

# Chapter 11

## Enforcing the rights of remote workers: the case of digital nomads

Zane Rasnača

### 1. Introduction

The Covid-19 pandemic and the often mandatory experience of ‘working from home’ has meant that remote work has reached new heights of relevance and popularity. It affords a certain flexibility and autonomy as well as a shortened commute, and promises improved work-life balance (Annesley 2007), in exchange for giving up office space and a collective way of working at an employer’s premises. Before the pandemic, the debate on this type of work was somewhat lagging in Europe in comparison to other parts of the world where the promotion of teleworking has been present in government and employers’ strategies, and embraced by workers, for much longer (Messenger 2019). Now, however, the debate on telework has been firmly set at the top of the agenda also in Europe (Council of the European Union 2021).

At the same time, at least in labour law, the discussion has focused mainly on the substantive rights of remote workers (Eurofound 2022) rather than on their enforcement. Enforcement often comes as an afterthought: while, with a certain political will, rights ‘on paper’ can be created with comparative ease, whether they actually function in practice is disclosed only over a significant period of time and requires more in-depth analysis (Rasnača et al. 2022). Nevertheless, laws are senseless if they are not enforced (Jacobs 2022), so enforcement in the context of remote work is of utmost relevance and, even if there is little to no data revealing whether and how remote workers actually enforce their rights, the topic as such requires closer analysis.

Indeed, the conclusions of the Council of the European Union in 2021 on telework already require Member States to consider amending their policies regulating telework on the issues of the monitoring of health and safety, the monitoring and organisation of working time and effective checks by labour inspectorates; thus recognising the utmost importance of enforcement practices in the context. So far, however, no comprehensive EU legal measures have been adopted specifically with telework in mind and even less attention has been paid to the challenges in enforcing the rights of workers who work remotely.

The reliance on Member State procedural autonomy often still permeates the debate on the enforcement of labour law at European level (see for exceptions Malmberg 2003; Koukiadaki 2022; Rasnača et al. 2022) and the rights of remote workers do not constitute an exception. This chapter aims to identify some of the issues that make any structuring of an effective enforcement system for remote workers both very challenging

but also desirable in order to make sure that such workers do not fall through the cracks of EU and national enforcement systems.

Enforcement in this chapter is understood in a broad sense comprising both private and public enforcement mechanisms characteristic of the wider area of labour law. Hence, enforcement is considered as the whole set of tools including the administrative, criminal and civil law mechanisms available to actors at both individual (workers) and collective (trade unions, worker representatives, etc.) level, and going beyond mere judicial enforcement. At the same time, the exploration of the rules surrounding the choice of law and forum in intra-EU cross-border situations is left largely outside of this chapter since that is covered in another contribution to this volume (see Grušić).

In order better to illustrate the key challenges in the enforcement of remote workers' rights, this chapter uses the example of digital nomads as a comparatively extreme case of 'remote work', as opposed to the more mundane kinds of remote working (for example, teleworking once per week from home in the same country where the office is located). Due to the cross-border nature and spatial flexibility that characterises digital nomads, they potentially face one of the widest arrays of enforcement issues that can be experienced by remote workers and therefore present a potentially promising case study from this perspective.

At the same time, as I also argue in this chapter, many of the enforcement issues that digital nomads face are not unique to this group and can be experienced by other 'atypical', 'precarious' or 'dispersed' workers (e.g. workers in agriculture, domestic workers and transport workers). As such, the enforcement of remote workers' rights might present a rather special conundrum: while remote workers often constitute a relatively privileged, well-paid group of workers, when it comes to enforcement their situation might have significant parallels with (other) underprivileged categories of workers.<sup>1</sup> This poses an additional definitional challenge to the question of remote work. It may be that, for the purpose of other matters, the 'working from home' definition used in the majority of chapters in this book and by major data sources such as Eurostat might be tempting but, as shown below, it might not be suitable for addressing the enforcement challenges since it does not account for the plenitude of situations that remote workers, such as digital nomads, encounter; and its widespread use might create a privileged sub-group while keeping other groups of workers facing similar enforcement challenges in the shadows.

The chapter unfolds as follows. In Section 2, I locate digital nomads in the context of remote work definitions and discuss the key characteristics of this kind of work. This section tries to place the matter of the enforcement of digital nomads' rights against the broader background of remote work and exposes the many uncertainties surrounding this type of work, especially from a definitional perspective. It seems necessary in the light of the very sparse literature on the topic to take some time to locate where digital nomads stand in the discussion on remote work as such. In Section 3 the focus is on the

---

1. See, for example, the distinction between groups of remote workers provided both by Countouris and De Stefano and by Rainone (in this volume).

enforcement challenges and gaps they face in Europe that, together with the very sparse regulatory framework dedicated to them, might specifically leave them largely under the radar of most enforcement mechanisms. The chapter's conclusions are contained in Section 4.

## 2. Defining digital nomads in the context of remote work

### 2.1 Lack of clear-cut definitions

It is difficult to define who is a digital nomad, especially since the term is often closely connected with notions of other 'types' of work such as 'remote work', 'telework', 'telecommuting' and others that also often severely lack clarity. The general understanding is that digital nomads are people who use the internet and technology to do their work while travelling around from place-to-place. Journalistic and scholarly sources often define them as young, work-oriented professionals who reject the outwardly imposed structures of traditional office work – such as the 9 to 5 – and place value on autonomy, flexibility and the ability to travel and work where they please (Cook 2019). A distinction noted in the literature is that, whereas business travellers travel for limited periods of time because of their work, digital nomads try to gain their freedom by moving around whilst retaining work (Müller 2016: 346; Reichenberger 2018: 15). However 'digital nomad' is not the only term for this emerging and subjective category of worker; whilst the term may have both hopeful and derogatory connotations, terms such as 'location-independent' and 'remote worker' are sometimes used as more neutral alternatives (Holleran 2022).

