Analytical report 2018

Social security coordination and non-standard forms of employment and self-employment: Interrelation, challenges and prospects

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MoveS - Free movement of workers and Social security coordination

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EXECUTIVE SUMMARY

New forms of organising work, non-standard forms of employment and new forms of self-employment are contributing to the diversity in the labour market across the Member States. They can be observed in the heterogeneity of the forms of employment that are distinct from those based on individual permanent employment contracts, which have dominated employment relationships for decades. Moreover, they influence the time dedicated to work and related income, both of which may be distinct from individual permanent employment contracts.

The purpose of this report is to acknowledge this diversity by exploring how this diversity is classified under national social security law and by identifying any resulting problems for social security coordination when non-standard employed and self-employed workers move within the EU. Possible solutions are put forward on how to overcome these obstacles in order to guarantee the freedom of movement of non-standard workers.

The present report neither analyses the diversity from a labour law perspective, nor does it try to propose solutions formodifying or abolishing this diversity.

In order to know what non-standard work is, it has to be determined what standard work is. Social security systems were primarily developed for a worker with a permanent, full-time employment contract for an indefinite period of time. Standard social security is built on this premise. Non-standard forms of employment and new forms of self-employment are deviations from the standard, i.e. fixed-term contracts, part-time work (either temporary or permanent, horizontal or vertical), employment relationships between more than two parties, casual work, including on-demand work (including zero-hour contracts) and intermittent contracts, platform work (i.e. people working for digital platforms, without having a fixed workplace, also known as crowd employment), temporary agency work (i.e. interim positions), domestic work, voucher-based work, telework, traineeship and student work, self-employment, especially involuntary, bogus, dependent, new and part-time self-employment, or other country-specific non-standard contracts (mini-jobs, civil law contract, etc.).

A segmentation of labour markets and acceleration of job polarization has been reported in recent years. Permanent, full-time employment as a proportion of total employment has declined by four percent over the last 15 years, to a figure below 60% in 2016. Solo self-employment (without employees) and temporary and part-time contracts have become more common.[1] Noticeable is also the slow but steady increase of involuntary temporary employment (for the EU-28, from 7.2% in 2008 to 7.8 % in 2017), however with significant differences among Member States.[2] Although, among all work arrangements approximately a quarter (in the EU) or a third (in OECD countries) were performed in a non-standard form, the proportion of non-standard (self-)employment is much higher among newly created jobs (around 60% in OECD countries).[3]

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[1] European Commission (2018) Employment and Social Developments in Europe: Annual Review 2018, Luxembourg, Publications Office of the European Union, pp. 56, 58, 60-62.

[2] Eurostat (2018). Involuntary temporary employment (this indicator represents employees who could not find permanent job as a percentage of total employees), http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tesem190&plugin=1.

[3] G. Schmid and J. Wagner; Managing social risks of non- standard employment in Europe, ILO, International Labour Office Geneva, 2017, p. 7, https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_584686.pdf, argue that non-standard forms amounted to 25.8% in the EU-28 in 2014. Approximately one third of all workers is engaged in non-standard forms, whereas a proportion of non-standard forms among new employments amounted to 60% in the period between 2008 and 2013. OECD: In It Together: Why Less Inequality Benefits All. Paris: OECD Publishing, 2015 https://read.oecd-ilibrary.org/employment/in-it-together-why-less-inequality-benefits-all_9789264235120-en#page7. See also C. Codagnone et. al., Behavioural study on the effects of an Extension of Access to Social Protection for People in All Forms of Employment, European Commission, Luxembourg: Publication Office of the European Union, 2018, p. 19, ec.europa.eu/social/BlobServlet?docId=19161&langId=en.

However, the present analysis demonstrates that non-standard forms of employment and self-employment might present important challenges for the (non-) application of labour law rules, but that this does not necessarily lead to non-standard social security. It may be true that non-standard forms, along with new patterns of (short-term) mobility might break the traditional relation between (standard) work, (sufficient) income and (comprehensive) social security. But in many social security systems non-standard forms of employment and self-employment are considered as employment (related to whether someone is considered as a worker according to the labour law definition or as a self-employed person (covered by a general or by special schemes) for social security purposes). However, non-standard workers might not be covered by the full range of social security entitlements, such as unemployment or accidents at work benefits. In residence-based systems the type of work is of less importance.

Problems that may cause difficulties for social security coordination might be related to distinct classifications in various Member States or the fact that such classification in one Member State is not recognised in another Member State, and thresholds, e.g. related to certain income levels or working hours, for being covered by the social security system and subject to (traditional) coordination rules.

These problems are further reflected on when determining the applicable legislation, equal treatment, aggregation of relevant periods, and export of benefits also for non-standard workers.

An increasing number of people are combining different work activities. It is likely that the increasing number of combined work activities will result in a higher number of combined cross-border activities (small jobs in different Member States). If the qualification of these activities is done differently under the different legislations involved, the number of conflicts of EU competence rules is likely to grow. Moreover, new work forms applied in e.g. telework and platform work are becoming increasingly virtual (digital). However, the rules on applicable social security legislation start from a very physical concept of work, i.e. that the Member State where work is performed should be responsible for the workers' social security (*lex loci laboris* principle). In the case of platform work we can notice that work is not always performed in the same place (such as e.g. the place of residence of the platform worker) and that mobile applications allow platform workers to 'take the work with them' while moving around. If on the other hand platform or telework is organised in the territory of a given country or from a fixed location, it is not hard to imagine that, due to the intrinsic virtual and thus flexible character of the work, the involved parties may opt for systems that are cost beneficial (risk of status shopping and related social dumping).

Further problems concerning the applicable legislation might be the introduction in Member States' social security systems of a new 'in-between' category of workers, who are neither workers nor self-employed. Probably the most problematic tendency is the growing number of persons who are considered to be marginal workers, i.e. in relation to hours of work and/or income gained. The question raises whether marginal work performed in more than one Member State could in sum still be considered as marginal.

Special attention is paid in the present report to the equality principle. Problems related to social security coordination and possible solutions could be summed up into two types of problems, which are both analysed in the present report. The first type of problem refers to the problematic situation of non-standard workers who are considered employees or self-employed persons under their national legislation, but who are not covered for all social security risks. The other type of problems concerns non-standard workers who are not considered employees or self-employed persons in the Member State of work due to the existence of certain thresholds.

For the aggregation of relevant periods, e.g. for unemployment benefits, certain difficulties are detected when Member States apply distinct affiliation requirements for non-standard employed and self-employed workers. Persons could be qualified as an employee in one Member State, but as self-employed in another. Based on current social security

coordination rules, periods of non-standard work might in practice not be considered as relevant in the competent Member State and would be lost for the purpose of the accrual of unemployment benefits. For the calculation of long-term benefits (predominately pensions), the “less than one-year” rule might be obsolete in times of high mobility and increasing part-time activities, which in some Member States have to be recalculated to a full-time equivalent thus resulting in short insurance periods.

As a rule, when and if acquiring social security benefits, standard and non-standard workers would be subject to the export of benefits in a similar way. The latter might even enjoy some additional benefits, e.g. with respect to family benefits or necessary healthcare in another Member State. However, certain benefits are not subject to export rules at all, e.g. social assistance, special non-contributory cash benefits (SNCB), although non-standard workers might be dependent on such assistance more than standard workers. In order to enable equal freedom of movement also for non-standard employed and self-employed workers, the material scope of the social security coordination rules might have to be amended.

There are several possible solutions to the detected shortcomings of the traditional rules of social security coordination. These range from adjusting mere interpretation of already existing rules, possibly supported by the decisions of the Administrative Commission for the coordination of social security systems, to targeted modifications to the social security coordination Regulations. Some avenues for addressing the detected shortcomings are presented at the end of the present report.

1. INTRODUCTION

National labour markets are changing, and we are witnessing more flexible, short-term work, including an increased use of modern information technology (IT). This has an impact on social security systems which have not been fully adapted to such new forms of work. The consequences might be negative, especially for economically active people who may be denied access to full social security, which should be guaranteed to anyone, as a member of society.[4]

Negative consequences are even more profound for mobile workers, who might lose their right to social security just because they have moved to or worked in another Member State of the European Union (EU) or EFTA State (EEA State or Switzerland). This can hardly be acceptable, since also mobile workers have the right to social security.[5] The right to free movement, especially of workers, but also of all Union citizens, is one of the fundamental rights of the internal market, which celebrated its 50th anniversary in 2018.[6] Obstacles to such free movement have to be removed, also by coordinating or linking the individual national social security systems. Social security coordination has been one of the priorities of the EU for 60 years.[7]

In order to identify non-standard employment and self-employment for purposes of social security (coordination), standard employment must be defined, the existing knowledge in this field must be recognised and the scope of the present report needs to be determined.

1.1 'Standard' employment and social security

European social security systems stem from the post-war period and are predominately still tuned to the industrial society that had matured by then. Within this framework, social security rested on several assumptions.[8] One of them was the assumption of the typical industrial worker in a stable full-time, open-ended employment contract (with family responsibility),[9] which is still a standard in international and European social security law.[10] Hence, standard employment also led to standard social security.[11]

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[4] See Article 22 of the Universal Declaration of Human Rights and Article 9 of the International Covenant on Economic, Social and Cultural Rights. See also the Charter of Fundamental Rights of the EU, OJ C 326, 2012, 26.10.2012, especially Articles 34 and 35.

[5] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 19: The right to social security (Art. 9 of the Covenant)*, 4 February 2008, E/C.12/GC/19, available at http://www.refworld.org/docid/47b17b5b39c.html, June 2018, p. 11, 15.

[6] In 1968 Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community, OJ L 257, 19.10.1968 was passed.

[7] In1958 the first social security coordination Regulations were passed, i.e. Regulations (EEC) No 3/58 and 4/58.

[8] For these assumptions see also J. Berghman: Basic Concepts on Social Security in Europe, in *Social Security Policy and Economics*, KU Leuven, 1999-2000, p. 20.

[9] Benefits should be high enough to allow the worker and those who depend on his or her income to live on it; hence, the derived rights and family rates (together with family benefits).

[10] A standard beneficiary according to ILO Convention No 102 on minimum standards of social security (from 1952) is a man with a wife and two children (Article 67). A similar assumption is used in the European Code of Social Security (from 1964, Article 67). Only a bit more modern (equalising men and women, but still resting on the assumption of one breadwinner) is the revised European Code of Social Security (from 1990), according to which a beneficiary is a person with a spouse and two children (Schedule to Part XI). Also Regulation (EC) No 883/2004 is reinforcing such a model. According to its Article 1(i)2, if the applicable legislation of a Member State does not make a distinction between the members of the family and other persons to whom it is applicable, the spouse, minor children, and dependent children who have reached the age of majority shall be considered members of the family. See also Strban, Grega: Family benefits in the EU - is it still possible to coordinate them?, *Maastricht Journal of European and Comparative Law*, 2016, No 5, p. 782.

[11] See also Opinion of the European Economic and Social Committee on 'Sustainable social security and social protection systems in the digital era' (own-initiative opinion), OJ C 129, 11.4.2018, p. 7-10.

However, a single breadwinner can no longer be a model for shaping social security systems. Today's reality is characterised by a diversity of family forms: a model where both partners are fully employed (*two-actives model*) or a model of a family where one is fully employed and the other is employed part-time (*full-part-time actives model*).[12] It could also be that both earners are employed part-time (which might not yet be recognised as a model) or only one partner is active in a single parent household or a single person household.

The traditional full-time employment contract with security of full-time tenure has its merits, for both employer and employee, but it seems that it does not suit everyone. Amongst those who remain in paid work, some people may choose to be self-employed or to have an 'atypical' contract (especially part-time and/or maybe to a lesser extent fixed-term contract, short-time assignments, interim jobs etc.). In the meantime, self-employment seems to become non-standard in itself. Self-employed persons are no longer independent (shop owners), but are more and more showing the features of a worker, being dependent on one client or bogus (fictitiously) self-employed.[13]

However, not everyone may freely choose such 'flexible' employment. In the last two decades and even more so during the last economic crisis, more and more flexible working arrangements have emerged and are being utilised. They are supported by a massive technological transformation at global level. The distinguishing characteristic is the accelerating speed and scope of the IT platforms and systems that support modern society. This phenomenon has been called the fourth industrial revolution.[14] Moreover, it can lead to a situation where the relation between standard work and standard income, presenting a basis for social security benefits, is often broken. People may work for a short amount of time and earn a high income. The same is possible *vice versa*, i.e. people work long hours but do not earn enough for a decent living. Hence, social security can no longer be focused on income (from work) replacement benefits.

All negative consequences of non-standard and more flexible employment, which might lead to precarious work, i.e. unstable work with an unpredictable future for the worker, have to be removed to the largest possible extent. However, what could be non-standard in terms of the scope of labour law might not necessarily be non-standard in terms of social security. The more Member States treat non-standard forms as 'standard' employment and self-employment for social security purposes (especially in social insurance-based systems) the more persons covered enjoy decent social protection.

It seems that the only constant thing in societies is their constant change. Not only types of work, but also patterns of mobility have changed. According to a more traditional type of career path, mobile workers leave the country of origin and move abroad for a longer period of time, where they are covered by the social security system of the host State long enough to be entitled to the wide scope of social security benefits. Such career path has become more and more rare. The patterns of mobility of workers and Union citizens in general have become more diverse. They are characterised by more mobility and multiple shorter-term stays in another Member State. However, this should not lead to reduced

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[12] E. M. Hohnerlein, E. Blenk-Knocke, Einführung, in: Bundesministerium für Familie, Senioren, Frauen und Jugend, Forschungsreihe Band 8, Rollenleitbilder und -realitäten in Europa: Rechtliche, ökonomische und kulturelle Dimensionen, Nomos, Baden-Baden, 2008, p. 13-18.

[13] One out of five self-employed persons is self-employed because he or she cannot find a job as an employee (Recital 11 of the proposed Recommendation on access to social protection for workers and the self-employed, COM(2018)132 final).

[14] The first industrial revolution occurred when the power of water and steam were first harnessed. Then came electricity and the rise of mass production. Most recently, there have been tremendous strides in electronics and processing speed. This exponential growth has now ushered in the fourth industrial revolution, exemplified by new technology such as artificial intelligence and machine learning, biotechnology and the emerging Internet of Things. These new technologies are distinct, but they all depend on ubiquitous and increasingly fast connectivity. See http://spacenews.com/sponsored/industrial-revolution/, June 2018.

social protection, e.g. if a person is performing mini or casual jobs in more than one Member State. Each of the jobs might not (fully) cover such person, although he or she might be fully productive in the EU. Such situations must be avoided, also by adapted and adequate social security coordination rules.

Hence, the rule of law, a cornerstone of every Member State and the EU, requires from national and European legislatures to follow the changes in social relations with their normative action.[15] However, it seems that the new forms of (organising) work and mobility patterns have not been followed by adapted (national and EU) legal rules, at least, not until very recently.[16] As a consequence, mobile non-standard (employed or self-employed) workers may end up with incomplete or even non-existent social protection. Therefore, existing social security-related obstacles to free movement of non-standard workers should be eliminated and also their free movement should be promoted. Workers should not suffer disadvantages merely because they are employed or self-employed in a non-standard form.

1.2 Building on the existing knowledge of non-standard forms of employment and self-employment – the context

'Non-standard forms of employment' is an umbrella term for different employment arrangements that deviate from standard employment (which typically refers to full-time work under a permanent contract). In the comparative literature other umbrella terms can be found as well, such as 'atypical work',[17] 'flexible' work arrangements,[18] or 'alternative working arrangements'.[19] Non-standard forms of work may include: fixed-term contracts, part-time work (either temporary or permanent), on-demand work, employment relationships between more than two parties, intermittent contracts, casual work (i.e. zero-hour contracts, e.g. a shelf-stacker in a supermarket who only gets called when there is more work), temporary agency work (i.e. interim positions), and domestic, voucher-based and platform work (i.e. people working for digital platforms without having a fixed workplace), together with bogus self-employment and dependent self-employment.

Recently such forms of work have been more and more subject to research both from a labour[20] and social security law perspective.[21] Some forms of employment, such as fixed-

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[15] C.f. the decision of the Slovenian Constitutional Court, No U-I-69/03, SI:USRS:2005:U.I.69.03.

[16] Although, the debate on the necessary adaptions of labour and social security law in the EU is high on the agenda. It is reflected in the proclamation of the European Pillar of Social Rights and in particular in its follow-up in the Commission proposal on transparent and predictable working conditions and access to social protection. The Directive (EU) 2019/1152 on transparent and predictable working conditions in the European Union has been passed in June 2019. More under the next point of the present report.

[17] E.g. P. Schoukens, A. Barrio, The changing concept of work: When does typical work become atypical, *European Labour Law Journal*, 8 (2017) 4, p. 306-332.

[18] I. Grgurev, I. Vukorepa: Flexible and New Forms of Employment in Croatia and their Pension Entitlement Aspects, in: *Transnational, European, and National Labour Relations* (Eds. G. Sander, V. Tomljenovic, N. Bodiroga-Vukobrat), Springer 2018 (forthcoming).

[19] F. L. Katz, A. B. Krueger: The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015, http://scholar.harvard.edu/files/lkatz/files/katz_krueger_cws_v3.pdf, June 2018.

[20] Eurofound (2015) New Forms of Employment, Publishing Office of the European Union, Luxembourg; ILO (2016) Non-standard employment around the world: Understanding challenges, shaping prospects, International Labour Office – Geneva: ILO; A. Broughton, M. Green, C. Rickard (2016), Precarious Employment in Europe: Patterns, Trends and Policy Strategies. Brussels: European Parliament; P. Schoukens, A. Barrio, The changing concept of work: When does Typical work become atypical, *European Labour Law Journal*, 8 (2017) 4, p. 306-332; C. Williams, F. Lapeyre, Dependent self-employment: Trends, challenges and policy responses in the EU, ILO, 2017.

[21] E.g. S. Spasova et al, Access to social protection for people working on non-standard contracts and as self-employed in Europe - A study of national policies; ESPN synthesis report, Luxembourg: Publications Office of the European Union, 2017, http://ec.europa.eu/social/BlobServlet?docId=17683&langId=en; B. Suarez Corujo, The 'Gig' Economy and its Impact on Social Security: The Spanish example, *European Journal of Social Security*, 19 (2017) 4, pp. 293–312; I. Grgurev; I. Vukorepa: Flexible and New Forms of Employment in Croatia and their Pension Entitlement Aspects, in: *Transnational, European, and National Labour Relations* (Eds. G. Sander, V.

term contracts or agency work have already been omitted from some studies. It can furthermore be noticed that some forms of employment are classified distinctly (cf. the table below).

ILO (2016)	Eurofound (2015)
Temporary employment (fixed-term, including project-based or task-based, casual work)	-
Part-time	-
On-call work	Casual work • Intermittent work • On-call work (zero-hour contract)
Multi-party	Employee-sharing • Ad-hoc employee sharing (labour-pooling) • Strategic employee-sharing
Temporary employment (seasonal)	Voucher-based work
Disguised employment	-
Dependent self-employed	-
-	Job sharing
-	Interim management
-	ICT based mobile work
Casual work in 'on-demand' or 'gig economy'	Crowd employment
-	Portfolio Work
-	Collaborative employment (umbrella organisations, cooperatives etc)

Nevertheless, these trends have led to a certain instability and lack of predictability in some working relationships, especially for EU migrant workers in the most precarious situations.[22] More flexible work arrangements can also create uncertainty as to applicable rights or entitlements, including social security benefits.[23] What has become especially problematic is the lack of or insufficient social protection for such mobile workers.[24]

Therefore, the European Pillar of Social Rights recognises the right of workers to fair and equal treatment regarding working conditions and access to social protection, regardless

Tomljenovic, N. Bodiroga-Vukobrat), Springer, 2018 (forthcoming); B. De Micheli et al, Access to social protection for all forms of employment: Assessing the options for a possible EU initiative, Luxembourg: Publications Office of the European Union, 2018. Y. Jorens, J-P. Lhernould, Europe of the self-employed: Self-employed between economic freedom and social constraints, 2010.

