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FREELANCERS IN THE SERBIAN COMPANY LAW AND PRIVATE INTERNATIONAL LAW***

-Abstract-

Undoubtedly, digital or gig economy is an ubiquitous phenomenon. Growing number of digital workers, often using digital platforms as an intermediary, has not left Serbia a side. However, the Serbian legislator has not completely, or successfully enough, regulated all the issues tackling legal protection of digital workers in general - those whose contract with the demanding side is characterized as the individual employment contract or rather as some general contract in terms of law of obligations. Besides, digital (platform) work often imply the cross-border dimension, raising the issues of international jurisdiction and applicable law with regard to the weaker party's protection. In Serbian company law, significant implications of the legal status of digital worker come to the fore, as digital workers can be perceived as entrepreneurs or as members of a one-person LLC. In this paper, the authors strive to open and discuss some of the legal shortcomings or implications of digital worker's legal status stemming from the Serbian company law and the Serbian private international law.

Key words: digital (platform) work, Serbian company law, Serbian private international law, weaker party's protection principle, digital workers, freelancers

I. INTRODUCTION

Digital (crowd/platform) work refers to the paid remote work where the employer is not necessarily located, or registered, in the same country as the worker (Anđelković, Šapić, Skočajić, 2019: 4). In the context of the EU, the platform economy is a growing phenomenon, with approximately 11% of the EU workforce already providing services through a platform. With regard to Serbia, the Online Labour Index (OLI) of the Oxford Internet Institute shows that Serbia was ranked the tenth in the world and the fourth in Europe in 2020, based on the number of active digital workforce (Anđelković, Šapić, Skočajić, 2019: 4). They most often provide services in the field of software and technology development (30%), writing and translation (29%) or in the creative and multimedia industry (22%). A significantly lower percentage of digital workers from Serbia is engaged in sales and marketing (3%), clerical and data entry (6%), and in professional services (10%).[1] The fact that business rules are defined individually on each

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platform, results in the absence of regulations that would standardize the relationship of freelancing business on the global market.[2] Hence, the principle of legal certainty may become vague in the digital (platform) work legal matters.

In the global market, digital work does not necessarily involve the individual employment contract, but the demanding and supplying side may enter into general contracting regimes of the law of obligations (Reljanović, Misailović, 2021: 409-410). Although platform work seems appealing due to the flexibility and diversity of the global market offers, it often lacks transparency and sufficient legal protection of the digital (platform) worker who is, in most of the cases, a weaker party. As a global and massive phenomenon, the digital work implies different legal issues, emerging from several branches of law, such as labour law, social protection law, company (commercial) law, and data protection law. Often, digital (platform) work involves contracting parties from two States where private international law issues emerge as well. This cross-border dimension results in the issues of their protection in determining the international jurisdiction and applicable law.

The digital workers could be, in general, divided in two categories. The first group of the digital workers are employees whose labour and social protection are regulated by the individual contracts of employment. Other digital workers are described as the individual contractors (to which we refer as the freelancers *stricto sensu*). The latter may become increasingly vulnerable category of digital workers, even more than (digital) employees, since they cannot rely on the labor law protection. These independent contractors usually perform work based on the contracts which are part of the law of obligations (Reljanović, Misailović, 2021: 410). Therefore, the authors of this paper discuss the legal status of the digital workers in the Serbian company law emphasizing the shortcomings of the legal rules which could be applied in the case of different categories of digital workers. Likewise, they discuss whether the digital (platform) work imposes the need for special protection of freelancers (*stricto sensu*) and other digital workers in the Serbian Private International Law, especially in comparison to the EU PIL.

II. SERBIAN COMPANY LAW ASPECTS

For many years, freelancers have been an invisible category of persons in the legislation of the Republic of Serbia (hereinafter: RS).[3] This view is unacceptable, bearing in mind that RS is among the ten fastest growing freelancing markets in the world.[4] The lack of definition of their

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[1] Young and highly educated people with university degrees in economics, design, marketing, architecture, philology, and engineering are the majority of digital workers from Serbia. Anđelković, Šapić, Skočajić, 2019:4.

[2] See for more details Reljanović, Misailović, 2021: 409-410.

[3] A freelancer is considered to be any person who performs a certain activity on his/her own account (working independently or in partnership with another freelancer) and is responsible for one's own work and income but he/she cannot employ others when performing the chosen activity (Kozica *et al* 2014: 5). There are those who perceive them as highly qualified persons who can respond to the requests of the principals (Burke, 2015: 5).

[4] According to this research, in 2019, Serbia was tenth in the world, and fourth in Europe in terms of the rate of development of the freelancing market. However, considering that Covid-19 pandemic had a huge impact on the number of freelancers, it can be concluded that the rate of freelancers grew in the years that followed. See: The Global Gig-Economy Index Cross-border freelancing trends that defined Q2 2019 http://metadataetc.org/gigontology/pdf/q2_global_freelancing_index.pdf.

legal status is a frequent shortcoming in the legislation of other countries as well.[5] Although the law of the RS do not guarantee any rights to freelancers when performing their activities, in October 2020 the Tax Administration publicly invited freelancers in RS to pay tax obligations with retroactive effect for the period starting from 2015.[6]

From that moment, the legal battle between the representative associations of freelancers and the Government of the RS began, with the aim to correct and specify their tax duties but also to regulate their status, rights and obligations in the legislation of our country.[7]

In the absence of a clear definition of freelancers, their activities on the global market have often been designated as independent contracting (Kozica, Bons, Kaiser, 2014: 424).Such an understanding allows them complete freedom in deciding on the number of clients to whom they will provide their services, the time they will spend on their work, and the place from which they will do business online (Shepard, 2018: 2).[8] Yet, with an extensive interpretation of the norms of certain laws, freelancers could find their place in the legal framework of the RS. The legal provisions on this subject matter are provided in the Pension and Disability Insurance Act (hereinafter: PDI Act), the Labor Act (hereinafter: LA) and the Personal Income Tax Act (hereinafter: PIT Act).

