HUNGARIAN LABOUR LAW
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The Cross-Border Extension of National Labour Representational Law

Appropriate solution for the digital future or the concept of an analogue past?

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Abstract

The buzzword 'digitalization' is now ubiquitous and has not stopped at the world of work.

Employers and employees have adjusted to teleworking, largely because cultural, technological, and social obstacles have been removed. Remote work, now firmly established in the working world, eliminates the need for a physical office within a shared workspace.

The developments in the corporate world are leading to a growing interest among employees in effective representation of their interests, which also meets the needs of a spatially unbound organizational structure.[1] Emerging regulations across the European Union, together along with agreements between workers and employers and individual arrangements on company level, play a key role in shaping the future of telework.[2] Ultimately, increased digitalization should not lead to a reduction in employee participation and co-determination.

However, compared with current European regulations on individual labour law, those concerning collective labour are scarce.[3] As a result, the question of which member states' labour constitutional laws apply in a cross-border context remains dependent on national legislation. This paper will illustrate the search for an applicable national labour constitution law based on the Principles of Territoriality and *Extension* prevailing in Austria. The focus is on whether this current scheme can withstand the challenges of a modern working world.

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1 This paper is based on a research project from the University of Vienna that was developed in collaboration with work councils confronted with virtual employment and was financed by the Viennese Chamber of Labour. The results were published in early 2025: Hannah Lutz – Martin Gruber-Risak (Hrsg.): *Virtuelle Arbeitnehmer: innen*. Wien, ÖGB-Verlag, 2025.

2 *The rise in telework: Impact on working conditions and regulations*. Eurofound, Publications Office of the European Union, Luxembourg, 2022. 7.

3 Gregor Tüsing: *European Labour Law*. München, C.H. Beck, 2013. 176.

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1. Introduction

Digitalization has profoundly impacted not only the way we work but also the places from which we work. Employees increasingly collaborate in decentralized organizational structures where team members from different countries often meet only virtually. The geographical distance between colleagues thus no longer poses an obstacle to successful collaboration. As the International Labour Organization (hereinafter ILO) aptly expressed: "All available indications point to the fact that telework, whether occasional or full-time, is prevalent and growing, with far-reaching implications for the world of work."[4]

Workers who are sent to different locations by their employers are by no means a new phenomenon. This is also true about virtual work, since early legal studies on information and communication technology (hereinafter ICT) -supported jobs can be found as early as the beginning of the 1990s.[5] Following the invitation by the European Commission, European-level representatives of employers and trade unions signed a Framework agreement on telework in 2002. The agreement defines telework as a "form of organising and/or performing work, using information technology, in the context of an employment contract/relationship, where work, which could also be performed at the employer's premises, is carried out away from those premises on a regular basis."[6]

Telework recently gained momentum due to the COVID-19 pandemic, broadening its adoption across various segments of the workforce, including employee groups that had previously rarely worked remotely, such as mid- and low-skilled white-collar workers and staff from small businesses.[7] The examination of its effects on labour law, especially works constitutional law, however, is still in its early stages. According to the implementation report of the aforementioned framework agreement on telework, national implementation measures vary significantly.[8] For this reason, insight into cross-border co-determination is rather limited, leaving the question of which (national)individual member sate's rules apply in a virtual cross-border context largely unanswered.[9] The failure of recent

4 *Challenges and Opportunities of Teleworking for Workers and Employers in the ICTS and Financial Services Sectors*. Geneva, International Labour Office, 2016. 20.

5 Johann Egger: Telearbeit – ein neues Phänomen der Arbeitswelt. *Das Recht der Arbeit,* no. 2 (1987) 97–106.

6 *Framework Agreement on Telework*. European Trade Union Confederation, Brussels, 2002. 2.

7 Eurofound op. cit. 22.

8 European Commission: Commission staff working paper – Report on the implementation of the European social partners' – Framework Agreement on Telework. COM(2008)412 final 2 July 2008.

9 Elisabeth Brameshuber: Betriebliche Mitbestimmung bei grenzüberschreitender digitaler Arbeit. In: Susanne Auer-Mayer et. al. (Hrsg.): *Festschrift Rudolf Mosler.* Wien, Manz, 2024. 4.

negotiations on implementing a sectoral agreement on digitalisation and telework according to Art. 155 (2) TFEU[10] further illustrates that this highly contested issue is marked by opposing interests.[11]

This paper will explore the effect of cross-border virtual work on employee participation rights from an Austrian perspective, where employee representation has a long and strong standing tradition. Although the paper will primarily focus on the Austrian legal framework, owing to apparent similarities, German constitutional labour law will also be considered, thus affording broader insight into virtual cross-border participation.