At the same time, digital nomad laws and visas have been on the rise in Europe in recent years and this potentially aids us in understanding who and what they are in more practical legal terms. Several EU countries such as Portugal, Croatia, the Czech Republic, Estonia, Germany, Hungary, Greece, Italy, Malta, Romania, Spain and Latvia offer some form of specific visa allowing digital nomads to stay legally in their country and work from there. There is, however, great variety in their approaches to definitions and these are far from unified. For example, Portugal enables the non-EU and non-EEA remote workers employed by foreign companies based abroad to relocate and work remotely from Portugal if they are earning four times the national minimum wage (Global Citizen Solutions 2023). Estonia grants remote workers residency rights for up to one year on condition that they have monthly gross income of at least 3504 euros and they are either self-employed or have an active employment contract with an establishment registered outside Estonia. Latvia gives all OECD country residents the opportunity to become digital nomads by giving one-year residence rights to all who can prove that they can work remotely for their employer, and who have income of at least 2857 euros per month and health insurance, without the need to shift their tax residence (Immigration Law of the Republic of Latvia, Article 11). In Germany only the self-employed and freelancers in healthcare, law, tax and some other professions have the possibility to stay based on a sort of digital nomad visa while working entirely for establishments abroad; their initial residency rights are only for three months (but these can be converted into a residence permit of up to three years during that period of time).

At the same time, Germany requires them to be registered with their tax office which is an extra requirement that does not exist under many other digital nomad regimes.

These few examples already reveal a wide variety of legal approaches to who can be a digital nomad within European understanding. What all these approaches have in common is that a digital nomad will be someone working typically entirely for clients or employers based abroad (having no permanent establishment in the country where s/he is currently working), having a right to stay in the host country for a certain (limited) period of time and working remotely via digital means.

As such, digital nomadism is thus a form of remote work and presents a somewhat extreme (or exaggerated) case of this phenomenon. A unified, recognised definition of either remote work or telework does not exist (Montreuil and Lippel 2003). However, remote workers, similarly to teleworkers, can be characterised according to four variables: 1) premises (home or other); 2) status (worker or self-employed); 3) time spent working remotely (partial or full-time remote work); and 4) computer connection (work online or not) (Montreuil and Lippel 2003: 340). It seems useful to think about digital nomadism and also remote work alongside these four variables in order to avoid having too narrow a definition, such as that adopted by Eurostat's Labour Force Survey (LFS) which defines remote work exclusively as 'working from home'. While cross-border teleworkers such as digital nomads might indeed be working from home some of the time, they might travel and work elsewhere or frequently change their 'home', residence or even their habitual place of residence. Such a broader and more inclusive understanding with regard to telework has been adopted by both the International Labour Organization and Eurofound (ILO 2017; Eurofound 2022).

While precisely defining remote work and who is a digital nomad is not the objective of this chapter, there are four characteristics that seem the most relevant to our understanding in the specific context of enforcement. First, work should be carried out away from an employer's premises. Second, work is done via digital means. Third, there is a cross-border element in which the employer is not based in the same country where the work is being done. Finally, while digital nomads can be both workers and self-employed, in this chapter I primarily focus on those who are working under an employment contract and thus subject to labour law enforcement mechanisms.<sup>2</sup> In addition to this, the cross-border nature means that such workers would typically be working remotely their entire or almost their entire working time; hence, occasional remote work is not covered by our understanding of digital nomadism.

Three scenarios guide our understanding. The first is to be an intra-EU digital nomad (working remotely for an employer in a country other than the current country of residence and where both countries are EU Member States). The second is working for an employer based in another country (outside the EU) while living in an EU country. The third is working remotely for an EU-based employer from another (non-EU)

---

2. Self-employed digital nomads potentially also pose an excellent challenge from the perspective of enforcement since many employers might be tempted to reclassify workers as self-employed to avoid liability for payroll taxes, employee benefits, overtime pay and workers' compensation insurance (Mills et al. 2001: 57).

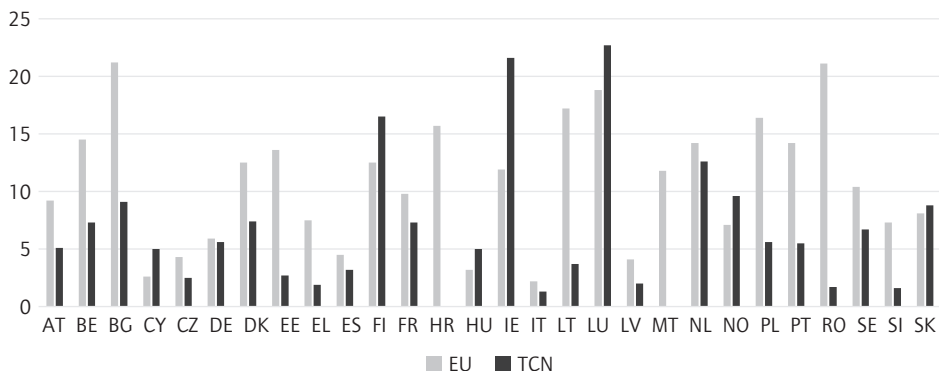
country. This latter approach (but also intra-EU telework from the west or north to the south or east) is often associated with geoarbitrage – the maximisation of salary by moving from one region or country (with higher costs) to another (with lower costs) (Holleran 2022).

## 2.2 How prevalent is digital nomadism?

Even more difficult than definitions, however, is the establishment of somewhat reliable data as to how many digital nomads are in the European Union (EU) (and individual Member States). About two million people in the European Union live in a country other than the one in which they work and there are sizeable regional differences with such regions as Benelux having thousands of workers in incoming and outgoing labour flows (Maastricht University 2022) while others are less affected. For all of those who work in a country other than where they live, telework might be a tempting option.

