

Global Workplace Law & Policy

Digital Nomads and the Rome I Regulation: An Overview

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The rise of digital nomads following the Covid-19 Pandemic

For years, workers have been longing professional and personal freedom, especially the Millennials and Gen Z population. The willingness to escape the so-called ‘rat race’ and the ‘9-to-5 mentality’ is omnipresent, and the yearning for a combination of work and vacation prevails.[1] Nonetheless, flexible work arrangements allow workers to work wherever and whenever they want, for example at home but just as well on a tropical beach at an exotic destination. This spatial flexibility is facilitated by cheap flight tickets, the global deployment of high-speed internet and online collaboration tools, the increased digital literacy of the population, and so forth.[2] Consequently, workers are able to work ‘anywhere, anytime’.

During the COVID-19 pandemic, millions of workers were forced to telework while confined in their homes. This led to an increased desire to travel and work from abroad. Workers want to have

more flexibility in and control of their work (professional freedom) and their life (personal freedom) while not being tied to a single physical location (spatial freedom). More and more people realized that work and vacation are not the opposites of the same continuum, but could be intermingled in a holistic perspective, for example, in *workcations*.^[3] Therefore, they are not hindered by temporal or spatial constraints. This allows individuals to move or travel to states with low costs while having a relatively high wage, for example, from their employer established in a high-cost location.^[4] Eventually, the combination of the recent trends led to digital nomads coming to the fore. For instance, a Dutch national could be hired by an American firm yet working remotely from Latin America while being highly mobile in the region and relocating between states to travel. Basically everyone who can perform work via a laptop or smartphone is able to become a digital nomad. Even before the COVID-19 pandemic, the digital nomad lifestyle was gaining popularity, with currently over 35 million digital nomads worldwide. The possibility to work remotely has become an additional employee demand, where lifestyle and location independence have become as important as salary aspects. Given their flexible work arrangements, digital nomads could be considered the forerunners of Directive 2019/1152 on Transparent and Predictable Working Conditions of 20 June 2019. Also in the aftermath of the pandemic, digital nomadism is going to be a keeper.

However, due to the lack of a harmonized definition, it needs to be clarified what a digital nomad actually is. Moreover, ambiguity surrounds the applicability of labour law: it is often merely adjusted to working at a fixed place, preferably the employers' premises. On top of that, the employment relationship becomes individualized due to globalization, flexibilization and digitalization.^[5] In turn, this leads to difficulties for governments, employers and employees.

CONCEPTUALIZATION AND IMPLICATIONS OF DIGITAL NOMADS

Digital nomads are linked with a wide variety of work arrangements and characteristics. Some are highly mobile and stay a relatively short period in the host state, while others are more static and do not move that often. Regarding their qualification, a digital nomad can be self-employed or engaged in an employment relationship as an employee. Despite these differences, several main characteristics can be identified. First, digital nomads work remotely using technology (hence 'digital'), enabling them to be place independent. Therefore, they do not have a fixed physical workspace, but instead create a temporary workspace wherever they want. This emphasizes their need for portable ICT devices and tools, such as laptops and smartphones, which they adjust in light of their travel patterns.^[6] This results in their (high) mobility, even to the extent that no permanent home base exists (hence 'nomad').^[7] Second, digital nomads explicitly and purposely pursue a specific (minimalistic) lifestyle, where they integrate work and leisure based on their personal preferences instead of employers' demands. They do not work for a company or client located in the current host state but for companies and clients established abroad.^[8] Where this company or client is established is irrelevant. Third, a digital nomad is likely to work on a result-oriented base instead of a fixed amount of hours, which allows him to allocate his time according to his lifestyle. Last, due to this lifestyle, digital nomads create a shared identity and are part of a worldwide community. Recapitulatory, HENSELLEK and PUCHALA linked these characteristics into the following definition, namely "*Digital nomads are individuals who pursue a work-leisure lifestyle by working remotely leveraging digital technologies whilst on the move, which enables them to work independently from anywhere in the world*".^[9] Consequently, merely travelling and working with ICT devices is not sufficient to qualify as a digital nomad.

Following this concept, digital nomads resemble existing categories of workers, such as

teleworkers, nomadic and posted workers. Despite similarities, digital nomads do not necessarily qualify as such. For example, digital nomads resort to the remote work category, specifically telework. However, whereas telework is more related to working from home, digital nomads are (highly) mobile and create their workspaces wherever but at home, due to their location-independent lifestyle and often even lack a stable household.[10] Furthermore, by using technology as an essential part of their work performance, digital nomads distinguish themselves from nomadic workers. On the one hand, nomadic workers travel specifically for work purposes, while, on the other hand, digital nomads' work is not related to their travels. Moreover, digital nomads are not posted workers. Posting is an employer-driven cross-border interaction with a strict temporary element incorporated. At the same time, digital nomads are driven by their own motives, do not provide services for a local service recipient in the host state and are not bound by any temporal constraint. Besides, posting shows a strong link between the place of work and the performance of the work, while for digital nomads, the nature of the work and the place of work do not show any connection. The lifestyle of digital nomads is absent for posted workers too.