[22] Non-standard employment is not spread evenly across the labour market. In general, women, young people and migrants are more likely to be found in non-standard arrangements compared to other population groups.

[23] From the mandate for the present report.

[24] For a comparative analysis see S. Spasova et al, Access to social protection for people working on non-standard contracts and as self-employed in Europe - A study of national policies; ESPN synthesis report, Luxembourg: Publications Office of the European Union, 2017, http://ec.europa.eu/social/BlobServlet?docId=17683&langId=en. See also ESPN Thematic country Reports on access to social protection for people working on non-standard contracts and as self-employed, national reports http://ec.europa.eu/social/keyDocuments.jsp?pager.offset=0&langId=en&mode=advancedSubmit&year=0&country=0&type=0&advSearchKey=ESPNsensw, June 2018

of the type and duration of the employment relationship,[25] and the right to adequate social protection for workers and, under comparable conditions, the self-employed.[26] In order to reflect the current trends and to follow-up on the European Pillar of Social Rights, the EU legislator, following a proposal by the European Commission (EC) adopted a new labour law Directive, i.e. the Directive on transparent and predictable working conditions in the EU[27]. It complements and modernises existing obligations under the current ''Written Statement Directive''[28] to inform each worker of his or her working conditions. The directive creates new minimum standards to ensure that all workers in the EU, including those on non-standard contracts, benefit from more predictability and clarity as regards their working conditions. It also contains extensive provisions aimed at improving the enforcement of the rights it provides. The Directive must be transposed into national law by 1 August 2022.

In the social security field, the EC proposed a Council Recommendation on access to social protection for workers and the self-employed.[29] It proposes that workers and self-employed persons can adhere to corresponding social security systems; can build up and claim adequate entitlements; can easily transfer social security entitlements from one job to the next; and have transparent information about their social security entitlements and obligations. This recommendation should be strongly supported, since it concerns the internal market. Moreover, social security coordination and (proper functioning of the) internal market are two sides of the same coin.

However, these instruments might not be enough to solve all difficulties faced by mobile non-standard workers. The new labour law Directive focuses on working conditions and the proposed social security Recommendation is directed towards national systems which should take non-standard forms of employment into consideration. Moreover, it is foreseen that national social protection can be provided not only through public (social security) schemes, but also through occupational and private schemes, in accordance with the fundamental principles of national social protection systems. Although the proposed Recommendation is citing Regulation (EC) No 883/2004, it should be noted that the latter applies only to social security schemes and hence excludes private schemes from its personal scope.[30]

Therefore, in the context of the EU social security coordination law, non-standard working relationships involving EU mobile citizens may result in legal uncertainty with respect to qualification of work. For instance, persons may not be considered as ''workers'' under the respective national legislation and could therefore be excluded from social security coverage. This may also affect current and future social security entitlements for the workers and the members of his or her family, such as family benefits, sickness, unemployment benefits, and future pension rights.

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[25] Principle 5 – Secure and adaptable employment.

[26] Principle 12 – Social protection.

[27] Directive (EU) 2019/1152 of 20 June 2019.

[28] Directive 91/533/EEC on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, OJ L 288, 18.10.1991, p. 32. This Directive will be repealed on 1 August 2020.

[29] Council Recommendation on access to social protection for workers and the self-employed, COM/2018/0132 final - 2018/059 (NLE) http://ec.europa.eu/social/BlobServlet?docId=19158&langId=en.

[30] Article 3 of Regulation (EC) 883/2004. Also occupational schemes are excluded, since Regulation (EC) No 883/2004 does not apply to schemes relating to the obligations of an employer (Article 3). With CJEU case law M. Fuchs, Sachlicher Geltungsbereich, in M. Fuchs (Hrsg.), *Europäisches Sozialrecht*, 7. Auflage, Nomos, 2018, p. 153.

1.3 Scope of the present report and methodology

The focus of the present report is on coordination of social security expectations (when a person is building-up social security periods) and entitlements (already acquired, vested rights) for persons in non-standard forms of employment and self-employment when they exercise the freedom of movement within the EU. Therefore, the purpose is to explore how these forms are classified in national social security law, since (non-) coverage in national law has direct impact on the personal scope of EU social security coordination rules. Moreover, it is of the essence for the freedom of cross-border movement of non-standard employees and self-employed persons how the basic principles of EU social security coordination law are applicable to them.

It should be noted that the development of non-standard forms of employment and self-employment may have influence also on other parts of national and EU law, which might be an inspiration also for social security coordination law. Since in many Member States women are more likely than men to work part-time (although the share of male part-time workers generally is also increasing)[31] and have lower earnings and shorter careers due to care responsibilities (for children, elderly and disabled family members), women might have limited access to certain (insurance and income-related) social security benefits, and the amounts of these benefits might be lower. The Court of Justice of the European Union (CJEU) is leaving a broad margin of discretion to the Member States. This is expressed, for example, by allowing the calculation of *pro rata temporis,* pensions, where appropriate, in the case of part-time employment.[32]

In Spain social security law had to be changed, as the CJEU and the Spanish Constitutional Court[33] argued that the Spanish legislation worked to the disadvantage of part-time workers.[34] It excluded these workers from any possibility of obtaining a retirement pension because of the method used to calculate the required contribution period (even with some corrections applied). It was an indisputable statistical fact that such legislation affected women far more than men, given that, in Spain, at least 80% of part-time workers were women. More recently, CJEU case-law, followed again by the Spanish Constitutional Court, has established that the calculation system of old-age pension of part-time workers was also indirectly discriminatory on the grounds of sex. Besides, the Constitutional Court considered that Spanish legislation was against the constitutional right to equal treatment as the law unjustifiably disadvantaged part-time workers in comparison to full-time workers.[35] In these last judgments the issue concerned mainly part-time workers with wages below the minimum contribution base whose situation was not enough protected or neutralised by the compensatory measures laid down in Spanish Social Security Law.

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[31] The CJEU has developed a methodology of comparison between full-time and part-time workers in order to assess the existence of an indirect discrimination. In case C-300/06, *Voß v Land Berlin*, EU:C:2007:757 (§41-42) the CJEU argued that '*the best approach to the comparison of statistics is to consider, on the one hand, the proportion of men in the workforce affected by the difference in treatment and, on the other, the proportion of women in the workforce who are so affected. If the statistics available indicate that, of the workforce, the percentage of part-time workers who are women is considerably higher than the percentage of part-time workers who are men, it will be necessary to hold that such a situation is evidence of apparent sex discrimination, unless the legislation at issue in the main proceedings is justified by objective factors wholly unrelated to any discrimination based on sex*.'

[32] Case C-4/02 *Schönheit*, EU:C:2003:583. See also G. Strban, Gender Differences in Social Protection, MISSOC Analysis 2012/2.

[33] See case *Tribunal Constitucional* 110/2015.

[34] Case C-385/11, *Elbal Moreno*, EU:C:2012:746.

[35] Case C-161/18 *Villar Laiz*, ECLI:EU:C:2019:382; and Judgment of Spanish Consitutional Court nº 91/2019. See also on this recent case-law D. Carrascosa Bermejo, Dolores. "Capítulo VIII. Trabajadores a tiempo parcial y su derecho a la igualdad de trato y a la no discriminación por razón de sexo» /in / Various authors. *Por una pensión de jubilación adecuada, segura y sostenible (tomo I)*. III Congreso Internacional y XVI Congreso Nacional de la Asociación Española de Salud y Seguridad Social. Comares. 2019. P. 507-519.

The exclusion of part-time workers from any possibility of obtaining a retirement pension was not considered a measure genuinely necessary to achieve the objective of protecting the contributory social security system, and no other measure less onerous for those workers is capable of achieving the same objective. Consequently, Article 4 of Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security precludes legislation of a Member State which requires a proportionally greater contribution period from part-time workers to qualify for a contributory retirement pension in an amount reduced in proportion to the part-time nature of their work.

Hence, recalculation of part-time work to its full-time equivalent might be against EU law, not only in the field of gender equality, but also in the field of social security law. For the latter field, this would mean that any kind of thresholds, e.g. in the form of minimum hours of work or minimum income gained, present an obstacle to access to social security and at the same time an obstacle to free movement within the EU.

Moreover, national social security systems should be modified in order to allow access to social security benefits (including pensions and unemployment benefits)[36] also to (vertical and horizontal) part-time workers.[37] For instance, Directive 41/2010/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity[38] defines self-employed workers as all persons pursuing a gainful activity for their account, under the conditions laid down by national law. Access to full social protection is essential also to all other groups of non-standard employed and self-employed persons.[39]

According to the mandate, the report should build on and complement the existing knowledge on this evolving area of law and policy. It should focus on the impacts that the development of forms of work have on EU social security coordination rules and their application. To this end, the report should consist of 1) an executive summary, 2) an introduction describing non-standard forms of work and the relevant EU framework with a link to social security coordination, 3) building on the existing overview of Member States' legislations as regards non-standard forms of work and self-employment in a social security context (e.g. conditions for qualification to social security benefits when it comes to non-standard forms of work, identification and assessment of challenges and shortcomings together with clear conclusions and proposed solutions to the problems identified at EU level), 4) an outline of ideas for possible future actions at EU level in the context of social security.

The first two points have already been dealt with above. The core of the report, i.e. points three and four, are the subject of an in-depth analysis below. In the present report, not only access to social security coordination is essential, but also determining the legislation applicable for non-standard employed and self-employed workers. Regulation (EC) No 883/2004 on the coordination of social security systems[40] builds on the presumption of standard employment with physical performance of work. Hence, the Member State where work is being performed (*lex loci laboris*) should be the Member State responsible for the workers' social security. However, the question is, whether such principle is still valid in the case of very flexible work forms -as e.g in tele- and platform work. Work has partially

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[36] For unemployment benefits see case C-98/15, *Espadas Recio*, EU:C:2017:833. Pérez del Prado, D. "Desempleo, discriminación y trabajo a tiempo parcial: las enseñanzas del caso Espadas Recio" /in/ J.M. Miranda Boto (Dir) et al, El Derecho del Trabajo español ante el Tribunal de Justicia: problemas y soluciones. Ed Cinca. 2018 p. 295-316.

[37] Part-time work is called 'vertical' when the person performing it concentrates his or her working hours on certain working days of the week, and 'horizontal' when the person performing it works on every working day of the week. *Ibid*, paragraph 23.

[38] Directive 41/2010/EU, OJ L 180, 15.7.2010.

[39] The CJEU applied similar arguments in access to occupational pension schemes. Case C-170/84, *Bilka*, EU:C:1986:204.

[40] Regulation (EC) No 883/2004, OJ L 166, 30.4.2004 with later amendments.

moved to IT platforms or is performed remotely (telework). It allows people to work swiftly from different places (in different countries) or to have the work organised in such a manner that it is located in countries with low-cost systems of social security. Moreover, social security systems are not necessarily based on social insurance, as was the case with the founding six Member States of the EU. Hence, the question is whether Regulation (EC) No 883/2004, which should provide a complete and uniform system of conflict rules, still fits modern reality. If it does not, we should explore where the problems lie and what solutions could be proposed.

Moreover, other social security coordination principles might assume increased importance or might no longer be fully valid for mobile non-standard workers. For instance, the equality principle might be increasingly relevant for non-standard mobile workers. This is especially the case when income from another Member State (where such income might not lead to social security) should be equalised or taken into account by the competent Member State.

Also the rules on totalisation of relevant periods which might be rather short (e.g. below one year) or mixed (e.g. in one Member State counted as self-employment and in another as employment or not counted at all) might present problems. Moreover, limited social security coverage might lead to problems related to the export of social security benefits, e.g. especially those of a (partial) social assistance nature (e.g. special non-contributory cash benefits – SNCBs). It might happen that a non-standard worker has to fall back on social assistance-based benefits, because no other (higher-ranking) benefits are available to him or her. Of course, also social security administrations might be affected, since they would have to report on (mini) work, as a rule not detected by their standard social security databases.

The present report not only detects problems of social security coordination for mobile non-standard workers, but also presents several solutions on how to overcome them.

The methodology applied to write the present report consisted of consulting the primary sources, i.e. national legislation and case law as detected by MoveS national experts in their original language and communicated to the authors of the present report by way of replying to a comprehensive questionnaire. The questionnaire included questions on labour law and social security law definitions of non-standard employment and self-employment, access of non-standard workers to social security, and related problems possibly encountered by national administrations when coordinating social security systems. Other primary sources, especially EU law, were consulted by the authors directly. Moreover, secondary sources were also used, e.g. relevant available literature on non-standard employment and self-employment and social security coordination rules.

2. PERSONAL SCOPE OF SOCIAL SECURITY COORDINATION - BUILDING UPON NATIONAL LEGISLATIONS

Contrary to its predecessors, Regulation (EC) No 883/2004 is not limited to workers or economically active persons only, but it has a broader personal scope.[41] It applies to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors.[42]

[41] On the evolution of the personal scope of social security coordination law in the EU, see R. Cornelissen, 50 Years of European Social Security Coordination, *EJSS*, 11 (2009), p. 18.

[42] Article 2 Regulation (EC) No 883/2004.

However, free movement of workers is still at the forefront of the free movement provisions,[43] and coordination of national social security systems should promote such free movement (or at least should not present an obstacle to such movement). The Regulation (EC) No 883/2004 does not provide a definition of 'worker' or 'self-employed person', which avoids complex annexes with specifications of these definitions.[44] However, definitions of distinct activities of employed and self-employed persons are still needed for the implementation of the coordination rules, e.g. on applicable legislation (more below). Therefore, a comparative overview of national legislations is required.

2.1 Workers

The concept of worker may be defined by national or EU law. It constitutes an autonomous concept specific to EU law, unless the EU instrument in question makes express reference to definitions under national law (whereby also attributing the EU meaning to such concept).[45]

Hence, there is a distinction in EU law between free movement definition of a worker, and a social security law definition.[46] On the one hand, according to settled CJEU case law, there is an autonomous EU concept of migrant worker linked to free movement[47] that follows a factual perspective, i.e. services must be performed for and under the direction of another person in exchange for remuneration.[48] Such definition explicitly excludes persons who do not perform activities considered genuine and effective, i.e. those who perform activities on such a small scale to be considered marginal and ancillary.[49]

On the other hand, Regulation (EC) No 883/2004 refers to national law when "activity as an employed person" has to be determined.[50] For instance, in case *Kits van Heijningen*,[51] the coordination Regulations could be applied (imposing the application of the *lex loci laboris* rule) despite the marginal activity performed by the worker (2 hours per week), which precluded the qualification as a migrant worker.[52] The definition is relevant, especially with respect to non-standard workers, since national legislatures are free to

[43] Article 45 TFEU and Regulation (EU) No 492/2011, repealing Regulation (EEC) No 1612/68, passed exactly 50 years ago. See also Citizens' Rights Directive 2004/38/EC (sometimes referred to as the Free Movement or Residence Directive) and Directive 2014/54/EU on facilitating free movement of workers.

[44] See Annex I of previous Regulation (EEC) No 1408/17. Y. Jorens, F. Van Overmeiren, General principles of Coordination Regulation 883/2004, *EJSS* (11) 1-2, p. 55.

[45] See case C-75/63, *Unger*, EU:C:1964:19.

[46] For instance, in the coordination Regulations there is a reference to insurance under national social security systems, disregarding nationality (Regulation (EU) No 1231/2010). However, according to the free movement perspective, the migrant worker concept is only applied to EU nationals. See also C-428/09, *Union syndicale Solidaires Isère*, EU:C:2010:612. For more on the concept of worker in labour law and social security law, see J.-P. Lhernould et al, The interrelation between social security coordination law and labour law, FreSsco Analytical Report 2017, p. 15.

[47] See e.g. cases C-66/85, *Lawrie-Blum*, EU:C:1986:284, and C-53/81, *Levin*, EU:C:1982:105.

[48] See also case C-94/07, *Raccanelli*, EU:C:2008:425.

[49] On the scope of these undefined terms (marginal and ancillary) in the Member States see C. O'Brien, E. Spaventa and J. De Coninck, The concept of worker under Article 45 TFEU and certain non-standard forms of employment, FreSsco Comparative Report 2015, EU 2016. This study concludes that "*the settled Union meaning of migrant work is in practice neither a 'settled' nor a 'Union' meaning"* as far as States have exercised, and stretched, their considerable discretion on the aforementioned undefined terms.

[50] Article 1(a) defines "activity as an employed person" as any activity or equivalent situation treated as such for the purposes of the social security legislation of the Member State in which such activity or equivalent situation exists.

[51] Case C-2/89, *Kits van Heijningen*, EU:C:1990:183.

[52] In the same vein see cases C-221/95, *Hervein*, EU:C:1997:47 and C-340/94, *De Jaeck*, EU:C:1997:43.

determine the requirements to be covered by social security law, of course respecting the EU Law at the same time.[53]

Reportedly, many Member States in their national law apply the labour law definition of a worker (or employee),[54] which is essentially based on subordination (dependency, but also on personal work and remuneration),[55] also for social security purposes (e.g. in BE,[56] BG,[57] CY,[58] CZ, DE,[59] DK,[60] EL, FI, FR,[61] HU, IT, LT, LU, LV, NL,[62] PL, PT, SI, UK).

[53] See cases C-266/78, *Brunori*, EU:C:1979:200; C-10/70, *Coonan*, EU:C:1980:112; or C-340/94, *De Jaeck*, EU:C:1997:43.

[54] E.g. the term 'worker' is not used in Irish labour or social security law. The relevant term is 'employed person' or 'employee'. Similar definition applies for the UK.

[55] E.g. in IS there is no employment if no wage is paid (e.g. voluntary work or trainee work).

[56] Although mostly unified, in BE separate rules still exist for various categories of workers, i.e. blue-collar workers and white-collar workers. Civil servants are subject to a specific scheme, as well as self-employed persons. Reportedly, each of these social security regimes has their own set of rules and obligations.

[57] Reportedly, in Bulgaria legal theory has developed the notion of worker, based on his or her dependency and the same notion is adopted by the social security legislation.

[58] According to the Czech Social Insurance Law of 2010 (*Ο Περί Κοινωνικών Ασφαλίσεων Νόμος του* 2010*,* N. 59(I)/2010*),* which is the instrument governing the implementation of social insurance (see Article 3), an 'employed person' (*μισθωτός*) is defined as "*the person who exercises any insurable activity (ασφαλιστέα απασχόληση) determined in Part I of the First Schedule*" (Article 2). Amongst others, the following is considered to be an insurable activity: employment of a person in the Czech Republic in virtue of a contract of employment or apprenticeship or under such circumstances from which a relation between an employer and an employee may be deduced, including employment in the Service of the Republic.

[59] The legal definitions of labour law and social security law in Germany may sound different to a certain extent, but the Federal Labour Court and the Federal Social Court have been eager to cover the same type of persons. Reportedly, this means that in practice there are no real differences between labour law and social security law. There is a formal procedure in social insurance law to determine the status of a person, i.e. if s/he is employed or self-employed. The pension insurance system decides – applicable for all branches of social insurance – upon application of employer (business) and worker if a situation is an employment relationship.

[60] From a practical point of view, there are no significant differences in the meaning of the term 'employee' within the scope of labour law and social security law (and tax law) in Denmark. Yet, there might nevertheless be some nuances as the term might still depend on the aim of the given legislation or on the collective agreement in question. In respect of the latter, the Danish labour market being highly regulated through collective agreements, the terms and conditions for workers differ from sector to sector or agreement to agreement. The Social Security Acts might have their own definition of who is a worker and is thereby covered by its provisions. Nearly all employees would be able to meet the moderate requirements for receiving sick pay, maternity leave and compensation for injuries at work and occupational diseases. Unemployment benefits are on the other hand reserved to those who have contributed to a fund.

[61] In French labour law, the concept of worker (employee) is defined only by case law. According to settled case law of the French *Cour de cassation*, a worker is a person who "*performs services for and under the direction of another person in return for which he receives remuneration*" (e.g. *Cour de cassation*, social chamber, 19 December 2000, case 98-40.572). In social security law (Article L311-2 of the Social Security Code), a similar definition is provided as to the one applicable in labour law.