2. The Global Workspace

Evermore, employees render their service within a 'virtual information space', eliminating the need for them to be physically present at their company's worksites. This is facilitated by creating a digitalized global workspace, allowing employees to collaborate just as efficiently and seamlessly as they would in case of traditional on-site work. This increases cross-company and cross-border collaboration, transcending spatial, temporal, and organizational boundaries.[12]

Historically, employees performed their work at a specific location prescribed by their employers, using provided tools and under constant supervision from their superiors. Our understanding of labour constitutional law is based on this analogue reality. The unique aspect of telework, however, is that cross-border activities occur without corresponding physical mobility.[13] What, then, happens in an increasingly global working environment where an ever-increasing number of employment relationships deviate from the principles established through teachings and prevailing doctrines?

In light of the the developments outlined above, this paper considers the significance of mere virtual work for an establishment in one country performed by employees physically present in another. Specifically, it aims to answer the questions of which national law is applicable from an Austrian perspective, and what this means for employees' rights to information and co-determination.

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10 *Employers reject EU cross-sector telework rights. Implement sectoral agreement on digitalisation and telework now!* Brussels, European Public Service Union, 2023.

11 Brameshuber. op. cit. 5.

12 Barbara Langes – Elisabeth Vogl – ISF München: Arbeit in der Informationsökonomie. In: Barbara Langes – Elisabeth Vogl (Hrsg.): *Die Cloud und der digitale Umbruch in Wirtschaft und Arbeit.* Freiburg, Haufe Group, 2019. 151–153.

13 Martin Gruber-Risak: Grenzüberschreitendes Arbeiten im virtuellen Raum – ein Fall für das europäische Arbeitsrecht? *Das Recht der Arbeit,* no. 2 (2019) 117.

2.1. Virtual work within the 'Matrix'

Of course, there is no such thing as the prototypical virtual employee, given that the global working world offers a myriad of possibilities for cross-border collaboration. This paper therefore describes Austrian establishment that is part of a company operating across multiple countries. The company is structured as a 'matrix organisation', virtually assigning employees across borders and business units.[14] Although 'matrix organisations' originate from project-driven environments, their structures are also common in sectors such as marketing, finance, and international business. This model adds an extra layer to the traditional hierarchy, creating dual lines of authority and accountability.[15]

The corporation in question consists of several subsidiaries and branches across Europe. In many areas, cross-border virtual teams composed of employees from different subsidiaries operate internationally. In the given example, employees are hired by a foreign subsidiary and subsequently virtually assigned to a domestic entity. This is achieved by transferring the authority to issue professional instructions to said entity. The employees are thereafter engaged in the domestic operation, which reimburses the hiring subsidiary within the group. Consequently, some positions formerly based in Austria are therefore no longer filled locally. Instead, tasks are undertaken by employees physically based in other countries, effectively shifting hiring abroad, whilst virtually using the employees' contributions within the Austrian establishment.

2.2. The virtual workplace

In terms of the structure of the virtual workplace, the 'matrix organisation' enables employees to enter an employment relationship abroad whilst virtually performing their duties for an entity within Austrian territory. They are therefore physically situated abroad, while simultaneously being present in a virtual workspace allocated to a national entity. Work is conducted collaboratively and across borders via the intranet or any other provided virtual space. Virtual integration into an entity abroad results in authority to issue professional instructions being split between two entities. Typically, a manager at the company's foreign location is responsible for contractual and organisational tasks, while day-to-day business is coordinated within the virtual space. In both cases, it is difficult to distinguish employees working abroad from their colleagues working from home in Austria.

The outlined construct raises extensive international legal questions at an individual level. For example, which individual labour law provisions apply to virtual employees, and are existing regulations on labour migration and social dumping also applicable to virtual employment scenarios?

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14 Description as in Lutz–Gruber-Risak op. cit. 32–37.

15 Stephanie Grubenmann: Matrix Organisation. *Journalism Practice,* vol. 11., no 4 (2017) 458–476.

For instance, there is uncertainty surrounding the application of national laws on temporary agency work. Due to the lack of physical presence, its application is predominantly denied.[16] However, virtual work can impact domestic labour markets without a physical presence, thereby circumventing the purpose of temporary agency work legislation. As there have been no comprehensive investigations or case law on such matters yet, a different assessment cannot be ruled out.[17]

While individual labour law issues will also be addressed, the focus of this essay lies on collective labour law, posing the question: Are virtual employees who work remotely from abroad considered part of national establishments, and how does this modern form of work affect their rights to information and co-determination?

3. Virtual Work and the individual employment contract under Article 8 Rom I-VO

Virtual employees challenge long-standing legal assumptions because their work crosses borders without any physical movement, which is a central element of many labour law frameworks.[18] In cross-border employment, the applicable law is primarily determined by Art. 8 of the Rome I Regulation.[19] If no law is chosen, Art. 8(2) applies the law of the country in which the employee habitually works. If there is no such place, Art. 8(3) refers to the country where the employer's business is located. Art. 8(4) allows the law of a different country to apply if the overall circumstances demonstrate a closer connection to that country.

