# Digitalisation and Mobility of EU-Workers/Services ; Digitalisierung und Mobilität von EU-Arbeitnehmer/ Dienstleistungen ; Digitalisation et Mobilité des Travailleurs et Services Européens

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# Digitalisation and Mobility of EU-Workers/Services

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## I. Digitalisation, a multi-faceted phenomenon

Digitalisation[1] is the key driver behind socio-economic change in many branches of industry. The growing connectedness to the internet through mobile electronic devices such as smartphones, laptops and tablet computers, fosters e-commerce through online marketplaces (e.g. *eBay, Amazon*).[2] It enables the online raising of money through crowdfunding platforms such as *Kickstarter.*[3] It facilitates the acceptance of virtual currencies such as *Bitcoin* as payment instruments, even though these currencies are neither backed up by any financial institution, nor subject to any form of government supervision or control.[4] Indirectly, the digitalisation of these economic mechanisms and instruments influences job opportunities, the content of jobs and even the form of payment in exchange for labour.

In addition, digitalisation also directly transforms work life and thus impacts on labour law, which is the focus of this conference. This paper assesses the main theme of the conference from an EU workers' /services' perspective. From this angle, the focus is on topical manifestations of digitalisation of work: (1) *'ICT-based mobile work'* which takes place outside the employer's premises, and (2) '*platformisation' of labour'* by virtual network organisations. In reality, the two cannot be fully separated from one another, but instead represent a continuum, ranging from partially to fully digitalised work places and employment relationships.

Examples are used to enhance our understanding and to identify and outline[5] some complex legal issues that may arise in a cross-border EU context. Although it is not easy to predict at what scale

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[1] According to the Oxford English Dictionary, digitalisation refers to 'the adoption or increase in use of digital or computer technology by an organization, industry, country, etc.'

[2] Some sectors have already been profoundly transformed by electronic commerce, including travel agencies, sales of electronic and cultural goods, financial services, gambling and sports betting. Online clothing sales are growing, while food sales are still relatively undeveloped.There are high levels of consumption of music online, but it is still largely illegal, which has a very destabilising effect on the sector. See SEC(2011) 1641 final, p. 7.

[3] Mc Kinsey report (2014), *Global flows in a digital age: How trade, finance, people, and data connect the world economy*.

[4] This triggers discussions on tax and other legal implications. See Opinion of A-G Kokott of 16 July 2015 in *Hedqvist,* C-264/14, EU:C:2015:498, advising the CJEU to consider dealing in bitcoins for a commission to be a service exempt from VAT.

[5] A thorough discussion of the issues identified lies beyond the scope of this paper.

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digitalisation of work will become manifest across borders, its potential impact is high, in particular in Euroregions such as SaarLorLux,[6] and as a tool to facilitate working from large distances.[7]

## II. Setting the scene

As has been clear from the beginning of this century, digitalisation has set in motion the erosion of the fixed physical workplace. Ever more employees can work from anywhere, using virtual collaboration tools such as email, web-meeting software and file-sharing sites (e.g. S*kype, Google Docs*, *Dropbox)*. Some are actual e-nomads, 'invisible workers working digitally from everywhere'.[8]

According to Eurofound,[9] '*ICT-based mobile work'* refers to the possibility created by modern technology to work remotely from any location as effectively as from the employer's premises. ICT-based mobile work may be labelled as a variation of teleworking. It comprises all kinds of work patterns supported by electronic devices, which allow employees to operate from various locations outside the premises of their employer, for example, at home, at a client's premises or 'on the road'. It is characterised by the (partial or full) absence of a fixed workplace, internet-based processes, management support of mobility and a mobile work culture.

How then does this (partially) digitalised mobile work fit into the EU acquis of freedom of movement for workers,[10] underpinned as it is by traditional notions of a fixed physical workplace? We explore in particular the potential impact of a large-scale introduction of ICT-based work on mechanisms to coordinate and designate the applicable labour and social security law for cross-border workers (Sections III-VI).

*Platformisation of labour* is the most recent and radical manifestation of digitalised work. It is characterised by virtual network organisations seeking to optimise on-demand access to paid and unpaid work. The most renowned example of the latter is *Wikipedia*, while the most controversial example of the former is perhaps *Uber*.[11] As observed by Felstiner, due to platformisation, 'the traditional concept of a fixed workforce comprised of individually selected employees has begun to

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[6] Comprised of five different regional authorities located in the French and German speaking parts of Belgium; Lorraine, a region of France; the French départements Moselle and Meurthe-et-Moselle; and the German federal states of Saarland and Rhineland-Palatinate.