III. LEGISLATIVE FRAMEWORK ON FREELANCERS IN THE REPUBLIC OF SERBIA

1. Freelancers in the Pension and Disability Insurance Act (PDI Act)

Pursuant to the amendments to the PDI Act of December 2019, self-employed persons who performs work from Serbia for a foreign employer that does not have a registered representative office in the RS, receive compensation from the employer for such work and are not insured on another basis are considered to be insured *self-employed persons*.[9] This puts freelancers in the category of unemployed persons, which they certainly are, given that the list of mandatory users

[5] Most EU member states do not define the status of a freelancer, which is also the case in Great Britain (Kitching, 2015: 25). It is worth noting that Directive 2010/41/EU defines a *self-employed person* as someone who "performs a profitable activity for his own account, under the conditions prescribed by national law"-Art. 2(1) of the Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, OJ L 180/1, 15.7.2010.

[6] The public call did not explicitly refer to freelancers because RS legislation does not recognize them but the obligation was clearly intended to apply to them, as well as to all natural persons who have an inflow of funds from abroad. This Tax Administration move was preceded by amendments to the Tax Procedure and Tax Administration Act of December 2019, which envisaged that commercial banks are obliged to submit data on the balance and complete turnover on current accounts and savings deposits of legal entities at the request of the Tax Administration persons, entrepreneurs and natural persons, for the period specified in the request.

[7] The RS Government announced the adoption of the Act on flexible forms of work which would *inter alia* define the freelancers' status. The deadline (01.01.2022) has long expired but the draft has not been prepared yet.

[8] The freelancer's principal (the person from whom he/she receives income) can be: a non-resident legal or natural person, a resident natural person and another resident person who does not have to calculate and pay tax. From this limitation, it follows that a person whose client is a resident legal entity or an entrepreneur, as well as a branch of a Znon-resident legal entity in the Republic of Serbia, will not be considered a freelancer.

[9] Art. 12. p. 3a of the Pension and Disability Insurance Act ("*Official Gazette of RS",* no. 34/2003, 64/2004 – CC decision, 84/2004 , 85/2005, 101/2005, 63/2006- CC decision, 5/2009, 107/2009,101/2010, 93/2012, 62/2013, 108/2013, 75/2014, 142/2014, 73/2018, 46/2019- CC decision, 86/2019 and 62/2021, 125/2022 and138/2022).

of pension and disability insurance (mandatorily insured persons) includes: employees, persons who perform their activities independently, and farmers.[10] In order to acquire the status of insured self-employed persons, the freelancer's income from business engagement with a foreign employer that does not have a representative office in Serbia is relevant. At the same time, the legal form of their business relationship is irrelevant, which can be labelled as an employment contract, a work contract, etc., but also a contract that is not recognized by RS law.

2. Freelancers in the Labor Act (LA)

From the point of view of the Serbian Labour Act, freelancers could be subsumed under the category of unemployed persons who enter into a contract with an employer to perform temporary and casual work as an unemployed person.[11] This norm recognizes the work of freelancers, bearing in mind that such engagement represents work outside the employment relationship between the unemployed person and the employer, which can last no longer than 120 days in a calendar year. The norm defining such a work contract could be applied to the work of freelancers, considering the fact that an unemployed person can also appear here as the other contracting party.[12] However, this view has been criticized by the freelancers themselves because they usually do not conclude any kind of contract during employment, which therefore excludes the possibility of being subject to these norms of LA.
The question arises as to why the amendments to the LA of 2014 abolished the category of "self-employed person", under which freelancers could be classified today.[13] Namely, this kind of wording would greatly simplify the recording of income from abroad, as well as the procedure for paying taxes and contributions, and it would enable the Tax Administration to more easily collect tax fees from freelancers. Among other things, the self-employed status would enable freelancers to join a trade union, which would strengthen their position in negotiations with the RS Government regarding their basic labor and social rights.[14]

3. Freelancers in the Personal Income Tax Act (PIT Act)

The PIT Act includes legal provisions regulating the basis of freelancers' taxation.[15] In the previous period, as a result of the negotiation process regarding the tax treatment of freelancers,

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[10] Art. 10. c 1. of the PDI Act. This opinion is supported by the fact that (in Art. 12. c 1. t. 1.) *self-employed per*sons are considered to be insured persons who are not necessarily insured on the basis of employment. Article 5 of the Labor Act defines an *employee* as a natural person who is employed by an employer.

[11] Art.197 of the Labor Act ("*Official Gazette of the RS",* No. 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 13/2017- CC decision, 113/2017 and 95/2018- authentic interpretation).

[12] This provision of the Labour Act is conditioned by the fact that it involves jobs that are outside the employer's scope of activities and that the subject matter is performance of independent work (Art. 199 par.1 LA).

[13] In the 2014 Amendments to the Labour Act, Chapter XVIII "Special Provisions", section II "Self-Employment" and Article 203 were deleted, where a self-employed person was designated as *a natural person who can independently perform activities as an entrepreneur, in accordance with the law*. (Act amending the Labour Act, http://www.parlament.gov.rs/upload/archive/files/cir/pdf/zakoni/2014/2344-14.pdf).

[14] The negotiations with the representatives of the RS Government were led by two associations of citizens (the Association of Internet Workers and the Association of Freelancers and Entrepreneurs of Serbia), which do not agree on all points of the negotiation process, which is consequently to the detriment of all freelancers.

[15] The Tax Administration found it appropriate to tax freelancers in accordance with the norm that applies to an unlimited number of cases. Namely, the PIT Act uses the enumeration system to specify which incomes are taxable,

the PIT Act was amended several times, with the aim of reaching the most adequate solution. The implementation of the attained agreement into the legal text can be divided into two time intervals: the first period refers to taxation of freelancers from 01.01.2015. to 31.12.2022.[16], and the second one refers to the period from 01.01.2023. onwards.