As mentioned earlier, it is difficult to make this assessment in cases of virtual work, as employees maintain a simultaneous presence in two different places. The question, therefore, is: Can virtual integration into an entity that is different from the physical location of work constitute a sufficient link to define a 'habitual place of work' as per Art. 8(2) of the Rome I Regulation? Or does the absence of a centre between the physical and virtual workplace default the applicable law to the hiring business's location? Furthermore, can virtual integration form a closer connection under Art. 8(4) Rome I Regulation to the virtual workplace?[20]

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16 Martina Schlamp: Beschäftigung ausländischer Fachkräfte, *Betriebs Berater,* no.17. (2023) 949.; Christina Hödlmayr – Karin Köller: Employer of Record - Ein rechtlicher Game-Changer in der globalen Arbeitswelt? *Fachzeitschrift für Arbeits- und Sozialrecht,* no. 6. (2024) 216–226.

17 A recent ruling by the Austrian Supreme Administrative Court (VwGH) concerning cross-border virtual agency work – where employees operated within Austrian territory on behalf of a company based outside the European Union – has drawn considerable attention. In its decision, the court held that the approval requirement for cross-border assignments to non-EU countries also applies to purely virtual deployments: VwGH 29.04.2025, Ro 2024/11/0002.

18 Stephanie Springer: *Virtuelle Wanderarbeit*. Darmstadt, S. Toechte-Mittler Verlag, 2002. 4.

19 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). OJ L 177., 4.7.2008., 6.

20 The possibility of establishing a connection to the virtual place of work based on a closer connection when assessing international Telework, was considered by the European Commission in 2003 in its preparatory work for the Rome I Regulation. Despite the recognition of international teleworks particularities, however, no explicit provision was made: Green paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation. COM(2002)0654 final 14 January 2003. 45.

Despite the possibilities that go with the digital transformation, most legal scholars still interpret the term 'where' the work is habitually carried out' as requiring a physical presence.[21] Even as virtual employment becomes more common, this physical focus persists. Supported by the ECJ, which considers where the employee's activities actually take place, the focus is on physical data entry or in-person engagement.[22] According to this prevailing physical understanding, the requirement to carry out activities in a state can only be met through physical presence.[23]

However, the conflict-of-law presumption that the physical place of work has the closest connection to the contractual relationship falls short in the case of virtual employees. Thanks to digitalisation and globalisation, there are now vast possibilities for virtual integration into a work organisation, establishing a connection that surpasses the bond to the physical place of work for an ever-increasing number of employment relationships.[24]

If the legal assessment of applicable law also considers the unique characteristics of virtual work, Art. 8(4) Rome I Regulation could favour the application of the law of the virtual workplace. Yet this view is predominantly rejected by legal scholars, with the ECJ emphasising physical elements such as the location of social security systems when determining a 'closer connection' under Art. 8(4) of the Rome I Regulation.[25]

The current physical interpretation of the conflict-of-law rules allows companies to exploit wage differences across jurisdictions. When work can be conducted remotely, employers are offered access to a wide range of local labour markets by virtually integrating employees based abroad. In light of this development, European law must reconsider its physical bias, either by redefining the term 'habitual place of work' in line with Art. 8(2) Rome I Regulation, or by extending the determining factors of a 'closer connection' under Art. 8(4) Rome I Regulation. While these reform options are essential, they require further exploration that would exceed the scope of this article.

Notwithstanding future debates, it may be concluded that, for the time being, the physical workplace remains the reference point for virtual work under conflict of law rules. For virtual employees in a matrix structure, as in the example, this means that: The individual employment contract is governed by the law of the country of data entry, rather than the country of virtual integration. Austrian individual labour law is therefore not applicable.

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21 Thomas Dullinger: Individualarbeitsrechtliche Aspekte grenzüberschreitender Unternehmens- und Konzernstrukturen. *Fachzeitschrift für Arbeits- und Sozialrecht,* no. 1. (2022) 214–216.; Diana Niksova: Die Arbeitswelt im digitalen Wandel: Ausländisches Homeoffice und virtuelle Entsendungen aus arbeitsrechtlicher Perspektive. *Fachzeitschrift für Arbeits- und Sozialrecht,* no. 2a. (2023) 83–87.

22 C-29/10. Heiko Koelzsch v État du Grand-Duché de Luxembourg [ECLI:EU:C:2011:151]; C-384/10. Jan Voogsgeerd v Navimer SA [ECLI:EU:C:2011:842].