[7] For Norway, a country with low population density and long distances between communities, ICT-based mobile work in knowledge-intensive firms has been identified as a new potential driver for economic growth. It may offer workers who live far away from potential employers the chance to increase their employability without having to relocate. See Eurofound (2015), *New forms of Employment* report, p. 81.

[8] J. Popma (2013), *The Janus face of the 'New Ways of Work'. Rise, risks and regulation of nomadic work*, Brussels: *ETUI Working Paper* 2013.07.

[9] Eurofound (2015), Ch. 6, p. 72 – 81, 132.

[10] As confirmed in the Eurofound 2015 study, ICT-based mobile work is also taken up by self-employed. However, ICT-based mobile work among the self-employed is often linked to other new employment forms, such as crowd employment. Hence, for our purposes, it is more interesting to look at the employee-related impact of ICT-based mobile work, since the issues concerning the qualification of ICT-based mobile work partly overlap with those raised in the context of crowdworking.

[11] See, e.g., news items on *EurActiv.com*: Uber Chief: 'Uber and Europe is definitely a conversation worth having,' by Ecaterina Casinge, 17 Apr 2015, and on *Cnbc.com*: Uber drivers' suit given class-action status. How to classify workers has wide-ranging impact for Uber's business model, by Kate Rogers, 2 Sep 2015.

disintegrate.'[12] This is true in particular for platforms such as *Amazon Mechanical Turk*, *Upwork*, *ELance* and the German-based *Clickworker.* These online platforms for work replace stable workforces through networked 'crowds'. Howe defines this phenomenon as 'taking a job traditionally performed by a designated agent (usually an employee) and outsourcing it to an undefined, generally large group of people in the form of an open call'.[13] Large business processes are broken into smaller specific tasks – such as data entry and verification, copy-writing or graphic design – and distributed to crowd workers through internet platforms, regardless of geographic boundaries.

This phenomenon has triggered a fierce debate, particularly in the U.S., and litigation on how microtasking crowd workers should be classified. How should this phenomenon be dealt with in the EU context (Section 7-9)? Do cross-border crowd workers qualify as employees as interpreted by the CJEU in the framework of the free movement of workers? And what legal questions arise before or concurrent when determining their employment status?

## III. EU free movement of ICT-based mobile workers

Migrant EU workers have a right to equal wages and other working conditions with national workers, including social advantages and social security benefits. This equal treatment principle is underpinned by the Regulations determining the applicable social security legislation (Regulation 883/04) and the objectively applicable labour law (Rome I: Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations). The main principle underlying these rules has always been the law of the *habitual place of work* (*lex loci laboris)*.

The Treaty provisions on the free movement of workers and what are now enshrined in Regulation 492/2011[14] and Regulation 883/04,[15] were designed on the basis of an image of a 1960s migrant worker: a full-time worker who relocates his (fixed) physical work place and his place of residence (taking his family with him) to another Member State. If migrant EU workers move both their physical place of work and their residence to another Member State, the legal system operates smoothly: the right to equal treatment translates into full coverage of the migrant worker by labour laws and the social security system of the receiving Member State.

As mentioned above, ICT-based mobile workers do not fit into this archetype. They do not work at one fixed location, but work more flexibly, in various places or even on the road. In a recent Spanish case before the CJEU,[16] Advocate General Bot emphasised that such[17] workers are not able 'to choose to adjust their private life and their place of residence for the sake of proximity to their place of work,

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[12] A. Felstiner (2011), *Working the crowd: Employment and labor law in the crowdsourcing industry*, Berkeley Journal of Employment & Labor Law, Vol. 32, No. 1, pp. 143-203. See also M. Risak (2014), *Crowdworking: towards a 'new' form of employment*, Vienna: Working paper ELLN.

[13] Jeff Howe (2006), *Crowdsourcing: A definition*. At: http://www.crowdsourcing.com.

[14] Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, replacing old Regulation 1612/68.

[15] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, replacing old Regulation 1408/71.

[16] Judgement of the CJEU of 10 September 2015 in *CC.OO. v Tyco,* C-266/14*,* EU:C:2015:578.

[17] In casu, the workers used a company vehicle to drive to customers' premises daily to install equipment. They were provided with *a mobile phone and an application on their phones* to receive a daily list including the different premises they are expected to visit that day within their geographical area of work.

since that place varies daily' (point 21). Translated into a cross-border (Euro)region, it might not make sense for workers without a fixed place of work to move their place of residence to the employer's premises in another Member State.

