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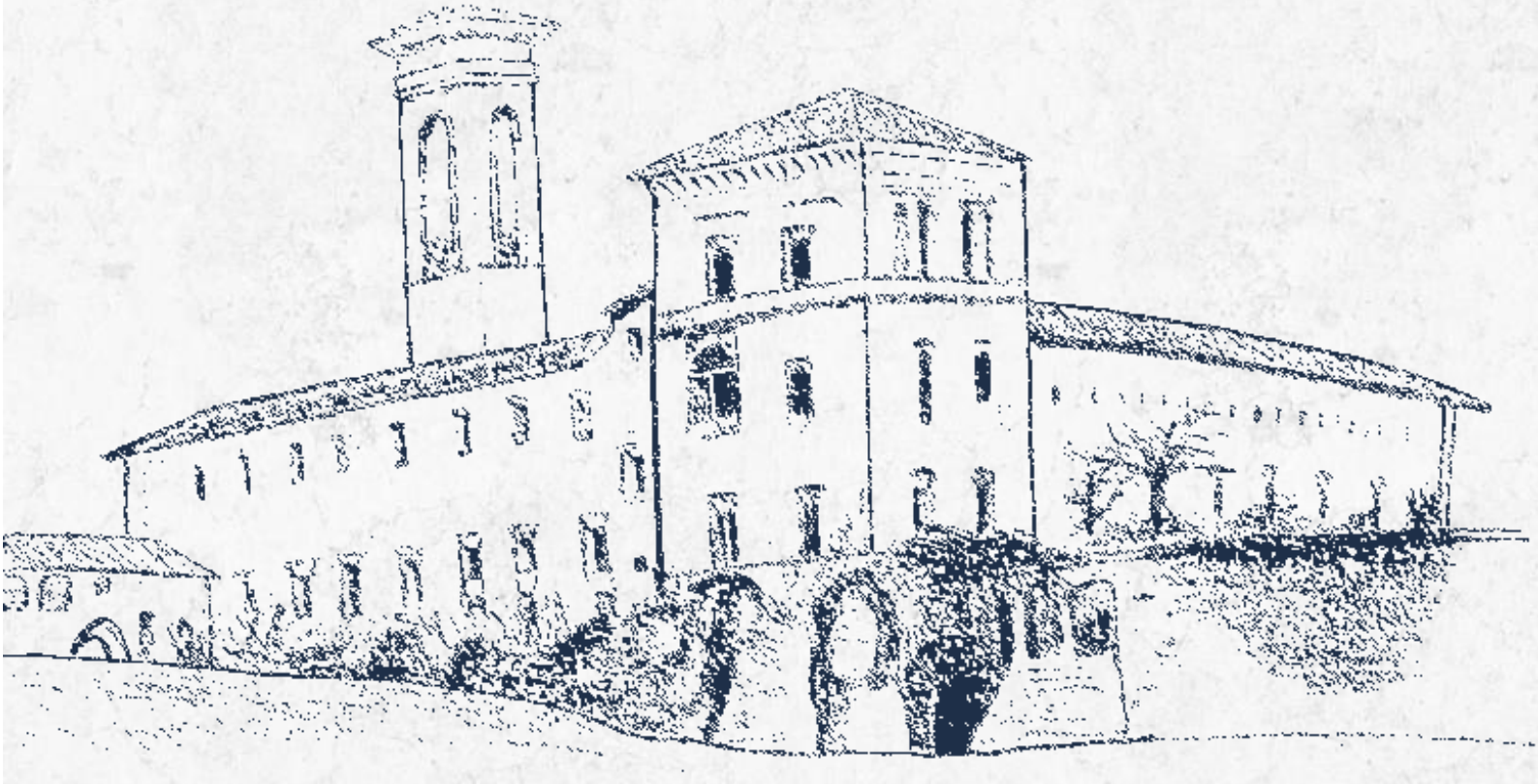

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Can a Destination Country's Labor Law be Applicable to Employees Enjoying a "Workation"?

Martina Menghi and Pieter Manden*

Abstract: This article deals with the investigates which employment law is applicable to employees during workations, according to EU law. Not surprisingly, in cross-border situations, the employee benefits of special protection. Working abroad might trigger the application of the law of the Host State, notably concerning two categories of rules: provisions that cannot be derogated from by agreement (1) and overriding mandatory provisions (2). Unfortunately, both categories are not defined by EU legislation. Provisions belonging to the first category, (mainly considered as, for instance, on minimum wage) are those of the State corresponding to the habitual place of employment. In case it is not possible to identify it, residual criteria might apply. Further, provisions belonging to the second category must always be applied by national courts, regardless of the law applicable to the employment contract. While legal scholars often disagree on categorisations and interpretations of such rules, the ECJ confirmed that this category of provisions must be interpreted strictly.
The posted worker Directive defines the rules (e.g., salary), which are 'overriding mandatory provisions' of the Host State, applicable to posted employees. It makes sense to ask whether these would be applicable to workationers too. However, several arguments speak in favour of not equating employees enjoying workations to posted employees and there is no evidence that these rules would be considered as overriding provisions

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during workations. Even if a risk of application of some Host State employment law provisions exists, it appears strongly mitigated.

Keywords: private international law, international employment law, provisions that cannot be derogated from by agreement, overriding mandatory provisions.

Introduction

The aim of this paper is to highlight important criteria to consider when identifying applicable employment law for workationers temporarily working from abroad during a so-called 'workation' (a combination of work and vacation). These people, which we will refer to as 'workationers,' are employed in one State ('Home State') and temporarily working in another one ('Host State'). Given this context, it is crucial to define what must be considered as a workation given the fact that this definition will influence the outcomes for applicable laws.

A workation occurs when employees find themselves in a situation where these four cumulative requirements are met: (1) the main aspects of a temporary stay abroad are solely determined by an employee, such as the destination and the duration of their visit to a Host State. (2) The employer allows (but does not assign) the employee to temporarily work remotely outside of the Home State. (3) The trip does not have any business reason or purpose, i.e., the employer has no initiative nor need for the trip, which is privately driven, to occur. (4) The employee is bearing the relevant costs, e.g., the travel costs related to the trip.

By contrast, the opposite of the above features qualifies as a business trip, where there is an employer interest behind the trip; it is the employer that sends an employee abroad to perform their work in an employer-defined Host State and situation.[1]

This paper focuses on the legal framework in EU law, whether the existing international private law rules – both from primary and secondary

[1] Workations and business trips have the main common feature in their short duration. In both cases, the employee does not give up the residency in the Home State and works outside its territory on a temporary basis (where 'temporary' is generally being defined as 'of short duration', a few days or weeks, and in any case never exceeding 183 days per calendar year – this would have some significant implications, notably tax related).
It has been observed that "the distinction between business and leisure tourism" in a more and more digitalized world "seems to be outdated". M. Bassyiouny, M. Wilkesmann *Going on workation – Is tourism research ready to take off? Exploring an emerging phenomenon of hybrid tourism*, in *Tourism Management Perspectives*, 2023, vol. 46.

levels and including relevant decisions of the European Court of Justice – fall short in providing the necessary answers or not. This topic has been discussed a lot in recent literature but is far from being crystallized.[2]

As argued in this paper, there some relevant pieces of legislation that are available even if workations did not represent their scope of application at the time these rules were adopted in EU private law. On the contrary, the relevant rules were instead shaped with business trips in mind. Therefore, applying the existing rules to workationers is particularly complicated.

This paper does not intend to analyze specific national rules, if these exist.[3] National laws, if mentioned, are done so through examples and illustrations of practical implementations. Given the current legal framework, however, it should be possible to identify some common rules for workationers within the Member States.

The rules that will be analyzed were adopted before the Covid-19 Pandemic and the explosion of remote work during and following it.[4] As a result, the rules were never designed with the current reality in mind, which leads to an ambiguous situation.