23 Systematic analysis likewise points to this interpretation. With regard to virtual cross-border tax advisory services, the ECJ has for instance already decided that a service rendered without physical movement does not fall under Art. 5 of Directive 2005/36 because the service provider does not move to the territory of the host Member State; C342/14. X-Steuerberatungsgesellschaft v Finanzamt Hannover-Nord [ECLI:EU:C:2015:827] 35.

24 Gruber-Risak (2019) op. cit. 117.

25 C-64/12. Anton Schlecker v Melitta Josefa Boedeker [ECLI:EU:C:2013:551] 41.

4. Virtual cross-border work and employee representation

The growing prevalence of cross-border work supported by ICT not only impacts the determination of the applicable law governing the individual employment relationship. It also raises questions concerning the applicability of labour constitution law to employees working remotely or in dislocated settings.

Compared to current European regulations on individual law, those on collective labour are rather limited.[26] Some matters have been regulated at the European level, creating a general framework for informing and consulting employees in the European Community,[27] as well as collective redundancies[28] and the establishment of a European Works Council.[29] However, the legal acts presented do not clarify which national labour constitution law applies in virtual cross-border cases. In the absence of harmonisation or coordination measures at the European level, Member States are therefore, in principle, free to determine independently the connecting factors that define the scope of their legal provisions.[30] The question thus remains: When is national labour constitution law applicable in the case of cross-border telework?

4.1. Principle of territoriality and extension

Before answering the question from an Austrian perspective, it is necessary to outline the essential principles of the Austrian Labour Constitution Act (ArbVG), which provides a detailed description of the rights of employee representative bodies. Works representation law establishes the legal framework for representing employees' interests within establishments, undertakings and groups. The terms 'establishment', 'undertaking', and 'group of undertakings' differentiate the various levels of workplace co-determination, with the establishment serving as the primary point of reference.[31] The undertaking and the group of undertakings are relevant under works representation law only if

26 Tüsing op. cit. 176.

27 Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community – Joint declaration of the European Parliament, the Council and the Commission on employee representation. OJ L 80., 23.3.2002., 29.

28 Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies. OJ L 225., 12.8.1998., 16.

29 Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees. OJ L 12.2, 16.5.2009., 28.

30 EJC, C-566/15. Konrad Erzberger v TUI AG [ECLI:EU:C:2017:562].

31 Martin Gruber-Risak – Johanna Helme – Sascha Obrecht (eds.): *Introduction to Austrian Labour Law.* Vienna, LexisNexis, 2023. 24–25.

multiple establishments are combined within a single undertaking or if several undertakings form a group of undertakings. In such cases, additional representative bodies must be established.[32]

Workplace organisation, and thus the participation and co-determination of employees, can only occur within establishments as defined by Section 34 of the ArbVG. An establishment consists of several elements, including at least five employees; a workplace, where work is carried out; the owner of the establishment; and means of production.[33] Following the prevailing view in literature,[34] virtual enterprises consisting of a closely collaborating community that pursues a common operational purpose also fall under the scope of labour constitutional law.[35] While physical proximity between employees becomes less important, elements such as the use of shared digital tools, regular coordination among employees, and work performance under the guidance of the establishment's owner become the main focus. This digital structure of work enables establishments to expand their activities beyond national borders.[36]

To determine the applicable law in cross-border cases, Austrian courts and the majority of legal scholars apply the principle of territoriality. According to this principle, the Austrian Works Representation Law only applies to establishments as defined in Section 34 of the Austrian Labour Constitution Act, provided they are located within Austrian territory. The nationality of the company owning the establishment is irrelevant. Therefore, domestic operations of a foreign company are subject to Austrian representation law, while independent foreign operations of domestic companies are not.[37]

However, considering cross-border telework, one will rapidly encounter limitations to this territorial restriction. To overcome these limitations, German courts developed the Principle of *Extension (Ausstrahlungslehre)*.[38] To this day, this principle is also applied by the Austrian Supreme Court of Justice (OGH) in cross-border cases, enabling employees working remotely from abroad to be considered part of a domestic entity. The two principles (Territoriality and *Extension*) are not contradictory. In fact, they complement each other to a considerable degree.[39] When determining whether employees based abroad are part of a domestic entity, the only decisive factor is their integration into an Austrian

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32 Ibid. 26.

33 Ibid. 25.

34 E.g. Diana Niksova: Das Internationale Betriebsverfassungsrecht im digitalen Transformationsprozess. In: Rudolf Mosler (Hrsg.): *50 Jahre ArbVG*. Wien, ÖGB Verlag, 2024. 593.; From a Germain Perspective: Olaf Deinert: Herausforderungen der Internationalisierung der Arbeitswelt. *Das Recht der Arbeit,* no. 1a. (2022) 155.

35 Even though the courts have not explicitly decided the matter yet, existing jurisprudence points to the interpretation outlined, OGH 22.1.2020, 9 Ob A 89/19g.