Currently there is no European-level data available as to how many workers work remotely for an employer based abroad. LFS data reveal that the rate of workers working (almost) exclusively from home varies among EU countries with Luxembourg, Finland, the Netherlands and Ireland having comparatively more such workers than other EU countries (see also Zwysen, this volume). Among non-native EU citizens working in the country, Bulgaria, Romania, Luxembourg, Croatia and Lithuania have the biggest share of those working from home. Among workers from outside the EU (third country nationals), Ireland, Luxembourg, Finland and the Netherlands have a relatively large share of workers working from home. However, there is no comparative data revealing how many of these workers work for an employer without a permanent establishment in the country in which they currently reside. We can assume that some do, but it is not clear precisely how many and exactly how widespread is the phenomenon of digital nomadism.

Figure 1 The share of employees with EU (+ EFTA) or third country nationality (TCN) working from home (almost) all the time in the EU



Source: Own calculations based on LFS, 2018-2021.

While there is no country specific data on cross-border teleworking as such, the EU average shows that the share of cross-border workers that usually work from home increased from 2 per cent before Covid to 12 per cent in 2021 (Maastricht University 2022). Moreover, there is likely to be a significant number of cross-border teleworkers who are carrying out such work but who are in the country based either on a tourist visa or on various types of residency rights based on EU law (for intra-EU digital nomads): for example, as a family member of a local worker, for less than three months of stay or as a tourist, or someone having sufficient means to establish residence in the country. Hence, there is a good chance that many such workers remain largely under the radar of the authorities.

According to the Council of the European Union, roughly one-quarter of workers in telework and ICT-based mobile work arrangements, including intermediate level and high skilled workers, report a combination of low wages, job insecurity, a lack of access to training and limited career prospects. This puts them in a precarious employment situation (Council of the European Union 2021: para 26). It is also clear that, currently, cross-border teleworking significantly challenges existing taxation systems and that both company profits and workers' wages might be subject to the threat of double taxation, as recognised by the European Economic and Social Committee (EESC) and the European Commission (European Economic and Social Committee 2022; European Commission 2021a).

Consequently, while the overall numbers of digital nomads might be relatively small if measured against the entire EU workforce, there are clearly recognised instances of the abuse of their rights and the question of the enforcement of these is therefore an extremely pertinent one.

### **3. The perils of enforcing digital nomads' rights**

As already illustrated, digital nomads present a rather extreme form of telework in line with the four variables characterising such work mentioned above (premises, status, time and form). The work they do thus illustrates the other end of the spectrum to the perhaps more traditional and more easily accepted type of telework – work done remotely from one's home maybe once or twice per week with the rest of the time being spent in a traditional office and where both the employer and the worker are based in the same country. While the latter form of telework might not require significant adjustments to the enforcement structure, the former has certain characteristics that considerably complicate the assertion of one's rights.

In general terms, enforcement activity could be considered effective (Rasnača et al. 2022) where the law is able to reach those to whom it is addressed in cases where it has been initially ignored and where it has led to the effective realisation of the rights it has conferred. Enforcement thus takes place after the (substantive) law has not been complied with and could be considered effective where it brings about the situation that should have prevailed if there had been compliance in the first place, or at least where the victim of that non-compliance has been duly compensated. However, enforcement

can have other objectives beyond reinstatement and compensation. First, the criminal justice system seeks a sort of retributive justice where infringement is not only rectified but punished (Rasnača et al. 2022: 1-10; 521-530). Second, one can distinguish between enforcement approaches based on the idea of deterrence or persuasion (Becker 1968; Stigler 1971; Gunningham 1987). Enforcement thus has a number of roles to fill: compensation; retributive justice; prevention or deterrence; and persuasion.

Within the area of labour and social policy law, effective enforcement is difficult to achieve even in the most 'traditional' forms of work and for most 'typical' kinds of workers (Rasnača et al. 2022). The principles of equivalence<sup>3</sup> and effectiveness,<sup>4</sup> together with procedural autonomy<sup>5</sup> and other general principles, are what direct the institutional framework for the enforcement of EU law. The most central principle in this regard, the principle of effectiveness, although often explored and written about (Mendez-Pinedo 2021; Kokott and Kaspar 2012; Lenaerts 2013; Nebbia 2008), still remains ambiguous and somewhat obscure, especially when the idea of construing an 'effective enforcement' system is discussed in specific rather than general terms and beyond judicial recourse. It generally requires that remedies are construed in a way that leads to effective legal protection in the fields covered by EU law, but what this actually entails is largely left to the interpretation of the Court of Justice of the European Union (CJEU) in singular cases. There is currently no clear yardstick against which to measure whether certain workers' rights are being enforced efficiently and what kind of enforcement mechanisms should be in place for what kinds of workers. As soon as there are any aspects that complicate the situation (for example, a cross-border element, multiple employers, work carried out in an atypical manner or from an 'atypical' location), the situation becomes difficult. Digital nomads find themselves in exactly such a perilous position.

There are three key challenges that potentially create significant vulnerability when it comes to the enforcement of digital nomads' rights: 1) an ambivalent legal status; 2) spatial challenges; and 3) the individual character pertaining to digital nomadism. Let us look at these three challenges in turn.

- 
3. The principle of equivalence means that the enforcement of EU law takes place by requiring that the rule at issue is applied without distinction, whether the infringement alleged is of EU law or national law, where the purpose and cause of action are similar (CJEU *Levez*, para. 41).
  4. The principle of effectiveness is regulated mainly by Article 19(1) of the Treaty on European Union requiring that Member States provide sufficient remedies to ensure 'effective legal protection' in the fields covered by EU law; and is protected by Article 47 of the Charter of Fundamental Rights of the European Union, as interpreted in the light of Article 6(1) of the European Convention on Human Rights and further developed by the Court of Justice of the European Union.
  5. This means that EU Member States are free to establish their own national procedural rules to govern the exercise of EU law. However, those rules must respect the effectiveness and equivalence of EU law.

### 3.1 Ambivalent legal status

Even though digital nomad laws and visas are on the rise in Europe,<sup>6</sup> their legal status and the array of rights they enjoy still remains rather ambivalent and undefined.