At the same time, workationers already existed prior to the pandemic. Take Mario as an example: he is an associate at a big German law firm that deals with mergers, projects that usually take months. The negotiations for a new project start after Mario booked his vacation to Greece. If he is lucky enough to be allowed by the law firm to leave for vacation, instead of having to cancel it last minute, the most likely solution would be for him to constantly look at his mobile phone, read, and send

[2] At the international level, outside the EU, 'For many decades, labour and employment lawyers had tended to neglect jurisdictional issues; and lawyers who were studying conflicts of law tended to ignore labour law issues'. M. A. Cherry, *Regulatory options for conflicts of law and jurisdictional issues in the on-demand economy*, *International Labour Organisation Paper*, 2019, 4.

[3] In German law, for instance, the Work Councils (*Betriebsräte*) have a co-determination right in defying the 'structuring of mobile work performed by means of information and communication technology' Works Constitution Act (Betriebsverfassungsgesetz - BetrVG), in so far as the matter is not prescribed by legislation or collective agreement. Therefore, they also have a co-determination right when considering how to regulate remote work while abroad. Dr. M. M. Knorr, Global Mobility: The dos and don'ts of mobile work or remote work from abroad, *Blog: Labor Law*, 2022, https://buse.de/en/blog-en/labor-law/global-mobility/ (accessed 11 October 2025).

[4] The massive transition to remote work has been analysed by several authors, not only from a legal but also economic and operational perspective, inter alia, T. Neeley, *Remote Work Revolution* HarperCollins, New York, 2021. D. Foroux, *Highly Productive Remote Work: A Pragmatic Guide*, North Eagle Publishing, 2020. I. Szapar, *Remote Work is the way*, Iwo Szapar, 2021.

emails to catch up and understand what is going on during his (physical) absence from the office. This raises some questions: does such a situation justify the application of Greek employment law? Is Mario considered to be on a business trip, or does he even qualify as a posted employee? It seems that these questions, even if open, were not considered as relevant before the advent of workationers.[5]

Not surprisingly, in situations characterized by some degree of internationality, a cross-border dimension (employment in the Home State and temporary remote work in the Host State) presents potential law conflicts. Notably, one of the main risks is that the Host State's employment law becomes applicable. This has some very relevant practical implications. Amongst others, the following questions need to be answered: which minimum wage standards must be applied to these employees, those deriving from the law of their Home State or their Host State? Which law determines the maximum working hours, the minimum rest periods, and annual holidays?

Therefore, it is crucial to identify the applicable laws for the employment relation with certainty. In EU law, it is possible to seek the relevant answers in Regulation (EC) No 593/2008 of 17 June 2008 for the laws applicable to contractual obligations (Rome I) (hereafter 'the Regulation'). This is an instrument of 'universal application', meaning that any law specified in it shall be applied, whether it is the law of a Member State or not, as stated in its Article 2. The Regulation's general objective, as announced in Recital 16, is legal certainty in the European judicial area. The foreseeability of the substantive rules applicable to contracts must not be affected.[6]

It is crucial to investigate the applicable legislative framework. There is no doubt that the Regulation Rome I is applicable to workations. Therefore, its provisions need to be regraded in detail. The principle of the parties' choice is restricted by both Article 8 and Article 9, establishing limitations to its application. While both articles raise some interpretative issues, the criteria laid down in Article 9 deserve a deeper and more detailed analysis and is evaluated separately in the next chapter. Finally, the Posted Workers Directives is the topic of discussion in the last chapter to show how unlikely it is that a workationer can be considered as a posted employee.

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[5] S. Stefanova-Behlert, N. Davidovic, *Arbeiten aus dem Ausland: Praktische Herausforderungen*, in *Unternehmensjurist*, 2023, n. 6.

[6] Case C-135/15, *Hellenic Republic* v. *Grigorios Nikiforidis*, [2016], Recital 46.

1. Identifying the Limitations to the Parties' Choice according to Article 8

Article 8 presents the parties' choice as the general rule. However, it also lays down crucial criteria that acts as a counterweight, which requires identifying the provisions that cannot be derogated by an agreement (1.1.) according to the law of the habitual place of employment (1.2.).

1.1. The Provisions that cannot be Derogated by an Agreement (Art. 8 (1))

According to the Regulation, an employment contract shall be governed by the law that the parties have chosen. Such a choice, however, may not have the result of depriving the employee of the protection derived by the application of some particular provisions. These provisions are those that cannot be detracted from by agreements under the law that would have been applicable in the absence of choice.

A recent decision[7] from the CJEU offers a comprehensive overview on the law applicable to the employment contract, which is worth summing up.

The Court ruled that the correct application of Article 8 of the Rome I Regulation requires subsequent steps to be accomplished: first, the national court must identify the law that would have applied in the absence of choice and determine, in accordance with that law, the rules that cannot be derogated from in an agreement. In a second step, the national court must compare the level of protection afforded to the employee under those rules with that provided for by the law chosen by

[7] As a general rule, the Court recalls that the individual employment contract is to be governed by the law chosen by the parties. However, such a choice of law may not have the result of depriving the employee of the protection afforded to him/her by provisions under the law that cannot be derogated from by agreement and that would be applicable to the contract in the absence of such a choice. This primarily refers to the law of the country in which or, failing that, from which the employee habitually carries out his or her work in performance of the employment contract. If those provisions offer the employee concerned greater protection than those of the employment law chosen by the parties, the former provisions will override the latter, while the law chosen will continue to apply to the rest of the contractual relationship. Therefore, the same contract will be, in practice, governed by different laws.
Case C-152/20, *DG and EH* v. *SC Gruber Logistics SRL and Sindicatul Lucrătorilor din Transporturi v SC Samidani Trans SRL*, [2021].

the parties. Finally, if the level of protection provided for by those rules is greater, those same rules must be applied.[8]

To the extent that the parties have not chosen the law applicable to the individual employment contract, the contract shall in principle be governed by the law of the habitual place of employment.

As clarified by the Court, once the country of the habitual place of work of the employee is identified, it is necessary to look at the provisions that, according to the laws of that country, cannot be derogated from by agreement. Those laws will have to be applied to the employment contract of an employee, even if these employees work remotely in another country for some time, in the case they are more favorable.

Unfortunately, the Regulation does not give a definition of 'provisions that cannot be derogated from.' This means, as confirmed by the Court, whether a provision belongs or not to those that cannot be derogated, that will have to be decided according to national law: 'The referring court must itself interpret the national rule in question."[9]

A case-by-case analysis is necessary. The CJEU had the opportunity in several judgements to clarify, in practice, some guidelines. According to the Court's interpretation, the provisions in object 'can, in principle, include rules on the minimum wage.'[10]

Further, rules concerning safety and health at work,[11] protection against unlawful dismissal,[12] and rules on working hours[13] are some relevant examples coming from national jurisprudences. These are rules that have

[8] *Id.*, Recital 27.

[9] *Id.*, Recital 29.

[10] *Id.*, Recital 32 and conclusions.

A. Poso, *È il luogo di esecuzione abituale della prestazione di lavoro che fissa il salario minimo. La Corte di Giustizia accoglie le istanze degli autotrasportatori rumeni*, *Labor*, 2021 https://www.rivistalabor.it/e-il-luogo-di-esecuzione-abituale-della-prestazione-di-lavoro-che-fissa-il-salario-minimo-la-corte-di-giustizia-accoglie-le-istanze-degli-autotrasportatori-rumeni/ (accessed 11 October 2025).

[11] Report on the Convention on the law applicable to contractual obligations by Mario Giuliano, Professor, University of Milan, and Paul Lagarde, Professor, University of Paris I, OJ 1980 C 282.

It has been observed by some scholars that actually health and safety provisions are not simply provisions that cannot be derogated from by an agreement, they are overriding mandatory rules (See below, footnote 86).

[12] G. Monga, The law applicable to individual employment contracts, *Aldricus Working Paper*, 2020, https://aldricus.giustizia.it/the-law-applicable-to-individual-employment-contracts/?lang=en (accessed 11 October 2025).