[62] Traditionally it is pointed out that the Dutch Social Security Appeals Tribunal (*CRvB*) uses a different basis for establishing whether or not there is an employment relationship than does the civil court (where a labour law definition of a worker can be found). Whereas the civil court attaches more importance to the parties' intentions, the *CRvB* focuses on the factual relationship existing between the parties. However, the significance of this difference in approach between the two courts should not be overemphasised. Recent years have seen a trend towards more convergence.

Most of the disputes heard by the Dutch Social Security Appeals Tribunal (*CRvB*) regarding the existence of a private employment relationship ultimately relate to the question of whether or not there is a factual relationship of subordination. Disputes about this issue often arise during short-term, incidental employment relationships. Whether or not the facts in the case in question imply the existence of what is called a significant relationship of subordination is relevant. It should be established that the employee is required to follow the employer's instructions. Generally speaking, in cases where the work forms a significant part of the business operations, even if it is of an incidental nature, it can be established that there is a relationship of subordination.

In some Member States an independent definition of worker or employee is applied in social security law (e.g. in CH,[63] IS,[64] LI, SK, MT as insurable employment, RO as insured persons, SE for work-based insurance benefits).

Some Member States have no definition under labour law, but they have a definition under social security law. For instance, in Austria neither the term employer (*Arbeitgeber*) nor the term employee (*Arbeitnehmer*) are legally defined under civil or labour law. According to Section 1152 of the *Allgemeines bürgerliches Gesetzbuch* (*ABGB*) also non-paid employment contracts are (theoretically) considered legal. The *Oberster Gerichtshof* (*OGH*, the Austrian Supreme Court) interprets Section 1151 in such a way that the core element of the employment contract is the obligation to provide services in personal dependency. However, in social security law the notion of 'employee' (*Dienstnehmer*) is defined as a person who performs work in personal and economical dependency in return for remuneration, including also persons where the attributes of personal and economical dependency outweigh the attributes of self-employment.[65]

In many Member States workers (or employees) are subject to all social security schemes, regardless of income, wage, working hours or other criteria. However, in some Member States they are only subject to social security under specific conditions, e.g. if their monthly remuneration exceeds a certain amount (e.g. in AT € 438.05 for the year 2018, the so-called *Geringfügigkeitsgrenze*; if the monthly remuneration is less the person is only subject to accident at work insurance, but can voluntarily apply for health care and pension insurance; in DE in the so-called 'mini-jobs', where people earn less than € 450 per month and are treated as workers under labour law but are not covered by social security).

In some Member States and for some schemes, working hours might be of relevance (e.g. in FI for unemployment and health insurance schemes;[66] in MT work should last for more than 8 hours per week).

Interestingly, in Spain Article 7.5 of the social security law still envisages that the Government[67] may, at the request of the interested parties (employees), exclude from the scope of application of a social security scheme those persons whose work, taking into account their working hours or their remuneration, can be considered marginal and not constituting a fundamental means to make a living. This discretionary option has very stringent requirements and has only been used once more than forty years ago for situations that are nowadays overcome.[68]

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[63] In Switzerland social security, the relevant definition is based on the legislation concerning the public old-age and survivor insurance (Article 5 *Bundesgesetz über die Alters- und Hinterlassenenversicherung - AHVG*, SR 831.10); the position of a worker is qualified by being a relation of subordination towards the employer and working for a certain time period as well as for a certain wage without assuming a proper economical risk. There is no threshold, neither in labour nor in social security law. Both definitions are independent from each other.

[64] In Iceland there is no formal definition of the term employee besides "individuals who work". They are defined in tax law No 45/1987 and social security law No 100/2007.

[65] See Section 4 (2) *Allgemeines Sozialversicherungsgesetz* (ASVG, the Austrian General Social Insurance Act).

[66] According to Chapter 5, section 4 of the Finnish Unemployment Allowances Act (1290/2002) the working time condition is met when a person's working time in one or more work is at least 18 hours per calendar week and the condition for earnings is met when a person's salary is in line with the collective agreement, and if there is no collective agreement, the full-time salary must be at least € 1,189 per month (in 2018). Pursuant to Chapter 1, section 4 of the Health Insurance Act (1224/2004) "*employee means a person who is employed in an employment relationship or in a public-service employment relationship or other service relationship, and to persons referred to in section 7 of the Employees Pensions Act (395/2006) whose working hours and earnings fulfil the requirements specified in Chapter 5 section 4 of the Unemployment Security Act (1290/2002)*".

[67] At the proposal of the Ministry of Employment and Social Security, after hearing the most representative trade unions and professional associations involved.

[68] Reportedly, in 1972 this exception was applied to workers of breeding promotion that performed marginal work in Madrid Hippodrome, i.e. they only worked some Sundays during horse races. However, these workers were still protected against accidents at work and would therefore still be considered workers. In fact they all worked on a regular basis for other companies (Decree 1382/1972). The Employment Ministry has denied any further

In some Member States social security can cover as workers or employees other categories outside the labour relationship and labour law definition of a worker, e.g. in the Czech Republic civil servants, members of the cooperative, voluntary care workers, paid foster parents, working prisoners, managers of a limited liability company; in Hungary social insurance status is based on the legal relationship (e.g. employment, cooperative, mandate). In Latvia the following persons are among others insured as employees: persons who have entered into a work-performance contract, a sharecropping contract or a carriage contract[69] and have not registered an economic activity; persons who are engaged in carriage of passengers by a taxi for a reward. Similarly, under Polish social security law persons under an agency contract, a commission contract (contracts of mandate) or another contract for services are covered as employees.

However, some Member States do not shape their social security systems around the notions of worker and economic activity. For instance, in Estonia there is no special definition of 'worker' in the context of social security law. Social security coverage is not connected with the status of a 'worker'. It depends on residence (living or being in EE) and/or payment of social tax/unemployment insurance premiums and criteria laid down in laws regulating certain branches of social security law. Many other Member States have distinct residence-based schemes. In Sweden for instance, for residence-based benefits the Social Security Code (*Socialförsäkringsbalk*, 2010:110) states that a person who comes to Sweden and expects to stay for longer than one year will be resident if there are no overriding reasons for assuming that this is not the case. Following a policy shift at the administrative level, the social security administration no longer investigates whether a person is lawfully residing in Sweden under Directive 2004/38/EC when taking the decision on whether the person fulfils the residence conditions under Swedish law. This means that if Regulation (EC) No 883/2004 refers to Sweden as the competent State, this person will always be seen as resident under social security law and thus be eligible to apply for residence-based benefits.

It could be argued that the best social security coverage and all social security coordination rules apply to persons who are defined as or assimilated with full-time workers under national law. If persons are excluded due to work being considered as marginal or merely ancillary, they are also not subject to social security coordination as workers. They might be covered under another heading, e.g. non-actives (if at all covered by the national social security system). This would mean that other coordination rules would apply to them and not those for workers. Alternatively, if the national social security system covers all residents, problems of classification of economic activity might not be as pertinent.

2.2 Self-employed persons

With numerous active employment measures many unemployed persons were encouraged to start their own business or exercise their profession independently in some kind of self-employment activity. According to a survey carried out in 10 countries (DE, ES, FR, IT, NL,

claims for exceptions, even those regarding this same type of workers. Their last negative decision was ruled legal by the Supreme Court considering that it is a discretionary power of the Ministry, and nowadays all part-time workers have to contribute to social security (Judgement of the Supreme Court Administrative 30-5-01, Rec 628/99, EDJ 2001/47633). In Spain some authors consider that the application of the Social Security Law, Article 7.5 (persons whose work, taking into account their working hours or their remuneration, can be considered marginal, and not constituting a fundamental means to make a living could be excluded) could be contrary to equal treatment and be considered indirect sex discrimination. They have proposed repeal of this Article. J. Cabeza Pereiro, F. Lousada Arochena, El trabajo a tiempo parcial: algunos comentarios valorativos, *Revista Derecho de las Relaciones Laborales,* No 4 April 2018, p. 431.

[69] Provided for in Part IV, Chapter 15 of the Latvian Civil Law.

PL, PT, RO, SE, SK)[70], one out of five self-employed persons is self-employed because s/he cannot find a job as an employee.[71]

In EU law, self-employed persons were added to workers in Article 48 of the Treaty on the Functioning of the European Union (TFEU; in the chapter on free movement of workers)[72] by the Lisbon Treaty, now covering "employed and self-employed migrant workers". Such provision is indeed a bit odd, since self-employed persons are usually distinguished from workers. For self-employed persons other provisions of the TFEU might apply, predominately the freedom of establishment and the freedom to provide services in the internal market. However, this shows that workers and self-employed persons might no longer be clearly distinct categories, especially in social security coordination law.

Also Regulation (EC) No 883/2004 defines "activity as a self-employed person" in a similar way as activity of an employed person.[73] Of course, also in this case the national definition and social security coverage, partially influenced by EU law,[74] are decisive for the social security coordination regime.

In some Member States neither labour law nor social security law provides for a legal definition of self-employed person (e.g. in AT, BG, DK, EE, EL). The notion might be defined in a negative way, i.e. every person who does not perform services on the basis of an employment contract or is not a civil servant is considered to be self-employed (e.g. in AT, BE,[75] CH, CY, DE, FI,[76] IE, LI, PT).

In some Member States there is a (positive) definition, established in special legislation. For instance, in Spain there is a specific Self-employed Workers' Statute (*Ley 20/2007 del Estatuto del trabajo autónomo*). Self-employed persons are comprehensively defined as "*natural persons who perform a full time or part time economic or professional activity for a lucrative purpose regularly, personally, directly, on their own account and outside the scope of the direction and organization of another person, irrespective of whether they have employees or not*." In few Member States the definition can be found in labour law, e.g. in Malta Article 2 of the Employment and Industrial Relations Act (EIRA; Chapter 452 of the Laws of Malta) holds that "*self-employed persons are all persons pursuing a gainful activity on their own account*".[77]

The definition might also be enshrined in social security law (e.g. in CZ,[78] HU, IS, LT, LI in old-age and survivor insurance, LU, LV, NO, SE in the Unemployment Insurance Act, SI,

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[70] This result is derived from a survey carried by LSEEES and Open Evidence, commissioned by Directorate General for Employment, Social Affairs and Inclusion of the European Commission to prepare the initiative on Access to social protection - "Behavioural Study on the Effects of an Extension of the Access to Social Protection for People in All Forms of Employment", EU 2018, http://ec.europa.eu/social/main.jsp?catId=1312&langId=en.

[71] Recital 12 of the Recommendation on access to social protection for workers and the self-employed, (2019/C 387/1). More on self-employed persons in S. Spasova et al, Access to social protection for people working on non-standard contracts and as self-employed in Europe, A study of national policies, ESPN, 2017, p. 12, 20.

[72] See Title IV, Chapter 1 TFEU.

[73] Art 1(b) Regulation (EC) No 883/2004.

[74] See Article 2 Directive 41/2010/EU.

[75] In Belgium self-employed workers/persons are a rest category. Everyone who is not a blue-collar worker, white-collar worker or civil servant is considered to be a self-employed worker.

[76] Under section 3 of the Finnish Self-Employed Persons' Pensions Act (1272/2006) a self-employed person means a person who is working for earnings but not in a contractual employment relationship, public service employment relationship or other employment relationship.

[77] More specifically, in Malta a distinction is made between a self-employed person (a person whose earnings are derived from sources other than a gainful activity, e.g. dividends, rental income etc) and a self-occupied person (a person whose earnings are indeed derived from a gainful activity).

[78] The only definition in the Czech social security law can be found in Act No 48/1997 Coll., on health insurance, Section 5(b).

SK) or a (limited) definition might be provided by commercial law,[79] civil law[80] or tax law (e.g. HR, IS, LT, NO, RO, SE).

Nevertheless, in social security law, self-employed persons are as a rule covered by the general (e.g. in AT, BG, CH, CY, CZ, FI, HR, IE, LI, LT, LV, PL, SE, SI, SK, UK) or special social security scheme (e.g. in BE, DE in special schemes for farmers and artists, ES, FI for pensions, IT in several professional schemes or by a specific branch of the public scheme, i.e. *gestione separate*, PT). Distinct laws may apply to them, as well as to farmers (considered as a special group of self-employed persons in some Member States), artists and independent professions like barristers or medical practitioners. In some Member States (e.g. IE, SI) there is a tendency to harmonise the benefits of employed and self-employed persons (e.g. invalidity benefits since December 2017 in IE).

Only for certain schemes might they remain without coverage, e.g. for the risk of unemployment (e.g. in AT, where it is voluntary for self-employed persons, BE, CH, DE, EE,[81] LI, NO) or accidents at work and occupational diseases (e.g. in BG, CH, LI, RO since 2018[82]) or complementary pension schemes (e.g. in CH, DK - not covered by the labour market pension scheme, LI) or for most of them (e.g. in NL).[83] In some Member States certain groups of self-employed persons do not have access to sickness benefit (e.g. EL, IT or they do not have access to contributory sickness benefit, like in IE).[84] In certain Member States self-employed persons are not covered if they do not reach a certain annual income (e.g. in FI € 7,656.26; IE € 5,000; MT € 910). However, in some other Member States the income threshold has been abolished (e.g. in SI for pension and invalidity insurance of the self-employed since 2013). Self-employed persons might have options for opting-in or opting-out from certain schemes.[85]

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[79] E.g. in Germany § 84 *Handelsgesetzbuch* (Commercial Code), which reads "*A person is self-employed if he/she is able to organize his/her occupation basically independent and can determine his/her working hours*". In Dutch civil law, self-employed persons work on the basis of either 1) a *overeenkomst tot aanneming van werk*, i.e. producing work of a physical nature such as in construction (Civil Code, Article 7:750) or 2) *overeenkomst van opdracht*, i.e. commissioned work (Civil Code, Article 7:400), which is the dominant form.

[80] E.g. Article 2222 of the Italian Civil Code defines a self-employed person as a person who provides a labour activity or a service personally and autonomously, in return for remuneration.

[81] In Estonia the self-employed have the right to tax-financed residence-based unemployment benefits (which are much lower that the unemployment insurance benefits) and labour market services.

[82] Romanian Law 346/2002 on accidents at work and occupational diseases modified by Government Emergency Ordinance No 103/2017 for the modification and completion of some normative acts in the field of social insurance, which entered into force on 1 January 2018, excluded self-employed persons from the possibility to be insured for accidents at work and occupational diseases (before they were covered).

[83] In the Netherlands, self-employed persons may access employee insurance schemes on a voluntary basis. They are covered by residence-based schemes.

[84] See Table A.3 - Lack of formal social security coverage for the self-employed, in the Impact Assessment, Accompanying the document Proposal for a Council recommendation, on access to social protection for workers and the self-employed, Strasbourg, 13.3.2018, SWD(2018) 70 final, p. 78, http://ec.europa.eu/social/main.jsp?catId=1312&langId=en.

[85] See Table A.5: Voluntary social security schemes for the self-employed, in the Impact Assessment, Accompanying the document Proposal for a Council recommendation, on access to social protection for workers and the self-employed, Strasbourg, 13.3.2018, SWD(2018) 70 final, p. 79, http://ec.europa.eu/social/main.jsp?catId=1312&langId=en.

In some Member States courts of law decide in border cases between workers and self-employed persons and consequently their social security coverage (e.g. in CY,[86] DE, where employment seems to be favoured, DK,[87] FI,[88] IT,[89] NL,[90] NO,[91] PL, SE,[92] SI,[93] UK).

For instance, under Irish common law 'employee' is used to describe a person employed under a "contract of service" as opposed to a "contract for services", which denotes a self-employed person. It has fallen to the courts to distinguish between those employed under a contract of service, i.e. employed persons/employees and those under a contract for services, i.e. self-employed persons. [94] The status of employment is determined by taking into account a number of factors pertaining to the relationship between the parties.[95]

2.3 (Non-)standard employment

Persons in non-standard employment are best covered if they are treated as workers or employees for social security. When they move, they are also protected by a wide range of social security coordination rules.

Persons performing non-standard forms of work can be classified as employees or self-employed persons as well. The classification is dependent upon whether the person concerned performs his or her work in a status of personal dependency. If this is the case the person concerned must be considered as an employee, if not, as a self-employed person.

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[86] Supreme Court of Cyprus case 793/2002 of 30 October 2003 dealt with an appeal on a taxation matter, where the need for the interpretation of employed and self-employed persons had arisen (Νίκος Στεφάνου κ. Κυπριακής Δημοκρατίας μέσω Υπουργού Οικονομικών και Εφόρου Φόρου Εισοδήματος).

[87] In Denmark a case-by-case assessment is made before courts and quasi-judicial bodies, which draw the line between employed and self-employed.

[88] In Finland the Supreme Court precedent KKO:2017:37 dealt with the question concerning a framework agreement on on-demand work. The Supreme Administrative Court precedent KHO:2016:35 dealt with, inter alia, the question whether changing an employment contract to a commission agreement was artificial.

[89] The *Foodora* case (*Tribunale di Torino*, 11 April 2018, not yet published) concerning the qualification of Foodora's bikers. The Tribunal concluded that, all elements considered, the bikers must be considered as self-employed persons and, thus, they are not covered by the rules governing the termination of the contract in the case of subordinated or quasi-subordinated workers.

[90] In the Netherlands, post deliverers were required to conclude contracts for service as solo self-employed workers with the company. Many courts ruled this to be a bogus construction, but on appeal the Arnhem-Leeuwarden court of law (NL:GHARL:2016:6621) and the Amsterdam court of law (NL:GHAMS:2016:2686) confirmed that the solo self-employed workers did indeed deliver post for PostNL as solo self-employed workers. According to the courts the parties' intention as well as the actual performance of the work indicated that the parties wanted to conclude a contract for services.

[91] E.g. in Norway the court considered foster parents as freelancers and persons selling Tupperware products at home as self-employed (decisive was that no employer instructs the Tupperware salespersons on how and when they perform the work; the only condition is "where", i.e. sales parties at home).

[92] E.g. the decisions by the Swedish Supreme Administrative Court in case 6679-13, about whether a person was to be considered a self-employed person under the Unemployment Insurance Act (1997:238), or case 34-13, about whether a person in non-standard forms of employment qualified for unemployment benefits.

[93] E.g. in case U-I-358/04 (SI:USRS:2006:U.I.358.04), the Slovenian Constitutional Court recognised a partial pension also to self-employed persons (although they have no working time and cannot reduce it). In case U-I-40/09, SI:USRS:2010:U.I.40.09 (also U-I-287-10, SI:USRS:2011:U.I.287.10), invalidity benefits were recognised to self-employed persons (and farmers).

[94] A relationship can change from employment to self-employment as the working relationship between the parties changes. (*Barry and Ors v Minister for Agriculture & Food*. [2015] IESC 63, paragraph 9).

[95] This multifactorial test was formulated by J. Mc Kenna in the seminal case *Ready mix Concrete (South East) Ltd. v Minister of pensions and National Insurance* [1968 I All ER 433). Several tests have been elaborated to determine self-employment, i.e. the Enterprise Test, Provision of Equipment, Opportunity to make a Profit, risk of loss.

In all Member States part-time and fixed-term work is legally regulated, also as a result of EU law.[96] In some Member States the pay threshold (mentioned above) might be even more demanding for part-time than full-time workers in order to be considered as workers and thus subject as such to social security coordination rules. In some Member States the preferred form of dependent work, sometimes even set as a rule, is employment for an indefinite period of time (e.g. in CZ, SI).

In temporary agency work, the agency is usually considered as the employer and hence the agency workers might have social security coverage as employees (e.g. in BG, EE, FI, FR, IE, IT, LV, MT, NL, NO, PT, SI).

In some Member States domestic workers are defined as employees providing domestic work for an employer, irrespective of whether they belong to his or her household. In this case they are covered by the general social security scheme for employees or the scheme for self-employed persons (e.g. in AT, BE, BG, DE, ES, special scheme within general scheme, FR, LI, LV, NO, PT, UK). However, in some Member States there is no definition of domestic work (e.g. in CZ, EE) or it is performed according to civil law rules (e.g. in IT).