First, digital nomads as a category technically do not exist in EU law. The European Commission has started to work on the matter of cross-border telework, and issues such as the challenges and opportunities facing taxation systems in an increasingly mobile working environment have been discussed (European Commission 2021a). No long term solutions have yet been adopted at European level even though the EESC, for example, has suggested that solutions should be sought at global, or at least intra-EU, level (European Economic and Social Committee 2022: para. 1.7). While there are posted workers, frontier workers, intra-EU migrant workers, migrant workers from third countries and workers working for multiple companies in multiple countries (in line with Article 14 of the Social Security Regulation<sup>7</sup>), digital nomads might at some point coincide with one or even more of these categories – but not necessarily and not always. For example, one could ask whether an intra-EU digital nomad could be considered a posted worker under the Posted Workers Directive (96/71/EC<sup>8</sup>) if the employer has agreed to the worker working from another EU country. There is an ongoing discussion regarding whether a business trip amounts (always) to the posting of workers (digital nomadism might be considered as such where there is agreement with the employer and the idea of a business trip is understood rather broadly). Even though the definitions in the Directive seem to require some sort of service provided within the host country, one could wonder whether intra-EU digital nomads could potentially sometimes fall under the posting definition.

Overall, since there is no recognised and clear legal status that works at EU level, and while any guidance from the EU is currently missing, digital nomads might fulfil the requirements of some statuses but might also easily fall through the cracks of protection when they are not considered to fulfil the criteria for certain categories. This obviously has consequences not only for tax and social security liabilities for both workers and their employers but also for the enforcement of the former's rights.

Even where digital nomads, alongside everyone working in the EU, can profit from certain labour rights, such as the protection of working time, some Member States have taken steps to exclude those working remotely from the scope of this protection. There is some empirical evidence suggesting that teleworkers work longer than the average employee (Gschwind and Vargas 2019: 48) and thus working time requires special attention from the perspective of enforcement.

---

6. For a good general overview please see <https://www.globalcitizensolutions.com/digital-nomad-visa-europe/> (accessed 8 Feb 2023).

7. Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

8. Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.



Article 2 of the Working Time Directive provides a definition of working time within which the time performed by a teleworker might easily fall: 'any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, in accordance with national laws and/or practice'. Yet, the Directive also foresees the possibility to derogate from (some of) the provisions in the Directive. Article 17(1) states that this is permitted 'on account of the specific characteristics of the activity concerned, the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves'. Some countries, including Belgium (Bright Plus 2020), use this provision to exclude all teleworkers from the scope of application of the working time rules, regardless of teleworkers' (in)capacity to determine their working hours themselves (Huybrechts 2022). In the light of the tendency of the CJEU and the European Commission to interpret exclusions in a narrow way, and with the diverse spectrum of telework situations in mind, it might be argued that Belgium is violating the Directive on this point (Huybrechts 2022).

Hence not only is their legal status often unclear, telework might also potentially trigger exemptions from and exceptions to sets of applicable rights.

Finally, digital nomads who have entered the EU not by using the specific visa that exists in some Member States but rather as a tourist or on another type of visa are extremely vulnerable in terms of both their access to labour rights and their right to residence. Namely, a tourist visa does not allow the holder to work and hence a digital nomad who has entered the EU on the basis of this type of visa and who is carrying out work on EU territory is in breach of his or her visa requirements. There is some research showing that workers with unclear residency status are less likely to exercise and assert their labour oriented rights and digital nomads would probably find themselves within this group (European Commission 2021b). Even family members who have a right to join their EU-based partner might be in an obscure situation from the perspective of tax liability and the question of the applicable labour law if their employer has no establishment in the country in which they are working.

This means that digital nomads potentially constitute an extremely vulnerable group of workers from the perspective of enforcement due to the legal uncertainty surrounding their status; the likely resistance to asserting their rights which might follow; and the very real possibility that they might be considered undocumented migrants and lose the right to stay in the country were they to proceed.

### 3.2 Spatial issues

Digital nomadism poses certain challenges to enforcement that can be seen as 'spatial' in nature. On the one hand, nomadism potentially facilitates spatial and social mobility offering a channel to reverse the depopulation and cultural impoverishment of many territories in Europe (Aloisi and Corazza 2022). Indeed, personal computers and telephones first permitted the relocation of traditional office work away from the employer's premises, while the dispersion of mobile devices (laptops and mobile phones) allowed work to be carried out on trains and in cafés. Omnipresent internet

access has now virtualised the workplace and made work accessible on smaller and smaller devices. Messenger distinguishes between three generations – home office; mobile office; and virtual office (Messenger 2019: 3) – in this regard.

However, this *prima facie* very appealing aspect of digital nomadism – the flexibility to be able to travel as often as the mood strikes and regularly change country of residence (Nash et al. 2020) – is of potential relevance for enforcement purposes since it has consequences for the shifting of liability for taxes, social security and labour law from one country to another and, accordingly, it creates spatial barriers to the enforcement of one's rights. A digital nomad might move country every few months, or s/he might live in one country for many years while always working for an employer abroad, and this variation might have different consequences from the perspective both of the substantive law and its enforcement.

First of all, the current EU rules in place on the applicable social security system, as well as the choice of law and forum, are ambivalent at best and potentially crucial for cross-border workers, including digital nomads, who telework. The basic principle of these conflict rules is the state of employment principle (*lex loci laboris*): an employee is subject to the social security legislation of the Member State from where the employee is working. However, Article 14(8) Regulation (EC) No 987/2009<sup>9</sup> specifies that a share of less than 25 per cent of working time indicates that a substantial part of the worker's activities is not being pursued in the relevant Member State. This therefore means that the responsibility for social contributions would shift to the country of residence as soon as the worker worked from there for at least 25 per cent of working time. Consequently, working from home for 1.25 days per week might be sufficient to shift the place of social security coverage to the country of residence (Verschueren 2022: 81-82) for any worker who is carrying out cross-border telework. Temporary exceptions were put in place to avoid the shifting of social security responsibility during the Covid-19 pandemic, but these have now largely come to an end (European Commission 2020: point 8; Verschueren 2022: 82).

