from the uncertain predictability of the outcomes of a cross-border dispute, subject to unclear or in any event different rules. In addition, the impact of the rules on the allocation of costs: if placed at the expense of the individual class members, they could discourage individuals from joining the class.
91. See P. Mankowski, P. Nielsen, *Introduction to Articles 17-19*, in U. Magnus, P. Mankowski (eds.), *European Commentaries on PIL.* Brussels 2016, 450; M. Danov, *The Brussels I Regulation: cross-border collective redress proceedings and judgments*, in *Journal of Private International Law*, 2010, Vol. 6, No. 2, 359 ff.; H.M. Watt, *Brussels I and Aggregate Litigation*, (2010), 2, *Praxis des Internationalen Privat- und Verfahrensrechts* (IPRax) 111.
92. Already in the 2013 Recommendation, at point 17, the Commission invited Member States to ensure that national rules on admissibility and *locus standi* did not exclude foreign applicants from the use of collective redress mechanisms. See A. Stadler, *The Commission's Recommendation, cit.,* 235 ff.
93. See A. Nuyts, *The Consolidation of Collective Claims Under Brussels I,* in A. Nuyts, N.E. Hatzimihail (eds.), *Cross-Border Class Actions*, *cit*., 69, note 72.
94. For example, the application of the special jurisdictional rules referred to in Art. 7 (for contractual and non-contractual disputes) could lead to a parallelism of procedures, whenever the places of performance of the contract, or the *locus commissi delicti*, are not identical, with significant obstacles to the possibility of consolidating the proceedings. In this case, the rules on *lis pendens* (Art. 29) and related actions (Art. 30) will not be of great help, because the former require the identity, among other things, of *petita* (which does not occur when the relief requested before one court is an injunction, and before another court, compensation), the latter because they entrust the assessment – as to whether or not to stay the proceedings – to the discretion of the judge. The situation could be further fragmented if jurisdiction agreements exist which are stipulated only by some class members but not by the others.
95. For example, possible consolidation of proceedings; third party intervention; application, for some members, of 'special' jurisdictional rules due to their particular status, and so on.

proceedings, in fact, courts will have to assess the existence of the requirements in relation to the individual parties, to the single *petita* and to the single *causae petendi,* with potentially disruptive effects of the collective actions, frustrating their rationale and goals.

The difficulties that exist in a European context – where integration of legal systems and cross-border cooperation are particularly intense – are multiplied when considering the international (extra-EU) dimension,[96] which is inevitably subject to the conflict-of-law rules of individual States.[97] The outcomes relating to the different procedural steps of a collective judicial action are in this case unforeseeable, fatally variable from State to State and subject to potential discrimination between subjects belonging to the same class.[98] The situation could perhaps improve with the Hague Convention on the Recognition and Enforcement of Foreign Judgments (adopted on 2 July 2019), which includes, in the notion of 'decision on the merits', also decisions issued within class action proceedings,[99] allowing their easier recognition and enforcement in other Contracting States. A high number of ratifications,[100] in fact, could have an indirectly harmonising effect on the main procedural profiles of the collective redress mechanisms, with a gain in terms of legal certainty.

However, at present, the actual impact of collective judicial actions on the cross-border protection of web-based workers' rights is far from ideal. And this, as we have seen, concerns both European and, even more so, non-European workers.

12. Second conclusions

The foregoing analysis should have highlighted some critical issues in respect of the identification of the competent forum in relation to the phenomenon of web-based work in general, and of crowdworking in particular, which is not yet sufficiently regulated, in particular as far as the international procedural dimension is concerned. Indeed, the extension to those new scenarios of common rules and principles developed with reference to other contractual typologies (primarily those of so-called peripatetic workers) is not always satisfactory, due to the extreme variety of disputes in which workers of this category may be involved.