[13] *Cour de cassation*, *civile*, *Chambre sociale*, Judgement 20-14.178 8 December 2021.

been considered as 'provisions that cannot be derogated from by agreement' by national courts.
Since it is unlikely that the Host State will become the habitual place of work for a workationer, the application of these provisions for workationers is quite unlikely to materialize. Provisions that cannot be derogated from through an agreement (Art. 8 (1)) applicable to these employees will be the ones of the State where they are employed, namely the Home State.

1.2. The Habitual Place of Employment (Art. 8 (2))

As a preliminary observation, employment contracts, in principle belong to the private law sphere. This means that, like in all private law contracts, the parties' will is crucial and therefore they are able to choose which law shall be applicable.
Employment contracts usually specify which law shall govern it, so this is expected to be the most common scenario.
However, the employment contract is indeed a peculiar one, where one of the two parties (the employee) is facing a situation of weakness compared to the other party (the employer). Considering negotiation power, the employee is *de facto* in the position of having less room to maneuver and less flexibility than their employer.
Therefore, the Regulation adjusts this unbalanced situation by providing employees with some further protections. In Article 8 (1) it establishes that, generally, an individual employment contract shall be governed by the law chosen by the parties. However, it also specifies that such a choice of law may not have the result of depriving an employee of the protection afforded to him/her by provisions that cannot be derogated from by an agreement under the law that, in the absence of choice, would have been applicable to the contract.
Therefore, it becomes decisive to answer the following question: how can one identify the law that, in the absence of choice, would have been applicable to the contract? Some authors refer to this law as the 'objective law' of the contract.[14]
The main criterion is laid down in in Article 8 (2) of the Regulation: '(t)o the extent that the law applicable to the individual employment contract

[14] For instance, J. P. Lhernould, Cross-border telework and Covid-19. Impact on mobile workers' status, *European Commission Working Paper*, 2021, 38, and A. A. H. van Hoek, Private International Law: An Appropriate Means to Regulate Transnational Employment in the European Union?, in *Erasmus Law Review*, 2014, n. 3, 158.

has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract.'

Throughout this text we refer to the 'country in which or, failing that, from which the employee habitually carries out his work in performance of the contract' simply by saying the 'habitual place of work.'

The same provision also clarifies that the country where the work is habitually carried out shall not be deemed to have changed if the employee 'is temporarily employed in another country.'

It is relevant from the beginning to notice that a regular workation, meeting the criteria defined in our introduction, is very unlikely to change the habitual place of work of the employee. Given this, it is essential to define the adverb 'temporarily.' According to Recital 36 of the Regulation, 'work carried out in another country should be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad.'[15]

Article 8 has as an objective to ensure compliance with the provisions protecting the employee that are laid down by the law of the State in which that employee carries out his/her professional activities as much as possible.[16]

To have a complete understanding, it is also worth mentioning that the 'habitual place of work' is not the only criterion provided by the Regulation. In fact, in some cases determining that is not possible. Art. 8 (3) states that, in such cases, 'the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.' Further, according to Art. 8 (4) '(w)here it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply.'

It is important to point out that these last two paragraphs (3) and (4) are residual to paragraph 2 and therefore the criterion of the country where the employee is 'habitually' working is the privileged one, having priority

[15] In EU law, recitals, introduced by the word 'whereas', indicate the rationale behind the adoption of pieces of EU legislation. They are not legally binding; however, they can serve as guidelines for the text interpretation, notably where an EU law is ambiguous. Since they describe the purpose of the act, they are used as interpretative instruments by the CJEU. 'The law of recitals in European Community legislation', T. Klimas, J. Vaitiukait, The Law of Recitals In European Community Legislation, in *ILSA Journal of International & Comparative Law*, 2008, vol. 15, n. 1, 63.

[16] See, to that effect, *Nikiforidis* judgement, above n. 6, Recital 48.

over the others and to be interpreted in a broad sense. Only if it is not possible to identify the country where the work activity is habitually carried out, then the place of business through which the employee was engaged and at the closest connection to another country will be looked at. According to the European Court of Justice ('CJEU'), 'it was the legislator's intention to establish a hierarchy of the factors to be taken into account in order to determine the law applicable to the contract of employment.'[17]

In our analysis, we mainly focus on the dualism between, on one hand, the 'country where the employee habitually works' and, on the other, 'country where the employee is temporarily on workation.' We assume that it shall ideally be possible to identify – and if necessary to distinguish – between the two countries.

Undoubtedly, the core notion lies in the definition of the adverb 'habitually.' Unfortunately, there is no definition in the Regulation, so there is a question of how to identify it. In some cases, it is easier to define than in others. In the lack of a definition for 'habitually' in the Regulation, we are facing a notion characterized by 'flexibility.' Such flexible notions are quite common in the EU law and have the advantage of being used in several legal contexts, enabling the Court of Justice to fulfill the notion by giving an interpretation of their content and their limits.

It might be disappointing at first sight, but according to the Court there is no duration that can be taken as a standard reference. This might seem to be a disadvantage, but it is actually comprehensible. The identification of the 'habitual place of work' is not limited to a matter of countable and definable duration.[18] It is not possible to have a straightforward answer to the question 'How long does an employee have to work in a place before it becomes his/her habitual place of work?', simply because time worked in a given workplace is not the only factor enabling the assessment of the place of employment.[19] There are many other factors to be taken into account.

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[17] Case C-384/10 *Jan Voogsgeerd* v. *Navimer SA*, [2011] ECR I at 13275, Recital 34.

[18] The duration per se must be evaluated taking into account the specific case circumstances, namely the activity, as well as the company sector. E. Traversa, *Il rapporto di lavoro con elementi di transnazionalità*, in F. Carinci, A. Pizzoferrato (eds.), *Diritto del Lavoro dell'Unione europea*, Giappichelli, Torino, 2021.

[19] For instance, 'Italy is the place of employment of a secretary who was hired just yesterday to work a local job at an office in Rome — but Italy is not the place of employment of a Tokyo-based banker who has been working in Milan for the last two

The CJEU indicated some useful criteria[20] for identifying the country of habitual place of work, including the following: the actual workplace (in the absence of a 'center of activities', it is the place where an employee carries out the majority of the activities); the nature of the activity carried out; the elements that characterize an employee's activity; the country in which or from which an employee carries out his/her activity or an essential part of it – or receives instructions on his/her tasks and organizes his/her work activity; the place where the work activity tools are placed; and finally, the place where an employee is required to present himself/herself before carrying out his/her duties or to return after having completed them.

The Court of Justice specified that the notion of 'habitual place of work' 'must be interpreted as meaning that, in a situation in which an employee carries out his activities in more than one State, the country in which the employee habitually carries out his work in performance of the contract is that in which or from which, in the light of all the factors which characterize that activity, the employee performs the greater part of his obligations towards his employer.'[21]

Furthermore, there can be situations in which the location an employee does most of their obligations for their employer is particularly complex. This is illustrated by case law before the CJEU.[22] The Court took the opportunity to first specify that in case of a contract of employment under which an employee performs for his employer the same activities in more than one Member State, it is necessary, in principle, to take account of the employment relationship's complete duration to identify the place where the employee habitually works. If other criteria fail, the habitual place of work will be the place where an employee has worked the longest.[23] This consideration, however, is intended to play a role only where it will not be

months, closing a deal on a long business trip'. D. C. Dowling, Jr., *How to Determine Which Jurisdiction's Employment Laws Reach Border-Crossing Staff*, in *Labor Law Journal*, 2016, n. 67.
The duration has to be considered by taking into account the specific activity performed by the employee abroad. Therefore, a 5-year period might be regarded differently if performed by an engineer on a nuclear site, by a director in a bank branch or by an employee from the sales department. E. Traversa, above, n. 18, 335.

[20] See on this point G. Monga, *op. cit.*
Voogsgeerd judgement, above n. 8.
Case C-29/10, *Heiko Koelzsch* v. *État du Grand Duchy of Luxembourg*, [2011] ECR I, at 1595.

[21] *Id.*, Recital 39.

[22] Case C-37/00, *Herbert Weber* v. *Universal Ogden Services Ltd.*, [2002] ECR I, at 2013.