Accordingly, the possibility of shifting social security residence in the case of remote work, together with the threat that frontier workers<sup>10</sup> might not be able to benefit from telework in the same manner as workers residing in the country where they work, has become very real. There is a potential regulatory gap for digital nomads in this context since it is far from clear how these rules apply to them and whether they can be, or are, enforced at all. Verschueren has argued that the conflict rules laid down in the social security regulations are no longer suited to hybrid and very flexible forms of work (Verschueren 2022: 93) and one only can agree that they are certainly not suited to the situation of cross-border telework and digital nomadism as such.<sup>11</sup>

9. 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) No 883/2004 on the coordination of social security systems.
10. A frontier worker is a worker who is employed in the frontier zone of an EU Member State but who returns each day, or at least once a week, to the frontier zone of a neighbouring country in which they reside and of which they are nationals (Council Resolution of 20 June 1994 on limitation on admission of third-country nationals to the territory of the Member States for employment).
11. The transitional period regarding social security was extended until 30 June 2023 by the European Administrative Commission; however, no long term legal certainty has been achieved as yet.

An Opinion by the EESC from 2022 recognised that a cross-border teleworking employee could be faced with double taxation on their income, resulting in lengthy and costly disputes between an employee and Member States' tax authorities. Dependent on a country's tax treatment of foreign income, an employee could also be obliged to comply with two separate tax declarations, possibly at different times due to differences in the tax filing deadlines between Member States (European Economic and Social Committee 2022: para. 1.2). During the pandemic, Member States took a series of temporary tax measures allowing cross-border teleworkers not to have to shift their tax liabilities across the border. But these were only temporary (e.g. the one agreed by Belgium with its neighbouring countries came to an end on 30 June 2022).

This means that digital nomads potentially face extreme legal uncertainty when it comes to their tax liability and that of their employer. The European Commission is searching for long term solutions concerning tax and social security liabilities in cross-border telework, but nothing concrete has yet been proposed and it is not clear whether and how far non-EU digital nomads will benefit from any regulatory framework since the plans at the moment seem to concern only intra-EU cross-border teleworkers (Orbitax 2022).

The spatial flexibility of digital nomadism potentially also creates significant other challenges for enforcement purposes. An obvious one is that work is not done on the employer's premises. This means that any enforcement becomes more challenging. Even individual judicial enforcement, which might not be much harder to achieve for other types of remote workers in comparison to typical office workers, might be potentially more difficult for digital nomads. The forum of the 'habitual place of work' can be used under the Brussels I Regulation, while the 'habitual place of work' is also the key variable determining the applicable law in line with Article 8 of the Rome I Regulation. This means that, for most remote workers (working remotely from the same Member State where their employer is located), their *locus standi* is the same as for typical office workers; namely, they will bring a claim in the country in which they work (see also Grušić, this volume). However, digital nomads potentially reside in a country that is not their country of origin and always in a country that is not the country in which their employer is based. This means that, in practice, they might have very little connection either with the place they 'habitually work in' or the country where their employer is located. Subsequently, when bringing a case before a court, they might experience many more hurdles than other types of workers.

The same legal and practical uncertainty is also faced by an employer who might inadvertently become tax liable in the current host country of the digital nomad. Hence the cross-border element necessarily creates a sort of spatial detachment with their employer that goes beyond 'typical' telework and poses a challenge for enforcement purposes.

Another issue present not only in digital nomadism but also in other forms of remote work (even beyond work done via digital means) is that not only is the work not being done on an employer's premises but it is also being performed in a private home or a private property owned by a third party (e.g. a café, a hotel or a co-working space).

In the context of administrative enforcement, labour inspectors must be able to enter remote work premises, usually a private home. This implies significant potential clashes with the right to private life and the protection of one's home, with specific warrants and other barriers dependent on the applicable procedural law.

The conclusions of the Council of the European Union on telework recognise the significant challenges for the effective enforcement of labour law by labour inspectorates whose instruments and inspection procedures may need to be reviewed in order to adapt to these new working patterns while continuing to respect the privacy of workers (Council of the European Union 2021: para 25). This again is a serious spatial challenge present in the context of remote work and potentially even more challenging in the case of digital nomads: not only does enforcement go beyond the employer's premises but also cooperation with administrative or criminal enforcement authorities across borders might become necessary. Moreover, it might be close to impossible to organise cooperation among multiple enforcement authorities where third countries are involved and either the digital nomad is working for a company based outside the EU or s/he works in a third country for a company based in the EU.

Given this rather 'detached' form of monitoring, occupational health represents a specific concern. Typically, in order to verify that health and safety rules are correctly applied, employers, trade union or worker representatives, and other relevant authorities, have access to the workplace within the limits specified in national laws and collective bargaining agreements. In line with the European Framework Agreement on Telework (2002), teleworkers are entitled to ask for an inspection visit regarding their health and safety, with access to their home subject to prior notification and requiring their agreement (para. 8). However, there are currently no rules and guidance on how this can be organised in the case of cross-border telework and regarding digital nomads.

A further spatial challenge is the enforcement or compliance with digital nomads' collective rights in the cross-border setting in which they find themselves. It might be extremely difficult to exercise the right to strike, freedom of association and the rights to information and consultation in cases of remote work with a cross-border element (Dedden et al., this volume). Hence, special rules should be adopted since it seems that, so far, self-regulation via collective agreements across borders and standard setting through collective representative bodies has not really taken place. While the Framework Agreement on Telework has been agreed between the European social partners, it does not contain any special rules dedicated to enforcement via collective rights across borders. For digital nomads, the only way in which the exercise of these rights could be ensured might be via digital means. And actually, building a digital space and practice for exercising one's information and consultation rights might also yield some benefits. First, such approaches might improve the accessibility of such rights; and, second, due to the digital nature and trail that would remain, there might be better possibilities for enforcement authorities to check whether these rights had duly been complied with (see also Piasna and Vandaele, this volume).