Interestingly, the fact that the workers in this recent Spanish case did not have a fixed work place and that their work was ICT-based was not the result of a request from the workers themselves, but had been a decision of their employer, who closed down the regional offices (their previous fixed work place) in order to cut costs. However, in several European countries, employees may request or even claim a right[18] to (partially) work from home and/or from any location by means of ICT. It is submitted that if undertakings only allowed national but not cross-border workers to engage in ICT-based remote work, this would run counter to the equal treatment principle enshrined in Art. 45 TFEU/Art. 7 Regulation 492/2011. ICT-based mobile work may in fact be even more attractive from a transnational perspective, as it significantly enhances the work-life balance of frontier workers, for instance. From an EU-policy perspective, promoting this form of digitalisation may be helpful in realising the goal of a 'genuine European labour market', since opportunities for ICT-based mobile work would certainly lower the barrier to accepting a job (or posting) with an employer based in another Member State.

It does, however, unfortunately make sense to discourage cross-border ICT-based mobile work from a universal perspective: it would, at a large scale, have (too) far-reaching implications for the (predictability of) applicable law and hence for labour costs and the administrative capacity of employers' HR and pay roll departments. As a matter of fact, experts are warning employers to be cautious.[19] From a Member State perspective, cross-border ICT-based work would not be applauded, either: The sustainability of social security (and tax) systems and collectively agreed social funds could deteriorate as a result of a large-scale adoption of ICT-based mobile work.

## IV. A hypothetical example in a Euroregion

This point can be better illustrated if we take the SaarLorLux region and assume that 1,000 employees work for company X, established in Luxembourg, with 250 of these employees residing in France, another 250 in Germany and half (500) in Luxembourg.[20] From 2016 onwards, company X decides to opt for ICT-based mobile work to cut costs. If 40 percent of the employees' total working time took place in a remote ICT-based work place (home, coffee shop, train, at a friend's home and occasionally when traveling abroad), their employer could reduce the necessary office space and thus save costs. One point for consideration needs to be raised here: What would the impact be on the employment contracts of the cross-border workforce in terms of the applicable labour and social security laws?

Currently, in accordance with the rules of Rome I and Regulation 883/04, company X applies Luxembourg's labour and social security laws (*lex loci laboris*) to their frontier workers. In case company X implements its plan as of January 2016, Regulation 883/04—for the majority of cases[21],—

[18] In the Netherlands, according to the Flexible Working Act, from 1 January 2016, employees will have the right to request more flexibility as regards their place of work.

[19] See, for instance, Stefan Nerinckx (2012), *International: Cross-border tele-working: beware!* at: http://www.fieldfisher.com/publications/2012/06/ .

[20] In Luxembourg, cross-border workers account for approximately 45 percent of the country's workforce.

[21] For part-time workers who may have another job with a different employer that is either based in Luxembourg or in the worker's country of residence, the coordination rules may play out differently.

stipulates a 'switch' from the presently applicable social security law to that of the country of residence, namely France or Germany. This is the case if at least 25 percent of the employees' working time takes place outside the employer's premises, in this specific case, in France and in Germany.[22]

As regards applicable labour law, the picture is less straightforward. A full (or partial) switch from Luxembourg's applicable social security laws to those of France/Germany could occur, depending on several factors, such as the existence of a choice-of-law clause[23] and the factual (and for each employee individual) assessment of which country objectively qualifies as the country *in* which or, failing that, *from* which the employee habitually carries out his or her work in the performance of the contract (Art. 8(2) Rome I).[24]

If employees' work across the SaarLorLux-region were so mobile that no habitual country of work could be identified, the laws of the country in which the registered seat of the employer is located would apply (Art. 8(3) Rome I). However, this specific factor was considered strictly secondary by the Court to that of the employee's habitual place of work. Therefore, it only plays a very subsidiary/ancillary role. If even international truck drivers are deemed to have a habitual country from which they carry out their work, then our frontier workers of company X can have one as well.

Finally, depending on the circumstances of the individual case, the law of the country with a closer connecting factor may trump the other two connecting factors. This could well mean that French or German law is applicable, since the factors taken into account pursuant to the *Schlecker* judgement[25] must include the country of social insurance coverage (which, as we have seen, would be France/Germany). However, many labour law rules, such as health and safety laws and working time regulations, have an overriding mandatory character. Hence, Luxembourg's labour law would probably continue to apply to some parts of the employment contracts (at least on those days on which the cross-border workers perform work at the employer's premises in Luxembourg) and (partly) depending on the assessment whether German or French law is not more favourable for the workers concerned.[26]

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[22] In case a worker works in two or more Member States, the rules laid down in Article 13 of Regulation 883/2004 apply. These point to the country of residence if a substantial part of a person's activity is carried out there. Pursuant to Art. 14 of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) 883/2004, 'substantial' usually means that at least 25 percent of the employee's working time takes place in the Member State of residence.