In many Member States there is no definition of casual work, including on-demand work and intermittent contracts (e.g. AT, BG, CZ, where casual work is treated as employment if the income exceeds a certain threshold, ES, FI,[97] FR no on-demand work, but intermittent contracts are covered as employment, HR, IE, where zero-hour contracts should be eliminated,[98] LU, MT, SI, SK). Some forms might even be recognised as illegal by the courts of law (e.g. on-demand work in AT,[99] zero-hour contracts are not allowed by the Labour Inspectorate in EE).

Other Member States do recognise casual work (e.g. IT,[100] PT intermittent work). For instance, in Denmark most persons performing casual work or on-demand work are considered employees and most often subject to legislation or collective agreementsas agency workers. In some Member States (e.g. EL) a presumption is made that for on-demand work, telework and domestic work a contract of dependent labour is concluded and therefore all provisions for employees apply.[101]

In some Member States voucher-based work is legally regulated for certain services, e.g. cleaning or babysitting, whereby the duration of work and level of payment might be limited. Voucher workers may be considered as employees (e.g. in AT covered by accident insurance, BE, FR, IT, SI, covered by pension and health insurances). However, in many Member States voucher work is not regulated and hence not covered by social security law, possibly leaving persons performing it without social protection (e.g. in BG, CZ, EE, ES, FI, LV, MT, NL, NO, PT, SK).

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[96] Council Directive 97/81/EC concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, OJ L 14, 20.1.1998. Definitions of part-time worker and comparable full-time worker are enshrined in its Clause 3. Council Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ L 175, 10.7.1999.

[97] See also Finnish Supreme Court precedent KKO:2017:37, concerning the framework agreement on on-demand work.

[98] There is a legislative proposal currently pending before the Irish Parliament which will amend Section 18 of The Organisation of Working time Act 1997, with the result that zero-hour contracts will be virtually eliminated in Ireland.

[99] According to the Austrian Supreme Court on-demand work is not in line with section 19c *Arbeitszeitgesetz* (*AZG*; Labour Time Act) and is therefore illegal (cf. OGH 19.12.2007, 9 Ob A 118/07d). Section 19c *AZG* requires that the employer and employee agree upon a defined volume of working time.

[100] First regulated by the so-called "Biagi Law" (Legislative Decree 276/2003), which has been modified by Articles 13-18 of Legislative Decree 81/2015.

[101] In Greece, Article 1 (1) of Law 2639/1998 states: "*Employer and employee agreement is presumed to conceal a subordinate employment contract if the work is provided in person exclusively or principally to the same employer for 9 months consecutive months*".

Teleworkers (using IT and) providing services in personal dependency are in many Member States subject to social security law for employees (e.g. home workers in BE, BG, CH, EE, ES, FI, FR, HR, HU, IE, IT, LV, MT, NL, NO, PL, PT, RO, SK). An exception may be that the rules regarding the employer's workplace, like accident-at-work insurance, are not applicable (in AT). In some Member States telework is not regulated (e.g. in CZ).

Crowd workers may be considered as employees or (dependent or independent) self-employed persons, taking into account all the circumstances of a specific case (e.g. in AT, EE, where they can also establish a private limited company and have access to social protection as board members, FI, FR,[102] IT, LV, NO, PT). Although in recent months the number of cases across Europe (re)qualifying[103] platform workers as employees for the application of their social insurance, has risen, it is hard to tell under which status these workers eventually fall. Depending on the concrete organization of their work, they will be considered either as employed or as (dependent) self-employed. However, what is clear though is that a multitude of these workers are formally hired as self-employed yet work in reality as wage-earner (bogus self-employed).[104] In some Member States platform work as such is not regulated yet it does not offer social security coverage due to the ample use of minimum (insurance) thresholds (e.g. in BG, CZ, EE, ES, HR, LU, MT, NL, SI, SK).

Nevertheless, progress in regulating the collaborative economy[105] may be noticed, regulating not only online capital platforms (e.g. when renting an apartment), but also online work platforms (when providing services). For instance, Denmark has recently witnessed the establishment of platforms linking workers to users, among others for cleaning services and waiters. One union has very recently succeeded in making a platform provider sign a collective agreement. As a result, the service providers are considered as workers and thus granted rights in respect of sick pay, pension and unemployment benefits. Another example could be France, where the case law seems to be yet

[102] Platform workers may be self-employed in France, or are offered (on a voluntary basis) access to the statutory scheme against accidents at work or occupational diseases (Article L743-1 of the Social Security Code). In this case contributions must be reimbursed by the platform.

[103] Some recent examples in Spain: Tribunal Superior de Justicia de Asturias, decision of 25 July 2019, ECLI: ES:TSJAS:2019:1607; Juzgado de lo Social de Madrid No. 19, decision of 22 July 2019, ECLI: ES:JSO:2019:2952; Juzgado de lo Social de Barcelona No. 31, decision of 11 June 2019, ECLI: ES:JSO:2019:2253; Juzgado de lo Social de Valencia No. 5, decision of 10 June 2019, ECLI: ES:JSO:2019:2892; Juzgado de lo Social de Gijon No. 1, decision of 20 February 2019, ECLI: ES:JSO:2019:280; Juzgado de lo Social de Madrid No. 33, decision of 11 February 2019, ECLI: ES:JSO:2019:279; Juzgado de lo Social de Valencia No. 6, decision of 1 June 2018, ECLI: ES:JSO:2018:1482; Juzgado de lo Social de Barcelona No. 11, decision of 29 May 2018, ECLI: ES:JSO:2018:2390 In France: Cour d'appel de Paris, pôle 6, ch. 2, decision of 10 January 2019, ECLI:FR:CCASS:2019:C2020; Cour de cassation, decision of 28 November 2018, ECLI:FR:CCASS:2018:SO01737 and in the in the Netherlands: Rechtbank Amsterdam, 15 June 2019, ECLI:NL:RBAMS:2019:198.

[104] See e.g. recently for an example of massive requalification to wage-earnership: https://elpais.com/economia/2019/07/28/actualidad/1564322291_541124.html, November 2019.

[105] See also the Communication for the Commission, A European agenda for the collaborative economy, COM(2016)356 final.

unsettled.[106] Platform economy and social protection of workers in such economy is gaining momentum also in political debates.[107]

In some Member States volunteers are not considered employees, but may still be covered by certain social security schemes (e.g. in AT by accident insurance[108]). In some Member States student work might be considered employment if earnings exceed a certain level (e.g. in SK € 200 per month). In some Member States students are not covered for any of the social risks covered by Regulation (EC) No 883/2004. For instance, in Belgium this is explained by the fact that for students, special social security contributions are due which are well below the normal social security contributions. In some Member States student (and trainee) work is not regulated (e.g. in CZ) or they are covered only for accidents at work and occupational diseases (e.g. in FR, HR, SI, in PT student work offers limited social security, similarly in SI). In Hungary students' cooperatives seem to be widespread in university cities.

In some Member States apprentices are covered by the social security system as workers (e.g. in CH). For trainees, there might be a distinction between the trainees who need to fulfil their traineeship in order to obtain their diploma and special groups (e.g. the traineeships of doctors in BE, where the doctor in training is covered by all risks of the Regulation). In some Member States courts of law have had to classify the work in question (e.g. in EL[109]).[110]

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[106] For instance, the Paris Court of Appeal ruled in a case of 13 December 2017 that taxi drivers' contracts with their platform ("Le Cab") had to be reclassified as employment contracts. The Court considered several factors: 1) the platform had a power of sanction, namely the right to breach the contract with drivers in case of an insufficient number of connections, 2) the drivers were in an exclusive relationship with the platform with their own clients. The conclusion of the Court of Appeal was that the "*exclusive purpose of the organisation of the activity is to artificially create an appearance of cooperation between a platform and a self-employed worker, where, in reality, there is actually an employment relationship*". Conversely, some courts have ruled that the crowd workers' claims of reclassification were unjustified. The Paris Court of Appeal, in a case of 7 January 2016, held that crowd workers could manage their working time independently and could freely decide to exercise their activity for a company from the same sector. A Paris Court of Appeal case of 12 October 2017 and two cases of the Paris Court of Appeal of 9 November 2017 also rejected the platform workers' claim. Also in the UK Pimlico case, where the company maintained that the plumber was a self-employed contractor while the Supreme Court held that the Pimlico plumber was a worker, considering, among other reasons, that he was under a minimal obligation to devote to the work provided to him by the company and that he was required to wear uniforms, drive company logo vans an adhere to service standards set by the company which included terms such as not using the toilet in customer's office (*Pimlico Plumbers Ltd and anor v Smith* (2018) UKSC 29). Besides the "*Employment Appeal Tribunal (EAT) has held that a bicycle courier with Addison Lee was a worker when logged on to the app, and, consequently could bring a claim for holiday pay*" (*Addison Lee Ltd v Gascoigne* (2018) IKEAT 0289_17_1105. See regarding this information, the updated Memo Employment 2018. Indicator FL Memo. London. 2018. In the same vein, for the first time a Spanish social court considered a Deliveroo rider an employee, considering dependency and control by the enterprise (*Juzgado de lo Social Valencia* No 6 1-6-18, autos 633/2017). However, it has been also considered that a Glovo rider was an actual self-employed (Juzgado de lo Social Madrid Nº 39, 18-9-18, autos 1353/2017 http://www.poderjudicial.es/search/openDocument/fa259a801e2ea6e1/20180926). More recently Social High Court Judgments have started to be delivered confirming law courts rulings, in one case a Glovo rider was considered an employee (TSJ Asturias 25-7-19, Rec 1143/19; ECLI:ES:TSJAS:2019:1607); in another case this type of workers was considered a TRADE (TSJ Madrid 19-9-19, Rec 195/19 ECLI: ES:TSJM:2019:6611). Analyzing both sentences can be consulted Emilio Palomo Balda "Calificación de la relación jurídica de los repartidores de plataformas digitales a la luz de la reciente y divergente doctrina de suplicación" Actum Social nº 152/2019. Lefebvre.

[107] C. Forde et al.: The Social Protection of Workers in the Platform Economy, European Parliament, Study for the EMPL Committee, EU 2017, http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2017)614184.

[108] The Austrian Supreme Court defines volunteers as persons whose interest in the apprenticeship outweighs the interest of the employer in the workforce. Therefore, the attributes of personal dependency are typically less distinct; and if any exist (like pre-setting of labour time or workplace) they result from the framework of the apprenticeship.

[109] E.g. the Greek judgment of 2 October 2017, Council of State, 17/2018, paragraph 7 (social insurance, persons subject to IKA insurance; when the apprentice employee is in a dependent employment relationship).

[110] See also Table A.2 - Lack of formal coverage to social security for people in non-standard employment and Table A.4: Voluntary social security schemes for people in non-standard employment, in the Impact Assessment,

2.4 (Non-)standard self-employment

Similarly, as with standard and non-standard employment, non-standard forms of self-employment have emerged next to standard self-employment. A standard self-employed person could be described as a person who performs a voluntary (personally and economically) independent (commercial or professional) activity, carries the business risk and performs work alone or with other employees. Non-standard forms of self-employment could be defined as involuntary, dependent, new and bogus self-employment. More than one of these characteristics could be merged within one person, e.g. a person could be involuntarily dependently self-employed (due to so-called outsourcing of certain activities). Moreover, also self-employed persons might perform work on a part-time basis.

An involuntarily self-employed person is a person who would like to be employed, but who cannot find (standard) employment. Nevertheless, this person is showing all the features of a self-employed person and should be treated as such also under social security coordination rules.

An economically dependent self-employed person is mainly dependent on one client and could, for social security purposes, be treated as an employed person (e.g. in AT,[111] DE, designated as 'small self-employed',[112] EL, if providing services to one or two employers, both physically and legally, ES, so-called TRADEs,[113] HR,[114] PT,[115] SI). In this case the rules on social security contributions being shared between the self-employed person and his or her 'employer', and the benefits' scope for employees might become applicable. In some Member States (e.g. AT), also self-employed persons who are economically dependent can be considered temporary workers.[116]

Accompanying the document Proposal for a Council recommendation, on access to social protection for workers and the self-employed, Strasbourg, 13.3.2018, SWD(2018) 70 final, p. 76 and79, http://ec.europa.eu/social/main.jsp?catId=1312&langId=en.

On gaps in social protection coverage for non-standard workers see also Employment and Social Developments in Europe, Annual Review 2018, European Commission 2018, p. 135, http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8110&furtherPubs=yes.

For changed employment biographies and social protection in Europe see also E-M. Hohnerlein et al., 2018.

[111] In Austria the *ASVG* (General Social Insurance Code) applies also to *freie Dienstnehmer*, i.e. a sort of freelancers who perform work on the basis of a *freier Dienstvertrag* in personal independency, but economic dependency, according to Section 4(4) *ASVG*. The latter group of self-employed persons is also called *arbeitnehmerähnliche freie Dienstnehmer* (employee-like freelancers).

[112] "Small self-employed" in Germany are persons who in connection with their self-employment activity usually do not employ an employee mandatorily insured and permanently and basically work only for one customer.

[113] In Spain an economically dependent self-employed worker (TRADE *trabajador autónomo económicamente dependiente*) is defined as an independent professional (self-employed worker) who pursues an economic or professional activity for profit, habitually, personally, directly and predominantly for one individual or legal entity, known as the client. The 75% (or more) of TRADE's total income as a self-employed person must come from this client. This client must recognise them formally as TRADEs. Only from that moment will s/he be covered by certain special legal guarantees that are not envisaged for the rest of the self-employed workers (in labour law they have paid annual leave, they receive a kind of redundancy compensation at the end of the contract, and in social security law they are directly insured for sickness benefits in kind, accidents at work and occupational diseases; they have specific conditions for being entitled to a cessation of autonomous activity benefit). "*In 2017 (2nd quarter), there were 10,530 TRADEs registered […] it accounts for a very low proportion of total self-employed without employees (0.7%)".* E. Gonzalez Gago, Case study-gaps in access to social protection for economically dependent self -employed in Spain, in various authors, Access to social protection for workers and the self-employed: six case studies, European Commission, March 2018, p 7, available at http://ec.europa.eu/social/main.jsp?catId=738&langId=es&pubId=8070, July 2018.

[114] There is no legal definition in Croatia, but media reports reveal in practice e.g. certain journalists as dependent self-employed persons.

[115] In Portugal dependent self-employed persons are those performing at least 80% of work for one contractor.

[116] The Austrian legislature provides a specific legal framework for *Arbeitskräfteüberlassung* (temporary work). *Arbeitskräfteüberlassung* is characterised according to Section 3 *Arbeitskräfteüberlassungsgesetz* (*AÜG*; Temporary Work Act) by the provision of workforce by an employer to third parties irrespective of whether the work is provided in personal and/or economical dependency.

The question is how dependent self-employed persons should be treated for social security coordination purposes. According to national law, they might still be considered as self-employed. Special rules might apply to them (assimilating them to employees) or not (e.g. in PT they are still covered by a special scheme for the self-employed).

Classification in national law bears consequences also for social security coordination law. For instance, if a dependent self-employed person is classified as an employee in Member State A (where s/he performs a significant activity of more than 25% and also resides) and as an employee in Member State B, Member State A will be competent for social security. However, if, under the same conditions, Member State A classifies such person as self-employed, Member State B may be competent due to priority of Member State of employment over Member State of self-employment.[117]

In some Member States the so-called 'new self-employed' are emerging (e.g. in AT those who are performing non-licensed trade).[118]

Bogus self-employed persons conclude a contract for self-employed persons (i.e. a freelance contract or contract of services), although they provide their services in personal dependency. Some Member States consider this hidden employment. And if all the elements of the (factual) employment relationship are established by a court of law, they are treated as employees (e.g. in AT,[119] ES,[120] FI, FR, HR, NL, PL, PT, SI, usually established by settled case law) under an indefinite contract (e.g. in MT). This also means that the employer has to pay social security contributions and potentially administrative fines for not registering a worker (e.g. in ES). It is usually for less economic burden and to avoid labour law rules that a self-employment activity is preferred over employment. If a Member State would still consider such person as self-employed, the same problems of social security coordination might be raised as for dependent self-employed persons, mentioned above.[121]

Possible solutions:

- do not take into account thresholds concerning income or number of working hours for mobile non-standard employed and self-employed workers, e.g. working simultaneously in two or more Member States;
- cover as many groups of non-standard employed and self-employed workers as possible as workers for the purpose of social security coordination;
- in cases of doubt, self-employed persons should be included in the personal scope of workers for the purpose of social security coordination;

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[117] Article 13(3) Regulation (EC) No 883/2004.

[118] In Austria some fields of services and trade are not covered by the *Gewerbeordnung*. Self-employed persons who carry out such an unlicensed trade are nevertheless subject to the *GSVG* (Trade Social Insurance Act), if they perform their services on the basis of a *Werkvertrag* (service contract) or on the basis of a *freier Dienstvertrag* (freelance contract), but in economic independency according to section 2 (1) 8 *GSVG*. This group is also called *Neue Selbständige* (new self-employed persons).

[119] See Section 539a *ASVG* (Austrian General Insurance Code).

[120] In Spain, the qualification of non-standard forms of employment can be an issue mainly for bogus self-employment. The following case law merits mention: Supreme Court 8-2-18 Rec. 3389/2015; Supreme Court 24-1-18 Rec. 3394/2015. Regarding TRADEs, it has been underlined that "*normative changes are needed to make compulsory the recognition of the TRADE nature of the dependent self-employed, since today is not a fraud that a dependent self-employed is not registered as TRADE*". Besides, "*the labour inspectorate has no competences to act it finds such a case*". E. Gonzalez Gago, Case study-gaps in access to social protection for economically dependent self -employed in Spain, p. 21.

[121] On gaps in social protection coverage for the self-employed see also Employment and Social Developments in Europe, Annual Review 2018, European Commission 2018, p. 135, http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8110&furtherPubs=yes.

- alternatively, the importance of the activity as employed or self-employed person should be abandoned; instead the individual and his or her situation (also income) as a whole should be looked at;

- consider mobile non-standard employed and self-employed workers as residents in residence-based schemes;

- promote information sharing between the Member States, especially on classification, in particular on income and working hours, and on multiple activities, e.g. a person being simultaneously self-employed, working part-time for one or more IT platforms.

3. CHALLENGES AND SHORTCOMINGS

The abovementioned forms of non-standard employment and self-employment may present certain challenges for the social security coordination of mobile workers within the EU and show their potential shortcomings. This may concern not only the personal scope of social security coordination, but also its principles and rules. Therefore, they are analysed in relation to the basic principles of social security coordination, and examples are given of certain more specific coordination rules, e.g. examples related to healthcare, pensions, unemployment and family benefits.

The analysed principles are a unity of applicable legislation, equality of treatment (also of income), protection of the rights in the course of acquisition (with totalisation of periods) and already acquired rights (with export of benefits). It goes without saying that the diversity on the labour markets more than ever requires excellent administrative cooperation, supported by modern IT. Details of the latter would be outside of the scope of the present report, and other projects are already dealing with this.[122]

3.1 Applicable legislation

3.1.1. Different qualification of professional activities and defining location of work

Whether a person works or not, is considered as an employee or self-employed person, is still important for the application of the coordination rules, and in particular for Title II of Regulation (EC) No 883/2004. The applicable legislation rules differ across working and non-working groups and across employees, self-employed persons and civil servants. Consequently, Title II is not neutral regarding the eventual qualification.

One of the major challenges in an ever-diverging landscape of national qualifications is to know in the end which of the authorities involved is to make the eventual qualification of the professional activity. The *Zinnecker* case[123] provided us with some key elements to answer this question. Each of the Member States (involved) on whose territory professional activities are performed is competent to determine the nature of these activities. Taking into account the outcome of the legal qualification of each of these activities, the competent Member State will eventually be assigned by the rules of Title II. An artist performing activities both in Member State A and Member State B may be qualified differently across the countries (self-employed in A; wage earner in B). The outcome will be that Member State B will become competent as a result of the application of Article 13(3) of Regulation (EC) No 883/2004. Only in the case of posting under Article 12 of Regulation (EC) No

[122] On Electronic Exchange of Social Security Information (EESSI) see e.g. http://ec.europa.eu/social/main.jsp?catId=869, July 2018.