3.1. Tax treatment of freelancers from 01.01.2015. to 31.12.2022.

By the end of 2022, the amended PIT Act recognized the non-taxable annual income of citizens in the amount of 384,000 RSD and 50% of the realized income in the name of standardized costs.[17] With this normalization of the non-taxable amount and normalized expenses, it can be concluded that freelancers were exempted from paying tax in the previous period if they had an annual income of up to 768,000 RSD.[18] It follows that the freelancers were obliged to pay tax only on the income that remains when 384,000 dinars are deducted from the second half of the income. The obligation to pay taxes and contributions is imposed on the tax base determined in this way: income tax of 20%[19], contributions for pension and disability insurance of 25%[20] and contributions for health insurance of 10.3%. At the same time, a person who is employed and concurrently earns income from freelancing on another basis does not have the obligation to pay a contribution for health insurance because the employer is obliged to pay it on the basis of the

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then Article 85 lists 15 types of other incomes that are categorized under "other", while Article 85 point 16 of the given norm (the original basis for taxation of freelancers) refers to "all other non-taxable income..." Therefore, freelancers' income is taxed in accordance with the aforementioned law, and thus declared as "other than other income". It follows from this that it is extremely unacceptable to take this norm as the basis for taxing freelancers, because it may refer to some extremely extraordinary case, and freelancers' income is certainly not. By the way, an additional argument for the inadmissibility of this norm is the fact that in 2001 (when the PIT Act was adopted) there were no freelancers in the RS and that the specific norm at that time referred *inter alia* to the income of domestic persons in the form of payments from abroad (several times during year), while today the same norm is applied to freelancers who regularly generate income based on the provision of online services.

[16] The statute of limitations for tax obligations is 5 years (Art. 114 of the Tax Procedure and Tax Administration Act). The tax administration retroactively carried out tax control during the given time interval, not counting the current year. The obligation to pay retroactive tax liability (from 2015 to date) will be imposed only on those freelancers for whom the tax control procedure was initiated during 2020; the freelancers whose tax control procedure was not initiated during 2020 cannot be subject to control in 2015 and will not be obliged to pay tax for that year.

[17] Art. 5 par. 2 and 3 of the Act amending the Personal Income Tax Act ("*Official Gazette of RS", no*. 44/2021 and 118/2021). Normalized costs are business costs that are recognized without accounting to prove their existence.

[18] If a freelancer had an annual income of 768,000 RSD in 2018, the non-taxable amount is 384,000 RSD, and its normal costs amount to 384,000 RSD (50% of realized income, i.e. 768,000/2), the freelancer has no tax liability because when the non-taxable fixed amount and standardized expenses are subtracted from the realized annual income, the tax base is 0 (zero) RSD.

[19] Art. 86 par. 1 of the Personal Income Tax Act. Freelancers' income is taxed at a tax rate of 20% because their income is classified as other income according to Art. 85 of the PIT Act.

[20] Art. 40. p. 1 of the Act amending the Act on Contributions for Mandatory Social Security ("*Official Gazette of RS",* No. 84/04, 61/05, 62/06, 5/09, 52/11, 101/11, 47/13, 108 /13, 57/14, 68/14-other act, 112/15, 113/17, 95/18, 86/19, 153/20 and 44/21) reduced the previous tax rate (25.5%) for PDI by (0.5%). Therefore, the tax rate for PDI of 25.5% will be applied to the annual tax base of freelancers from 2015 to the end of 2021, while in accordance with the amendments to this Act the rate of 25% will apply for the year 2022..

employment relationship.[21] With this amendment to the PIT Act, the legislator has provided relief to freelancers when paying off the tax debt for the previous period in 120 equal monthly instalments, with the first amount due for payment by the 15th of the following month in relation to the month in which the decision of the Tax Administration was made.

3.2. Tax treatment of freelancers from 01.01.2023. onwards

Under the new legal solution applicable since January 2023, freelancers settle their tax obligations through self-taxation but now they have to do it quarterly. They are now be required to submit their tax return and pay tax within 30 days from the end of the last day of the quarter for which the tax is calculated.[22] At the same time, they are offered the possibility of taxation based on two different models, whereby their choice will be decisively influenced by the generated income. The possibility of choosing the first taxation model in one quarter and the second taxation model in the next quarter is not excluded.

The first taxation model allows freelancers a tax-free monthly income of 19,300 RSD, or 57,900 RSD quarterly.[23] In this case, standardized costs are recognized in the amount of 34% of realized revenues.[24] Freelancers are obliged to pay income tax at the rate of 10%[25] on the established tax base, which is obtained when standard expenses and the triple value of non-taxable monthly income are deducted from the total quarterly income.

In *the second taxation model*, there are no standardized costs, while the non-taxable quarterly income is 96,000 RSD, or 32,000 RSD per month. Unlike the first model, the freelancer's income in this case is taxed at a rate of 20%. Regardless of which taxation model they choose, freelancers are obliged to pay contributions for pension and disability insurance of 24% and contributions for health insurance at a rate of 10.3%.[26]

If the freelancer's income is less than the untaxed amount per quarter, he/she will be exempt from paying tax on the income, but not from paying the expenditure on contributions. In that case, another distinction between these two models is evident. Namely, in case of choosing the first taxation model, a freelancer would be obliged to pay the minimum amount of contributions for pension and disability insurance (PDI) and for personal income tax (PIT) by law; in case of choosing the second model, the obligation would only apply to contributions for personal income tax.[27] Apparently, the first model is more favourable to freelancers who generate higher incomes,

[21] Art. 15 of the Health Insurance Act ("*Official Gazette of RS",* No. 25/2019) prescribes the order of determining the priority basis of insurance, excluding other bases of insurance, for the insured person who meets the conditions for acquiring the status of the insured under several insurance bases.

[22] Regardless of which taxation model they choose, freelancers are obliged to pay contributions for pension and disability insurance (PDI) of 24% and contributions for health insurance at a rate of 10.3%.

[23] Art. 126. 2. Company Act

[24] Art. 56 Company Act

[25] The tax base is obtained when normalized expenses and three times the value of non-taxable monthly income are subtracted from the total quarterly income.