[23] Rome I is based on party autonomy. Hence, the parties to the (employment) contract may designate the law that is applicable to the contract. The law selected by them will be the law that governs the contract – the *lex causae*. However, in order to protect the employee, Article 8(1) limits the effect: A choice of law may not have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law applicable in the absence of such a choice.

[24] Even in the case of a truck driver working in international transport (Judgement of the CJEU of 15 March 2011 in *Koelzsch,* C-29/10, EU:C:2011:151) or a sailor working on a seagoing vessel (Judgement of the CJEU of 15 December 2011 in *Voogsgeerd,* C-394/10, EU:C:2011:842), the national court should try to establish whether, based on the circumstances as a whole, a country can be identified from which the work is actually performed.

[25] Judgement of the CJEU of 12 September 2013 in *Schlecker,* C-64/12*,* EU:C:2013:551. In this judgement, the CJEU clarified the scope of Article 8(4) Rome I.

[26] Art. 9 Rome I allows courts to apply domestic 'overriding mandatory' provisions (law of the forum), regardless of the (objectively) applicable law. As a result, Article 9 Rome I facilitates labour law systems which rely (sometimes heavily) on overriding mandatory law.

## V. When the exception becomes the norm

Several variations could be added to this example, highlighting the almost prohibitive complexity of large-scale ICT-based remote work from a legal perspective. Within the limited scope of the present paper, a reference to easily available and comprehensibly written practical guides on the applicable legislation[27] should suffice to emphasise the main point being made here: If ICT-based remote work at any point in the future became a regular HR policy in large organisations in cross-border regions (as well), the system for determining the applicable law might simply cease to function.

The time consuming, unpractical need to undertake an in-depth investigation of each individual case (e.g. by looking at the frequency at which the duty rosters change or the travel calendars or other information) in order to establish the time spent working in a given Member State would be a far too heavy burden for institutions and employers. Moreover, such individual assessments would make other administrative and collective modes of protection and enforcement more problematic as well. For instance, it could seriously hamper the workers' options to protect their interests by way of collective negotiations. It also sits uneasy with the objective pursued in Articles 45-48 TFEU, namely equal treatment, if workers who are employed by the same employer established in a given Member State (i.e. not a multinational employer) would no longer by default be covered by the same law.

## VI. Is there a way out of this complexity?

It is necessary to tackle the obstacles for large-scale ICT-based work across the EU. However, the heterogeneous and individualistic nature of online working patterns makes it difficult to propose adaptations to the systems to determine which applicable law would meet all requirements of transnational employees, their employers and the Member States involved. A few building blocks can however be suggested.

- In all situations of cross-border ICT-based (highly) mobile work, it is crucial to avoid frequent changes in the applicable legislation.[28] This is in the interest of the employees, employers and institutions alike.
- In case of cross-border telecommuting for only part of the working time (as in the example of company X), it might be in the mutual interest of the employer, employees and competent State to create the legal fiction or rebuttable presumption that ICT-based mobile workers (virtually) perform their work in the country of the employer's premises.[29] ICT-based remote work hinges on access to the employer's premises and networks. Even if equipment is not provided (BYOD), the workers must log in to the employer's online work environment in order to access company information and applications at any point in time and from any place.

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[27] See, for example, European Commission, *Practical guide: The legislation that applies to workers in the European Union (EU), the European Economic Area (EEA) and in Switzerland*, Brussels 2012.

[28] One good example is Art.14(10) of Regulation 987/2009, which stipulates that the applicable legislation for flight or cabin crew is assessed on the basis of a projection of work for the following 12 calendar months and should remain stable during that period (on the condition that there is no substantial change in the situation of the person concerned, but only a change in the usual work patterns).

[29] It would in a sense 'codify' many company practices where ICT-based work from home or elsewhere is only agreed upon informally and hence not reported to competent social security institutions. See Eurofound (2015), p. 74-75.

- It would be interesting to explore the specific sectors in which ICT-based mobile forms of cross-border work are used. Sector-specific aspects would allow for tailor-made solutions,[30] for instance, in a European sectoral social dialogue, and could include the modernisation of the general EU Framework Agreement on Telework based on sectoral needs.