[123] Case C-121/92, *Staatssecretaris van Financiën v A. Zinnecke*r, EU:C:1993:840.

883/2004, the country from where the worker is posted remains to have the qualification competency over the activities.[124]

As such the *Zinnecker* case follows a healthy logic: each of the Member States remains competent to determine the legal qualification of the professional activities. Yet the question still remains as to the extent to which the competent Member State will have to respect the legal qualification made by the other relevant Member State. Concretely, if an artist is self-employed for his or her activities performed on the territory of Member State A, will Member State B as a competent country have to give due respect to this legal qualification when applying its own legislation? Can it requalify the legal qualification made by Member State A? In the Administrative Commission, the consensus drew on the more practical approach- to have the eventual competent Member State deciding on the qualification of all activities involved.[125] So it may be that our artist, considered to be self-employed in Member State A, may be requalified for that activity (performed on the territory of Member State A) as a wage earner activity, when the legislation of Member State B considers such activities for the application of social security as wage earner activities. However, notwithstanding this common position, it was interesting to notice that in some country reports another interpretation was followed, which forces the competent Member State to respect the qualification given by the authorities on whose territory activities were performed. It appears that there is still no final consensus on how far the legal effect of national qualifications should reach.

The eventual qualification given by a Member State to a professional activity can impact the outcome of the applicable law rules. Whether one is considered to be an employee or a self-employed person, can lead to a different applicable legislation in the end. This may become problematic when similar professional activities turn out to be qualified differently across national social security systems. It is important to remember that employee activities prevail over self-employed activities (Article 13(3) of Regulation (EC) No 883/2004) and civil servant activities in turn prevail over employee and self-employed activities (Article 13(4) of Regulation (EC) No 883/2004). It is therefore important to determine which Member State is competent and what the exact legal effect of the eventual qualification of the professional activity is or will be.

Due to the increased flexibilisation of work, the qualification of work activities may face some new challenges. An increasing number of people are combining different work activities. It is likely that the -rise of combined work will result in a higher number of combined cross-border activities (small jobs in different countries). Apart from the qualification issues discussed above (employee or self-employed), flexibilisation of labour may generate another problem: from which moment does an activity become professional and which Member State decides upon this? Because of its minor or irregular nature, some countries may decide that the activity is not to be considered as work, whereas other countries may consider it as a genuine work activity. Which of the involved countries is then to decide whether the person is working or not? The answer to this question is important for the purpose of determining the application of Title II of the coordination Regulation, as the competency rules differ between working and non-working persons. Later on we will take up this issue in a more extensive way.

In a similar manner, the discussion on the geographical aspect of work will increase. New work forms applied in e.g. telework and platform work are becoming more virtual. Title II of Regulation (EC) No 883/2004 on the other hand starts from a very physical concept of work: the *lex loci laboris* principle is based on the underlying default situation that the physical place where the person is working is to determine in the end the Member State competent for social security. The CJEU in the *Partena*-case[126] stated that it is clear from

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[124] Case C-390/98, *Banks,* EU:C:2001:456.

[125] Conclusion discussion Administrative Commission, 21 December 2017. See for a comment S. Nerinckx, “Social security status and simultaneous activities: some clarifications”, *Expat News*, 2018, N° 2 (February), 1-3.

[126] Case C-137/11, *Partena vzw v Les Tartes de Chaumont-Gistoux SA*, EU:C:2012:593.

the broad logic of the coordination regulation that "*the criterion of the 'location' of the employed or self-employed activity of the person concerned is the main criterion for designating a single legislation which is applicable […]*" (obs. 49). And after having considered that unlike the concepts of employed and self-employed activity, "*the concept of 'location' of an activity must be considered to be a matter, […] for EU law and, consequently for interpretation by the Court*" (obs. 53), it defined the concept, "*in accordance with the primary meaning of the word used, as referring to the place where, in practical terms, the person concerned carries out the actions connected with that activity*" (obs. 57).

Can this now still be upheld as a basic assumption in a world where people organise their work in an increasingly virtual manner? Virtual work as often applied in telework or platform work makes long-distance work relations possible, where employers and employees are well-connected online but remain geographically very distant from each other. Moreover, due to IT-tools it is now much easier to carry out (parts of work) at home. In line with the above mentioned *Partena*-case, is this kind of homework to be taken into account as well for the indication of the location where someone is carrying out physically his/her work? Taking into account the growing facilities granted to workers to carry out the work (partially) at distance/from home, it is very likely that Regulation (EC) No 883/2004 will face a growing number of cases where the geographical relation between employees, self-employed persons and employers on the one hand, and the Member States on other hand will become more virtual and hence will further complicate the applicable law rules in their application.[127] Persons however do no longer necessarily organise their work in a given place. Although solid data are still missing on the concrete work organisation of platform workers, we gradually get to know more concrete cases indicating the flexible work organisation induced by crowd work. Where e.g. is the person working in the following situation: a person has (formal) residence in Spain, where s/he however stays only up to three months a year (on average) as s/he still studies in the Netherlands? On the basis of a unique account app s/he is available for 30 hours a week for a delivery platform; in reality s/he works for approximately 20 hours a week in Spain[128] (when s/he is staying at his/her residential address), the Netherlands (where s/he studies) and/or Belgium (where s/he often stays over at her/his friends' place). Apart from this off-line platform activities, the person generates income also from jobs done on an on-line platform (carried out from her/his mobile device, wherever s/he stays). One could argue that the person works simultaneously in different countries (article 13 Regulation (EC) No 883/2004), yet the question remains how to define the criteria of income/working hours to determine the substantial kind of the activities (see below).

A first indication on how the applicable law rules may have to deal with homework is to be found in the recent case *X v Staatssecretaris van Financiën*[129]. The person concerned worked for an employer located in the Netherlands; as he occasionally worked from home, the question was whether these occasional activities (performed at distance; from home) were to be taken into account for designating the applicable law (see also below point 3.1.3. on occasional and marginal work). Interesting were the considerations of Advocate-General *Szpunar* where he stated that "*it is one of the advantages – or, for some people, a curse – of the digital economy, that an employee may be asked or allowed to accomplish a part of his office tasks while away from the office, by working from home. The particularity of such working arrangement lies in the fact that it potentially undermines the*

[127] For some examples, see the conference Employment, Social Policy, Health and Consumer Affairs Council (EPSCO), *The future of work, making it E-easy*, Tallinn, Estonian Presidency, 13-14 September 2017.

[128] The work in his country of residence is for the purposes of social security not considered to be of a 'regular' kind as, at least the declared income in Spain, does not generate enough income (i.e. below minimum wage).

[129] Case C-570/15, *X v Staatssecretaris van Financiën*, EU:C:2017 :674.

concept of a particular place of employment, as a relevant factor for determining the Member State which has the closest link to the employment relationship (obs. 36.-37)"[130].

In line with the opinion of the Advocate-General, the CJEU decided that the activities (i.e. the ones performed at home) were of a too marginal nature to be taken into account for the concerned applicable law rules of the Regulation (EC) 883/2004. In a situation such as that at issue, "*where working from home is not explicitly reflected in contractual documents, does not constitute a structural pattern and amounts to a relatively small percentage of the overall working time, it is inappropriate to rely on that circumstance for the purposes of applying the designation rules"*.[131] But what if conversely, the activities are not marginal (in kind), are followed in a structured manner and/or are agreed upon with the employer? Should they then be considered for the application of Title II? And may the organisation of structural home/distance activities not become subject to fraudulent constructions, deliberately circumventing the underlying ratio of the current designation rules?

Regulation (EC) 883/2004 will have to address in its designation rules the specific nature of virtual work underlying many tele- and platform work activities. Due to their virtual character these activities are difficult to be confined to the territory of a given country. One can even argue that due to their intrinsic mobile character, the workplace of these workers is by definition 'transnational', and hence of a 'European' kind. This could call for an own coordination approach where such workers are taken care of in an own European social insurance addressing (very mobile European) workers, such as the kind of the 13th state[132] or alternatively the clicking system granting the possibility for very mobile workers to click their social insurance for once and forever into a given national system at the beginning of their career.[133]

It is evident that in the absence of new designation rules in the current coordination rules, the CJEU will have the eventual task to decide how this circumstance of working partially at home (or at distance from the regular working place) through IT-facilities, will have to be taken into account for indicating the competent social security state (Advocate General *Szpunar*, obs. 38).

3.1.2 The growing in-between categories of workers: employees or self-employed for the application of Title II?

A considerable amount of Member States have introduced in their social security law a new 'in-between' category of workers, i.e. in-between the traditional groups of employees and self-employed persons. Traditionally, at least when we disregard the group of civil servants, in social security law workers are either employees –in a subordinated relation with their principal – or self-employed persons – professionally active but not subordinated to their principal. Due to a growing flexibilisation of work, new groups of (non-standard) workers emerged taking on characteristics of both: while some workers may not be in a subordinated relation vis-à-vis their principal, their economic dependency on their sole co-contractor calls for a more extensive protection than the one provided for the traditional self-employed persons. The best known example of these in-between groups are the

[130] Opinion Advocate Genereral in Szpunar, case C-570/15, X v Staatssecretaris van Financiën, EU:C:2017 :182.

[131] Ibidem.

[132] D. Pieters, S. Vansteenkiste, *The Thirteenth State. Towards a European Community Social Insurance Scheme for intra-Communatarian workers*, Leuven, 1993. Although this European scheme was originally conceived as a general (opt-in) insurance for (new) migrant workers, the authors underlined as well its potentiality as special European scheme for very highly mobile workers.

[133] As suggested for the group of mobile researchers by J. Berghman and P. Schoukens (eds), *The Social Security of Mobile Researchers,* Leuven, Acco, 2011, 144p.

economically dependent self-employed persons, as introduced in quite a number of countries.[134]

For the application of the coordination rules these in-between categories create some challenges when it comes to the qualification of their labour status. For workers, Regulation (EC) No 883/2004 only makes a distinction between activities as an employed person and self-employment activities (again disregarding the group of civil servants). How should their activity be qualified and who is to assess the nature of their work? Article 1 of Regulation (EC) No 883/2004 refers for the definition to the national legislation of the Member States where the activities are being performed and follow in that respect the *Zinnecker* principle: it is up to the national system where the activities are performed to assess the nature of the activities. Yet this brings us no further when this system, besides employees and self-employed persons, includes a third – in-between – category of professionally active persons. How should this 'third' group be considered for the application of Title II Regulation (EC) 883/2004, as the applicable law rules only refer to two categories of professional activities: activities undertaken as employees or activities undertaken as self-employed persons?

Some guidance in answering the above question can be found in the case *Van Roosmalen*,[135] which dealt with non-standard work *avant la lettre.* One of the questions before the Court was whether a priest could be considered as a worker for the application of Regulation (EEC) No 1408/71, and if so, whether he was self-employed or an employee. It is interesting to note that the national law in question, was not clear in answering these questions either. As Mr Van Roosmalen was covered under the (Dutch) system first and foremost as a resident, it did not matter so much for the application whether he was a worker or not.

The CJEU reminded that for the application of the coordination Regulations, the concepts "employee" and "self-employed persons", are first and foremost to be determined by the national legislation (involved). However, as the national legislation involved was not itself clear on the matter, the CJEU ruled that in such a situation, one could fall back upon the European definitions as made available by the coordination Regulations themselves (in particular the national definitions at that time provided by the Member State in Annex 1 of Regulation (EEC) No 1408/71) or, in absence of these, as applied by the articles shaping the free movement of workers (Article 45 TFEU or the implementing Regulation). The Court held that the priest could be considered as a self-employed person within the meaning of Article 1(a), Annex I of Regulation (EEC) No 1408/71, as the concept of self-employment defined by the Netherlands under this annex applied to "*persons who are pursuing and have pursued otherwise than under a contract of employment in a trade or profession, an occupation in respect of which they receive income permitting them to meet all or some of their needs, even if that income is supplied by third parties benefiting from the services of a missionary priest*" (i.e. the members of the parish). Two crucial elements were present: the fact that the performed activities were of a "professional nature" (intention to earn a livelihood) and that there was "no subordinated relationship" (no employee).

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[134] For instance, in Norway the category of freelancer is considered to have a status "in-between" employee and self-employed person. Similarly, in Italy and Spain the economic dependent self-employed person is a third category in-between the employee and traditional self-employed person. In Spain these are called "TRADE" (*trabajador autonomo economicamente dependiente*) workers, who receive 75% of their total income from one client from social security law point of view, they are considered self-employed workers with some peculiarities (as mentioned above). In Italy reference is made to "co.co.co." or "coordinated and continuing collaboration", applying to activities carried out on an exclusively personal basis and under the organisational guidance of the contractor. See also the discussion under chapter 2, above. On applicable law in teleworking see below point 3.2.1 scenario b.

[135] Case C-300/84, *Van Roosmalen,* EU:C:1986:402.

Of similar relevance are the (even older) cases *Unger*,[136] *De Cicco*,[137] *Janssen*,[138] *Brack*[139] and *Walsh*,[140] as they date from a period where the coordination Regulations applied to employees. Most of the cases dealt with self-employed persons who for the application of the European coordination rules could be considered as "atypical employees" and hence could be covered by the personal scope. Although they were self-employed under national law, the CJEU considered them to be "atypical employees" for the application of the coordination Regulations as they were formally covered by the national system for employees. Interesting in this respect was the opinion of the CJEU when it defined the concept of employee: essential in its view was not so much the nature of the work (in subordination or not) but more the formal belonging to the social security system of the employee. The fact that the self-employed persons concerned were all formally covered by the social security system of employees was enough to have them considered as employees for the application of social security coordination rules, even though for some of them specific rules were in place in the national systems concerned.

By analogy, one could apply a similar reasoning to the new non-standard workers who are neither employees, nor self-employed in their country. In case the national system is not clear on the definition of their status, the concept should be defined by European standards. This means that we first and foremost look to which of the professional systems they formally belong (employees or self-employed); if the formal categorisation does not give a proper answer either, it is upon the more general European definitions as made available in the free movement rules to find out whether they can be considered as an employee or as a self-employed person.

Possible solutions:

- In order to address the problems related to the delineation of the work concept and in order to be able to continue to differentiate between the working groups (distinction employees and self-employed persons, but also the growing group of in-between work categories) it would be good to examine whether for example the 'work neutral' criteria, such as residence, could be used as a final parameter for determining the applicable legislation. This would mean that the amount of cases where the legal consequence depends on the nature of the professional activity might be diminished. Alternatively, it can be investigated whether the rules on applicable legislation could be more neutrally formulated as to the kind of professional activity that is performed (e.g. in article 13 Regulation (EC) 883/2004 where one professional activity prevails over the other for determining the competent state in case of simultaneous activities).

- For the time being and as long as this 'work-neutral' principle is not fully introduced, it should be envisaged to invite Member States to define in more detail the concepts of employees and self-employed persons in an annex in order to ascertain that all professionally active persons who make use of the coordination Regulations are appropriately qualified as employees, self-employed persons and civil servants for the application of Regulation (EC) No 883/2004. In particular, Member States which provide for 'in-between' categories of workers in their social security system should indicate to which professional group these categories belong for the application of the coordination Regulation. Likewise, Member States having minimum thresholds in place that are used to define and/or give access to national professional systems should unveil the criteria that are used (e.g. income or hours of work) to determine

[136] Case C-75/63, *Unger*, EU:C:1964:19.

[137] Case C-19/68, *De Cicco*, EU:C:1968:56.

[138] Case C-23/71, *Janssen*, EU:C:1971:101.

[139] Case C-17/76, *Brack*, EU:C:1976:130.

[140] Case C-143/79, *Walsh*, EU:C:1980:134.

for the application of the coordination Regulations whether a person works (or not) and under which professional system. In case uncertainty remains on the qualification of the professional group, the CJEU eventually will have to fall back upon the European definition in place for the free movement of workers.

- Due to their virtual character telework and platform work are difficult to be confined to the territory of a given country and hence they do not fit in very well with the current *lex loci laboris* approach. One can even argue that due to their intrinsic mobile character, the workplace of these workers is by definition 'transnational', and hence of a 'European' kind. This could call for an own coordination approach where such workers are taken care of in an own European social insurance addressing (very mobile European) workers, such as the kind of the 13th state or alternatively the clicking system granting the possibility for very mobile workers to click their social insurance for once and forever into a given national system at the beginning of their career.

3.1.3 The growing group of 'marginal' and 'occasional' work: consequences for Title II

Probably the most problematic tendency discerned is the growing group of persons who are considered to be marginal workers. Marginal or occasional work refers to the small and/or irregular character of work in relation to hours and/or income gained. This group often struggles to reach the income[141] and/or working hour[142] thresholds introduced by many Member States. They have introduced thresholds which exempt/exclude the group from social insurance protection, limit the social insurance protection from certain key risks (sometimes guaranteed through universal schemes), and/or grant only a voluntary insurance to them. In some other Member States, marginal work receives a special treatment with regard to financing: it exempts the workers from paying contributions and/or gives them a preferential treatment in paying (lower) contributions.[143] In some countries both are applied together: special treatment contributions and reduction in social coverage. Marginal workers are largely (but not exclusively) to be found in the rapidly growing platform economy, being characterised by its 'gigs' or small-sized tasks made

[141] In the Czech Republic e.g. the minimum income threshold (monthly) to be affiliated to the social security system is 10,000 CZK (€ 400), in Germany it is € 450, in Austria € 438.05. In Latvia the monthly amount is € 70 for seasonal workers (in the agricultural sector) and € 50 for self-employed persons. In Malta there is a minimum annual threshold set for self-employed people, which amounts to € 910; in the UK in the case of self-employed, persons with earnings from self-employment of less than £ 6,205 per year are exempted from compulsory joining social insurance schemes (however, they may opt to join on a voluntary basis). Some countries introduced a minimum weekly amount. In Ireland it is € 38 a week, in Cyprus € 174.38 a week and in the UK this amount is equal to £ 116 a week for employees (while those between £ 116 and £ 162 are insured but exempted from payment of contribution); a person will not be eligible for national insurance credits if earnings are below). Some countries however apply a reduced coverage in case the income falls below the set level; for wage-earners often coverage is still foreseen for the scheme of accidents at work although the threshold is not reached. In Spain, according to the Supreme Court, self-employed persons are obliged to be insured if they earn more than the minimum wage. This threshold is considered a relevant element when determining the regular (habitual) character of the self-employment activity (Supreme Court Judgments 29-10-97, Rec 406/1997, ES:TS:1997:6441, 29-4-02, 30-4-02 and 20-3-07, Rec 5006/2007, ES:TS:2007:2483). However, it is possible to be voluntarily insured when the income is below this threshold. For two years, self-employed persons could pay a flat-rate contribution of only € 50 per month.

[142] Without being exhaustive, some examples: in Switzerland, Liechtenstein and Malta, in order to fall under the social security schemes, the threshold of a minimum of 8 hours of work activities a week is applied; in Norway there is a *de facto* threshold of 1 hour per week, whereas in Luxembourg the period of work should not be less than 3 months of continued (employed and self-employed) work in the last year.

[143] In Latvia e.g. self-employed persons with a low income (less than € 50 a month) enjoy a reduced contribution rate for the pension insurance scheme: 5% instead of 24.5% (general rate). In France the scheme of micro-entrepreneurs allows the self-employed person to pay his or her contribution in a proportional manner from the declared income (and not starting from the minimum income threshold, i.e. for traders and craftsmen € 15,893 for sick pay and € 4,569 for the pension scheme).

available through the intermediary platforms to an indefinite group of persons potentially interested to do the micro task.[144]

Interestingly in some countries the minimum income threshold is determining the definition of a worker.[145] If the person does not earn the minimum amount required, s/he is not to be considered as professionally active. Instead of the regular pattern of the performed activities or the duration of the working time, the level of income becomes the determining factor for deciding whether a person works or not. The underlying idea is that at the end of the day the person has to generate enough financial means to earn his or her livelihood. Whether this is done on the basis of activities over a regular time span or on a flexible ad hoc basis is not so crucial, especially when the activities are performed as a self-employed person.