[26] Art. 44.par.1, item 1 of the Act on Contributions for Mandatory Social Insurance *("Official Gazette of RS",* No. 84/2004, 61/2005, 62/2006, 5/2009, 52/2011, 101/2011, 7/2012, 8/2013, 47/2013, 108/2013, 6/2014, 57/2014, 68/2014, 5/2015, 112/2015, 5/2016, 7/2017, 113/2017, 7/2018 , 95/ 2018, 4/2019, 86/2019, 5/2020, 153/2020, 6/2021, 44/2021, 118/2021, 10/ 2022, 138/2022 and 6/2023

[27] In the first model, the minimum contribution for PDI is 25,218 RSD while the minimum contribution for social security is the same for both models and amounts to 4,638 RSD. With the first payment of the PIT contribution, the freelancer is insured for the next six months, with the option of insuring family members as well.

while the second model is more acceptable to those with lower incomes. This tax treatment applies to all natural persons who are in the self-taxation system. The legal status of freelancers is still not defined in Serbian law but the aforesaid system is applied to their *ad hoc* business and income stemming from copyright and related rights through self-taxation.

IV. FREELANCER AS A BUSINESS ENTITY

Bearing in mind that freelancers see themselves more as individual companies that do business with clients than as a class of workers with similar interests (Salamon, 2020: 106), they are given the opportunity to alternatively regulate their business status by registering one of the forms of business entities in accordance with the Company Act (hereinafter: CA). On that occasion, they would most frequently choose the status of an entrepreneur or a limited liability company (LLC).[28]

1. Freelancer as an entrepreneur

According to the Company Act (CA), an entrepreneur is a natural person who performs an activity with the aim of generating income and who is registered as such in accordance with the Registration Act. The position of freelancers in a business relationship is characterized by the absence of subordination (Lukeš, 2013: 76), which further implies their complete responsibility for the selection and implementation of business projects. This legal form has two categories of taxation: a) flat-rate taxation, and b) taxation of the entrepreneur's actual income. When choosing a tax treatment, a freelancer as an entrepreneur will be greatly influenced by monthly income.

a) *Flat-rate taxation* is limited only to those entrepreneurs whose activity is in accordance with the Regulation governing this form of tax treatment in more detail.[29] In this regard, some of the activities which are most favoured by freelancers (and which are also included in the Regulation) are: computer programming, web portals, engineering activities and technical consulting, specialized design activities, data processing, hosting, etc. Another limitation of flat-rate taxation is reflected in the annual turnover, which must not exceed 6,000,000 RSD.[30] Freelancers who are taxed on a flat-rate basis have lower business expenses than those who are taxed on the basis of actual income because they are not required to keep business books. In case of generating income above the specified limit, this tax treatment ends

[28] Partnerships and limited partnerships cannot be sole proprietorships, and therefore are generally not acceptable to freelancers. In addition, the choice of an LLC is influenced by the limited liability of the members of this company), which depends on the amount of their contribution to the obligations towards the company creditors; in case of a partnership, the members have an unlimited and joint liability with all their assets (the exception is the limited partner who is liable as a member of the LLC, depending on the amount of their contribution in the company. Although a joint-stock company can be a one-person company, this form of capital company is not adequate for the business of freelancers due to the greater complexity of operations compared to LLCs.

[29] Not all entrepreneurs can be taxed on the flat-rate basis but only those whose predominant registered activity is in accordance with the Regulation on detailed conditions, criteria and elements for flat-rate taxation of taxpayers on income from self-employment ("*Official Gazette of RS",* No. 94/2019, 96/2019- *corr.* and 156/2020).

[30] There are other limitations of flat-rate taxation, but they do not come into question when it comes to freelancing. It refers to entrepreneurs who perform activities in the field of advertising and market research, wholesale and retail trade, hotel and restaurant industry, financial mediation and activities related to real estate (which frequently include investments of other persons), as well as entrepreneurs who are obliged to pay value added tax in accordance with the law governing value added tax (Art. 40. PIT Act).

and the payment of taxes and contributions is calculated on the basis of real income (gained profit), regardless of the business activity the freelancer is engaged in.

b) *Actual income taxation.* In case the freelancing activity generates annual income above the specified limit, the entrepreneur can no longer be subject to flat-rate taxation and is obliged to keep business books in order to determine his/her actual income (taxable profit).[31] This amount is obtained by calculating the difference between realized income and expenses, and thus the tax base is obtained, on the basis of which taxes and contributions are paid. In cases involving freelancers, this tax treatment is characterized by the possibility for an entrepreneur to register any legally permitted activity without restrictions, whereas the common feature of flat-rate taxation is the application of taxes, contributions and tax rates.[32]

The Amendments to the Personal Income Tax Act enacted in 2013 provided for another form of real income taxation, which implies that the entrepreneur pays out his/her own salary in the amount which he/she determines. Here, tax rates are present as in the case of flat-rate taxation, but they are applied differently to the entrepreneur's earnings and to his/her actual business income (taxable profit). Therefore, in this form of taxation, an entrepreneur is his/her own employer who pays taxes and contributions on his/her own earnings and tax on actual income (profit) from self-employment, which is obtained by calculating the difference between realized income and expenses. The advantage of this tax treatment is reflected in the fact that the entrepreneur does not pay taxes and contributions on the amount of "real" profit (as the amount of the entrepreneur's earnings is the expense of his/her business), but only on the amount of earnings that he/she determines at his/her own discretion. At the same time, he/she only pays tax on income from self-employment in the name of real income (obtained profit). In this taxation model, the entrepreneur is obliged to inform the Tax Administration by December 15 of the current year whether he/she will continue the self-taxation model with the payment of personal earnings in the following year as well.

Looking at the aforementioned tax treatments, it is best for a freelancer who is in the initial stages of business to choose the flat-rate taxation of entrepreneurs. On that occasion, he/she will pay taxes and contributions in a single amount on the tax base determined by the Tax Administration as long as his/her income does not exceed the amount of 6,000,000 RSD in the business year. If the freelancer earns more than the stated amount, he/she will be obliged to pay taxes and contributions based on actual income, but in that case he will prefer to choose the model "with payment of personal earnings" due to the lower tax fees in this tax treatment model.

2. Freelancer in employment - freelancing as an additional income

There is no dispute that there is a significant number of freelancers who are formally employed and concurrently provide freelancing services as a source of additional income. As this category of freelancers are employed, they cannot be taxed on the basis of employment income. One

[31] From the point of view of this tax treatment, a distinction is made between two forms: a) taxation of real income (gained profits) of the entrepreneur, which entails self-taxation of the entrepreneur; and b) taxation of real income (gained profits) with payment of personal earnings to the entrepreneur. In the first form of "pure" self-taxation, there is no flat-rate income generated from the tax base; here, it represents the business profit, i.e. the difference between income and expenses.