[23] *Id.*, Recital 58.

possible to use the other criteria listed above, such as the actual workplace, the nature of the activity carried out and so on.
It has been pointed out that, generally, occasional tele-work should in principle not affect the identification of the habitual workplace. For example: an employee that habitually works in Germany and for a 6 month-period during the pandemic worked full-time from another EU Member State (e.g. Austria). Whether his/her employment contract stipulates that German law is applicable or not, German law will govern the contract.[24]
Once the Home State has been identified as the habitual place of work and its provisions cannot be derogated from through an agreement, is it possible to completely exclude the application of the Host State employment provisions to workationers? The (negative) answer lies in Article 9 of the Regulation. There are some provisions of the Host State that will have to be observed.

2. The Overriding Mandatory Provisions (Art. 9)

Article 9 of the Regulation refers to a Host State's 'overriding mandatory provisions': 'The Regulation shall not restrict the application of the overriding mandatory provisions of the *law of the forum*.'[25] 'Because of their importance for the State that has enacted them, such provisions must be observed even in international situations, irrespective of the law governing the contract under the normally applicable choice-of-law rules of the Regulation.'[26] Their respect is regarded as crucial by a country for safeguarding its public interests, such as its political, social, or economic organization. They are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under the Regulation.[27]

[24] J. P. Lhernould, *op. cit.*, 40.
[25] As a general remark, the expression 'provisions' concerns different type of rules 'mandatory provisions could be contained not only in the collective agreements and arbitration awards affecting the contract of employment, but also in the following national laws: the law applicable to the individual contract of employment, the law of the place where the work has to be performed and the law of the competent forum.' G. P. Moreno, *Article 8: Individual employment contracts*, in U. Magnus and P. Mankowski (eds.), *ECPL Commentary – Rome I Regulation*, 2017, 599.
[26] A. Bonomi, *Article 9: Overriding mandatory provisions*, in U. Magnus and P. Mankowski (eds.), *op. cit.*, 604.
[27] Art. 9 (1) of the Regulation.

The difference between overriding mandatory provisions and overriding those analyzed under the previous section, namely the 'provisions that cannot be derogated from by an agreement', based on Art. 8, is not of immediate comprehension.[28] Unfortunately, the Regulation does not give a definition for overriding mandatory provisions (likewise to the previous article dealing with the provisions that cannot be derogated). Again, a case-by-case analysis is necessary.

The only specification from the legislature is to be found in Recital 37 of the Regulation where it is stated that the two categories of rules shall 'be distinguished.' Those of Art. 9 should be construed more restrictively: 'Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions.'[29]

These two categories of provisions have complementary purposes: Art. 8 seeks to avoid that the general principle of 'freedom of choice' for the applicable laws to employment contracts will diminish the protection of an employee working in a Host State. Art. 9 aims to enable the Host State

[28] E. Traversa, *op. cit.*, 331.

On the difference between the two categories, see the conclusions of the Advocate general Manuel Campos Sánchez-Bordona in the case *Gruber Logistics*, unfortunately not available in English, para. 64-68 :

L'analyse systématique permet de cerner la catégorie des « dispositions auxquelles il ne peut être dérogé par accord ». Elle impose de faire une distinction entre celles-ci et les « lois de police » mentionnées à l'article 9 du règlement Rome I ... Les lois de police, en tant que règles impératives « quelle que soit par ailleurs la loi applicable au contrat d'après le présent règlement » rendent inopérant (dans leur champ d'application) le choix d'un droit étranger que les parties aient formulé dans leur contrat.

La gravité de cette conséquence explique les restrictions que le règlement Rome I impose à la catégorie des lois de police:

– seules les lois de police du for peuvent être pleinement applicables;

– il pourra également être donné effet aux lois de police de l'État d'exécution du contrat, mais uniquement dans la mesure où lesdites lois de police rendent l'exécution du contrat illégale.

Par contre, les règles « auxquelles il ne peut être dérogé par accord » de l'article 3, paragraphes 3 et 4, de l'article 6, paragraphe 2, de l'article 8, paragraphe 1, et de l'article 11, paragraphe 5, sous b), du règlement Rome I, sont celles auxquelles il ne pourrait pas être dérogé dans un contrat domestique mais auxquelles, en revanche, il pourrait être dérogé dans un contrat international, moyennant le choix de l'ordre juridique régissant le contrat.

Dans ce cas, les règles facultatives et les règles non susceptibles de dérogation de l'ordre juridique choisi sont applicables, sauf si (et dans la mesure où) le règlement Rome I le prévoit autrement, ce qui est exceptionnel.

[29] Recital 37 of the Regulation. As noted by the CJEU, 'Article 9 of the Rome I Regulation derogates from that principle that the applicable law is to be freely chosen by the parties to the contract. This exception has the purpose of enabling the court of the forum to take account of considerations of public interest in exceptional circumstances.' *Nikiforidis* judgement, above n. 6, 43.

to safeguard its public fundamental interests by applying its core overriding rules to all contractual relations executed on its territory, regardless of the applicable law. In other words, the application of provisions that cannot be derogated from by agreement can be avoided (for instance because the habitual place of work is not in the Host State), while the overriding mandatory provisions are always applicable.

As a derogating measure, Art. of the Rome I Regulation must be interpreted strictly.[30] National courts, in applying it, do not intend to increase the number of overriding mandatory provisions applicable by way of derogation from the general rule set out in Article 8 (1) of the Regulation.[31]

'In considering whether to give effect to the provisions, regard shall be given to their nature and purpose and to the consequences of their application or non-application.[32]

It has been observed that due to its exceptional nature as 'derogating measure', the practical importance of Art. 9 should not be overestimated.[33] It is possible to identify overriding mandatory provisions in different legal areas (4.1.). When it comes to employment law, there are currently very few examples (4.2.). Provisions concerning posted workers are considered as part of this category. We argue, however, that workationers are not to be considered as posted employees (4.3.).

[30] *Nikiforidis* judgement, above n. 6, 44.
The Court clarified that when a rule is 'of strict interpretation", its application might be invoked only in limited cases. It 'must be constructed in such a way as to limit its scope to what is strictly necessary for safeguarding the interests which that provision allows the Member States to protect." Case, 225/85, *Commission of the European Communities* v. *Italian Republic*, [1987] ECR at 2625, Recital 7.
Furthermore, when a rule has to be interpreted strictly, 'its scope cannot be determined unilaterally by each Member State without being subject to control by the institutions." Case 36/75, *Roland Rutili* v. *Ministre de l'intérieur*, [1975] at 1219, Recital 27.

[31] *Nikiforidis* judgement, above n. 6, 47.

[32] Art. 9 (3) of the Regulation.

[33] A. Bonomi, *op. cit.*, 604. See also R. Ellger, Overriding Mandatory Provisions, in *Max Planck Encyclopedia of European Private Law*, https://max-eup2012.mpipriv.de/index.php/Overriding_Mandatory_Provisions (accessed 15 October 2025).

2.1. General Examples of Overriding Provisions

As stressed, it is not easy to establish whether a provision is mandatory or not. In some cases, it is directly stated in the provision itself.[34] Some examples can be found in different areas of the law, such as family law, property law or public law.[35] Unfortunately, this is seldom the case. Indeed, the CJEU's decisions 'giving effect to foreign overriding mandatory provisions, as allowed by Art. 9 (3)' are particularly rare.[36] Without indication, it is a matter of interpretation, a decision made by examining the content of the rule and its underlying policy under domestic law.[37]

It is worth mentioning that the prevailing opinion in the German academic interpretation states that 'a clear distinction should be made between the mandatory norms pursuing public goals and those protecting individual interests.'[38] On the one hand, there are rules interfering with contractual law (named after the German verb '*eingreifen*', to interfere, ('*Eingriffsnormen*')), in order to pursue public interests. On the other hand, there are rules aiming to preserve and even re-establish a balance between the contract parties and the interests of some specific categories of individuals (e.g., the employees).[39] This methodology leads to the conclusion that employee's protection does not fall under the scope of overriding mandatory provisions.[40] This is not only a scholars' view, but it

[34] An example in French law concerning child's affiliation, Art. 311-15 of French Civil Code: 'if the child and his or her father and mother or one of them have their habitual residence in France, whether joint or separate, possession of status produces all the consequences arising from it according to French law, even if the other elements of filiation could have depended on foreign law.'