Moreover, due to the barriers to access to justice that the worker is faced with (especially in relation to an individual dispute to be located in a jurisdiction other than that of his/her domicile), an attempt was made, in section II of this article, to enhance the role of trade unions as a collective pursuer of judicial remedies. In respect of the latter aspect, dissatisfaction with the current regulatory regime regarding class actions, when their use is necessary in the context of cross-border disputes, should impose an acceleration in the path of harmonisation of national disciplines[101] that,

96. This dimension will see European workers carrying out their activity for an employer and/or through a web platform located in non-EU territory and vice versa.
97. Which govern the aspects of both the determination of jurisdiction and the recognition of foreign decisions.
98. Consider the rejection of a class action brought in the USA by crowdworkers domiciled in different EU Member states: the possibility of bringing the action again in their respective Member states will vary according to the different applicable regime in relation to the recognition of a foreign decision originated by class action and in relation to estoppel effect of foreign final decisions.
99. See Art. 3, Definitions, par. 75.
100. For references see P.A. De Miguel Asensio, G. Cuniberti, P. Franzina, C. Heinze, M. Requejo Isidro, *The Hague Conference on Private International Law 'Judgments Convention',* Studio per il Parlamento Europeo, 16 April 2018.
101. Unfortunately, not easy at European level and perhaps even utopian at international level. However, a 'European' regulation of the phenomenon is increasingly deemed as no longer delayable, with many Authors wishing to see a set of harmonised conflict-of-laws rules (see C. Peraro, *Right to collective action in cross-border employment contexts: a*

for example, foresees, for an entity or association registered in a particular State, the possibility of representing applicants from different States (even outside the EU) and of operating in any jurisdiction, with the possibility that other associations intervene in the same proceedings.

In order to avoid the phenomenon of parallelism of procedures, one could even envisage a system in which, in the face of prejudice suffered by a plurality of workers, only one collective action is authorised at European level (possibly subject to a single law), to be filed not so much with the court of the respondent's domicile (which tends to favour the respondent to the detriment of the claimants), but before the court of the place where, for reasons closely related to the type of harmful conduct or to that particular class of applicants, the main centre of their interests is to be located.[102] This should be combined with intense information activity (through publicly accessible and interconnected electronic registers), aimed at making all potential stakeholders aware of the scope of the action (or actions).[103]

These, we are well aware, are almost futuristic solutions at the moment, as, in the European context, they are up against the predictable resistance of the Member States as well as the principles of proportionality and subsidiarity. Moreover, in relations with Third Countries, a critical issue is the absence of international agreements of mutual assistance and judicial cooperation (since the Hague Convention on the Recognition and Enforcement of Foreign Judgments is inconclusive for these purposes). But this, we believe, is definitely the ideal direction in which we should move.

Author note

Although the present work results from the joint reflection of the two authors, §§ 1-6 were written by Maria Teresa Carinci; §§ 7-12 by Albert Henke.

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fundamental social right not yet covered by EU private international law, in *UNIO - EU Law Journal*, June 2016, Vol. 2, No. 2, 20-38), also in light of the fact that the right to collective actions has been deemed as falling within the scope of fundamental social rights recognised and protected by European and international legal instruments (such as the Charter of Fundamental Rights of the European Union), in connection with the right to an effective protection of rights (for such reference see the decision of the CJEU in the case C-396/13, *Ammattiliitto*).

102. By analogy to what happens in other sectors – consumer, competition, environmental law – where jurisdictional options are left to the claimants. Alternatively, one could think of a system in which, in the face of the possibility of bringing several class actions simultaneously, a *main proceedings* can be clearly identified, which, in terms of importance and effects, stands above a series of secondary or ancillary proceedings, conceivable for the protection of only some special and limited interests. A solution patterned after the provisions of EU Reg. 2015/848 relating to insolvency proceedings, which share with class actions the need to avoid parallel procedures and for a decision that binds a plurality of stakeholders.
103. On these proposals see the Study '*Collective Redress in the Member States of the European Union*', *cit.,* 106 ff.