[32] In both flat-rate taxation and real income taxation, the entrepreneur is obliged to pay: tax on income from self-employment (tax rate of 10%) and three types of contributions: pension and disability insurance of 24%, health insurance of 10.3%, and contribution in case of unemployment 0.75%.

solution for this category of employed persons is to register one's freelancing activity as an entrepreneur, whereby it would have the status of "additional activity", considering that their main activity results from the employment relationship. Thus, according to the given entrepreneurial form of taxation, the freelancer is obliged to pay tax on profit from entrepreneurial activity at a rate of 10% and contributions to PDI at a rate of 24%. In this case, he/she will not be obliged to pay contributions for health insurance and in case of unemployment because they are paid only on one basis of employment and will be settled by the employer where the person is formally employed, considering that the employment relationship is primarily observed in relation to entrepreneurial activity.

Although many freelancers consider themselves entrepreneurs (Gandia, 2012: 61), there are noticeable fundamental differences that do not give the right to completely equate these two terms. There are also those who are dissatisfied with the consequences of doing business in this form of business entity because they want flexibility in work without entrepreneurial responsibility (Holloway, 2016: 299). Apparently, all freelancers can be entrepreneurs, but all entrepreneurs cannot be freelancers.

3. Freelancer as a member of a one-person LLC

Freelancing has greatly transformed the way companies operate (Drahokoupil, Fabo, 2016: 4) in such a way that many companies replaced the form of permanent employment with *ad hoc* hiring of freelancers (Kässi, Lehdonvirta, 2018: 243).[33] At the same time, freelancers are given the opportunity to register their business in the form of a one-person LLC (limited liability company). Generally, in this type of company, one or more members of the company have shares in the basic capital, but the company members are not responsible for the company's obligations.[34] The main tax treatment for LLC operations is the payment of tax on the profit of a legal entity (the difference between realized income and expenses) at a tax rate of 15%.[35] When a member of a one-person company wants to withdraw the obtained profit, it is necessary to pay tax on capital income in the name of participation in the company's profit (dividend) at a tax rate of 15%.[36] Therefore, if a freelancer were to register his/her business in the form of a one-person LLC, then he/she would be obliged to pay a double amount of tax in terms of the realized profit, first as a company in the capacity of a legal entity, and then as a natural person on profit obtained from dividends. By all accounts, in contrast to the entrepreneurial form of taxation, LLC entails higher expenses in terms of tax duties; thus, it is rightly assumed that freelancers who opt for this

[33] An increasing number of highly qualified individuals are switching from the traditional form of employment to freelancing business; therefore, companies are increasingly focused on project business (Claussen, Khashabi, Kretschmer, Seifried, 2018: 4; Leighton, Brown, 2016: 90).

[34] For the establishment of this legal form, a minimum basic capital of 100 RSD is required, and only one person can appear as the founder. The tax treatment in this legal form entails the payment of taxes and contributions to at least one person, the legal representative of the company. If that person is not the founder and member of a one-person company, then it is necessary to conclude an employment contract with a third party who will perform this function. In a specific case involving the founder (freelancer), the company is obliged to pay him/her the agreed compensation for work and pay taxes and contributions (Art. 139 Company Act).

[35] Art. 32. par. 2. Corporate Income Tax Act ("*Official Gazette of RS*", no. 25/2001, 80/2002, 80/2002, 43/2003, 84/2004, 18/2010, 101/2011 , 119/2012, 47/2013, 108/2013, 68/2014, 142/2014, 91/2015- authentic interpretation, 112/2015, 113/2017, 95/2018, 86/2019, 153/ 2020 and 118/2021).

[36] Art. 64. in accordance with Art. 61 par. 1, item 2 PIT Act.

form of business entity have a renowned status in providing certain online services on the global market and that they generate higher incomes.

At the same time, the possibility of regulating the business of freelancers by applying tax norms related to economic entities does not reduce the need to define their status in Serbian law.[37] Their business is characterized by uncertainty, which is reflected in the short-term provision of services, the absence of security of continuous business, and thus the absence of constant income (Ashford, Caza, Reid, 2018: 26).[38] It is up to the Serbian legislator to provide additional security to all those who are engaged in this flexible form of employment by defining the legal status of freelancers. In anticipation of the adoption of the Act on Flexible Forms of Work, which would include the definition of innovative forms of business, freelancers are given an alternative choice to regulate their business status in accordance with the existing norms.

V. PRIVATE INTERNATIONAL LAW ASPECTS OF THE FREELANCERS - VIEW FROM THE EU PIL AND SERBIAN PIL

1. EU PIL - international jurisdiction and digital (platform) work disputes

In terms of regulatory predictability and legal certainty within the digital (platform) market in the EU, the Eurofound research has shown that good working conditions has not been achieved, either for platform workers or platform companies.[39] To remedy this situation, especially towards those digital workers who may appear as employees, the European Commission has submitted a Proposal for a Directive aimed at improving the working conditions of platform workers elucidating their legal status, and supporting the sustainable growth of digital labour platforms in the EU.40 The proposed Directive aims to ensure the correct determination of platform workers employment status (while being in dependence with platforms) are not misclassified as freelancers *stricto sensu*.[41] These criteria include controlling remuneration; setting rules with respect to appearance; conduct or performance of work; supervising performance; and restricting both the freedom to organize work and the possibility to independently build a client base. In addition, the prospective directive would set a minimum floor of rights with respect to the transparency of algorithmic management systems for all platform workers. The fulfillment of

[37] The US has passed a law that strictly applies to freelancers, defining them as "any individual or any organization consisting of not more than one individual (whether registered or using a trade name) who is engaged or retained as independent contractor by an engaged service provider in exchange for compensation" (Freelance Isn't Free Act, N.Y.C. Administrative Code §§ 20-927, Int. No. 1017-C, A Local Law enacted on 11/16/2016 to amend the administrative code of the city of New York, in relation to protections for freelance workers, effective from 15.5.2017). By adopting this Act, the USA strives to provide basic protection to freelancers, reduce the time for collecting their claims and enable them to develop their business and promote their services more diligently (Baranowski, 2018: 442).