[35] T. Szabados, Overriding Mandatory Provisions in the Autonomous Private International Law of the EU Member States – General Report, in *ELTE Law Journal*, 2020, vol. 1, 10. On this point, see also A. Bonomi, *op. cit.*, 622.

[36] *Id.*, 619.

[37] *Ibid.*

[38] *Id.*, 622.

[39] *Ibid.*

[40] 'According to Art. 9 (1), respect for overriding mandatory rules should be considered crucial by a state for 'safeguarding its public interests'. Does this imply that rules aiming at the protection of individual interests cannot be regarded as overriding mandatory provisions? The legislative history of the Rome I Regulation provides no clarity on this matter. According to the German Supreme Court and to the majority opinion in the German literature, the answer is affirmative.' L. M. van Bochove, Overriding Mandatory Rules as a Vehicle for Weaker Party Protection in European Private International Law, in *Erasmus Law Review*, 2014, n. 3, 149.

has also been confirmed by German courts. In this sense, the protection of employees would not be considered as within the scope of Art. 9. A renowned case law did not apply protection to a dismissal litigation. The German Federal Labor Court ('*Bundesarbeitsgericht*') refused to apply several German rules protecting employees against abusive dismissal.[41]

'It is highly debatable whether Art. 9 also covers mandatory rules that are designed to protect certain categories of individuals, in particular weaker parties, such as consumers, employees, tenants, commercial agents, franchisees, etc.'[42] However, there are also scholars promoting a different approach, according to which 'rules aimed at the protection of individual interests can also qualify as overriding mandatory provisions'[43] by arguing that 'although Art. 9 refers to the safeguarding of public interests ... this provision should not be construed as implying an a priori exclusion from its scope of all norms aimed at the protection of individual interest.'[44]

Beyond the different argumentations, the interpretative dispute is still open. For the moment, it is not (yet) possible to answer unilaterally and unequivocally the following question: which norms fall under the definition of overriding mandatory provisions? Therefore, due to this uncertainty, some scholars tend to promote a quite cautious interpretation of the existing rules by arguing that the overriding provisions of the Host State will become applicable to workations.

2.2. Employment Law Overriding Provisions

As previously mentioned, there are not many guidelines in overriding provisions in employment law currently. Thus, each national court can establish which national measures must be considered as overriding.[45] At

[41] A. Bonomi, *op. cit.*, 623. The author quotes the decision from *Bundesarbeitsgericht*, 29 October 1992, in: IPRax 1994.

[42] *Id.*, 621.

[43] *Id.*, 625.

[44] *Id.*, at 623. See also L. M. van Bochove, *op. cit.*, 150: 'Until now, the CJEU has not addressed explicitly the issue as to whether the application of a rule based on the protective principle can be regarded as crucial by a state for the safeguarding of its public interest in the sense of Art. 7 Rome Convention/Art. 9 Rome I. In Unamar, the CJEU does not distinguish between 'private' and 'public interests' but speaks about 'an interest judged to be essential by the Member State concerned'.

[45] According to some authors, illustrations of a stricter interpretation can be found in Germany and Netherlands, while a wider interpretation belongs to France and Belgium. See A. A. H. van Hoek, *op. cit.*, 166. However, legal doctrine does not even seem to agree in qualifying the Dutch courts as promoters of the strict approach. See for instance L. M.

the national level, a decision of the French State Council ('*Conseil d'État*') is considered as 'the leading case related to overriding mandatory provisions.'[46] It stated that a company employing more than fifty employees in France must establish an employee representative committee, even if the *lex societatis* of the company was Belgian law. Another case including the Supreme Court of Luxembourg ruled that the jurisdiction of the Luxembourgish courts was mandatory regarding employees working in Luxembourgish national territory. Such jurisdiction could not be derogated by a court-of-choice agreement.[47]

At the European level, two significant decisions were adopted by the CJEU,[48] where it was recognized that 'the overriding reasons relating to the public interest which have been recognized by the Court include the protection of workers.'[49] It is, in theory, conceivable that a country has 'a crucial interest in compliance with a specific overriding mandatory provision in the area of employment law.'[50] However, even if an overriding mandatory character can be recognized by employment law rules, it is important to determine to what extent. In fact, they should always be interpreted in compliance with EU law.[51]

According to the most extensive interpretation of Art. 9, national rules having an objective to protect an employee should be regularly regarded as applicable overriding provisions,[52] even if the employee works in the Host State only on a temporary basis. This would be quite impractical and does not really seem to be supported by any case law at the moment.

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van Bochove, *op. cit.*, 150: 'In the Netherlands, according to the majority opinion in the literature, provisions aimed primarily at the protection of weaker parties can be applied as overriding mandatory rules.'

[46] *Conseil d'Etat, Assemblée*, 23 June 1973, 77982 quoted by T. Szabados, *op. cit.*, 22.

[47] *Cour de Cassation*, 2 July 1959, PAS. L. 17. 443 quoted by T. Szabados, *op. cit.*, 33.

[48] Joined Cases C-369/96 and C-376/96 *Criminal proceedings* v. *Jean-Claude Arblade and Arblade & Fils SARL and Bernard Leloup, Serge Leloup and Sofrage SARL*, [1999] ECR I at 8453.

See also Case C-165/98 *Criminal proceedings* v. *André Mazzoleni and Inter Surveillance Assistance SARL, as the party civilly liable, third parties: Eric Guillaume and Others*, [2001] ECR I at 2189.

[49] *Id.*, Recital 27. See also *Arblade* judgement, above n. 46, Recital 36, quoted by A. Bonomi, *op. cit.*, 624.

[50] *Id.*, 611.

[51] *Id.*, 628.

[52] 'Belgium and France employed a much wider notion of *lois de police*, under which *most of their mandatory labour protection* would apply to work performed within the territory.' A. A. H. van Hoek, *op. cit.*, 166. However, it is to notice that not even this interpretation goes as far as admitting that *all* mandatory labour protection would always apply.

Even though it cannot be ignored that such an argument might be invoked in the future, this interpretation would clash with the Regulation's wording which is to be interpreted strictly.
Lastly, it is also interesting to question whether the two categories of provisions – resulting from Art. 8 and Art. 9 – can be cumulatively applied. In other words, can a provision be considered 'non derogate-able' and 'overriding' at the same time?[53] This discussion seems open, and once again, different opinions coexist.[54] However, given the Recital 37 suggesting 'to distinguish' between them, it seems that a national provision either belongs to one category or to the other.

2.3. The (uneasy) Relation with Posting of Workers Rules

According to Recital 34 of the Regulation, 'The rule on individual employment contracts [notably the criteria in Art. 8] should not prejudice the application of the overriding mandatory provisions of the country to which a worker is posted in accordance with Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of

[53] Scholars do not agree, A. Bonomi, *op. cit.*, 611: 'the conditions for a concurrent application of Art. 9 can probably more easily be satisfied in the area of employment law: thus, it cannot be a priori excluded that a country might have a crucial interest in protecting its citizens through mandatory regulations when involved in working activities abroad. In any case, these instances are probably quite rare: thus, the concurrent application of Arts. 6, 8 and 9, albeit theoretically possible, should be allowed only in very exceptional cases.'