36 Lutz–Gruber-Risak op. cit. 45–47.

37 Franz Marhold – Elisabeth Brameshuber – Michael Friedrich: Österreichisches Arbeitsrecht. Wien, Verlag Österreich GmbH, 2021. 651.; Christoph Paul Ludvik: *Der internationale Betrieb*. Wien, Linde Verlag, 2021. 18.

38 The concept was developed 100-years ago in Germany and originally strictly limited to temporary deployment abroad: Franz Gamillscheg: *Internationales Arbeitsrecht*. Tübingen, Mohr Siebeck, 1959.180.

39 Günther Löschnigg: Forschungseinrichtungen österreichischer Universitäten im Ausland – personalrechtliche Implikationen. In: Susanne Auer-Mayer – Elias Felten – Rudolf Mosler – Elisabeth Brameshuber (Hrsg.): *Festschrift Pfeil*. Wien, Manz, 2022. 199.

establishment. Therefore, the territorial scope of the Austrian Labour Constitution Act does not extend beyond Austrian territory. Employees working abroad are covered by the Act's personal scope because they are part of an Austrian establishment within its territorial scope.[40]

This means that two legal provisions, further outlined shortly, determine whether an employee working from abroad is to be considered part of an Austrian establishment:

– Firstly, *section 34 Labor Constitution Act* defines the criteria of an establishment in which employees can organize and form a works council. This establishment needs to be located within Austrian territory.
– Secondly, *section 36 Labor Constitution Act* defines an employee. The definition is broader than the general definition. It pertains to all individuals working in the establishment, including apprentices, home workers, and all employees regardless of legal employment basis.[41]

The territorial point of reference proposed by the Principal of Extension is based on the structure of the Austrian Works Constitution, which is centred on the integration of employees within an establishment. This grants employees legal organisation as members of a workforce, forming a natural community of interests in opposition to the establishment's owner. The aim is to ensure a balance of interests between these two opposing sides. The works constitution therefore serves a significant public interest in maintaining order, as evidenced by its mandatory nature and protection under administrative law. Due to its focus on employees, the Austrian works constitution also applies to those who are part of the domestic workforce but work abroad.[42]

4.2. Point of reference: Domestic establishment

As previously mentioned, in terms of case law and legal doctrine, the point of reference for Austrian labour constitution law is a domestic establishment as defined in section 34 of the Labour Constitution Act. In the late 1990s, the Austrian Supreme Court dealt with a case involving four employees of an Austrian company who worked as sales representatives abroad. The Court ruled that the employees were obliged to contribute to the established works council fund[43] on the basis of their membership of domestic workforce.[44] Upholding the case law, the Austrian Supreme Court of Justice recently ruled that a human resources manager responsible for employees abroad was not covered by Austrian

40 With regards to the German Works Constition Act (BertVG), German Federal Labour Court (BAG), 22.3.2000, 7 ABR 34/98.

41 Gruber-Risak–Helme–Obrecht op. cit. 24.

42 Löschnigg op. cit. 199.

43 The works council fund consists of assets to cover the expenses of the works council and to finance welfare measures and is chiefly financed by the employees: Gruber-Risak–Helme–Obrecht op. cit. 27.

44 Austrian Supreme Court of Justice (OGH) 26.3.1997, 9 ObA 88/97z.

works constitution law. This was because, although she was working in Austria, she was not part of an establishment as defined by section 34 of the Labour Constitution Act.[45]

Linking employees to a domestic establishment may seem simple. However, increasingly complex factual scenarios, amplified by the virtual dimension of modern work, put this assumption to the test. When identifying which national legislation applies in cross-border cases, the focus has often been on whether an employee is assigned to a domestic establishment. The existence of such an establishment was usually accepted without question.[46] While this assumption has long aligned with the practice of purely domestic operations, the underlying conditions have since changed. This new situation requires a thorough examination of the location of partially virtual organisational structures operating across borders.

4.2.1. Localizing (partly) virtual establishments

As previously mentioned, an establishment consists of several elements, such as the workplace, the establishment's owner, and the existence of means of production.[47] However, the principle of Extension allows for the assignment of dependent parts of an establishment, as well as individual employees working abroad, to a domestic establishment. Accordingly, operational resources located abroad can also form part of a domestic establishment, provided they are used in pursuit of a unified purpose within a coherent organizational structure. The fact that individual constitutive elements or parts of the establishment are located abroad, thus does not preclude the qualification as a domestic establishment under section 34 Labor Constitution Act.[48] Conversely, the activities of individual employees within Austria – without a significant business organization – are not sufficient to qualify as an establishment located in Austria. This indicates that a minimum domestic presence is required for the territorial classification within the federal territory.[49] The question thus remains as to when the domestic presence is deemed sufficient.