[38] The status of freelancers who provide low-skilled services often features insecurity and legal uncertainty (Arnoldi, Bosua, Dirksen, 2021: 61).

[39] Eurofound, 2021:4.

[40] Proposal for a Directive of the European Parliament and of the Council, on improving working conditions in platform work, COM(2021) 762 final 2021/0414 (COD). Hereinafter: Directive Proposal.

[41] Article 3 of the Directive Proposal.

at least two indicators should trigger the application of the presumption.[42] Finally, the Directive would establish monitoring requirements for decisions taken by algorithms.[43]
Further on, the Parliament and the Council formally adopted the Regulation (EU) 2019/1149 of 20 June 2019 establishing a European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344, which entered into force on 20 June 2019.[44] European Labour Authority will reach its full operational capacity by 2024. Its role is to facilitate access for individuals and employers to information on their rights and obligations as well as to relevant services. Its role is also to support cooperation between EU countries in the cross border enforcement of relevant Union law, including facilitating joint inspections.
Regarding the freelancers *stricto sensu,* the Commission launched a public consultation in 2022, on draft guidelines on the application of EU competition law to collective agreements of solo self-employed people, i.e. people who work completely on their own and do not employ others, freelancers/individual contractors.[45] These draft Guidelines aim to bring legal certainty and make sure that EU competition law does not stand in the way of certain solo self-employed people's efforts to improve collectively their working conditions, including remuneration, in cases where they are in a relatively weak position, for example where they face a significant imbalance in negotiation power. The draft Guidelines cover both online and offline situations.[46]
In respect of the protection of both categories of digital/platform workers by the PIL rules, two EU Regulations come to the fore. If the digital worker is characterized as the employee, several provisions of the Brussels I recast Regulation[47] could be applied, by analogy, to the international jurisdiction over the individual employment contracts of the digital (platform) workers. Besides the defendant's domicile as the general international jurisdiction criteria,[48] employee, being a weaker party, is entitled to choose among several possible jurisdictions, unlike the employer. The employer as the plaintiff, can institute the proceedings only in the EU State where the employee is domiciled.[49] On the other hand, the employee has the right to institute proceeding against the employer in the EU State where the defendant is domiciled or, alternatively, in the EU State where employee habitually carries out his work or in the courts for the last place where he did so. However, if the employee does not or did not habitually carry out his work in any one country, the employer can be sued in the courts for the place where the business which engaged the employee is or was situated.[50] The forum *loci laboris* and the place where the business is (was) situated come to the fore in the case where the employer is not domiciled in the EU State, as long as any of these two jurisdictional grounds points to the EU MS.[51]

[42] Arts. 4 and 5 of the Directive Proposal.
[43] Article 6 of the Directive Proposal.
[44] OJ L 186, 11.7.2019.
[45] COM(2021) 761 final Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions: Better working conditions for a stronger social Europe: harnessing the full benefits of digitalization for the future of work.
[46] *Ibid.*
[47] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ. L. 351 of 20.12.2012.
[48] Art. 4 para. 1 of the Brussels I recast.
[49] Art. 1 para. 1 of the Brussels I recast.
[50] Art. 21 of the Brussels I recast.
[51] Art. 21 para. 2 of the Brussels I recast.

In addition, the Brussels I recast introduces weaker party's protection principle which is aimed at restricting the choice of the court by the employer and employee. Such agreement is concerned valid only if it is entered into after the dispute has arisen or if it entitles the employee to bring the proceedings against the employer in the EU State other than those which have international jurisdiction by the objective criteria set down in the Brussels I recast.[52] Since the Brussels I recast envisages also the tacit prorogation, it implements the special provision aimed at the protection of the employee as the weaker party. In such case, the elected court has a duty to ensure, before assuming its jurisdiction, that the defendant is informed of his right to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance.[53]
When the digital (platform) work does not fall under the category of the individual employment contract, the general international jurisdiction criteria still apply while the special international jurisdiction depends on the characterization of contract in each case.[54] In terms of freelancers *stricto sensu* (individual contractors), the most significant disparity (comparing the protective mechanism towards the employee) is the possibility to choose the forum (expressly or tacitly) without any restrictions specific for the employee being a weaker party in a gig economy. In this regard, the presumption of the inequality of negotiation power between the demanding party and the individual contractor (freelancers *stricto sensu*) on the terms of the contract would require the same special protection of the weaker party which applies in the case of the employee and employer.

2. EU PIL - applicable law and digital (platform) work disputes

In respect of the applicable law, Rome I Regulation[55] envisages the special regime for the individual employment contract aimed at the protection of the employee as the weaker party.[56] The conflict-of-laws rules include the possibility to choose applicable law with some restrictions, while, on the other hand, the objective connecting factor points to the application of the law of the country in which or from which the employee habitually carries out his work in performance of the contract.[57] If the applicable law cannot be determined in the latter way, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated (Article 8 para. 3). Except for the choice of the applicable law, special escape clause is also available in order to restore the closest connection principle in atypical cases (Article 8 para. 4)..
In a typical cases, the place where the work is habitually performed coincides with the employees' place of habitual residence. However, in atypical cases, the escape clause should come to the fore, correcting the primary conflict-of-laws rule. The party autonomy, inaugurated

[52] Art. 22 of the Brussels I recast.
[53] Art. 26 para. 2 of the Brussels I recast. In that respect, the European Judicial Network in civil and commercial matters advise to use a non-mandatory standard text form which member state courts.
[54] Regarding the provision of service contract (which is often a legal ground for the individual contractors engagement in the digital work), Article 7 para. 1 of the Brussels I recast Regulation specifies that the place of the performance of the obligation in question comprise the place in the EU State where, under the conditions of the contract, the service were provided or should have been provided.
[55] 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 of 4.7.2008.
[56] Article 8 of the Rome I Regulation.
[57] Article 8 para. 2 of the Rome I Regulation.