[54] To give an illustration of persisting contradictory interpretations in the legal doctrine, consider that the prevailing opinion is that the posted workers' 'hard-core' measures belong to the Art. 9 rules. Nevertheless, it is interesting to notice that according to some other interpretations, Art. 3 would actually offer an illustration of the kind of terms of conditions covered by the category of norms that 'cannot be derogated from by agreement,' based on Art. 8 of the Regulation, instead of 'overriding mandatory provisions' based on Art. 9.
'The Court of Justice has not only approached a definition of this complex category [namely the provisions concerned by Art. 8], but has also tried to restrict its application to make mandatory provisions – in the field of Employment Law – compatible with community freedoms, thus favouring the integrative objective of the EU. In accordance with that has been mentioned, only a limited number of Employment Law provisions (those establishing minimum working conditions) can be characterised as mandatory in relation to Art. 8. In this respect, the following conditions could be mentioned as mandatory: health, safety and hygiene at work, right to strike, redundancy protection, or minimum rest periods. In relation to this, Art. 3 Directive 96/71/EC offers a good illustration of the kind of terms of conditions covered by this category, when listing the 'hard-core'.' G. P. Moreno, *op. cit.*, 599.

the provision of services' (hereafter: 'the Directive').[55] In other words, regardless of the law applicable to the employment contract, when employees are posted to a Member State they are ensured protection in its territory. As a result, the Host State's provisions concerning specific matters shall always prevail and be applied for the entire posting duration. These matters are listed in Art. 3 of the Directive,[56] constituting the 'hard-core' of posted employee's protection.

For the nucleus of mandatory rules for minimum protection to be observed, the aim is to ensure fair competition among service providers, i.e., the employers posting workers in the territory of another Member State. The promotion of the transnational provision of services requires a climate of fair competition.[57] The respect of a posted employees' hard-core protection in a Host State guarantees that the freedom to provide services is exercised in compliance with EU law. This is ensured by avoiding competition distortions, which would take place if the services providers were able to exploit different levels of the posted employees' protection.[58]

Due to their protective character within rules posting, the hard-core provisions of the Host State are to be considered as overriding mandatory provisions for posted employees. The wording used in the German implementation of the Directive also qualifies the hard-core provision as mandatory.[59] The provision clearly expresses its intention to be applied independently from the law of the contract.

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[55] It is worth mentioning that Art. 3 (10) of Directive 96/71 states that it 'shall not preclude the application by Member States, in compliance with the Treaty, to national undertakings and to the undertakings of other States, on a basis of equality of treatment, of: — terms and conditions of employment on matters other than those referred to in the first subparagraph of paragraph 1 in the case of public policy provisions.'

[56] As amended by Directive 2018/957, of 28 June 2018, amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, also known as 'Enforcement Directive.'

[57] Recitals 5 and 13 of the Directive.

[58] One should not forget that the purpose of the Directive is facilitating freedom to provide services in the EU. E. Traversa, *op. cit.*, 155.

[59] The rules concerning the hard-core conditions are mandatorily applicable to employment relationships between employers established abroad and their workers employed in Germany, regardless of the law applicable to the employment contract. Act on Mandatory Working Conditions for Workers Posted Across Borders and for Workers Regularly Employed in Germany, (*Arbeitnehmer-Entsendegesetz – AEntG*). R. Ellger, *op. cit.*, 33.

Since 2014,[60] posted workers must be registered in their Host State. The aim of the registration is to notify the national labor authorities about the presence of posted employees in a national territory and facilitate controls and inspections. Therefore, it appears necessary to answer the question whether workationers are to be considered as posted employees or not. At the moment, the discussion appears controversial[61] and there is no absolute answer – neither in legislation nor in case law. Strong arguments lead to the direction of a negative answer, however.[62] The first two arguments are substantial,[63] while the third one is formal.

First, workationers are not providing a cross-border service. The provisions referred to as mandatory by the Regulation are those of the country to which a worker is posted. Arguably, this means in the Host State where they are temporarily assigned by the employer, but this is not the same as a workation type of situation. Workationers are not 'assigned',

[60] Directive 2014/67/EU of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation').

[61] 'Beyond the 'ideal type of posting', the interaction between the rules on the internal market and private international law are still cause for confusion and debate. As both areas of law are based on different logics – the one taking the service provider as its starting point and the other the individual contract of employment – this debate is unlikely to end with the Enforcement Directive.' A. A. H. van Hoek, *op. cit.*, 169.
The authorities tend also to give some contradictory interpretations. In Belgium, for instance, it appears that the national law adopted a larger interpretation of 'posting' than the scope of the Directive itself. Therefore, every time an employee temporarily works in Belgium, even without a service recipient and a client, it would be considered as 'posted.'

[62] S. Stefanova-Behlert, A. Haberland, *Remote Work im Ausland - die neue Freiheit?*, in *ZAU – Zeitschrift für Arbeitsrecht im Unternehmen*, 2022, n. 4, 241. *Unbeachtlich für den Arbeitgeber sind ferner die Anforderungen aus der EU Entsenderichtlinie, insb. Beachtung ausgewählter Arbeitsbedingungen sowie Meldepflichten gegenüber lokalen Arbeitsbehörden, da in der Regel keine Entsendenkonstellationen i.S. der EU-Entsenderichtlinie gegeben sind. Bei Remote Working erbringen Beschäftigte nach wie vor Arbeitsleistungen gegenüber dem deutschen Arbeitgeber vom Ausland aus und nicht gegenüber einem lokalen Empfänger im Auftrag des deutschen Arbeitgebers, wie von der EU-Entsenderichtlinie vorgesehen.*

[63] J. P. Lhernould, *op. cit.*, 65. Some consultants share the same opinion. When asked whether a Posted Worker Notification is required for an employee who is not on a formal assignment but is working from home for a limited period of time for the benefit of the home entity, the following answer was given: 'Generally, a posting requires a willful and targeted decision to send somebody to provide services to a customer on behalf of their employer. If there is no recipient of a service, then Posted Worker Notification is generally not required.' Expateer Peer to HR, On-line blog, https://expateer.ch/entsenderichtlinie-eu-posted-worker-directives (accessed 15 October 2025).

rather, they travel exclusively in their personal interest. For this argument to apply, it is fundamental to exclude that the remote worker has any business reason to travel to the Host State. However, no tangible business purpose can be identified in the case of workationers: the trip is entirely privately driven.

Secondly, there is no service recipient in the Host State. In the circumstance that the remote worker performs activities providing a service on behalf of the Home Company in favor of a host entity might have a relevant impact on their qualification as 'posted employee.' If the employee will travel for business purposes, the trip may not be considered solely privately driven any longer. However, no host entity can be identified in case of workationers. If a posting is taking place, there is no doubt that the hard-core terms and conditions of the Host State will be applicable to the employee, according to Art. 3 of the Directive.

Last but not the least, formal requirements for registration must be considered. Beside the substantial arguments mentioned, there are also practical considerations. Inter alia, several Member States' posted workers registration forms systematically require a host company to be provided and the 'scope of service.' If these fields are not completed, the registration is rejected and/or considered incomplete. In some cases, it cannot even be submitted, as the online portals prevent registration if some fields are left empty. Further, the scope of service must be selected from a dropdown list in some cases. Not surprisingly, the private interest of employees is not listed amongst the possible services options.[64]

In summary, the lack of two constitutive elements of posting (1. and 2.), in combination with the considerations on the registration requirements (3.), are clear indicators that posting rules including the hard-core rules ex. Art. 3 (1) of the Directive are not applicable to workationers. Still, this interpretation is shared but not unanimous; clarity through legislation or case law is urgently needed. Until then, we can only speculate which national employment law provisions will be considered as overriding for workationers. National courts will have the last word, mainly on a case-by-case approach.

Furthermore, not even the CJEU appears in the position to question whether, in practice, a national law can be invoked as overriding: 'it is not for the Court to define which national rules are 'overriding mandatory.'[65] The CJEU is nonetheless entitled 'to review the limits within which the

[64] See for instance, but not limited to: Italy, Austria, Luxembourg, Switzerland (even if not an EU Member, has its own registration portal).