## VII. Platformisation of labour in the EU context

As mentioned above, digitalisation not only boosts ICT-based remote and mobile work, but also the platformisation of labour. Whereas as ICT-based mobile work dealt with in the previous sections still presumes a regular employer-employee relationship and physical premises of the employer in a single country, platformised labour allows the demand-side of labour to become 'place-unbound' as well. It enables even the smallest company or single entrepreneur to become a 'micromultinational' that sells and sources products, services and ideas across borders.

Online 'marketplaces for on-demand labour' such as *oDesk* (now renamed Upwork) and *Amazon Mechanical Turk* link up virtual demand and supply. They make available a virtual workforce of crowdsourced workers. Through such (mostly U.S.-based) platforms, work is outsourced to a crowd of people who work remotely (ICT-based) from anywhere in the world on (micro)tasks or projects as required.[31] Hence, platformisation of labour is based on individual tasks or projects rather than on a continuous employment relationship.[32] According to Eurofound, crowd work is emerging in 11 Member States, involving a mix of large and small countries and geographic locations (BE, CZ, DE, DK, ES, GR, IT, LV, LT, PO, UK).[33]

How does platformisation of labour (potentially) affect cross-border working? No figures are available at EU level. To the extent that 'online platforms for work' may belong to what is referred to as 'e-commerce', recent Eurobarometer data on e-commerce bear relevance.[34] These data show that for companies that sell online, an average 85.4% of their online sales in 2014 came from their own country. A further 10.3% came from other EU countries, and 4.3% came from outside the EU. Hence, in contrast to the USA, a genuine EU digital single e-commerce market, let alone EU-wide platformisation of labour, is still in its infancy.

Regardless of its popularity in practice, the platformisation of labour has raised new and daunting questions concerning its classification. One-to-many relationships between an employer and employees that are of a permanent nature are being replaced by many-to-many relationships that are of a very short duration, 'sometimes as little as a minute or two', facilitated by a standardised environment located in cyberspace.[35]

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[30] Including perhaps sector-specific Art. 16 agreements or the inclusion of extended collective agreements in the framework of Regulation 883/04 and collective choice-of-law clauses in the framework of Rome I.

[31] See ELLN Working Paper of M. Risak (2014), *Crowdworking: towards a 'new' form of employment*, p. 2.

[32] This is also true for internet platforms offering on-demand labour that has to be performed offline, by 'Taskrabbits' or Uber drivers.

[33] Eurofound (2015), p. 108, Figure 15.

[34] Eurobarometer Flashreport 413 - Feb 2015.

[35] Felstiner (2011), p. 146.

How can such crowdsourced work relationships be qualified in a cross-border EU context? Let us take a Polish crowd worker, for example, who resides in Poland and performs cognitive digital piecework for 8 hours[36] a week on average on the German-based platform *Clickworker* for an unknown number of service recipients located in several EU countries.

## VIII. E-worker, e-service provider or even e-consumer?

The CJEU has consistently held that the term 'worker' is an EU concept and should not be interpreted restrictively.[37] Case law verifies that the type of employment relationship, duration of employment, working hours, size, origin or type of remuneration,[38] the need for income supplements as well as the worker's motive are not criteria in themselves to assess who should be regarded as a worker.[39] Accordingly, our Polish Clickworker may not be precluded from the scope of the concept of 'worker' on the sole basis of *the characteristics of his employment relationship*.

But what constitutes an employment relationship in the first place? In *Lawrie-Blum* it was stated that 'the essential feature of an employment relationship [...] that for a certain period of time a person *performs services for* and *under the direction of another person* in return for which he receives *remuneration*.' [40] These indicators - (1) the obligation to carry out work personally, (2) in (organisational) subordination, (3) in return for (periodical) payments - are used in most national labour law systems as well. In particular, indicators 1 and 2 may prove difficult to apply to the profoundly flexible nature of crowd work. Minimal commitments are made with regard to who[41] performs the tasks, when, and where. There is no need to give direction on how to carry out a given microtask or small project.

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[36] Felstiner (2011) in his ATM case study reveals that the 'average turker spends eight hours per week doing HITs, earning $ 1.25 per hour – well below the federal minimum wage (in 2011: $ 7.25), p. 167.