in article 3 of the Rome I Regulation, is rather broad, referring to the possibility to choose the law of a third State. In order to protect the employee as the weaker party who often cannot negotiate on equal footing with the employer on the terms of individual employment contract, the Rome I Regulation introduces a minimum standard of employment protection from which the individual employment contract cannot deviate. In that respect, a choice of law may not, however, result in depriving the employee of the protection guaranteed by the mandatory provisions of the law which could have been applicable in the absence of party autonomy.[58]
In the cases of individual contractors, when the parties entered into a contract constituting a part of the law of obligations general regime, different conflict-of-laws rules of the Rome I Regulation may be applied, depending on the characterization of the contract in question. Since the provision of service contract is the most common in the digital work market, Article 4 para. 1(b) of the Rome I Regulation refers to the law of the State where the individual contractor as service provider has his habitual residence. If this is not an appropriate characterization, then Article 4 para. 2 of the Rome I Regulation would lead to the application of the law of the country where the party owing the characteristic performance of the contract has his habitual residence. In addition, Rome I Regulation introduces the escape clause for the cases where there is an apparently closes connection with some other State (Article 4 paras. 3 and 4).

3. Serbian PIL - international jurisdiction and digital (platform) work disputes

When we turn to the Serbian digital workers, those who have obtained the status of self-employed in Serbia, are treated as entrepreneurs (sole-traders). However, they are usually deprived of access to unemployment benefits while their license is active, accidents at work and occupational injuries benefits, paid annual leave and maternity/paternity benefits.[59] As the researches shown, Serbian legal system does not yet recognize the principle of subordination of suppliers to global lead firms within the global value chains, and the related responsibilities of each party.[60] This leaves a vast space for platforms to continue to operate without any scrutiny of their treatment of workers, using intermediary agencies to engage workers.[61] Hence, the need for special legal protection of the digital workers as a weaker party is urgent, not only in a substantive law but also in the Serbian private international law.
Nevertheless, due to the lack of the separate piece of legislation which will, among other legal issues, regulate PIL aspects of digital work, the provisions of the 1983 PIL Act[62] still come to the fore. The 1983 PIL Act envisages a domicile or the seat of the defendant as the criteria of general international jurisdiction.[63] The residence of this party is relevant only when defendant is without domicile or it cannot be determined.[64] If both parties to the proceedings are Serbian nationals and defendant has residence in Serbia, then the general international jurisdiction of the Serbian courts

[58] Article 8 para. 1 of the Rome I Regulation.
[59] See *supra ad* 3. Freelancers as a business entity.
[60] Fairwork Serbia Ratings 2023, 2023: 18.
[61] Fairwork Serbia Ratings 2023, 2023: 18.
[62] The Law on Resolution of Conflict of Laws with Regulations of Other Countries1Official Gazette of the SFRY, 43/82, 72/82, Official Gazette of the FRY, 46/96 and Official Gazette of the RS, 46/2006.
[63] Article 46 para. 1 of the 1983 PIL Act.
[64] Article 46 para. 2 of the 1983 PIL Act.

could be seized but only in the contentious proceedings.[65] All of these criteria can be applied by analogy in the cases of digital (platform) work disputes.

Regarding the special international jurisdiction of the Serbian courts, several criteria come to the fore. First, prorogation is possible depending on a nationality or a seat of one contracting party. If at least one of the parties is Serbian national or legal person having its seat in Serbia, the parties may choose the Serbian court. Otherwise, if at least one party is foreign national or has its seat abroad, the foreign court may be chosen.[66] The tacit prorogation of the Serbian court is also permitted.[67] Unlike Article 26(2) of the Brussels I recast, the 1983 PIL Act has not introduced the duty for a court to protect the weaker party (nor even the employee) on the effects of tacit prorogation.

If the contract is characterized as the individual employment contract, only one special criteria is envisaged - the domicile of the employee. Still, the employee has to be Serbia national, who is living abroad where he/she was sent on duty or to work, by a State authority, or any other enterprise or legal person.[68] In terms of individual contractor, the possibility of prorogation of international jurisdiction is followed with two more criteria of special jurisdiction. In Article 54, the 1983 PIL Act prescribes that in disputes on pecuniary claims, the Serbian courts have jurisdiction if the defendant's property or the object claimed is situated in the Serbia. Likewise, if the dispute concerns obligations created at the time when the defendant was present in Serbia, the Serbian courts have jurisdiction. In disputes against a natural person or a legal entity having its seat abroad, for obligations that were created in Serbia or that must be performed in Serbia, the court has jurisdiction if that person has its representative office or agency in Serbia or if the seat of the legal entity to which it entrusted the conduct of its business is in Serbia.[69]

4. Serbian PIL - applicable law and digital (platform) work disputes

Regarding the issue of applicable law, the solutions depend on the characterization of the contract, but in any case Arts. 19 and 20 could apply. These provisions determine the law applicable to the contracts in general. The primary connecting factor is the party autonomy, which, in this case, set broad enough - parties are entitled to choose law of any State (Dika, Knežević, Stojanović, 1991: 74). Although the parties' autonomy regarding the applicable law seems as a adequate solution, it is questionable whether the digital (platform) workers, especially individual contractors, are in position to freely negotiate on the applicable law or the contract terms are predominantly decided by the demanding side (usually a business company, sometimes multinational). In other words, the further research on the freedom of negotiation of the

[65] Article 46 para. 3 of the 1983 PIL Act. The disputes between the contracting parties in the digital work market will, as a rule, fall under the contentious proceeding.

[66] Prorogation of the foreign court in not permitted for those cases in which the Serbian court has exclusive international jurisdiction. Yet, the exclusive international jurisdiction of the Serbian courts is excluded from all disputes over pecuniary claims (Article 49 in conjunction with Arts. 52, 54, 55 of the 1983 PIL Act).

[67] Article 50 of the 1983 PIL Act in conjunction with Article 198 of the Contentious Proceedings Act (Official Gazette of the RS, 72/2011, 49/2013, 74/2013, 55/2014, 87/2018, 18/2020 and 10/2023). Besides the appearance before the court (without contesting the jurisdiction), tacit prorogation also includes it is considered that the defendant has given consent by filing of a written answer to the claim, or an objection to the payment order without contesting jurisdiction, or, filling the counter-claim.