[65] A. Bonomi, *op. cit.*, 630.

courts of a Contracting State may have recourse to that concept.' As such, it is not excluded by a proportionality check.[66]
It is not possible to predict how the CJEU will rule, so once again there is room for speculation. In the context of workationers, free movement of citizens might be invoked in the future. This has proven to be one of the favorite arguments of the CJEU and of great importance for European integration, as it is taking place in the established legal limits – provided that the employee does not become an unreasonable charge for the Host State. Citizens of the Union shall enjoy rights and be subject to the duties provided for in the Treaties. They shall have, inter alia: the right to move and reside freely within the territory of the Member States.[67]

3. Managing and Mitigating Legal Uncertainty: The Main Risks that Would Materialize if a Workation was Treated like a Posting

Once credit is given to the interpretation in which workationers are not to be qualified posted employees, it is possible to hypothesize which national provisions can be considered as overriding and therefore applicable in the Host State. As a starting point, it seems reasonable to take as reference the hard-core protection rules for posted employees themselves.[68] We will try to find out whether the hard-core rules would be applicable also to workationers, even though we exclude their qualification as posted employees.[69]
Using an *a contrario* methodology, it can be argued that if the Regulation explicitly refers to the mandatory character core rules for a posted employee, it was not the legislator's intention to include under this kind of

[66] The national mandatory provisions will have to comply with the principle of proportionality, i.e., 'they must be suitable for securing the attainment of the objective which they pursue, and they must not go beyond what is necessary in order to attain it.' *Id.*, 628.
[67] According to Art. 20, TFUE.
[68] Please note that the 'conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings' are not analysed, since this only concerns temporary agencies.
[69] The hard-core matters were originally seven. However, the Directive 2018/957 also added to the list the following two: (h) the conditions of workers' accommodation where provided by the employer to workers away from their regular place of work; (i) allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons. However, given the fact that we defined workations as situations where the remote employees bear the relevant costs related to the trip, they do not seem relevant.

protection the other categories of workers, i.e. the employees that are not posted but rather belong to a different classification, like, for instance, workationers. These rules, however, have a protective nature, and therefore it is worth questioning whether they might be invoked as 'overriding provisions.'[70]

Two general remarks must be made here: first, the hard-core provisions are often matters directly regulated by EU law, as will be illustrated.[71] This pushes us to reconsider the risks. Secondly, Art. 9 is applicable in active litigation. A national court will have to determine which national overriding provisions will be applicable to pending cases. Although Unlikely, we might observe this in cases of workationers on workations.[72] For example, a remote worker is temporarily abroad without being assigned by using a benefit granted from the employer; the probability for the employee to take legal actions in the Host State against the employer is quite low.[73] At the same time, unforeseeable circumstances might always occur, so the possibility cannot be completely excluded.[74]

Further, even in cases where there is no claim from an employee, it is important to notice that several issues, such as worker safety, maximum

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[70] *'Die Existenz zwingender Arbeitsbedingungen muss im Einzelfall geprüft werden. Solche Vorschriften sind häufig im Bereich der Arbeitszeit, Feiertagsregelungen, Mindestgehälter etc. vorzufinden.*' S. Stefanova-Behlert, A. Haberland, *op. cit.*, 241.

[71] E. Traversa, *op. cit.*, 159.

[72] S. Stefanova-Behlert, A. Haberland, *op. cit.*, 242: *'Hingegen ist das Risiko des Entstehens eines Gerichtsstands für Beschäftigte am Einsatzort im Ausland – aufgrund der kurzen Dauer des Einsatzes – als gering einzuschätzen. Die geltenden Gerichtsstand Regelungen innerhalb der EU nach der Brüsseler Verordnung I knüpfen an den Wohnsitz der Beschäftigten bzw. an den gewöhnlichen Arbeitsort an. Beide dürfen sich bei kurzfristigen Auslandseinsätzen nach wie vor in Deutschland befinden.'*

[73] For the sake of completeness, it is also relevant to point out that according to paragraph 3 of Art. 9, in some cases, 'Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.' Therefore, in some extraordinary cases, a national court might apply an 'overriding mandatory provision' from another State. This is subject to a restriction: an overriding norm of the place of performance (i.e., of the foreign State in which the contract is performed) can only be applied insofar as it renders the performance of the contract unlawful. Therefore, there must be a 'prohibition rule" that orders the ineffectiveness of the performance of the contract. The scope of application of mandatory rules of the foreign place of performance is therefore extremely narrow and might include limited areas (e.g., prohibition of work).

[74] Not to mention the risk of abusive behaviours, which should be limited.

hours, or employment discrimination are considered as 'public enforcement' in many EU Member States, in the sense that their application is to be taken by national governmental authorities. Each national authority is responsible for either taking action to enforce the rules within its territorial boundaries.[75] Therefore, we argue that even if an employee does not submit any claim due to inspection or controls, employment authorities might – at least in abstract – question whether the national standards have been respected in the Host State.

De facto, the longer an employee stays in the Host State, the longer it's likely an inspection, control, and/or a litigation take place. On the other hand, one might also argue that inspections and controls at work are implemented 'randomly.' On average, however, it is unlikely they will concern workationers, working remotely from an Airbnb, hotel, or at a family house, as empirical evidence shows.

When it comes to posted workers controls, for instance, the sectors that are 'sensitive' from a social dumping perspective and, as such, are more frequently objects of national inspections and compliance checks are those mainly concerned. The best example is the construction sector.[76] Not surprisingly, this is also the sector where the majority of postings arise.[77] To illustrate this, if an engineer is posted from the Polish Home Company to the Netherlands to take part in business meetings with a Dutch client, and five employees are also posted to carry out their activities on the construction site within the same project, it is more likely that the five employees will be controlled by labor authorities rather than the former.

(a) Maximum Work Periods and Minimum Rest Periods;

Before analyzing whether working hours are to be considered as 'overriding provisions', it is worth stressing that this problem should not

[75] M. A. Cherry, *op. cit.*, 19.

[76] For instance, 'Nearly 20,000 posted workers in Finland – shortcomings addressed by inspections of posting companies and contractors.' Data published by the Finnish Regional State Administrative Agency, https://www.sttinfo.fi/tiedote/69936099/nearly-20000-posted-workers-in-finland-shortcomings-addressed-by-inspections-of-posting-companies-and-contractors?publisherId=69818103 (accessed 15 October 2025).

[77] 45% of postings in the EU belong to the construction sector, services for 29.4% and agriculture and fishing for 1.5%. https://www.europarl.europa.eu/news/en/headlines/society/20171012STO85930/posted-workers-the-facts-on-the-reform-infographic (last visited 11 August 2024).

be overestimated. Since working hours are the object of an EU directive,[78] there are not significant discrepancies amongst the Member States beside a few exceptions.[79] The 'European working week' is mostly aligned, on average, at 40 hours per week.[80] Even considering that there are still differences at the collective bargaining agreement (CBA) level, the average difference oscillates between 35.6 and 40 weekly hours. In addition, it is also unclear whether these agreements are applicable to workationers in the first place (e.g. non all EU Member States systems have erga omnes effects for CBAs).

Furthermore, when looking at working hours there is quite a discrepancy between theory and practice, as can be seen inter alia in the Euro Surveys on 'actual working hours per week', which show the difference among 'statutory' and 'effective' working hours worked by the employees in the Member States.[81] Therefore, working hours might not be such a big concern despite legal uncertainty concerning their mandatory character.

A decision recently adopted in France where the weekly working hours are the shortest in the EU, namely 35/w, is interesting to note. The French Court ruled that working hours are not overriding, but rather they are provisions that 'cannot be derogated.' If we look back at the interpretation of mutual exclusion in the two categories, one might reach the conclusion that working hours are mandatory for posted employees but not for workationers.

(b) Minimum Paid Annual Leave;[82]

Like maximum work periods and minimum rest periods, the matter of minimum paid annual leave is regulated in the EU Directive 2003/88. According to Art. 7 of this Directive, Member States shall grant at least

[78] Directive 2003/88/EC of 4 November 2003 concerning certain aspects of the organisation of working time.

[79] Industrial relations and social dialogue, Working time in 2019–2020, https://www.eurofound.europa.eu/en/publications/2021/working-time-2019-2020 (last visited 15 October 2025).

[80] https://europa.eu/youreurope/business/human-resources/working-hours-holiday-leave/working-hours/index_en.htm (last visited 15 October 2025).

[81] Eurostat, Hours of work - annual statistics, 2022, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Hours_of_work_-_annual_statistics#Employed_people_by_length_of_the_average_working_week (last visited 15 October 2025).