[37] See Judgment of the CJEU of 19 March 1964 in *Hoekstra,* Case 75/63, EU:C:1964:19, Judgment of the CJEU of 23 March 1982 in *Levin,* Case 53/81, EU:C:1982:105 and Judgment of the CJEU of 3 July 1986 in *Lawrie-Blum*, Case 66/85, EU:C:1986:284.

[38] Here, the issue of virtual currencies and gamification of crowdwork in relation to the remuneration criterion rises. This may not cause insurmountable problems in the context of EU law, as only voluntary work without any form of remuneration seems to be excluded.

[39] This was clarified and established by the CJEU in many cases dealing with atypical workers, such as part-time workers, fixed-term workers, short-term workers and on-call workers. See. e.g.. Judgment of the CJEU of 23 March 1982 in *Levin,* C-53/81, EU:C:1982:105; Judgment of the CJEU of 3 June 1986 in *Kempf,* Case 139/85, EU:C:1986:223; Judgment of the CJEU of 3 July 1986 in *Lawrie-Blum*, Case 66/85, EU:C:1986:284; Judgment of the CJEU of 5 October 1988 in *Steymann,* Case 196/87, EU:C:1988:475; Judgment of the CJEU of 31 May 1989 in *Bettray*, Case 344/87, EU:C:1989:226; Judgment of the CJEU of 26 February 1992 in *Bernini*, C-3/90, EU:C:1992:89; Judgment of the CJEU of 26 February 1992 in *Raulin*, C-357/89, EU:C:1992:87; Judgment of the CJEU of 14 December 1995 in *Megner and Scheffel*, C-444/93; Judgment of the CJEU of 6 November 2003 in *Ninni-Orasche*, C-413/01, EU:C:2003:600; Judgment of the CJEU of 7 September 2004 in *Trojani,* C-456/02, EU:C:2004:488; Judgment of the CJEU of 18 July 2007 in *Geven,* C-213/05, EU:C:2007:438; Judgment of the CJEU of 4 June 2009 in *Vatsouras and Koupatantze*, C-22/08 and C-23/08, EU:C:2009:344; Judgment of the CJEU of 4 February 2010 in *Genc,* C-14/09, EU:C:2010:57.

[40] Judgment of the CJEU of 3 July 1986 in *Lawrie-Blum*, Case 66/85, EU:C:1986:284, paras. 17 and 20.

[41] It may lead to new forms of (disguised) child labour. See Felstiner (2011), regarding the anonymity of crowd workers: p. 161-162, 185.

And even if in our example subordination were assumed, the question is to whom? Would our Polish crowd worker be subordinate to his service recipients (creating perhaps six 'employers' in the course of an hour) or to the German platform, which, through its online environment, exerts far-reaching control over the terms and conditions of work and has vested interests in the continued success of its business?

We do not have any clear-cut answers yet. However, as argued convincingly by Felstiner (for the U.S.), 'contrary to the expectations of vendors [platforms] and firms [service recipients], crowd workers' claims to an employee status are not inherently invalid'.[42] This is to some extent confirmed by studies of Risak and Däubler/Klebe (for Germany).[43] Interestingly, the latter demonstrate that crowd workers neither easily fit into other concepts of worker, such as solo-entrepreneur and 'Arbeitnehmerähnliche' (employee-like person).[44] In their view, crowd workers who only incidentally perform some work through an internet platform may be classified as consumers.[45] This would (e.g.) render them protection against unfair standard contract terms in accordance with EU consumer law.[46]

## IX. Real and genuine activities?

This surprising consumer[47] option also brings us to 'the key criterion for deciding whether a person is a worker, namely *the nature of the work itself*.' The CJEU has consistently held that a person must pursue an activity of economic value, 'which is effective and genuine, excluding activities on such a small scale as to be regarded as purely marginal and accessory'.[48]

For our Polish crowd worker, who performs crowd work for 8 hours a week, this criterion is crucial indeed. The CJEU has held that: 'Although the fact that a person works for only a very limited number of hours […] may be an indication that the activities performed are marginal and ancillary […], the fact remains that, independently of the limited amount of the remuneration for and the number of hours of the activity in question, the possibility cannot be ruled out that, following an overall assessment of the employment relationship in question, that activity may be considered by the national authorities

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[42] Felstiner (2011), p 187.

[43] Risak (2014), Däubler/Klebe (2015), *Crowdwork: Die neue Form der Arbeit – Arbeitgeber auf der Flucht?,* NZA 2015, 1032.

[44] Däubler/Klebe (2015), Part III, section 2 and 4.