4.2.2. Determining the Focus of Business

To determine whether a cross-border organisation constitutes a domestic establishment within the meaning of section 34 of the Labor Constitution Act, the central point of activity is proposed as the

45 Austrian Supreme Court of Justice (OGH) 22.1.2020, 9 Ob A 89/19g.

46 Löschnigg op. cit. 198.

47 Gruber-Risak–Helme–Obrecht op. cit. 25.

48 Austrian Supreme Court of Justice (OGH) 31.5.2023, 9 Ob A 26/23y.

49 Austrian Supreme Court of Justice (OGH) 22.1.2020, 9 Ob A 89/19g.

determining factor. If the central point of activity can be located within Austria, the establishment may extend over certain dependent parts abroad.

As noted above, up to this point, the judicial focus has often been on the assignment of foreign employees to a domestic establishment.[50] However this type of assessment is not entirely new, as it has already been developed in the context of transfers of undertakings.[51] When assessing whether an economic unit continues to exist following a transfer to a new employer, criteria such as the transfer of assets, workforce, and clientele are considered. The nature of the undertaking – the type of work performed or the methods of production and operation – is particularly important.[52] These criteria can also be used to locate a virtual, transnational establishment. Firstly, the establishment must be broken down into its components, such as the physical workplace of the employees, the location where employment-related decisions are made, and the location of certain operational resources (including licences for virtual tools). In a second step, these elements must be localised and assessed in their entirety to determine the focus of the work organisation.[53] In certain sectors where work does not rely on significant physical resources, the focus of the assessment shifts to human labour. Here, the employees – especially those with specialized expertise – gain greater relevance.[54] Additional indicators include the establishment's essential characteristics, such as its organisational structure, mode of operation, financing and customer base.[55] These elements should not be evaluated in isolation, but rather as part of a holistic assessment.[56] A comprehensive analysis of operational components is essential, particularly with regard to the type of activity performed. In cases of predominantly human-powered virtual cooperation, which is typical of virtual work, physical resources become less relevant, while factors such as organisational structure, managerial control and the employees themselves take precedence.

In the present case of 'the matrix organisation', the question of whether a local establishment exists is straightforward when only individual employees from abroad are assigned to an existing domestic establishment. However, if new units emerge entirely within the virtual space, it must be assessed whether they constitute an establishment. If so, based on the outlined criteria, it must be determined whether the establishment is located domestically. The Austrian Works Constitution Act only applies once both questions have been answered in the affirmative.

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50 Löschnigg op. cit. 198.

51 Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses. OJ L 082., 22.3.2001., 16.

52 EJC, C-13/95. Ayse Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice [ECLI:EU:C:1997:141] 18.

53 Martin Gruber-Risak: Disloziertes Arbeiten und Betriebsbegriff. *Das Recht der Arbeit,* no. 5. (2024) 429.

54 EJC, C-13/95. Ayse Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice [ECLI:EU:C:1997:141] 121.

55 EJC, C-175/99. Didier Mayeur v Association Promotion de l'information messine (APIM), [ECLI:EU:C:2000:505] 53.

56 EJC C-13/95. Ayse Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice [ECLI:EU:C:1997:141] 18.

4.3. The Extension of a domestic Establishment

Having identified an establishment located in Austria, as is the case in the used example of an Austrian establishment integrating virtual employees physically situated abroad, the next question is which employees are part of this establishment within the scope of the Principle of *Extension*.

The prevailing case law and legal opinion can be generalized to the extent that an Austrian establishment falling under the territorial scope of the Austrian Labour Constitution Act, also exerts extraterritorial effect on foreign, non-autonomous branches.[57]

As previously noted, the German Federal Labour Court (BAG) also applies the principle of E*xtension*. However, in comparable cases, it imposes stricter criteria for recognising the effect of an establishment extending beyond its own territory. It has previously denied such an effect in cases involving a right of recall to German territory, or where employees were hired exclusively for work abroad.[58] This position has been criticized in academic literature, with the argument being made that, as with domestic factual scenarios, the sole decisive factor should be the integration of the employees into the domestic establishment.[59]

4.3.1. Determining factor – functional integration into the establishment

The criteria imposed by the German Federal Labour Court differ from those the Austrian Supreme Court of Justice relies on. In the past, the Austrian Supreme Court has taken into account factors such as regular telephone contact with supervisors,[60] the existence of a domestic workplace, or the handling of the employment relationship through an Austrian establishment[61] as crucial indications of cross-border integration. As early as the 1990s, the Austrian Supreme Court of Justice stated that

> "What is essential […] is the extent to which integration into the operation occurs. […] The law's requirement for employment within the establishment should not be interpreted locally. It must be examined whether the employees, who do not work at the establishment's location, are in such *a close relationship with the operation* that they can still be considered part of the operation, *regardless of their work performed outside the establishment's premises*. (Author's translation)"[62]

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57 Marhold–Brameshuber op. cit. 651.