[82] As amended by Directive 2018/957, the original formulation of Directive 96/71 was 'minimum paid annual holidays.'

four weeks per year to employees. Contractual agreements might extend the minimum legal requirement.[83] Even if there might be differences among Member States, like for working hours, it seems reasonable to scale down the biggest concerns.
Given the fact that minimum paid holidays are usually accumulated per month yet taken on a yearly basis, this problem appears quite abstract. It seems rather impractical to admit that a remote worker might claim such entitlements during workations in the Host State when the stay lasts significantly less than one year.

(c) Remuneration, including Overtime Rates;[84]

Renumeration, including Overtime Rates is probably the most delicate aspect given this is where the biggest difference among Member States exists. It has been observed that in almost all jurisdictions in the world, rules on wage/hour tend to be mandatory and encompassing, even including guest workers temporarily working in a host country.[85]
Nevertheless, this argument seems, in principle, quite simplistic and contradicted by the reality of an interconnected and globalized world, where business trips, especially those with short durations are still quite common, despite the world moving on from the pandemic.
For instance, if an employee hired in Milan, Italy, under an Italian employment contract, travels on a three-day business trip to Stockholm, Sweden, to negotiate a contract with a potential client, it is unlikely to imagine they will invoke the Swedish salary application before Swedish courts, even if the Host State salary may be higher than in an employee's Home State. Further, it is unlikely that the Swedish court will recognize their right to have access to the national minimum wage.[86]
Such a scenario would also raise concerns when it comes to legal certainty if employees were able to fully invoke standards of the Host State every time there is a business trip. As mentioned, making legal certainty fragile is

[83] Industrial relations and social dialogue, above n. 79, at 19.
[84] As amended by Directive 2018/957, the original formulation of Directive 96/71 was 'the minimum rates of pay, including overtime rates.' The new Directive on posted workers also specifies that this point does not apply to supplementary occupational retirement pension schemes.
[85] D. C. Dowling, Jr., *op. cit.*, 7.
[86] Also, unlikely that the Swedish Court would admit its jurisdiction. Regulation 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters links jurisdiction for employment law litigation to the employee's place of residence or habitual place of work.

exactly what the Regulation seeks to avoid. Further, according to the CJEU, 'provisions that cannot be derogated from by agreement' can, in principle, include rules on the minimum wage. As states, if these rules are covered by Art. 8, they would not be considered as overriding according to Art. 9 of the Regulation.

(e) Health, Safety and Hygiene at Work;

Scholars do not agree when it comes to qualifying occupational health and safety. According to some, 'local rules always apply due to the territorial principle.'[87] Another interpretation states that health protection is part of provisions that cannot be derogated from, based on Art. 8.[88]
The discussion around this topic is a good legal exercise, however it remains in the end quite abstract in the EU: health and safety at work is already a harmonized topic, where the standards are regulated in several pieces of EU legislation, such as the Directive of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (89/391/EEC).

(f) Protective Measures regarding the Terms and Conditions of Employment of Pregnant Women or Women who have recently given Birth, of Children and of Young People;

For the groups within this category, the need for protection is even bigger since they are not only employees, but also in a particularly weaker situation. Given the fact that the initiative of workations lies exclusively in an employee's own initiative, even if it shall not be excluded a priori, it is hard to imagine workationers in situations where they are able to invoke these kinds of protective rules in the Host State.
Here again, the matters are regulated at the European level and minimum standards are shared by EU Member States, as stated in Directive 92/85/CEE.[89]

[87] Dr. M. M. Knorr, *op. cit.*
[88] M. Giuliano, P. Lagarde, *op. cit.*, 11.
[89] Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

(g) Equality of Treatment between Men and Women and Other Provisions on Non-discrimination.

Non-discrimination is a 'classic' EU topic.[90] The EU rights are built around a non-discrimination principle. Several directives have been adopted to fight against illegitimate discriminations,[91] and Member States commonly share the minimum standards.
As illustrated, Member States have a limited discretion in working around, through legislation, the 'hard-core' aspects of the employment relations. Therefore, even if differences exist, especially concerning salary standards, their scope should not be exaggerated.[92]
In practice, companies usually have thresholds calculated on the base of duration; this also goes for registering posted employees, even if in several countries, posting registration obligations apply from the first day of the posting. It is a matter of risk evaluation; therefore, it makes sense to advise companies operating in sensitive sectors where inspections are most likely to occur (e.g., construction) to be compliant with registration obligations from the very beginning. For companies posting mainly so-called 'white collars,' a more extensive and tolerant approach might be the best (e.g., registration only of postings exceeding a certain duration).
This premise highlights how, even if there is no doubt that rules concerning posted employees' obligations are better defined and established than those concerning workationers, risk assessment always plays a crucial role. In other words, it is hard to imagine that for companies adopting a 100% compliant approach would always have the best solution. Compliance checks imply costs and time. The effort required to guarantee full compliance is often not in line with the practical outcome.

[90] Not only an object of secondary law, e.g., directives, but also protected by the Treaties, since the first versions (1957). See A. Montanari, N. Girelli, *Parità di trattamento e divieto di discriminazione*, *Diritto del Lavoro dell'Unione europea*, *op. cit.*, 200.
[91] Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.
Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.
Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.
Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.
[92] E. Traversa, *op. cit.*, 160.

Conclusions

Considering the above, it is worth noting that EU Member States have a legitimate interest, while complying with EU law, to guarantee the protection of workers on their territory. This can be achieved by imposing a mandatory observance of some local rules. To invoke the application of national law, however, a sufficiently close degree of connection with a Host State is required.

The rationale behind the posted workers Directive and its rules on minimum protection is to facilitate the freedom to provide services. The question is whether and to what extent the Host State might need to apply national employment law provisions to a remote worker. In this context, it is also to be taken into account whether a remote worker can harm competition or interact with the labor market of their Host State.

Generally, employers should evaluate whether workations might trigger an impact on the laws applicable to an employment relationship. Local employment laws could, in some cases, override the contractual wording and contractual choices. To summarize, whenever the first problem above mentioned is solved, i.e., when it is possible to clearly identify the Home State as the country where an employee habitually works, looking at the second problem becomes redundant. In fact, there is no need to look at the 'provisions that cannot be derogated', because they overlap with the ones of the State of habitual place employment, i.e., the Home State.

As we saw, however, it is in principle always relevant to look at the third problem, i.e., overriding mandatory provisions. In abstract terms, it is unfortunately impossible to predict with certainty which provisions might be considered applicable due to their 'overriding mandatory' character.

In several cases, the EU legislation is not specific enough or we are facing a lack of clear provisions. Clarifications at the legislative and judicial level would be more than welcomed. In the meanwhile, there is still much room for speculation and different interpretations. However, nothing prevents that authorities' practices might change and evolve in different directions in the future. New EU legislation might be adopted, filling the current legal gaps and providing different answers than those given so far.

Lawmakers need to adjust existing rules to a new reality. There is an authentic need not only for employment, but for all legal areas where

there might be significant consequences for workationers, starting with taxation.[93] Once again, reality is overtaking legal provisions.

This remains an unexplored territory and therefore it becomes crucial to adopt a cautious approach and not extend a 'permissive' interpretation on the existing rules. At the same time, if the law does not explicitly forbid something, it does not make necessary sense to automatically assume that it is incompatible with EU law.

Given the uncertainty of the applicable legislation, it cannot be excluded a priori that some local employment provisions might become applicable in the Host State. Therefore, a safe approach might be the preferred choice for some employers who tend to limit the workations of their employees to avoid the risk that in some cases, some provisions of the Host State become applicable. Nevertheless, several arguments go towards the other direction, meaning it enables employees to benefit from workations, without worrying too much that the local labor law will become applicable. At the end of the day, it is very unlikely that, in practice, the employment law of the Host State will become applicable to workationers.

[93] European Economic and Social Committee Opinion, Taxation of cross-border teleworkers and their employers | European Economic and Social Committee ECO/585-EESC-2022-00408

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