Even individual judicial enforcement can be burdened within the context of remote work. While it is clear that the employer is responsible for what happens in the

workplace, breaches of health and safety law and other employment-related rights in respect of remote workers might be more difficult to prove before the courts. Directive 89/391<sup>12</sup> (the OSH Framework Directive) does not differentiate between work locations while the European Framework Agreement on Telework specifies that 'The employer is responsible for the protection of the occupational health and safety of the teleworker in accordance with Directive 89/391 and relevant daughter directives, national legislation and collective agreements' (Gschwind and Vargas 2019: 60).

It is not clear when and how far liability reaches and which situations within the home are covered and which are not. In fact, teleworkers may be especially susceptible to injury because there is no control over the safety of working conditions in a home office as there would be at a regular worksite. Most accidental injuries, after all, occur in the home (Mills et al. 2001: 57). Data from the United States suggest that the courts there are substantially more likely to find that violations did occur in the course and scope of employment, or with the employer's knowledge or consent, given employee access to the company network and resources around the clock in situations in which s/he is regularly working at home (Mills et al. 2001: 54). Casual teleworkers might not receive compensation in the same situation. This means that there might be a potential relationship between the frequency of telework and assessments by the courts of employer liability; however, this is just an assumption since there is currently no comprehensive data concerning Europe.

### 3.3 Individualistic character of digital nomad work

Industrial relations systems in the EU tend to be somewhat isolated from one another. Both trade unionism and worker representation is still largely national in its level of activity (Lafuente Hernandez and Rasnača 2019) and developed with the needs of local workers in mind. Giving digital nomads a voice necessarily requires a cross-border and transnational approach which is very difficult for organisations such as trade unions to achieve.

It is interesting to compare the situation of migrant workers with that of digital nomads. A migrant worker who is an EU national enjoys equality of treatment regarding trade union membership.<sup>13</sup> There is, however, no further facilitation of collective organising for EU workers and migrant workers specifically. For now, as Greer et al. put it, 'while workers in the EU have new civil rights to live and work in different countries, in accessing these rights they [often] give up the rights of industrial democracy' (Greer et al. 2013: 17). This rings potentially true also for digital nomads who are, by the very nature of their work, detached from traditional forms of collective organisation and worker participation in the country in which they work. In their case the only way forward

12. Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work.

13. Article 8, 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.

seems the embracing of digital collective organisation and digital exercise of their voice. However, there are currently no uniform rules in this regard at the European level.

Collective voice does not only mean representation by trade unions, however, especially when it comes to enforcement: other mechanisms could be used to strengthen the collective enforcement of rights. The introduction of pan-European collective redress opportunities at either EU or national level (Rasnača 2021) might also be a step in the right direction, while online redress for labour law disputes in some form might also go some way towards bridging the isolation of such workers. The EU recently adopted a Directive on Representative Action in Consumer Protection.<sup>14</sup> Similar mechanisms should also be put in place for some groups of workers including cross-border workers such as intra-EU digital nomads. This might facilitate both the enforcement of their rights in a collective manner as well as their collective organisation.

For the area of labour law collective rights are key to effective enforcement (Orlandini 2022; Rainone 2022). Hence, the scope of application of the principle of effectiveness has to be unambiguously extended to cover, in addition, collective labour rights and not only to rely on individual judicial enforcement. In this context, one has to understand the principle lying behind requiring ‘effective compliance’ with EU social and labour law in its entirety, including all types of rules related to enforcement and not only individual judicial enforcement. The conceptualisation by Nebbia of the principle of effectiveness as expressing the idea of ‘effective compliance’, encapsulating the concepts of obedience, sanction and enforcement, comes probably closest to being useful for the purposes of labour law (Nebbia 2008).

More specifically, remote workers have the right to the effective enforcement of their rights not only in terms of their own rights before the courts but also in an extended manner covering their collective rights. These are protected, amongst others, by the Charter of Fundamental Rights of the European Union: namely, freedom of assembly and association (Article 12); rights to information and consultation (Article 27); and the right of collective bargaining and action (Article 28). As yet, this is something that has not been explicitly recognised by the CJEU. Independently of the inherently individualistic nature of digital nomadism, there is therefore a certain potential embedded in the principle of effectiveness, which is as yet unfulfilled, to accommodate not only the individual but also the collective needs of workers.

## 4. Conclusion

Several countries in Europe have been confronted with the reality of cross-border and remote working. Perhaps in the attempt to challenge and benefit from the potential geographical flexibility enjoyed by digital nomads and wishing to attract them to their territories, or simply faced with the need to create (some) legal certainty for this

---

14. Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L 409, 4.12.2020, p. 1-27.

group, they have recently adopted special laws and visa regimes for digital nomads. These national rules, however, do not seem to contain any special rules in terms of the enforcement of digital nomads' rights, thus potentially leaving them vulnerable from this perspective. This chapter therefore tackles the question of the enforcement of the rights of such workers by positioning them in the theory and debate on remote work and telework on the one side; and by analysing the key challenges potentially making the enforcement of their rights more strenuous on the other.

It seems that digital nomads potentially face a wide array of enforcement challenges that could be viewed in line with the typology offered by Grimshaw et al. (2016) who, in their work on the enforcement of the rights of precarious workers, distinguish between four 'types' of enforcement gaps: a) mechanisms; b) awareness; c) power; and d) coverage. This seems useful in creating a more inclusive understanding of enforcement guidance for remote workers because, as is shown here, one could argue that digital nomads potentially face all four types of gaps.

The first challenge is access to the mechanisms of enforcement. Since there is no legal status in EU law afforded to intra-EU digital nomads, it is not particularly clear whether they have adequate access to the relevant enforcement mechanisms, such as the courts in the country where they currently find themselves. Access to enforcement mechanisms other than courts is also potentially difficult since any inspections, as well as criminal investigations, have to be directed at the worker's home while cross-border investigation and cooperation between labour inspectorates or the police might also be required. A further question is whether such mechanisms as complaints to equality bodies, ombuds offices, labour inspectorates or whistleblowing can be effectively accessed by digital nomads. The situation is even more complex where a digital nomad works for an employer based outside the EU since there is no uniform rules at global level to enforce their rights and bilateral treaties provide only an ad hoc and patchwork set of rules.