The reasons why workers and employers would opt for digital nomadism are multiple. A digital nomad experiences the ultimate freedom in terms of personal and professional life on the one hand, and regarding spatial and temporal aspects on the other. Nonetheless, the working anywhere and anytime narrative needs to be tempered. Indeed, digital nomads do face constraints regarding the place and time to perform work, including technical obstacles (such as internet connection, power supply and the ability to use ICT devices), behavioural and normative barriers (such as loud phone calls), and contextual hurdles (such as noise and light conditions). Also, time differences and a lack of privacy might impact the adequacy of a place to work. On the one hand, *workcations* create a grey zone between work and private life, thus blurring the work-life balance. On the other hand, it becomes entirely optional for digital nomads to live in an expensive capital city and commute to the company's headquarters. In turn, employers save costs of providing office space and can recruit from a broader pool of potential employees, which is crucial in the global war for talent. Combined with telework, this exposes nevertheless the possibility – or risk – of outsourcing.[11] A geographically widespread workforce with fissured workplaces might pose some concerns as well in terms of efficient collaboration. On top of that, the employer might experience difficulties regarding the digital nomad's workplace safety and compliance with applicable employment, social security and tax legislation in general.

DIGITAL NOMAD VISA

A relatively recent phenomenon is a Digital Nomad Visa, prompted by the COVID-19 pandemic. Such a visa provides a legal residency status for digital nomads to stay and work remotely in a particular state for as long as the requirements are fulfilled. Conditions to be found are, amongst others, the payment of an application and processing fee, having a minimum amount of income and (health) insurance. The visa provides a (renewable) temporary status, allowing family members and partners to reside in the host state as well. Contrary to a tourist visa, it allows the digital nomad to stay for a more extended period and to work in the host state. It was created to attract digital nomads, as they spend (a modest part of) their income locally and stimulate the local economy without taking employment opportunities away from the local population.[12] Digital nomads resorting to a Digital Nomad Visa are namely often not allowed to access the national labour market by working for an employer or client in the host state. It could also be interesting for states wanting to increase their population in certain (rural) areas. **Almost 50 countries** made available such a visa, amongst others Portugal, Estonia, Brazil and Thailand. Even digital nomad villages, such as **Zadar in Croatia**, were created to host a local community of digital nomads. Thus, states

are branding themselves as digital nomad hubs. However, states have different understandings and requirements of what a Digital Nomad Visa entails. The national scope of the visa also hinders digital nomads from travelling freely without impediments. Therefore, as far as the EU is concerned, an EU initiative towards a European Digital Nomad Visa might be desirable.

APPLICABLE EMPLOYMENT LEGISLATION ACCORDING TO ROME I REGULATION

The (high) mobility of digital nomads brings along multiple questions regarding the applicable legislation in terms of employment, social security, immigration and tax matters. The applicable law becomes blurred in the sense that it is often linked to the place where the worker is performing his work, reflecting the territoriality principle. Digital nomads, however, work consecutively in different states with different legislation. The longer a stay in a certain state, the higher the risk changes occur in the applicable legal system. In light of the employment aspects, questions arise regarding the applicable working time, minimum wage and holidays, as well as who is responsible for providing work tools and a healthy and safe work environment. This concerns only employee-digital nomads, as self-employed digital nomads are not subject to employment legislation. Thus, it is imperative to clarify the applicable rules and issues at stake for the first category because national employment legislation differs in this regard.

Subjective and objective applicable law

At the European level, the [Rome I Regulation](#) explicates the fundamental principles to determine the applicable law for individual employment contracts in case elements of more than one state are involved.^[13] However, this legislation was not designed for situations of digital nomadism leading to specific issues. A case-by-case evaluation is necessary to come up with concrete outcomes, as currently no case law provides clear-cut answers. Each digital nomad has different working and travel patterns leading to different outcomes regarding the applicable employment legislation. In turn, this leads to much room for complexity and uncertainty as the Rome I Regulation is not adapted to their (high) mobility.

First of all, employer and employee are free to choose the applicable law regulating their employment relationship through a choice of law clause (the subjective applicable law), irrespective of whether that chosen law has any connection to the employment relationship.^[14] This is recommendable to stabilize the applicable framework governing their relationship, yet often leads to the application of the law of the state where the companies' premises are located. However, such 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 that, in the absence of choice, would have been applicable based on the connecting factors.^[15] Consequently, with or without a choice of law clause, the employment relationship can also be subject to another law based on the following connecting factors (the objective applicable law) to protect the weaker party, namely the employee-digital nomad. This objective applicable law applies in addition to the law chosen by the parties in case these entail mandatory provisions and are more protective than the law chosen. Consequently, a case-by-case analysis takes place, including a comparison of the subjective and objective applicable law. In case no choice of law exists, the objective applicable law governs the employment relationship entirely and is determined upon the following three connecting factors.