[68] Article 52 of the 1983 PIL Act.

[69] Article 55 of the 1983 PIL Act.

contractual provisions in the gig economy is much needed. If the case involves the multinational business company, it is rather realistic to suppose that the negotiating positions of the demanding side (company) and the supplying side (individual contractor) does not stand on the equal footing. However, in all cases involving the party autonomy, the lack of its control aimed at the protection of the weaker party is obvious. Article 20 of the 1983 PIL Act prescribes that, in the absence of the chosen law, the escape clause might be applied. Surprisingly, this solution corresponds to the certain extent to the Rome I Regulation. If there is no room for the escape clause in the specific case, the objective connecting factor set also in Article 20 of the 1983 PIL Act leads to the applicable law, depending on the specific contract. In most cases, the connecting factor refers to the law of the State where the party owing the characteristic performance (not pecuniary obligation) is domiciled or has seat. However, the problem could occur in the cases where the domicile of individual contractor does not coincide with his/her habitual residence, and the work is performed in the latter State. This issue could be (successively) resolved by the escape clause.[70]

Concerning the digital worker who can fall under the category of the employee, party autonomy and escape clause are still applicable. Regarding the objective connecting factor, the law of the State where the labor contract is or was performed applies to pecuniary claims arising from the labor contract (as an exception from the domicile/seat of the party effectuating the characteristic performance).[71] This solution actually corresponds, to the certain extent, to Article 8 para. 2 of the Rome I Regulation. When the labour is performed in several States, the escape clause in Art. 20 of the 1093 PIL Act could lead to the correct interpretation, leading to the law of the State where the work is habitually performed.

Yet, when the employee perform the work in Serbia, regardless of his/her nationality, the Serbian Labour Act[72] is applicable as *lois d'application immediate* (overriding mandatory rule),[73] although this piece of legislation does not recognize the digital workers as the special category. Thus, the general regime applies. If the parties have not entered into contract whatsoever, but their legal relations could fall under the category of labor engagement, this (so called) factual employment is, under some conditions, equalized with formal employment.[74]

VI. Closing remarks

One of the first cases in Europe that received a great deal of attention was *Aslam v. Uber*, in which the London Employment Tribunal ruled that the Uber drivers bringing the case were "workers," an intermediate status between employee and independent contractor. The Tribunal noted that Uber had imposed a great number of conditions on the drivers, managed and

[70] If the contract is not expressly listed in Article 20 para. 1 of the 1983 PIL Act, the last provision refers to the law of the place where the person who made an offer was domiciled or had the seat at the time of receipt of the offer as applicable.

[71] Article 20 para. 1(19) of the 183 PIL Act.

[72] Official Gazette of the RS, 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 13/2017, 113/2017 and 95/2018.

[73] Unilateral conflict-of-laws rule in Art. 2 para. 1 of the Labour Act.

[74] Although the factual employment is unlawful, it is been equalized with the formal employment in order to prevent and scrutinize this practice when the "employee" and "employer" are not bound by any contract. The Labour Act envisages the conditions which have to be met for this conversion to take place. However, the factual employee does not enjoy the same legal protection as the formal employee (e.g. mandatory social insurance, insurance in the case of unemployment).

instructed the drivers through the cell phone app, and overall, controlled the drivers' working conditions.[75] When assessing whether the digital worker is an individual contractor, guiding principles could be also found in the Californian Supreme Court decision, rendered in the 2018 *Dynamex* case. In its decision, the court established the so-called ABC test, which states that for a classification of a worker as an independent contractor three requirements have to be met. The first one is that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact. Another condition is that the worker performs work that is outside the usual course of the hiring entity's business. The last one specifies that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.[76] Both of these cases could give some guidance in regulating the legal status of digital (platform) workers in Serbia *de lege ferenda* within the company law especially. It is up to the Serbian legislator to provide additional security to all those who are engaged in this flexible form of work by defining their legal status. In anticipation of the adoption of the Act on Flexible Forms of Work, which would include the definition of innovative forms of business, freelancers are given an alternative choice to regulate their business status in accordance with the existing norms

Regarding the 1983 PIL Act, the existing rules call for some changes, although not completely inadaptable to the situation involving digital workers. Therefore, a separate act on digital (platform) workers should be taken into consideration since the legislator's apathy towards new PIL Act does not abate. Party autonomy should be restricted by the principle of weaker party protection. In terms of tacit prorogation, it is significant to introduce the court's duty to inform the digital (platform) worker - both employee and individual contractor - on the effects of tacit prorogation. Concerning the applicable law, the protection is also needed in the case of party autonomy. As a restriction of party autonomy, mandatory provisions of the law otherwise applicable aimed at digital (platform) worker protection should be introduced as a restriction of party autonomy. Likewise, the party autonomy could be alternatively controlled by providing a subsequent judiciary control of party autonomy, similar to the solution in Art. 8(5) of the 2007 Hague Maintenance Protocol.[77] Although it regulates a completely different matter, the idea of a special protection of the weaker party who is not in the same position to negotiate on applicable law is, to the reasonable extent, corresponding to the urge to protect digital (platform) worker, especially individual contractor. In respect of the objective connecting factor, it should be taken into account the possibility to refer to the law of the State where individual contractor habitually resides. The other solution is to heavily rely on the principle of the closest connection, either as the objective connecting factor or as the escape clause. In most cases, it would lead to the application of the law of the state where the work is habitually performed (employee as a digital worker) or the habitual residence of the individual contractor (including the place where the service is habitually effectuated). Yet, the global multilateral convention is much needed,

[75]Uber BV and others (Appellants) v Aslam and others (Respondents) Hilary Term [2021] UKSC 5 On appeal from: [2018] EWCA Civ 2748, pp. 12-15.

[76] Dynamex Operations W. v. Superior Court and Charles Lee, Real Party in Interest, 4 Cal.5th 903 (Cal. 2018) .

[77] Official Gazette of the RS - International Agreements, 1/2013.

preferably drafted under auspices of the Hague Conference on Private International Law, alone or in cooperation with other relevant international organizations, especially ILO.[78]

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