Whether a person is professionally active or not is important for the application of the coordination Regulation, especially in relation to the rules determining the applicable law. Persons who perform their professional activities in a cross-border manner are ruled by the *lex loci laboris* principle; those who are not professionally active by the *lex loci domicilli* principle. Yet, the question remains what rules apply when activities of a 'marginal' kind are performed in a cross-border fashion by a non-active person, such as a pensioner or a student (who is no longer depending on his/her parents)? Should we take into account the minimum income threshold applied by the country where the activities are performed in order to give the activities a professional character (or not) for the application of the coordination rules indicating the competent state? When activities are simultaneously performed across several Member States, a series of specific applicable law rules start to become applicable in which residence and/or the size of the professional activity determine where the person is to be socially insured. Yet who is to determine whether the activity is of a professional nature?

3.1.3.1 Performance of 'marginal' activities and applicable law rules

The EU has its own definition of the concept of work indicating from which moment onwards activities have the characteristics to be considered as professional activities. For the application of the free movement rules (Article 45 TFEU, implementing Regulation, Free Movement Directive 2004/38/EC) the CJEU developed a series of criteria indicating from which moment a person can be considered a worker; here as well activities of a mere occasional and/or marginal nature are excluded from the definition of work. The reference case (*Lawrie-Blum*) provided us with a classic definition of a worker, based on the generally accepted principle of a person performing services for and under the direction of another person and for which s/he receives a remuneration.[146]

However, the EU coordination Regulations use a specific approach in defining this concept; they essentially refer to the social security legislation of the Member State concerned (Article 1 of Regulation (EC) No 883/2004). For the application of the applicable law rules, we first and foremost have to follow the national definition. If this qualifies the activity as too marginal to have it considered as a professional activity for the application of its own social security legislation, the person will not be considered to have a professional activity

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[144] P. Schoukens, A. Barrio: The changing concept of work. When does typical work become atypical?, *European Labour Law Journal*, 2017, Vol. 8, issue 4.

[145] See e.g. the recently introduced category of non-registered workers in Poland for self-employed persons having a reported income below the minimum wage, but also the specific rules on platform work in Belgium, exempting self-employed persons earning income from a registered platform below € 5,100 to become registered for social security purposes. Likewise, some countries use minimum income thresholds, often expressed in relation to (a percentage of) the minimum wage which self-employed persons have to earn on a yearly basis in order to become registered for social security purposes.

[146] Case C-66/85, *Lawrie-Blum*, EU:C:1986:284. The CJEU stated that the concept of 'worker' in Article 45 should be interpreted broadly as (i) a person (ii) performing services (iii) under the direction of another (iv) for remuneration, and that this included a trainee teacher. Article 45(4) is to be construed narrowly, and only to safeguard state interests.

for the application of the coordination Regulation. This may be due to the fact that the person is earning an income below the threshold set by the national law. Consequently, the activity which is not of a professional nature can thus not be invoked to indicate the competent Member State by application of the *lex loci laboris* rule. In a residual way, the person's residence will eventually be determining the competent State. Apart from the consequences for the coordination Regulation, the marginal 'non-professional' activity may also have an impact on the application of the Free Movement Directive (see chapter 3.2 below).

Marginal activities and substantial activities: the 5% rule

Furthermore, for the application of the applicable law rules the coordination Regulation itself applies a concept of marginal activities which refers to the limited amount of working time and/or remuneration (Article 14(5)(b), (7) and (8) of Regulation (EC) No 987/2009; CJEU case *X*[147]). So even though under national law the activity is considered to be of a professional nature, the coordination Regulations may not give legal effect to the activity as it is too marginal. For cross-border activities performed simultaneously in different countries, work of a marginal nature is not to be taken into account to determine the competent State (Article 14(5)(b) of Regulation (EC) No 987/2009).

Article 14 of Regulation (EC) No 987/2009 however omits to quantify the marginal character of the activities. Nevertheless, the Administrative Commission determined in its Practical Guide on Applicable Legislation that "*marginal activities are activities that are permanent but insignificant in terms of time and economic return. It is further on suggested in the guide that, as an indicator, activities accounting for less than 5% of the worker's regular working time and/or less than 5% of his/her overall remuneration should be regarded as marginal*".[148] Also the nature of the activities, such as activities that are of a supporting nature, that lack independence, that are performed from home or in the service of the main activity, can be an indicator that they concern marginal activities.

Article 14 of Regulation (EC) No 987/2009 is however restricted in application, i.e. to be applied when indicating a competent Member State when simultaneous activities are performed on the territory of the different Member States (Article 13 of Regulation (EC) No 883/2004).[149] Whether we can give an analogous application of the 'marginal activity rule' for the other provisions of Title II is far from clear. In this respect the recent case *X*[150] is of interest. This case defines marginal activities for the application of Title II (applicable law rules) of the (former) Regulation (EEC) No 1408/71, which at the time did not have an article on marginal work, like Article 14 of Regulation (EC) No 883/2004. *X* performed a minor part of his activities at home (6.5% of the total working time). Knowing that the country of residence was different from the country where he normally performed his job for his employer, the question was whether the designation rule for the performance of simultaneous activities in different countries (at that time Article 14(2)(b)(i) of Regulation (EEC) No 1408/71) was to be applied, or whether the work activities at home should be disregarded and hence the basic rule of the country of work (Article 13 of Regulation (EEC) No 1408/71) prevailed. Starting from the facts of the case the CJEU decided that an employment activity amounting to 6.5% of the total work hours of the employee, was of a marginal nature and hence to be disregarded for the application of Article 14(2)b).

Can we now deduce from this case a general rule, i.e. that professional activities of a marginal nature are not to be taken into account for applicable law rules of the coordination Regulation? Or do we restrict this omission of marginal activities to the rules developed in relation to simultaneous activities? Arguments may be found for both interpretations; yet

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[147] Case C-570/15, *X*, EU:C:2017:674.

[148] Administrative Commission, Practical guide on the applicable legislation, Brussels, Commission EU, 2013, 27.

[149] See case C-89/16, *Szoja*, EU:C:2017:538 for an application of the rule in case of simultaneous activities of a different nature (self-employment and employment).

[150] Case C-570/15, *X*, EU:C:2017:674.

it should be indicated from the outset that contrary to the main designation rule (*lex loci laboris*) and the posting provisions, the article dealing with simultaneous performance of professional activities clearly refers to the situation of a person who 'normally' pursues an activity as an employed or self-employed person (in two or more Member States). Both the CJEU and the Advocate General induced from this that marginal activities are not of such a nature that they can be considered as pursuing 'normal' activities, and hence could be disregarded for the application of this rule. Working 'normally' on the territory of a Member State refers to a pattern of regularity that is absent in the case of marginal activities. However, this regularity pattern is neither (yet?) required for the application of the main *lex loci laboris* rule, nor in the posting provision. For the latter rule of posting there are other conditions required of the professional activity (minimum activity before posting, bond with employer, same nature of self-employment activity etc) yet they do not refer to the minimum amount of remuneration or working time.

With the exception of Article 13 of Regulation (EC) No 883/2004, we can conclude that for the other applicable law rules the professional activities should not reach a defined minimum size in order to be taken into account for the indication of the competent Member State. However, these activities should from the outset be considered as professional (employee/self-employed) activity by the legislation of the Member State (by application of Article 1 of Regulation (EC) No 883/2004). And here, as we could see before, it can happen that by national law already the activity has to reach some set minimum amount of gain, income or working time in order to be considered as a professional activity.

Marginal activities and simultaneous activities: the 25% rule

Marginal activities play a (second) role as well in relation to the applicable law rule specifically designed for simultaneous activities (i.e. Article 13 of Regulation (EC) No 883/2004 and Articles 14-16 of Regulation (EC) No 987/2009). Activities which are too marginal (5% or less of the working time/remuneration) are not to be taken into account to prevent a manipulation of the rule.

In a second layer the size of the activity is taken into account to determine the eventual competent Member State: in principle the Member State of residence will be competent when activities are performed simultaneously, yet it is required that at least 25% of the activities are performed in that country. Otherwise it will be the Member State of the registered office of the employer employing the person working in different countries (see Article 13(1)(b) of Regulation (EC) No 883/2004 to see the sequence, in the event that there is more than one). To determine the 25% share, account has to be taken of the working hours and/or remuneration (for employees) and of turnover, working time, number of services and/or income for the self-employed (Article 14(8) of Regulation (EC) No 987/2009). Here some interpretation issues may arise.

Non-standard work forms (platform work in particular) are characterised by irregular working time periods and a multitude of micro-activities performed through the means of a platform. How should we have to deal with the listed parameters taking into account these irregular work forms? Moreover, by leaving the eventual criterion open for the parties involved to decide (Article 14 refers to an option - "or"), we may end up in quite some discussion between administrations and/or involved parties, especially when part of the activities are performed in a virtual manner. The number of hours worked based on cloud platform work is not easy to track down, let alone determining the physical location where these activities are performed online (see the case of digital nomads, continuously travelling to new locations from where they can access internet and their cloud activities).

3.1.3.2 Limited social insurance protection and applicable law rules – Effects of case law Bosmann and Franzen

The landscape of social insurance protection for non-standard workers differs strongly. Many States exempt non-standard workers from mandatory protection, reduce the

protection to some basic insurances and/or provide (only) voluntary access to the main social insurances.[151]

The social security coverage of the non-standard workers may thus differ largely depending on where the work is being carried out. In a cross-border situation one consequently has to take into consideration the possible effects of the case law of the CJEU which reduced the 'exclusive' and 'overriding' effect of the applicable law rules. From the *Bosmann* case[152] onwards, the CJEU started to apply the *Petroni* principle (also known as the principle of favourability) on Title II, allowing the insured person to fall back upon the social security system of the place of residence, in case the applicable system of the Member State of work was (too) limited in its eventual protection. The CJEU is inclined to do so, if under national law the residence scheme can be made applicable, e.g. because of the applied universal scope covering all residents. Contrary to its previous case law,[153] the CJEU was not in disfavour (anymore) to apply both systems involved when at least no overlap occurred with regard to the specific social insurance schemes. Consequently, the person could, e.g. be covered for family benefits by the residence scheme when the system that was made competent by application of the designation rules (Title II of Regulation (EC) No 883/2004) did only provide coverage for the occupational accident scheme.

The *Bosmann* case provoked quite some controversy amid scholars claiming that it would lead to a situation where social security coordination becomes unworkable. Yet the CJEU followed a similar line of reasoning in a series of follow-up cases.[154] Especially in cases where the eventual competent Member State provides only for a restricted social protection, the CJEU is tempted to accept additional access to the social security system of the other Member State involved when under national law this is made possible.

In the quoted *Bosmann* case, but also in the *Franzen* case,[155] non-standard work forms were brought into the ambit of the coordination Regulation. The persons concerned worked in 'mini-jobs' in Germany and hence were socially covered in a very restricted manner. In both cases the persons were still residing in the Netherlands and the involved non-standard workers tried to safeguard their access to Dutch universal social insurance on the basis of their residence. The CJEU followed this approach and hence neutralised to some extent the exclusive effect of the applicable law rules, until then a rock-solid principle in the case law of the CJEU. In *Franzen* the CJEU recalled that the general applicable law principle *lex loci laboris* means that a resident of a given Member State who works for several days per month on the basis of an on-call contract in the territory of another Member State, is subject to the legislation of the State of employment both on the days on which he performs

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[151] Thus, persons performing so-called mini-jobs in Germany and in Austria are excluded from the scope of the social security system. In Poland non-registered activity is not defined by social security law. In the UK, if a person is employed, but earns less than £ 116 a week, the latter will not be eligible to be entitled to social security schemes. In Denmark some trade unions forced platforms to provide crowd-workers with collective agreements, so they could receive minimum social security rights. In France and in Latvia the category of micro-entrepreneurs does fall under the special tax system, according to which all taxes and social security contributions are replaced by a single payment. In most countries non-standard forms of employment are not covered against accidents at work: in the Netherlands self-employed persons are not entitled to employee insurance, as there is no separate scheme for accidents at work and occupational diseases; the same situation can be found in Norway (however, freelancers are covered), Portugal, Iceland, Malta, Sweden and Austria. In Spain, insurance of self-employed persons entitles them to sickness benefits in cash (lack of income compensation in case of temporary incapacity – *incapacidad temporal*). Insurance against accidents at work and occupational diseases is compulsory for TRADEs and voluntary for other self-employed persons.

[152] Case C-352/06, *Bosmann*, EU:C:2008:290.

[153] Cases C-41/79, *Testa, Maggio, Vitale*, joined cases C-41/79, C-121/79 and C-796/79, EU:C:1980:163; C-302/84, *Ten Holder*, EU:C:1986:242; C- 60/85, *Luijten*, EU:C:1986:307.

[154] C-11/10, *Hudzinski & Wawrzyniak*, EU:C:2011:91; C-212/06, *Government of the French Community and Walloon Government v Flemish Government*, EU:C:2008:178; C-382/13, *Franzen*, EU:C:2015:261; recently re-introduced in C-95/18, *van den Berg*, EU:C:2004:665.

[155] Case C-382/13, *Franzen*, EU:C:2015:261. See also R. Cornelissen, The self-employed and the co-ordination of social security in Europe, in P. Schoukens (ed.), *Social protection of the self-employed in the EU,* Deventer-Boston, Kluwer, 1994 (43), p. 56-57.

the employment activities and on the days on which he does not. However due to the irregular and low income earned from her activities, Ms *Franzen*[156] was only covered for one scheme (accidents at work) in the competent Member State, excluding the person from other protection, such as childcare benefits. Due to the exclusive effect of the applicable law rules, access to childcare was lost in the country of residence as well. The CJEU stated that in circumstances such as these the migrant worker who is subject to the legislation of the State of employment is not to be precluded from receiving, by virtue of national legislation of the member State of residence, family benefits from the latter State. In the joint cases *Giesen* and *van den Berg* the CJEU came to a similar conclusion for access to the Dutch old-age pension.

Often the 'other' Member State involved turns out to be the State of residence, which by its universal character can be made applicable upon the person concerned (having its residence in the country concerned). Refusing the person to have the benefits granted by its own national law could be considered as an infringement of the free movement principle (Article 45 TFEU), especially as there is no positive conflict of laws at stake, the CJEU seems to reason.

However, the case law generates uncertainty as to how far this acceptance of a double designation across work and residence systems should reach.[157] Taking into account the very broad spectrum of coverage of non-standard workers in the EU countries it is likely that the number of these cases will increase especially when the non-standard worker is assigned to a system of limited (or no) protection whereas s/he may still be entitled to social security benefits on the basis of national legislation of other Member States involved (e.g. of residence and/or even of a country where simultaneously the remainder of the professional activities are performed). What if the protection guaranteed in the competent Member State turns out to be rather marginal compared to the one in the Member State of residence (and hence there is a positive conflict of law, yet one with different levels of protection or financing levels)? What if the competent Member State to a large extent provides only voluntary insurance whereas the state of residence grants a decent protection on the basis of reduced social security contributions. Coordination works fine as long as the standards/levels of the systems to be coordinated are not too different, but it provokes controversy as soon as systems are intrinsically very different as to level of protection and/or financing. In a landscape where there is too much variety in protection, the decision where one is insured is no longer purely legal; it becomes political.

3.1.4 The growing group of workers under voluntary protection

Reportedly, Member States increasingly give non-standard workers (only) voluntary access to the social insurance schemes. Especially for the workers/self-employed persons with low remuneration we notice the practice of exempting them from mandatory social insurance and at the same time giving them the possibility to be covered by social insurance on a voluntary basis.[158]

Leaving aside the question how many non-standard workers in reality take up social insurance in the end, the growing reliance on voluntary insurance has consequences for the application of the coordination Regulations. Although voluntary schemes related to the contingencies covered by the coordination Regulations[159] do fall under the material scope,

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[156] Apart from the concrete case of *Ms Franzen*, the case integrated two other similar (national) cases, i.e. *Giesen* and *van den Berg*, in which the access to the Dutch universal pension scheme (*AOW*) was under consideration.

[157] See the new request for a preliminary ruling in the same cases *Franzen*, *van den Berg* and *Giesen*, launched by the Dutch High Council (*Hoge Raad*) on 9 February 2018, OJ C 7 April 2018, 161/21-22.

[158] Most of the EU Member States provide the possibility to apply for voluntary based social security schemes. Some legislations allow to be entitled to social security contingencies in general: Ireland, Hungary, Denmark, others allow the limited entitlement, thus for pension insurance: Czech Republic, Germany, Latvia, Slovenia, Portugal, Liechtenstein and Switzerland. In some countries voluntary scheme is extended to insurances against accidents at work and occupational diseases: Finland, France.

[159] CJEU, joint cases C-82 and 103/86 *Laborero and Sabato*, EU:C:1987:356.

specific rules for such schemes nevertheless exist in Title II. Article 14 of Regulation (EC) No 883/2004 regulates the status of voluntary insurances in case they need to be coordinated with other (mandatory) schemes. The general rule is clear in stating that the applicable law rules (Article 11-13 of Regulation (EC) No 883/2004) are not applicable to voluntary insurance (or optional continued insurance), unless only a voluntary insurance exists in a Member State. Already here the first application raises questions. If non-standard workers are given voluntary access to a mandatory insurance (in place for regular workers) is this rule to be understood as if only a voluntary insurance exists for this type of workers?

Furthermore, Article 14 excludes persons made subject to the compulsory insurance of the competent Member State to take up voluntary insurance in another Member State (e.g. the Member State of residence). Taking into account the case law of *Bosmann/Franzen* (see above) this prohibition is likely to be interpreted in a restricted manner and will not apply in case the voluntary insurance refers to a contingency for which the competent State is not having a mandatory insurance in place. Already in the third paragraph of Article 14 it becomes clear that this Article is not aiming at an overall exclusion of voluntary schemes in the non-competent system, making an exception for invalidity, old-age and survivor's schemes.

If for a given branch the person may choose between several voluntary schemes (put in place by the different countries involved), s/he can opt for the scheme of his or her choice. Here as well the question is whether this rule is to be read contingency by contingency or system by system; the fact that the article refers to 'branch' presupposes the first interpretation.

Possible solutions:

- In order to reduce the side effects of the *Bosmann-Franzen* case law and to safeguard the protection of mobile persons, the application of the *lex loci laboris* rule is to be made subject to a minimum protection condition. The place of work remains determinant for indicating the competent Member State (in an exclusive and overriding effect) yet only under the condition that the worker is given access by the competent Member State to a minimum number of social contingencies (which are in line with the European standards of the Council of Europe Code of Social Security and the relevant EU legislation). As to which contingencies workers should eventually at least be given access to, inspiration can be found in the Council Recommendation on access to social protection prescribing a mandatory insurance for non-standard workers for the following contingencies: old-age, survivorship, work incapacity, health care and family burden; the scheme of unemployment is to be envisaged as a voluntary insurance.[160] In case this is not provided for on a mandatory basis, the competent Member State will (remain/become) the Member State of residence, which is apart from the coordination Regulation normally also the Member State governing the social assistance schemes of its residents. Such a change can indeed be considered fundamental and some will even utter that it entails harmonisation effects, yet it is to be justified from the internal market rules (free movement and minimum standards in social protection, as well as a logical consequence of the requirements applied in the Free Movement Directive).

- For the long term the coordination rules determining work might need to be revised and updated so that they come more in line with recent evolutions determining work. The evolution towards non-standard work forms generates some challenges. One of them relates to the question when an activity becomes a labour activity.

[160] A less demanding alternative is proposed in P. Schoukens, The social security of the self-employed in EU law: the impact of the free movement of self-employed persons *(De sociale zekerheid van de zelfstandige en het Europese Gemeenschapsrecht: de impact van het vrije verkeer van zelfstandigen),* Leuven, Acco 2000, p. 585-588 where a minimum protection is justified for health care, family burden, old age, survivorship and invalidity.