Legal obscurity when it comes to the status and protection due to digital nomads also potentially creates significant awareness gaps when it comes to the enforcement of their rights. In this sense the situation of digital nomads might be akin to groups of precarious or vulnerable workers such as seasonal workers who severely lack access to information concerning their employment situation and related rights, as well as information on how to assert these (European Commission 2021; Council 2021). Reviewing the relatively new digital nomad regime laws adopted in Estonia, Latvia, Croatia, Greece, Hungary, Malta and Spain, there seem to be no special rules oriented towards enforcement embedded in those mechanisms. It has also already been reported that the uncertainty surrounding the legal status of cross-border teleworkers might have led to unequal treatment. Employers are reluctant to hire employees across borders because of the administrative obstacles or because the potential costs to the employer are not predictable. This makes Europe as such into a less attractive labour market for remote workers (Maastricht University 2022).

Third, the power gaps in the context of enforcement are, for example, fear of the loss of a job or of residency, fear of exclusion from unemployment support and lack of access to

the employer. While autonomy and the flexibility enjoyed by digital nomads are some of the aspects mentioned most often as being among the driving factors in taking up such work, it comes with a certain lack of access to, or even detachment from, an employer that can only be breached via digital means (see spatial challenge identified above). While on a day-to-day basis such interaction and access might be sufficient, when problems with enforcement arise, the cross-border nature of digital nomadism creates an extra challenge to enforcement and drives the already inherent power imbalance in the employment relationship to an extreme.

Fourth, aside of those EU Member States that have regulated the work carried out by digital nomads, their legal status is often at best ambiguous, potentially creating coverage gaps. The stringent EU immigration rules that typically do not allow work on a tourist visa mean that a digital nomad from a third country has to obtain a visa allowing not only work but to work for an employer based outside the EU. Digital nomads who have entered a country under a tourist visa or who have joined their spouse as a partner, for example, are potentially not covered by employment protection rules and, even where they are covered, they might be reluctant to claim any rights fearing liability for tax and social security that might entail significant fines and expense for both the employer and the employee or the loss of residency rights altogether. The rules for intra-EU digital nomads are also complex.

As discussed in Section 3, digital nomads illustrate an extreme case of enforcement mechanism deficiencies due to certain elements inherent in the nature of their work that go beyond and cut across the four enforcement gaps identified by Grimshaw et al. (2016) in the context of precarious work. The lack of collective voice, spatial challenges and the detachment between the employer and the worker, and the extreme level of legal obscurity, poses significant further challenges to the enforcement of their rights.

The enforcement of the rights of digital nomads potentially raises a number of challenges akin to those faced by precarious workers when enforcing their rights. A key aspect for remote work is whether we understand it to cover all such forms of work or only those where work is being carried out via digital technology. While digital nomads fall under both these definitions, from an enforcement perspective it might be important to be inclusive since, for example, domestic workers, artisan workers, people working in agriculture and other workers who do not carry out their work at a desk in an office in front of a computer might actually face similar enforcement issues. Similarly, rights to information and consultation might have to be exercised in a different manner from traditional office workers for the simple reason that reaching their representatives, becoming one and benefiting from information and consultation rights might be a more complex matter than in an office setting. There might also be extra confidentiality issues to be faced, too (Rasnača and Jagodziński, forthcoming).

The isolation and individuality that characterises the working life of digital nomads requires a rethinking of how collective rights should be shaped and enforced; otherwise, they will remain entirely meaningless for these workers. However, it also requires remembering that the enforcement issues they face are not always unique to them and



that more inclusive enforcement frameworks spanning beyond narrowly understood remote work might be more successful.

## References

- Aloisi A. and Corazza L. (2022) 'South working': The future of remote work, *Social Europe*, 2 May 2022. <https://www.socialeurope.eu/south-working-the-future-of-remote-work>
- Annesley C. (2007) Lisbon and social Europe: Towards a European 'adult worker model' welfare system, *Journal of European Social Policy*, 17 (3), 195-205. <https://doi.org/10.1177/0958928707078363>
- Becker G.S. (1968) Crime and punishment: An economic approach, *Journal of Political Economy*, 76 (2), 169-217. <https://www.jstor.org/stable/1830482>
- Bright Plus (2020) Teleworking: The legal and practical dos and don'ts. <https://www.employers.brightplus.be/blog/teleworking-the-legal-and-practical-dos-and-donts>
- Cook D. (2019) The freedom trap: Digital nomads and the use of disciplining practices to manage work/leisure boundaries, *Information Technology & Tourism*, 22: 355-390. <https://doi.org/10.1007/s40558-020-00172-4>
- Council of the European Union (2021) Council conclusions on telework, 9131/21, 3 June 2021.
- Eurofound (2022) Telework in the EU: Regulatory frameworks and recent updates, Publications Office of the European Union. <https://doi.org/10.2806/42974>
- European Commission (2021a) Tax in an increasingly mobile working environment: Challenges and opportunities, European Commission.
- European Commission (2021b) Intra-EU mobility of seasonal workers: Trends and challenges, final report March 2021, European Commission. <https://data.europa.eu/doi/10.2767/173568>
- European Economic and Social Committee (2022) Taxation of cross-border teleworkers and their employers, Opinion, ECO/585-EESC-2022-00408.
- Global Citizen Solutions (2023) Digital nomad visa Europe – Everything you need to know. <https://www.globalcitizensolutions.com/digital-nomad-visa-europe>
- Greer I., Ciupijus Z. and Lillie N. (2013) The European migrant workers union and the barriers to transnational industrial citizenship, *European Journal of Industrial Relations*, 19 (1), 5-22. <https://doi.org/10.1177/0959680112474748>
- Grimshaw D., Johnson M., Rubery J. and Keizer A. (2016) Reducing precarious work: Protective gaps and the role of social dialogue in Europe. <https://documents.manchester.ac.uk/display.aspx?DocID=48958>
- Gschwind L. and Vargas O. (2019) Telework and its effects in Europe, in Messenger J.C. (ed.) *Telework in the 21<sup>st</sup> Century: An evolutionary perspective*, Edward Elgar, 36-75.
- Gunningham N. (1987) Negotiated non-compliance: A case study of regulatory failure, *Law & Policy*, 9 (1), 69-95. <https://doi.org/10.1111/j.1467-9930.1987.tb00398.x>
- Holleran M. (2022) Pandemics and geoarbitrage: Digital nomadism before and after COVID-19, *City*, 26 (5-6), 831-847. <https://doi.org/10.1080/13604813.2022.2124713>
- Huybrechts S. (2022) 20 years Framework Agreement on Telework: Looking back to move forward, *Global Workplace Law and Policy*, 18 July 2022. <https://global-workplace-law-and-policy.kluwerlawonline.com/2022/07/18/20-years-framework-agreement-on-telework-looking-back-to-move-forward/>
- ILO (2017) General survey concerning working-time instruments: Ensuring decent working time for the future. [https://www.ilo.org/global/standards/WCMS\\_618560/lang--en/index.htm](https://www.ilo.org/global/standards/WCMS_618560/lang--en/index.htm)