58 Deinert (2022) op. cit 155.

59 Olaf Deinert: *Betriebsverfassung in Zeiten der Globalisierung.* Frankfurt am Mai, HSI-Schriftenreihe, 2021. 38.

60 Austrian Supreme Court of Justice (OGH) 26.3.1997, 9 ObA 88/97z.

61 Austrian Supreme Court of Justice (OGH) OGH 2.6.2009, 9 ObA 54/09w.

62 Austrian Supreme Court of Justice (OGH) 26.3.1997, 9 ObA 88/97z.

The central criterion for assigning employees working abroad is thus the fact of their integration into the establishment within the scope of section 36 Labour Constitution Act. The required degree of integration primarily results from the exercise of employer authority. Relevant factors include the issuing of instructions, inclusion in company working time regulations, integration into operational workflows and hierarchies, as well as participation in company leave and time compensation arrangements.[63] Therefore, it is irrelevant whether a contractual employment relationship exists, and with which employer. Consequently, an employment contract concluded abroad with a foreign employer does not preclude the assignment of the employee to a domestic establishment under labour constitution law.[64] In light of today's communication technology, the organisational integration of employees working in geographically distant locations is possible to a much greater extent than in the past when long-distance communication was significantly more difficult.[65]

4.3.2. Cross-border integration within the 'matrix'

With the company's 'matrix organisation' structure in mind, an example of modern cross-border integration in the virtual space emerges. Assignment to the domestic establishment derives from subordination to the establishment owner in Austria. Furthermore, the work carried out by virtually assigned employees serves the business purpose of the domestic establishment, which pays a service fee to the subsidiary that deployed them for the duration of the assignment. These physically absent employees thus qualify as employees under Section 36 of the Labour Constitution Act, meaning that Austrian works constitution law applies to them irrespective of their physical location or contractual employer. However, since the employees' individual contracts are governed by the law of the country in which they carry out their work,[66] this creates a discrepancy between works constitution law and the law governing individual employment relationships.

However, if authority to issue instructions is only delegated in a limited manner or the employees only form part of an internationally operating team for a limited period, the situation becomes far more complex. The greater the flexibility and short-term nature of the virtual organisation, the harder it is to determine international allocation in the virtual environment.

63 Gruber-Risak (2024) op. cit. 428.

64 Ibid.

65 Austrian Supreme Court of Justice (OGH) 26.3.1997, 9 ObA 88/97z.

66 As outlined in point 3.

4.4. The Doctrine of Extension under Pressure in a Virtual and Borderless Work Environment

Following the Principle of Territoriality complemented by the Principle of *Extension*, the assignment of employees to an establishment, as well as the qualification of the establishment itself, is independent of any evaluation under foreign law. The co-determination and participation rights of employees engaged in cross-border activities are therefore determined based on the scope of application of the respective national works constitution systems.[67] Different national assessments can therefore produce different outcomes for the same case. Thus, a distinction must be made between the alternative and cumulative application of labour representation law, depending on whether only one national system applies or whether the co-determination regimes of two countries are applicable based on differing territorial and personal scopes of application.[68] Additionally, representation gaps may arise where no system applies due to divergent scopes of application under national labour representation laws.[69]

Although the courts still adhere to the principle of territoriality, it is increasingly criticised by legal scholars. According to these critics, it is paradoxical to combine works constitution law, which originates from private law, with the public law principle of territoriality.[70] Furthermore, it is argued that, in its static form, the principle cannot meet the requirements of a digitalised working world. The one-sidedness of the connection is also criticised, as it only clarifies whether domestic works constitution law applies; the applicable law remains unclear if the answer is negative. [71]

Therefore, it is worthwhile examining a different approach to determine which national labour constitution law applies in virtual cross-border cases.

4.4.1. A departure from the principle of territoriality?

As outlined above, the criticism of the territorial linkage of labour representation law is accompanied by various approaches to its classification under conflict-of-law rules in the sense of private international law, due to the already established classification of labour constitution law as part of private law.[72] In the absence of specific rules for labour constitution provisions, general private law terms state that a case with cross-border elements is to be assessed under the legal system to which it has the closest connection. This connection can be based on both subjective and objective factors such as the location

67 Löschnigg op. cit. 198.

68 Ibid.

69 Brameshuber op. cit. 9.

70 Niksova (2024) op. cit. 591.

71 Deinert (2022) op. cit 154–156.

72 Deinert (2022) op. cit 154–156.; Niksova (2024) op. cit. 591.; Ludvik op. cit. 305–351.

of the establishment,[73] the relevance of the employed workforce,[74] and even the entity where company-related decisions are made.[75]

One frequently proposed connecting factor is the seat of the establishment. Those who argue that labour constitution law is tied to the operational unit focus on physical factors such as the location of the establishment.[76] Similar to the connection to the establishment's location, other objective, activity-related connecting factors can be found in literature, such as the composition of the workforce[77] or the governing law of the employment contracts.[78] Since these elements usually coincide with the establishment's physical location, their practical result – regarding the application of labour constitution law – however, is functionally often equivalent to the territorial approach, as the location of the establishment is also the reference point of the Principle of Territoriality.