[45] According to Risak (2014), p. 2: crowd workers can essentially be categorised into three groups: (1) those who have other sources of income and use crowdworking to earn a little extra (e.g., students, pensioners or homemakers); (2) those for whom crowdworking is the only – or at least the most significant – source of income (there are also differences here, namely between (2a) well-qualified people for whom crowdworking represents a temporary solution and (2b) people who work in this way on a permanent basis, as they would otherwise be at risk of long-term unemployment); (3) those who are excluded from the regular employment market due to disabilities and social exclusion.

[46] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. See Däubler/Klebe (2015), Part IV, who notice that more professional (and hence more dependent) crowd workers would be left unprotected in case they are labelled as independent contractors.

[47] Fitting in the notion of blurring lines between consumers and producers and the advent of so-called 'prosumers'.

[48] COM (2010) 373, p. 2, referring to Judgment of the CJEU of 23 March 1982 in *Levin,* C-53/81, EU:C:1982:105, paras. 16 and 17.

to be real and genuine, thereby allowing its holder to be granted the status of "worker" within the meaning of [now Article 45 TFEU].'[49]

Even in the situation of an on-call worker who effectively only worked five hours a day over a period of twelve days, the CJEU confirmed that no threshold existed below which the economic activity performed may be considered as purely marginal and ancillary. [50] The CJEU did, however, add that 'the national court may take account of *the irregular nature* and *limited duration of the services actually performed* under a contract for occasional employment.' [51] If we translate that into the relationship between our Polish crowd worker and his service recipients, it is highly unlikely that such ultra short-term and irregular relationships would qualify as an employment relationship pursuant to EU law. [52]

Consequently, it only makes sense to invoke Art. 45 TFEU if the platform is deemed an employer.[53] This may be the case if our Polish crowd worker continues working 8 hours a week or more and works for *Clickworker* for a longer period of time. As confirmed in *Genc*: 'Also, *the total duration of a contractual relationship* with the same undertaking must be taken into account and such '[...] factors are capable of constituting an indication that the professional activity in question is real and genuine'.[54]

## X. Cross-border link and applicable law

Let us suppose that even if the Polish Clickworker indeed met the above definition of a worker, one crucial piece of the puzzle is still missing. Our crowd worker must be a *migrant* worker in order to be covered by EU law. Hence, we need to establish the cross-border link. According to established case law, EU rules apply when a person works *in* a Member State other than his or her country of origin.[55]

However, the Polish Clickworker does not physically (have to) exercise his right to free movement in order to work for the *Clickworker* platform based in Germany. This prompts two questions: *(a)* Can he be deemed a frontier worker, although he does not carry out his work *in the territory* of another Member State? *(b)* And if so, what need or at least what incentive would there be for the Polish Clickworker to invoke Article 45 TFEU? These questions may tentatively be answered as follows:

*(a):* Thus far, virtual movement has not been at issue in the context of Article 45 of the TFEU (see also Section 3 above). In my opinion, we could reason by analogy to the *Alpine Investment* judgement, in which the CJEU determined already 20 years ago that (what is now) Article 56 of the TFEU applies to

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[49] Judgment of the CJEU of 4 February 2010 in *Genc,* C-14/09, EU:C:2010:57, paras. 27 and 28.

[50] See Judgment of the CJEU of 26 February 1992 in *Raulin*, C-357/89, EU:C:1992:87, para. 13, and Judgment of the CJEU of 6 November 2003 in *Ninni-Orasche*, C-413/01, EU:C:2003:600, paras. 25 and 32. See also COM (2010) 373, Part I, para. 1.1.

[51] Judgment of the CJEU of 26 February 1992 in *Raulin*, C-357/89, EU:C:1992:87, para. 14. Emphasis added.

[52] If a service recipient frequently demanded work and repeatedly assigned the same crowd worker, the situation might, of course, be different.

[53] According to Risak (2014), p. 3: 'Due to the strong influence of the crowdsourcing platform on these relationships, it is possible to classify this construction as a covert contractual relationship between the crowdworker and the platform.'

[54] Judgment of the CJEU of 4 February 2010 in *Genc,* C-14/09, EU:C:2010:57, paras. 27 and 28.

[55] See, e.g., COM (2010) 373, p. 7.

'distance services' that a provider supplies to recipients established in other Member States without moving from the Member State in which he is established.[56]

*(b):* Currently, it is unclear *why* our Polish Clickworker would try to fall back on Article 45. He does not need residence rights,[57] whereas the right to equal treatment with national workers in terms of remuneration and other labour standards remains symbolic as long as national crowd workers do not have a consolidated employee status. If this were the case, the right to the statutory minimum wage in Germany could certainly be a trigger for invoking Article 45. Otherwise, labour law entitlements would remain modest and crowd workers would probably not be eligible for social insurance; in *Megner and Scheffel*, the CJEU upheld the exclusion of persons in minor employment from German statutory social security schemes.[58] Such measures are common in other countries as well.