- Jacobs A. (2022) The enforcement structure for EU labour law, in Rasnača Z., Koukiadaki A., Bruun N. and Lörcher K (eds.) *Effective enforcement of EU labour law*, Hart Publishing, 13-33.
- Kokott J. and Kaspar M. (2012), 'Ensuring Constitutional Efficacy', in Rosenfeld, Michel and Sajó András (eds.), *The Oxford Handbook of Comparative Constitutional law*, Oxford University Press, 2012), 795–815.
- Koukiadaki A. (2022) Remedies and sanctions in EU labour law, in Rasnača Z., Koukiadaki A., Bruun N. and Lörcher K (eds.) *Effective enforcement of EU labour law*, Hart Publishing, 35-56.
- Lafuente Hernandez S. and Rasnača Z. (2019) Can workers' rights ever catch up? The Erzberger case and EU cross-border reality, *Industrial Law Journal*, 48 (1), 98-116. <https://doi.org/10.1093/indlaw/dwy025>
- Latvijas imigrācijas likums (Immigration Law of the Republic of Latvia) (2022) Imigrācijas likums: I nodaļa, Vispārīgie noteikumi. <https://likumi.lv/ta/id/68522-immigracijas-likums>
- Lenaerts K. (2013) Effective judicial protection in the EU, Lecture at the Assises de la Justice – what role for Justice in the European Union? Brussels, 21-22 November 2013.
- Maastricht University (2022) The urgency of facilitating working from home by cross-border workers, News, 8 November 2022. <https://www.maastrichtuniversity.nl/news/urgency-facilitating-working-home-cross-border-workers>
- Malmberg J. (2003) *Effective enforcement of EC labour law*, Kluwer Law International.
- Mendez-Pinedo E. (2021) The principle of effectiveness of EU law: a difficult concept in legal scholarship, *Juridical Tribune*, 11 (1), 5-29.
- Messenger J.C. (2019) Conclusions and recommendations for policy and practice, in Messenger J.C. (ed.) *Telework in the 21st Century: An evolutionary perspective*, Edward Elgar, 286-316.
- Mills J.E., Wong-Ellison C., Werner W. and Clay J.M. (2001) Employer liability for telecommuting employees, *The Cornell Hotel and Restaurant Administration Quarterly*, 42 (5), 48-59.
- Müller A. (2016) The digital nomad: Buzzword or research category?, *Transnational Social Review*, 6 (3), 344-348. <https://doi.org/10.1080/21931674.2016.1229930>
- Montreuil S. and Lippel K. (2003) Telework and occupational health: A Quebec empirical study and regulatory implications, *Safety Science*, 41 (4), 339-358.
- Nash C., Jarrahi M.H. and Sutherland W. (2020) Nomadic work and location independence: The role of space in shaping the work of digital nomads, *Human Behaviour and Emerging Technologies*, 3 (2), 271-282.
- Nebbia P. (2008) The double life of effectiveness, *Cambridge Yearbook of European Legal Studies*, 10, 287-302. <https://doi.org/10.1017/S1528887000001348>
- Orbitax (2022) European Commission working on tax and social security arrangements for cross-border workers in connection with telework, *Orbitax Tax News & Alerts*, 18 August 2022. <https://www.orbitax.com/news/archive.php/European-Commission-Working-on-50636>
- Orlandini G. (2022) Enforcing EU Law via collective action, in Rasnača Z., Koukiadaki A., Bruun N. and Lörcher K. (eds.) *Effective enforcement of EU labour law*, Hart Publishing, 341-362.
- Rainone S. (2022) Enforcing EU information and consultation rights, in Rasnača Z., Koukiadaki A., Bruun N. and Lörcher K. (eds.) *Effective enforcement of EU labour law*, Hart Publishing, 243-264.
- Rasnača Z. (2021) Collective redress in labour and social law disputes: An (attractive) option for the EU?, *European Labour Law Journal*, 12 (4), 415-435. <https://doi.org/10.1177/20319525211056604>

- Rasnača Z., Koukiadaki A., Bruun N. and Lörcher K. (2022) Introduction, in Rasnača Z., Koukiadaki A., Bruun N. and Lörcher K. (eds.) *Effective enforcement of EU labour law*, Hart Publishing, 1-10.
- Rasnača Z. and Jagodziński R. (Forthcoming) Confidentiality and workers' information and consultation rights: A jigsaw puzzle.
- Reichenberger I. (2018) Digital nomads – a quest for holistic freedom in work and leisure, *Annals of Leisure Research*, 21 (3), 364-380. <https://doi.org/10.1080/11745398.2017.1358098>
- Stigler G. (1971) The Theory of economic regulation, *The Bell Journal of Economics and Management Science*, 2 (1), 3-21.
- Verschueren H. (2022) The application of the conflict rules of the European social security coordination to telework during and after the COVID-19 pandemic, *European Journal of Social Security*, 24 (2), 79-94

All links were checked on 02.03.2023.