Habitual workplace

First of all, the employment relationship shall be governed by the law of the state in which or, failing that, from which the employee habitually carries out his work in the performance of the contract. Thus, this connecting factor refers to the *lex loci laboris*. The main issue with this provision regarding digital nomads is determining the habitual place of work as they work remotely from various places. In that case, a significant link must be found with a specific state taking into account contextual elements referring to the centre of the activities.^[16] Interesting elements in this regard could be of a quantitative nature, such as the duration of work performed in each state, as well as a qualitative nature, such as the place where the digital nomad discharges his essential duties towards his employer.^[17] In case such a habitual place of work is identified, then this would not change because the worker is temporarily working in another state. This last element provides stability and continuity for a digital nomad who often travels yet has a habitual place of work. However, what is considered ‘temporarily’ is yet to be clarified.^[18]

Place of engagement

Only in the absence of a habitual workplace, the law of the state of the place of business through which the digital nomad was engaged shall apply. This connecting factor refers to the recruitment procedure, namely the location of the company that published the vacancy and conducted the recruitment interview.^[19] This place is usually the company’s premises. However, this connecting factor is becoming redundant, as courts are reluctant to use this criterion and always try to identify a habitual place of work, even for (highly) mobile workers. Thus, this connecting factor is only applicable if it is absolutely impossible to find a habitual place of work. Applying the legislation of the state where the place of business is situated often does not show any link with the digital nomad, yet provides stability and continuity as this place shall not change.

Escape clause

The last connecting factor refers to applying the law with which the contract has the closest ties. Suppose it appears from the circumstances as a whole that the contract is more closely connected with a state other than indicated based on the choice of law clause or the previous connecting factors. In that case, the law of that state applies.^[20] Thus, the habitual place of work and the place of engagement may be disregarded as connecting factors. It is important to note that this does not automatically lead to the application of the law most favourable to the worker.^[21] All relevant circumstances of the employment relationship shall be taken into account, such as the state in which the worker pays taxes and where he is covered by a social security, pension, sickness insurance and invalidity scheme. All other elements could be taken into account as well, such as the nationalities and languages of the parties involved, the parameters relating to salary determination, the currency in which the wage is being paid, the usual place of residence of the worker, and so on.^[22] Hence, this connecting factor considers all the elements of a specific employment relationship adjusted to the particular situation of a digital nomad, which reflects the individualization thereof.

Overriding mandatory provisions and public policy

In addition to the subjective and objective applicable law, the overriding mandatory provisions^[23] of the law of the forum or of the law of the state where the obligations arising out of the contract have to be or have been performed apply in so far these provisions render the performance of the

contract unlawful.[24] This entails for example provisions regarding health and safety, right to strike, criminal employment law and immigration law. Complementary, the application of a provision of the law of any state may be refused if such application is manifestly incompatible with the public policy (ordre public) of the forum.[25]

FINAL THOUGHTS

Digital nomadism changes the importance of geography and work. The enormous variety of temporal and spatial possibilities regarding the work performance (working anywhere, anytime) characterizes digital nomads. The (high) mobility of this borderless workforce allows them to experience the ultimate freedom by integrating leisure and work into their lifestyle. However, employers are confronted with different employment legislation applicable to their widespread workers. It would be arduous for the employer to comply with each specific legislation in each state adapted to the different situations the employees might be in. Consequently, it is imperative for the employer to proactively implement a policy for digital nomads and their applicable employment legislation. Such policy may contain temporal aspects, such as the duration, start and end dates and possible extensions, as well as spatial aspects, such as a list of countries employees can go to, based on time zone differentials or continents. This is necessary in light of the difficulties and uncertainty the application of the Rome I Regulation faces regarding a mobile and flexible world of work. Eventually, both the employer and the digital nomad shall benefit from a clear policy leading to legal certainty, predictability and stability.

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- [18] Consideration 36 Rome I Regulation provides some guidance.
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- [20] Consideration 20 and article 8.4 Rome I Regulation.
- [21] CoJ 12 September 2013, nr. C-64/12, ECLI:EU:C:2013:551, *Schlecker*, §34, 42-44.
- [22] CoJ 12 September 2013, nr. C-64/12, ECLI:EU:C:2013:551, *Schlecker*, §41.
- [23] Article 9.1 Rome I Regulation defines overriding mandatory provisions as “provisions for

which the respect is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation”.

[24] Article 9.3 Rome I Regulation.

[25] Article 21 Rome I Regulation.

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