Which of the generated income is work-related and from which point on is a work activity important enough to be taken into account for social security purposes? With a growing number of non-standard forms of work, these questions are getting more difficult to be answered.

- The relation between work and income is becoming cumbersome: what to do when income is not so much work-related anymore, yet more capital-based? We notice that, in many non-standard forms of work, the distinction between work-related income and other sources of income is becoming blurred (especially in the case of the prosumers, the employee shareholders, self-employed shareholders also performing professional activities within the ambit of the company in which they are shareholders, etc.).[161] In the design of modern social security schemes this situation can no longer be neglected, as it is becoming more difficult to draw a line between traditional work and economic risk-taking. The emphasis is shifting more towards income from an overall work position, and is based less on income in relation to performed units (hours) of work. This calls for a rethinking of many social security financing schemes, yet in the longer term this also calls for a rethinking of the social security coordination rules which are 'work'-related, not least the ones indicating the competent State. Application rules determining the amount of work (the '5%' and the '25%' rule) will need to be fine-tuned, and most probably the element of working hours will become less determinant in the assessment of the 'volume' of the work. But changes may become even more fundamental in the long run, as it remains to be seen whether the summa division '*lex loci laboris*' and '*lex loci domicilii*' can be upheld in the future when it becomes extremely difficult in practice to delineate professional activities (work) from non-professional activities (non-work) or when in the future for social security the origin of income will no longer be crucial for the financing and the benefit provision, but 'income as such' as an element to be guaranteed in order to protect subsistence and living standard. This in turn could call for a fundamental rethinking of the applicable law rules, where possibly the source of income or residence of the moving person will play a much more important role than the geographical place where the income-generating activity (professional or not) is performed/located.

3.2 Equality of treatment

As already mentioned, the conflict rules of Title II of Regulation (EC) No 883/2004 are in principle neutral. They only identify the national applicable law, disregarding whether the result of applying this law is less or more advantageous for the person concerned, for instance for a migrant with a non-standard type of work. Under the applicable national legislation, the Regulations guarantee equal treatment with nationals assured under said legislation (Article 4 Regulation (EC) No 883/2004).

Below, several situations are analysed regarding the application of national social security law (normally *lex loci laboris*, but also *lex loci domicilii*) that could be problematic for what concerns equal treatment.

3.2.1 A non-standard worker is considered a worker

A non-standard worker could be considered an employed or self-employed person under the national applicable law but is not insured against all contingencies. This worker would be in the same situation as all other nationals with the same type of work. However, s/he

[161] P. Schoukens, A. Bario: The changing concept of work: when does typical work become atypical?, *European Labour Law Journal*, 2017, Issue 4, p. 1-28.

may want to maintain certain benefits that s/he previously enjoyed in another Member State.

In certain working situations there is no entitlement to comprehensive benefits. For instance, in Austria persons with a monthly income under € 438.05 may voluntarily apply for health care and pension insurance but are not automatically insured. In Switzerland, workers who work under 8 weekly working hours are not covered for non-professional accidents. In Germany, people with mini-jobs earning less than € 450 per month and on-demand workers are not covered by social security (with the exception of accidents at work). In Spain, self-employed persons earning less than the minimum wage are not obliged to be insured under the social security scheme.[162] Something similar happens in Slovakia with self-employed persons earning less than € 5,298 per year (2017 data). In Norway, access to certain benefits, such as sickness, maternity and paternity, and unemployment benefits, is conditional upon a certain level of annual income (e.g. € 5,000 per year in the case of sickness, maternity and paternity benefits). In Member States where legislations envisage thresholds regarding earnings or hours there are no exceptions regarding the cause of a marginal activity. It could be "*due to disability or child care responsibilities, or due to caring for persons with disabilities*".[163] In these cases, discrimination on grounds of disability or even gender could be considered, if it were possible to prove that an important percentage of women are in that situation.[164]

Different possible scenarios are analysed.

Scenario a: A frontier worker[165] who wants to maintain some benefits enjoyed in the Member State of residence, or a migrant worker who left his or her family behind and wants to keep family benefits in the Member State where they reside as s/he is not entitled to them in the Member State where s/he works due to the non-standard nature of the work performed and the application of the aforementioned thresholds.

Possible solutions:

In such cases, the so-called *Petroni*[166] principle could be relevant: the application of the coordination Regulations cannot result in losing, withdrawing or reducing any national social security benefit received according to national legislation exclusively. As a result, it has been understood that the Regulations do not prevent a non-competent Member State (according to the conflict rules in Title II of the Regulation) to voluntarily grant family benefits when the competent Member State does not provide said coverage.[167] Such has been the case when the non-competent Member State has granted family benefits when a

[162] The obligation to be insured as a self-employed worker is linked to the requirement of regularity in the activity (Decree 2530/1970 Article 2). According to the case-law this requirement is not fulfilled, in the absence of other evidence, when the income obtained from that self-employment activity did not exceed the threshold of the minimum interprofessional wage (Supreme Court Judgments (social chamber) 29-10-97, Rec 406/1997, ES:TS:1997:6441, 29-4-02, 30-4-02 and 20-3-07, Rec 5006/2007, ES:TS:2007:2483). However, it is possible to be voluntarily insured as a self-employed worker when the income is below this threshold.

[163] See C. O'Brien, E. Spaventa, J. De Coninck, The concept of worker under Article 45 TFEU, FreSsco Comparative Report 2015, p. 9.

[164] See case C-257/13, *Cachaldora Fernández*, EU:C:2015:215.

[165] According to the EU coordination Regulations, the peculiarity that defines frontier workers is that, on the one hand, they do not reside in the State where they work and are insured and, on the other hand, they must as a rule return to the State of residence daily or at least once a week. See Article 1(f) of Regulation (EC) No 883/2004. According to the wording of this Article, frontier workers do not have to be residents in one of the neighbouring countries. A person residing in Madrid who works in London or Paris and returns to Madrid every week can apparently be categorised as a frontier worker. See D. Carrascosa Bermejo, The concept of the frontier worker and unemployment protection under EU Coordination Regulations, In C. Sanchez Rodas Navarro et al, *Good Practices in Social Law*, Thomson Reuters Aranzadi (2015). p. 127

[166] C-24/75, *Petroni*, EU:C:1975:129.

[167] Case C-611/10, *Hudzinski*, EU:C:2012:339 and C-612/10 *Wawrzyniak*, EU:C:2011:72.

minor resides on its territory, and s/he has certain ties with the Member State of residence.[168] These family benefits have been denied when residence was merely formal.[169]

Logically, this scenario requires that the Member State of residence of the frontier worker or the family of the migrant worker grants said coverage in the case of mere residence. Coverage because of this exception on the principle of *lex loci laboris* would be, anyhow, uncertain, as the Member State of residence would not have any obligation to maintain said coverage.[170] Removing coverage, however, would probably discourage mobility of workers in non-standard situations as they could decide to drop the employment in order to keep the family benefits.

Migrant workers should, in any case (applicable to the following scenarios) be informed in advance of these social security coverage gaps in the *lex loci laboris* rule. We are not referring to a general lack of protection regarding a benefit included in the material scope of the Regulations by a particular Member State, as a free definition of the extent of national social security coverage is not against EU law.[171] We are referring to the specific exclusion of coverage that affects the so-called 'poor workers' because of the existence of thresholds.

Scenario b: A teleworker residing in one Member State and working in another.

As already mentioned, the applicable national social security legislation in the case of a teleworker who has exercised his or her free movement right is far from clearly defined. For example, what is the national applicable law to a German national residing in Austria who works remotely for a German company? What would be the solution if s/he works at the headquarters of the company in Germany two days per week? In any case, we will not deal with posting, because, the employer would have nothing to do with the worker's decision to settle in Austria.

The Regulations do not provide a specific rule of conflict for this virtual type of work in Title II of the basic Regulation, neither is it mentioned in the Commission's Practical Guide on the Applicable Legislation. There is a problem of legal uncertainty.[172]

In the absence of an ad hoc rule, it seems that the general rule, *lex loci laboris*, should be applied according to the principle: 'where the law makes no distinction, neither must we' (*Ubi lex non distinguit, nec nos distinguere debemus*). However, this physical connection, *lex loci laboris*, in the case of a teleworker can be dubious (Article 11(3)(a) Regulation (EC) No 883/2004). Where would his or her place of employment be?

a) It could be Germany, where the enterprise is located and where s/he was recruited, being the place from where s/he receives instructions and a salary. This option would guarantee equality of treatment between regular employees and

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[168] Concerning long-term care benefits, see case C-208/07, *Von Chamier-Glisczinski*, EU:C:2009:455.

[169] Case C-394/13, Ministerstvo, EU:C:2014:2199.

[170] As stated in the aforementioned *Bosmann* case: EU Regulations just do not preclude a migrant worker, who is subject to the social security scheme of the Member State of employment, from receiving, pursuant to the national legislation of the Member State of residence, child benefits in the latter State. Obviously, the Regulations do not oblige the Member State of residence to grant these benefits if all entitlement requirements established in national legislation are met; however, the national courts did make such an obligation.

[171] Concerning long-term care, see case C-208/07, *Von Chamier-Glisczinski*, EU:C:2009:455

[172] In this sense see Y. Jorens, J.-P. Lhernould, J.-C. Fillon, S. Roberts, B. Spiegel, Towards a new framework for applicable legislation, trESS, 2008 (available at http://www.tressnetwork.org/TRESS/EUROPEAN%20RESOURCES/EUROPEANREPORT/ThinkTank_Mobility.pdf). See also J.-P. Lhernould, Conflits de lois en matière de sécurité sociale: la lex loci laboris en question, D*roit social*, No 5 (May)/2015, p. 457.

teleworkers.[173] In this case, should they be considered ordinary workers or frontier workers[174] (residing in one Member State but working in another)? In the latter case the special rules on healthcare (double coverage) and unemployment should apply.

Should the salary be very low or should the teleworker lack healthcare insurance, would s/he have the right to legal temporary residence in Austria considering Directive 2004/38/EC requirements (sufficient income and comprehensive healthcare coverage)?

b) It could also be Austria, the competent Member State where s/he actually teleworks and resides. It must be taken into account that telework could be performed from the whole world with a mere internet connection, so we would be referring, should this perspective apply, to a mobile place of work. Should the national applicable law be changed each time the teleworker changes the place of residence? Must the employer assume higher contributions costs because the teleworker decides to reside in another Member State?

   Again, should the salary be very low or should the teleworker lack healthcare insurance, would the teleworker have the right to be insured under Austrian social security legislation considering the existence of thresholds?

c) It could also be both Member States, particularly if the teleworker regularly performs on-site work in the company headquarters. Should we, in this case, apply Article 13 of Regulation (EC) No 883/2004? Where would the centre of interest of his or her activities be located?[175]

The principle of *lex loci domicilii* could be a solution. It seems to be the option chosen by the Administrative Commission, but its position has not been finally formalised.[176] However, it does not come without its problems, starting with the difficult determination of the *habitual residence* (according to Article 11 of Regulation (EC) No 987/2009).

Should the national applicable law be changed each time the teleworker changes his or her place of residence? What would be his or her centre of interests? Could it be Austria if s/he has a house in Germany where his or her children from the first marriage reside? Reality can be complex, and it is difficult to preview all possible scenarios.

Besides, applying the *lex domicilii* rule could stimulate social dumping.[177] Companies could tend to place teleworkers in a Member State with low contributions.

Possible solutions:

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[173] In this sense see Y. Jorens, J.-P. Lhernould, J.-C. Fillon, S. Roberts, B. Spiegel, Towards a new framework for applicable legislation, trESS, 2008, p. 5, (available at http://www.tressnetwork.org/TRESS/EUROPEAN%20RESOURCES/EUROPEANREPORT/ThinkTank_Mobility.pdf).

[174] Analysing this possibility: D. Carrascosa Bermejo, Good practices regarding the concept of the frontier worker and his unemployment protection under EU coordinating regulations, in C. Sánchez-Rodas Navarro (Dir.), *Good Practices in Social Law*, Thomson Reuters, 2015, pp. 127.

[175] The Commission Practical Guide (p. 40) considers that this centre of interest of activities has to be determined considering the following criteria: a) the locality in which the fixed and permanent premises from which the person concerned pursues his or her activities are situated; b) the habitual nature or the duration of the activities pursued; c) the number of services rendered; and d) the intention of the person concerned as revealed by all the circumstances.

[176] J.-P. Lhernould, Conflits de lois en matière de sécurité sociale: la lex loci laboris en question, *Droit social,* No 5 (May)/2015, footnote 16.

[177] In this sense see Y. Jorens, J.-P. Lhernould, J.-C. Fillon, S. Roberts, B. Spiegel, Towards a new framework for applicable legislation, trESS, p. 5.

There should be a specific rule of conflict for this type of workers, or at least an Administrative Commission Decision or Recommendation clarifying the application of the general rule, *lex loci laboris*, in these situations. The applicable law should be clarified because of the increasing phenomenon of virtual workers. Teleworkers, their employers and the national administrations involved deserve legal certainty.

When the *lex loci domicilii* was chosen, it would perhaps be a good practice to unify the more objective criteria in the different EU regulatory areas (administrative, social security or even fiscal) that are used to determine residence. We could consider, for example, an approach between the administrative/legal concept of residence and habitual residence under the Regulations. The establishment of temporary periods of stay in order to assume the change of residence could also be considered (unless there is proof to the contrary).[178] In this case, again, thresholds seem an important obstacle to free movement of workers that should be removed.

When the *lex loci laboris* applies and the Member State where the enterprise is located is considered as such, the aforementioned *Petroni* principle could also apply. For example, a person is residing in Austria and working remotely for a German company. Should this person be obliged to be insured in Germany, the Austrian authorities could, on a voluntary basis, grant him or her family benefits or s/he could maintain his/her family benefits.

In this same vein, should the salary be very low, or the insurance does not provide healthcare, this teleworker, who would not be a worker in Austria, could eventually face legal residence issues, taking into account the requirements of Directive 2004/38/EC regarding sufficient income and healthcare coverage (we come back to this point later).

Scenario c: A person that was insured against unemployment in a previous work in Member State A and is not insured for this contingency as a non-standard worker in Member State B.

Should this person lose his or her job in Member State B, s/he would not be entitled to an unemployment benefit in this Member State because s/he is not insured against this contingency. Entitlement would also not exist in Member State A because it was not his or her last State of employment.

Possible solutions:

Obviously, the right to unemployment in State B would be possible when thresholds were removed when considered an obstacle to free movement. Full social security coverage of migrant workers should be complete or at least referred to benefits linked to work. It could be argued that the imperative nature of the EU conflict rules cannot be emptied by a national law's requirement linked with work.[179] Moreover, as we will see, it does not seem logical that jobseekers could obtain 'benefits facilitating access to the job market' whereas workers do not have the right to unemployment benefits because they are not allowed to be insured.

Regarding the entitlement under the legislation of Member State A, only if the worker had suspended his or her unemployment benefit in Member State A could the benefit eventually be retrieved in case of returning to said Member State A.

[178] See D. Carrascosa Bermejo, Good practices regarding the concept of the frontier worker and his unemployment protection under EU coordinating regulations, in C. Sánchez-Rodas Navarro (Dir.), Good Practices in Social Law, Thomson Reuters, 2015, p. 126.

[179] See in this sense case C-196/90, *De Paep*, EU:C:1991:381. Other types of national requirements not linked with work have been admitted by the CJEU, see case C-110/79, *Una Coonan*, EU:C:1980:112; nowadays perhaps it would be considered an indirect discrimination on the grounds of age.

Scenario d: A person that was entitled to healthcare in Member State A and is not insured for this contingency as a non-standard worker in Member State B.

Possible solutions:

If this person has no healthcare coverage as a non-standard worker in Member State B, it is possible that s/he would want to access healthcare by using a European Health Insurance Card (EHIC) issued by Member State A. This would probably constitute fraud, as usually once the person no longer resides in Member State A or works in another Member State s/he would lose his or her healthcare coverage in Member State A. But it may not be easy to discover this, unless Member State B informs about the employment situation. From the point of view of Member State B, it would be a way of having a low-cost worker with healthcare coverage without bearing the healthcare costs. Besides, the lack of an EHIC seems an important limit to these workers' free movement.

Perhaps the EU Regulations could identify a subsidiary national applicable law in such cases, i.e. when insurance is not guaranteed under the competent *lex loci laboris* Member State because of thresholds. Subsidiary connections in conflict rules are not new; they have been present in the basic Regulation in order to get insurance (Title II)[180] but also coverage (Title III)[181] under applicable law.[182]

3.2.2 A non-standard worker is not considered a worker

A non-standard worker may not be considered an employee or a self-employed person in the Member State of work due to the existence of income or working hours thresholds. Besides the problems described above, the non-standard worker may not be considered a legal resident, if s/he does not comply with the previously mentioned requirements of Article 7(1)(b) of Directive 2004/38/EC: to have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State during their period of residence.

This could only be the case if the non-standard worker is not considered an employee or self-employed worker under the national labour law. Subsequently, the applicable social security law is that of the Member State of residence (according to Article 11(3)(e) of Regulation (EC) No 883/2004) and said Member State would be identified as established in Article 11 of Regulation (EC) No 987/2009. The Member State of residence, only one according to the Regulations,[183] is where a person habitually resides or where his or her centre of interests is located. Among the several factors included in Article 11 regarding a person's situation, the criterion mentioned first could be useful for non-standard workers excluded of social security, i.e. "*the nature and the specific characteristics of any activity*

[180] Regarding insurance on a voluntary basis, see Article 14(3) Regulation EC/883/2004. Previously, see also Article 14a(4) of Regulation (EEC) No 1408/71 which mentions a subsidiary connection when old-age insurance was not possible even on a voluntary basis. "*If the legislation to which a person should be subject in accordance with paragraph 2 or 3 does not enable that person, even on a voluntary basis, to join a pension scheme, the person concerned shall be subject to the legislation of the other* Member State *which would apply apart from these particular provisions, or should the legislations of two or more* Member States *apply in this way, he shall be subject to the legislation decided on by common agreement amongst the* Member States *concerned or their competent authorities*".

[181] See Article 44(3) of Regulation (EC) No 883/2004 regarding invalidity pensions.

[182] See in this sense D. Carrascosa Bermejo, *Coordinación comunitaria de la Seguridad Social. Ley aplicable y vejez en el Reglamento 1408/71,* CES, Madrid 2004, p. 125.

[183] Case C-589/10, *Wencel*, EU:C:2013:303.

pursued, in particular the place where such activity is habitually pursued, the stability of the activity, and the duration of any work contract."[184]

The Member State of work may treat the non-standard worker as an inactive person or jobseeker.

Scenario a: The non-standard worker is considered an inactive person under the coordination Regulations. Consequently, s/he may not have access to certain benefits for which Member States chose to require legal residence.

Such is the case of persons working in Malta that do not fulfil certain criteria (e.g. self-employed persons with an annual income under € 910), who are considered as inactive persons in terms of Regulation (EC) No 883/2004. EU citizens working in Norway are expected to fulfil the sufficient means rule in order to stay in Norway for a prolonged period of time, a requirement that can only be fulfilled by inactive persons and could be hard to fulfil by non-standard workers.

The CJEU has already denied access to minimum income SNCBs for inactive EU citizens who are not legal residents in a Member State according to Article 7 of Directive 2004/38/EC, when the national social security legislation requires legal residence to receive said benefits.

It should be noted, however, that these rulings referred to different situations:

- EU citizens who had moved without seeking work (e.g. *Dano*[185]);
- EU citizens who lost the status of worker after having worked in a Member State for a limited period of time (less than a year) but could not be expelled as they were active jobseekers and had a genuine chance of being engaged (e.g. *Alimanovic*[186]);
- EU citizens who ask for social assistance during the temporary stay, i.e. during the 3 first months (e.g. *García-Nieto*[187]).

It is not clear whether the CJEU would sustain the denial of SNCBs to non-standard workers, even if they are not considered workers by the national law or if they do not have comprehensive healthcare coverage.