Last but not least, from an applicable law perspective, the Polish Clickworker would face similar problems of complexity concerning the applicability of German (and/)or Polish labour law and social security law, which depends on an in-depth evaluation of his individual situation,[59] as explored in Section 4-5 above for ICT-based mobile frontier workers. Contrary to such workers, who work outside their employer's premises for only part of their working time, crowd workers have a fully virtualised workplace. My guess is that in this context, it will be difficult to identify a common interest for all stakeholders involved (crowd workers, platform-employer and competent State), in creating a fiction/presumption that crowd workers (virtually) perform their work in the country of the platform's premises. A more thorough examination would be necessary.

## XI. Jurisdictional issues

If anything becomes clear from the above, it is that many questions concerning cross-border crowd workers remain unanswered. Hence, to elicit some guidance, our Polish crowd worker should be encouraged to invoke Article 45 TFEU before the court and claim his right to mandatory statutory minimum wage under German law. In this final section, some of the jurisdictional issues involved will be briefly addressed.

Pursuant to Article 21 of Regulation 1215/2012 (Brussels I *bis*),[60] the Polish crowd worker may sue the German-based platform *(a)* in the courts of the Member State in which the platform is registered; or

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[56] Judgment of the CJEU of 10 May 1995 in *Alpine Investments*, C-384/93, EU:C:1995:126, paras 15 and 20 to 22. Distance selling - by mail, phone or internet - entails certain obligations (consumer protection) for the provider under Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights.

[57] Apart, perhaps, from rights for TCN family members such as those at stake in Carpenter (Case C-60/00), para 29: 'a significant proportion of Mr Carpenter's business consists of providing services, for remuneration, to advertisers established in other Member States. Such services 'come within the meaning of 'services' … in so far as he provides cross-border services without leaving the Member State in which he is established.'

[58] Judgment of the CJEU of 14 December 1995 in *Megner and Scheffel*, C-444/93, EU:C:1995:442, paras. 26, 27, 28. Interestingly, in this judgment, , para 20, the CJEU observed, referring to the Judgment of the CJEU of 19 March 1964 in *Hoekstra,* C-75/63, EU:C:1964:19, that the concept of 'wage-earner or assimilated worker' in Regulation 3/1958 (predecessor of Regulation 883/04), had, like the term 'worker' in what are now Articles 45 – 48, a Community meaning.

[59] Most often, as in the U.S., crowd workers have a full-time or part-time (regular) job next to their crowd work.

[60] 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 judgements in civil and commercial matters.

*(b)* in another Member State, namely *(i)* in the courts of the habitual country of work; or (*ii*) if no habitual country of work exists, in the courts of the country of engagement. Since the Polish crowd worker is claiming labour law protection under German law, it would be favourable for him to pursue proceedings before a German court and option (a) (the defendant's place of residence) allows for that.

If the platform challenged the jurisdiction of the German court (for instance, alleging that our Polish crowd worker is an independent contractor, who agreed to carry out the assignment based on a choice-of-forum clause, stating that the courts of the American State of Delaware have jurisdiction),[61] how would the Court proceed? We can look at the recent judgement in *Holterman*, where the CJEU ruled in the reverse situation involving a defendant who claimed he was an employee, whereas the applicant had sued on the basis of the main jurisdiction rules for contracts.

The defendant (successfully) argued that the employment section of the Regulation trumps concurrent jurisdiction on the basis of contract. In its response to the question whether the defendant was to be classified as a worker under what is now Article 22 of Brussels I *bis*, the CJEU grabbed the opportunity to expand its concept of worker developed under Article 45 TFEU in the case *Lawrie-Blum*. [62] Above, in Section 8 and 9, we looked at that definition and concluded that, depending on a general assessment of the facts, our crowd worker could at least have a chance of being classified as an employee. Thus, *Holterman* paved the ground for a crowd worker case…

[61] In case the special jurisdiction rules for employees apply, such a clause would under Art. 23 Brussels I *bis* only be valid when entered into after the dispute has arisen. Under the main rules, the forum clause would be valid.

[62] Judgment of the CJEU of 10 September 2015 in *Holterman*, C-47/14, EU:C:2015:574, para 41.