A different outcome may be achieved through a control-oriented approach, focusing on the location of production or service units, or the administrative headquarters that manage them. Under this approach, the location of the establishment may not be the most important factor in determining the closest connection. Where a physical location of the establishment exists, it will often coincide with the administrative headquarters, rendering the earlier observations applicable. However, this approach notably differs from those that focus on the physical location of employees' work performance. When assessing the centre of gravity of virtual work organisations comprising employees in different countries, this administrative-linkage model emphasises operational control over the workforce itself. Furthermore, since not all legal systems recognise the Austrian distinction between an 'establishment' and an 'undertaking', linking to the administrative headquarters offers a more universally applicable reference unit.[79]

4.4.2. Different assessment – similar outcome

If constitutional matters are assessed according to the general principles of private international law and are thus governed by the legal system with which they have the closest connection, two outcomes are possible. Where a physical establishment exists, its location will usually provide the necessary connection. However, if the establishment is virtual and has no physical structure, other factors must be taken into consideration. In this case, the holistic assessment set out in section 4.2.2 of this paper

73 Abbo Junker: *Internationales Arbeitsrecht im Konzern*. Tübingen, Mohr Siebeck, 1992. 374.; Deinert (2022) op. cit. 154.

74 Ludvik op. cit. 426.

75 Niksova (2024) op. cit. 599.

76 Junker op. cit. 374.

77 Ludvik op. cit. 426.

78 Gamillscheg op. cit. 370.

79 Niksova (2024) op. cit. 599.

can be used. The strongest connection of the establishment can be found by breaking it down into its components. These elements must then be localised and assessed in their entirety to determine the focus of the organisational work.

In most cases, however, the result will correspond with the territorial linkage and thus present similar problems to those mentioned earlier. The key difference between the two approaches is that private international law always determines which national law applies. The principle of territoriality, on the other hand, does not provide any guidance as to which law should apply if domestic labour constitution law is inapplicable.[80]

5. Conclusion

The principle of territoriality, complemented by the principle of extension, has a long history of extending the representational law of a nation to its workers abroad. As demonstrated by matrix-based cooperation, these two intertwined principles remain valid to a certain extent in the context of international work. They can adequately cover cases of extensive virtual cross-border integration where the allocation of employees to an establishment is clear. However, they do not encompass cases where it is uncertain whether an establishment exists at all or where it is situated, nor cases where integration into the establishment is insignificant.

As illustrated in the present paper. Legal scholars have been proposing different approaches following the general principles of private international law, which can result in different outcomes. However, because of missing harmonization on the European level, they face comparable difficulties with the Principle of Territoriality, leading to deficiencies in representation. Since, in principle, member states remain free and independent to define the connecting factors for the scope of application of their legal provisions, situations are unavoidable in which employees working remotely are faced with a lack of representation.

From employees' point of view, it would therefore be beneficial to clarify that the applicable law is determined by the location where the establishment's activities are primarily carried out. Additionally, a provision should be added making clear that information and co-determination rights cannot be undermined by the location of the employing entity or a group company. Also, supplementary rights have become necessary, ensuring that the international nature of telework does not disadvantage those involved.[81] As not all EU Member States share a definition of an undertaking or establishment, further discussion is necessary to establish a consistent definition throughout the EU ensuring much needs consistency.

80 Deinert (2022) op. cit. 155.

81 Deinert (2022) op. cit. 156.

Projects such as DIGILARE[82] play a paramount role in safeguarding the future of digital work, as a lot remains to be accomplished. However, legislation such as the European Works Council Directive demonstrates, that it is at no means impossible to establish uniform information and consultation rights for employees working across different member states.[83] Bearing in mind that this is a challenging negotiation process,[84] there is no alternative to engaging in a thorough discussion. After all: "If technology can evolve, so can the law."[85]

82 DIGILARE – Digitalization of Industrial Labour Relations. Age-old values in a new digital world (101126503). www.digilare.eu

83 Brameshuber op. cit. 10.

84 E.g. the failure of recent negotiations on implementing a sectoral agreement on digitalisation and telework according to Art. 155 (2) TFEU.

85 Simon Deakin: *Luddism in the Age of Uber.* Social Europe Publishing & Consulting GmbH, 2015. www.socialeurope.eu/luddism-in-the-age-of-uber