The abovementioned case law is based on the principle that Member States may make the granting of benefits to economically inactive persons dependent upon a legal right of residence under Directive 2004/38/EC. In this context, the Court considered the notion of 'social assistance' in Article 7(1)b of Directive as "all assistance introduced by the public authorities, whether at national, regional or local level, that can be claimed by an individual who does not have resources sufficient to meet his own basic needs and the needs of his family and who, by reason of that fact, may become a burden on the public finances of the

[184] "*Although this article is devoted specifically to identifying the residence in the event of disagreements between national legislations regarding applicable national law, the CJEU has also considered it relevant - in the case of disputes between an insured person and the former competent* Member State *(case C-255/13 Mr. I)*". This case shows the difficulties of establishing in practice the Member State of residence. D. Carrascosa Bermejo, Cross-border healthcare in the EU: Interaction between Directive 2011/24/EU and the Regulations on social security coordination, ERA Forum (2014), p. 370.

[185] Case C-333/13, *Dano*, EU:C:2014:2358.

[186] Case C-67/14, *Alimanovic*, EU:C:2015:597.

[187] Case C-299/14, *García-Nieto*, EU:C:2016:114.

host Member State during his period of residence which could have consequences for the overall level of assistance which may be granted by that State"".[188]

In addition to the cases listed above, the CJEU also rendered a controversial pre-Brexit judgment regarding ordinary, (non-special) non-contributory social security family benefits.[189] In that judgment, the CJEU, established that "legality of the claimant's residence in its territory is a substantive condition which economically inactive persons must meet in order to be eligible for the social benefits at issue".[190] Nevertheless, this requirement was considered by the CJEU as a possible indirect discrimination, because the residence condition is more easily satisfied by nationals than by citizens from other Member states.[191] However, in this case, the CJEU considered the different treatment justified and appropriate for securing the attainment of a legitimate objective: "the need to protect the finances of the host Member State".[192] Granting these social benefits "in particular to persons from other Member States who are not economically active" could have consequences for the overall level of assistance which may be accorded by that State.[193] Besides, the CJEU, referring to the requirements established in Directive 2004/38/EC, also mentioned that "Member State *may verify if these conditions are fulfilled, but such verification shall not be carried out systematically*".[194] The Commission proposal to revise the social security coordination Regulations codifies the recent case-law of the Court of Justice of the EU on the conditions for the access to welfare benefits by economically inactive mobile citizens. In relation to economically inactive mobile citizens, Member States may make access to both social assistance and social security benefits subject to having a legal right of residence. In order to have a legal right of residence, economically inactive citizens must have sufficient resources to reside without imposing a burden on public finances of the host State, and must have comprehensive sickness insurance.[195]

Possible solutions:

It does not seem reasonable to consider that a person who is working according to the national legislation, even if that legislation does not consider him or her a worker, can be

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[188] Case C-140/12, *Brey*, EU:C:2013:565, paragraph 61.

[189] For an in-depth analysis of all the aforementioned cases see, among others, D. Kramer "Had they only worked one month longer! An analysis of the Alimanovic case (2015) C-67/14" https://europeanlawblog.eu/2015/09/29/had-they-only-worked-one-month-longer-an-analysis-of-the-alimanovic-case-2015-c-6714/. G. Barbone "Dano and Alimanovic, the end of a Social European Union" https://blogs.kcl.ac.uk/kslreuropeanlawblog/?p=1012#.W-YEIJNKg2w. J-C. Fillon "Droit des citoyens européens inactifs aux prestations familiales droit de séjour et également des traitement" RJS 10/16 p. 664. C. O'Brien."Don't think of the children! CJEU approves automatic exclusion from family benefits in case C-308/14 Commission v. UK" EU Law Analysis http://eulawanalysis.blogspot.com/2016/06/dont-think-of-children-cjeu-approves.html, D. Carrascosa Bermejo, Libre circulación de ciudadanos de la UE inactivos y su acceso a las prestaciones no contributivas (incluida la asistencia sanitaria): el impacto de la Jurisprudencia del Tribunal de Justicia, *Revista del Ministerio de Empleo y Seguridad Social*, No 127/2017, p. 195-226 and "Libre circulación de ciudadanos comunitarios inactivos y protección social ¿sufre la UE de aporofobia?" /in/ J.M. Miranda Boto (Dir) et al, *El Derecho del Trabajo español ante el Tribunal de Justicia: problemas y soluciones*. Ed Cinca. 2018 p. 505-534. Regarding the first mentioned cases and many others, see J-P. Lhernould (ed.) et al, FreSsco Analytical Report 2015 – Assesment of the impact amendments to the EU Social Security coordination rules to clarify its relationship with Directive 2004/38/EC as regards economically inactive persons. Available at http://ec.europa.eu/social/main.jsp?pager.offset=10&catId=1098&langId=en&moreDocuments=yes.

[190] Case C-308/14, Commission v UK, EU:C:2016:436, paragraph 72

[191] Case C-308/14, Commission v UK, EU:C:2016:436, paragraphs 76 and 78. The Commission considered that it could be even a direct discrimination that infringed Article 4 of Regulation No 883/2004. See Case C-308/14, Commission v UK, EU:C:2016:436, paragraphs 33. See in this sense C. O'Brien. "Don't think of the children! CJEU approves automatic exclusion from family benefits… op. cit.

[192] Case C-308/14, Commission v UK, EU:C:2016:436, paragraph 79

[193] Case C-308/14, Commission v UK, EU:C:2016:436, paragraph 80

[194] Case C-308/14, *Commission v UK*, EU:C:2016:436, paragraph 9.

[195] Document COM(2016) 815 final. It should be noted that the situation is different in respect of active jobseekers: their right of residence in another Member States is conferred directly by Article 45 of the Treaty on the Functioning of the European Union. Active job seekers must be registered with the local public employment service and must have a chance to find a job in a reasonable time frame.

considered inactive. The question arises whether the CJEU would consider non-standard workers as inactive considering the EU concept of worker, their right to free movement and social advantages (Article 45 TFEU and Article 7(2) Regulation (EU) No 492/2011).

Social assistance has been considered as a social advantage,[196] but also social security.[197] From the beginning the CJEU has stated that "*It follows that the concepts of 'worker' and 'activity as an employed person' must be interpreted as meaning that the rules relating to freedom of movement for workers also concern persons who pursue or wish to pursue an activity as an employed person on a part-time basis only and who, by virtue of that fact obtain or would obtain only remuneration lower than the minimum guaranteed remuneration in the sector under consideration*".[198] Later on, the CJEU also stated that access to the labour market creates a sufficient integration link with this Member State of employment, and in consequence takes advantage of the equal treatment regarding social advantages, but only in cases where these workers pay contributions and taxes in the *lex loci laboris* Member State.[199]

Scenario b: The non-standard worker is considered a jobseeker under the coordination Regulations.[200]

Such is the case, for example, of a person working in the Czech Republic earning less than CZK 2,500 (around € 100). Such non-standard workers are usually registered and treated as jobseekers in order to obtain healthcare, unemployment benefits, social assistance and family benefits.

EU jobseekers, as is well known, could be considered to have the status of worker protected by the free movement of workers and the equal treatment principles envisaged in Article 45(2) and (3) TFEU.[201] The case law establishes that after a six-month period, considered enough to get to know the job openings, the jobseeker could lose the status of worker and be expelled if s/he is not actively seeking or does not have a genuine chance of being engaged.[202] Article 14(4)(b) of Directive 2004/38/EC also refers to a genuine chance of being engaged, although it does not establish a concrete period to familiarise with the labour market. However, as mentioned above, jobseekers may be entitled to reside, but would probably be denied access to SNCBs both at the beginning of their stay[203] and after the three-month period, if they had lost their worker status under the Directive.[204] These persons should be entitled to jobseekers' benefits when their aim is to facilitate access to the job market and a genuine link exists between the jobseekers and the employment

[196] See case C-20/12, *Giersch*, EU:C:2013:411. In the same vein see J-P. Lhernould, Les avantages sociaux en droit communautaire, *Droit Social*, No 4/1997, p. 389 and 390.

[197] See case C-85/96, *Martinez Sala*, EU:C:1998:217, paragraph 26.

[198] See C-53/81, *Levin*, EU:C:1982:105.

[199] See the evolution of this case law in point 36 of the Opinion of Advocate General Wathelet delivered in Case C-238/15, *Luiz Noé Viamonte Verruga*, EU:C:2016:389. In this sense, D. Carrascosa Bermejo, Libre circulación de ciudadanos de la UE inactivos y su acceso a las prestaciones no contributivas (incluida la asistencia sanitaria): el impacto de la Jurisprudencia del Tribunal de Justicia, *Revista del Ministerio de Empleo y Seguridad Social*, No 127/2017, p. 197.

[200] Considering this possibility see C. O'Brien, E. Spaventa, J. De Coninck, FreSsco Comparative Report 2015. The concept of worker under Article 45 TFEU, p. 9.

[201] Always considering that CJEU « has consistently held, freedom of movement for workers forms one of the foundations of the Community and, consequently, the provisions laying down that freedom must be given a broad interpretation (see, in particular, the judgment of 3 June 1986 in Case 139/85 Kempf v Staatssecretaris van Justitie[1986] ECR 1741, paragraph 13) » Case C-292/89, Antonissen, EU:C:1991:80.paragraph 11.

[202] Case C-292/89, *Antonissen*, EU:C:1991:80.

[203] C-299/14, *García-Nieto*, EU:C:2016:114.

[204] C-67/14, *Alimanovic*, EU:C:2015:597.

market of the Member State which granted those benefits, something that is not at all easy to determine.[205]

Possible solutions:

It seems reasonable to think that, even if the national labour or social security law does not consider persons with certain non-standard work as employees or self-employed workers, said persons would have the status of workers from the point of view of Directive 2004/38/EC. However, it is not clear if they would have access to SNCBs in the Member State of work if these benefits are not linked to job searching only to get a minimum income.

The criteria to be used in order to distinguish the aforementioned jobseekers' benefits from other benefits should be clarified.

Scenario c: The non-standard worker loses his or her job or suffers from temporary invalidity due to sickness or an accident.

Regarding residence, Article 7(3) of Directive 2004/38/EC envisages three circumstances[206] that allow persons to maintain the status of worker when they are no longer employed:

- Registering as unemployed person after involuntarily losing a job[207] in the Member State of work. If the job lasted for over a year, the status of worker is maintained indefinitely (Article 7(3)(b). If the job lasted less than a year, the status is maintained for no less than six months (Article 7(3)(c).

- Being in a situation of temporary invalidity due to sickness or accident (Article 7 (a).

- Pursuing vocational or professional training (Article 7(c).

Possible solutions:

It is unclear if the same would apply in the case of non-standard workers when they are not considered workers under national legislation. Furthermore, they could have no coverage against temporary invalidity due to sickness or an accident, so if the national authorities considered that s/he does not enjoy the above rights as a worker and s/he does not have enough resources and is unable to work, s/he could eventually be denied residence. It would be expected that, if s/he is actively seeking a job or has a genuine chance of being engaged, this would stop his/her expulsion but, anyhow, it seems s/he would not be entitled to any social assistance coverage for being in a state of need.

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[205] Underlying the current uncertainty regarding jobseekers' benefits, see *ibid*. See also cases C-22/08, *Vatsouras*, EU:C:2009:344; C-138/02, *Collins*, EU:C:2004:172; C-367/11 *Prete*, EU:C:2012:668 and C-67/14, *Alimanovic*, EU:C:2015:597.

[206] The case law has identified some additional situations, such as maternity leave, in the case of a woman who stopped working and was even seeking a job after giving birth. The CJEU considered that the woman should maintain the status of worker until she re-engaged in her previous job or start seeking after a reasonable period (C-507/12, *Saint Prix*, EU:C:2014:2007). See D. Carrascosa Bermejo, Libre circulación de ciudadanos de la UE inactivos y su acceso a las prestaciones no contributivas (incluida la asistencia sanitaria): el impacto de la Jurisprudencia del Tribunal de Justicia, *Revista del Ministerio de Empleo y Seguridad Social*, No 127/2017, p. 203.

[207] It has been also considered that Article 7(3)(b) of Directive 2004/38 must be interpreted as meaning that a national of a Member State retains the status of self-employed person for the purposes of Article 7(1)(a) of said directive where, after having lawfully resided in and worked as a self-employed person in another Member State for approximately four years, that national has ceased that activity because of an absence of work owing to reasons beyond his control, and has registered as a jobseeker with the relevant employment office of the latter Member State (C-442/16, *Gusa*, EU:C:2017:1004).

3.2.3 Non-standard workers and equal treatment of benefits, income, facts or events

According to the principle of assimilation of facts, factual circumstances which happen in another Member State should be taken into consideration, under the application of the national competent law, so that migrants can access social security coverage.[208] This principle protects the migrants against those national provisions that could be considered indirectly discriminatory on the grounds of nationality when it lacks a justification. This important principle is not new. It derives from previous CJEU case law[209] and was also included for certain situations under the former coordination Regulations.[210]

Nowadays, according to Article 5 of Regulation (EC) No 883/2204, this general principle of assimilation must be applied unless otherwise provided by this Regulation.[211] It includes two different rules:

a) the assimilation of social security benefits and other income;

b) the assimilation of certain facts and events that are similar.

Provisions in national legislation do not have to be identical and assimilation must be applied case-by-case when there is a similarity. This requirement has been interpreted generously by the CJEU.[212] In fact, unless fraud is proven, the Member State must admit the validity and accuracy of the foreign documents providing evidence of facts that can be assimilated[213] because they are similar.

This principle has its limits: it should be differentiated from the aggregation principle,[214] it must not interfere with conflict rules,[215] and it cannot lead to objectively unjustified results or to the overlapping of benefits of the same kind for the same period.[216]

The *Larcher* case[217] concerned a part-time worker and his right to a preretirement benefit abroad. The worker was an Austrian citizen who resided in Austria but had been employed and insured in Germany for nearly 30 years. Later on, he again worked in Austria on a full-time employment basis. However, four years later, he received under an agreement establishing a pre-retirement scheme of part-time work for older employees in Austria a

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[208] For an in-depth analysis, see M. Pöltl, E. Eeichenhofer, C. Garcia de Cortázar, FreSsco Analytical Report 2016 – The principle of assimilation of facts. European Commission. 2016. Available at http://ec.europa.eu/social/main.jsp?catId=1098&langId=en&moreDocuments=yes.

[209] See for instance, case C-20/75, *d'Amico*, EU:C:1975:101; C-228/88, *Bronzino*, EU:C:1990:85 or C-257/10 *Bergström*, EU:C:2011:839.

[210] It can be found, for instance, in Article 45(5) Regulation (EEC) No 1408/71.

[211] E.g. the exclusion in Annex XI.4, regarding Spain.

[212] Case C-354/14, *Knauer*, EU:C:2017:37 and case C-523/13, *Larcher*, EU:C:2014:2458.

[213] See e.g. case C-206/94, *Paletta,* EU:C:1996:20 or case C-336/94, *Dafeki*. D. Carrascosa Bermejo "Capítulo 19. Coordinación de los Sistemas Nacionales de Seguridad Social (Reglamentos CE/883/2004 y CE/987/2009) /in/ VVAA (Casas Baamonde, M.E y Gil Alburquerque, R. Directores). Derecho Social de la UE. Aplicación por el Tribunal de Justicia. Lefebvre-El Derecho. Madrid 2018. p. 509-556

[214] "*Assimilation of events and facts cannot interfere with the principle of aggregating periods of insurance, employment, self-employment or residence completed under the legislation of another Member State with those completed under the legislation of the competent Member State*" (Preamble Recital 10 Regulation (EC) No 883/2004). Totalisation has its ad hoc treatment in Article 6 of Regulation (EC) No 883/2004. See delimitation in Decision H6 by the Administrative Commission.

[215] "*The assimilation of facts or events occurring in a* Member State *can in no way render another* Member State *competent or its legislation applicable.*" (Preamble Recital 11 Regulation (EC) No 883/2004). It must be understood that the assimilation principle is limited to facts and events which constitute a requirement under national applicable law.

[216] Besides, "*in the light of proportionality, care should be taken to ensure that the principle of assimilation of facts or events does not lead to objectively unjustified results or to the overlapping of benefits of the same kind for the same period* "(Preamble Recital 12 Regulation (EC) No 883/2004)

[217] Case C-523/13, *Larcher* EU:C:2014:2458, solved under former coordination Regulations.

reduction in his normal weekly working time, from 38.5 hours to 15.4 hours (40% of the previous normal weekly working time). Afterwards he applied in Germany for a retirement pension following participation in a part-time work scheme for older employees. His application was refused. It was claimed that such a pension was not due because, under German law, there is a requirement to reduce working time to 50%, which was not fulfilled considering the part-time work scheme under which he had worked in Austria. As a result, the German administration assimilated foreign conditions, but considered that the foreign part-time work was not sufficiently similar to fulfil German requirements.

The CJEU established that equal treatment, under the coordination Regulations, precludes German legislation to consider exclusively the participation in a part-time scheme for older employees having taken place exclusively under its own national legislation. However, assimilation of foreign part-time scheme was not automatic. It was "*necessary to undertake a comparative examination of the conditions for the application of such schemes under the legislation of those two Member States, in order to determine on a case-by-case basis whether the differences identified are liable to compromise attainment of the social policy objectives pursued by the legislation at issue in the former Member State".*

According to the information reported by MoveS National Experts there are no special problems regarding equal treatment of benefits, income, facts or events (Article 5 of Regulation (EC) No 883/2004). The rules on equal treatment of benefits, income, facts or events are, in principle, being applied to non-standard workers in a similar way as to any other worker.

From a hypothetical point of view, as there is no case law and no actual problems have been pointed out, a couple of scenarios merit consideration.

Scenario a: National social security administrations should consider income or benefits acquired in another Member State when qualifying the status of persons in non-standard forms of employment, for instance when determining if they reach a certain threshold to be qualified as a worker or self-employed person, such as the mini-jobs threshold in Germany.

For instance, in Switzerland and Liechtenstein income, also ancillary income, earned in another Member State should be assimilated to income earned on their territory. The same assimilation should be done with the number of hours a person has to work to get the non-professional accident insurance (for example: a person residing in CH and working less than 8 hours on CH territory but working 1 or 2 hours in FR for the same employer should be insured in CH and be considered as a worker reaching the 8-hour threshold). In the same vein, in Malta and Norway it is considered that Article 5 would also apply. Belgium also considers that this assimilation of facts or events is possible even when under Belgian social security law this type of thresholds does not exist. It should be noted that if another Member State reported incomes or benefits (with a Structured Electronic Document, a Portable Document or an E-form) it would be easier to take said incomes or benefits into account.

The general assimilation principle should be applied according to Article 5 of Regulation (EC) 883/2004. There do not appear to be problems of similarity regarding income or working hours, in these cases. Therefore, the similarity would be considered intrinsic.

If assimilation was applied the migrant could be insured when s/he fulfils the threshold requirement. However, insurance would depend on the foreign earnings which may differ a lot from month to month in non-standard work or even decrease until under the threshold.

If the general assimilation principle was not applied, Article 5 would be breached as far as it seems that there are no problems of similarity regarding income or hours of work.

In both cases the free movement of these non-standard workers could be in danger. If the assimilation principle would not be applied, the non-standard worker would not be considered an employee or self-employed person. S/he would be in the situation explained under 3.2.2, above. This might be problematic, since it could affect the decision to work abroad.

Possible solutions:

The general assimilation principle should be applied according to Article 5 of Regulation (EC) 883/2004. Furthermore, the CJEU has already established in its case-law that income earned in another Member State must be considered when calculating different benefits.[218] In the same vein, the foreign income should be assimilated in order to fulfil insurance requirements.

Scenario b: The assimilation of the foreign income could work against the interest of the non-standard worker.

For instance, in the Netherlands this foreign income could be considered for the entitlement to means-tested schemes or with an anti-accumulation objective (under Article 10 Regulation (EC) No 883/2004 – only applicable to several benefits of the same kind – and always considering the ad hoc rules on pensions that also consider foreign income).[219] In this case, national institutions will be keen to take all income into account, also income from all sorts of marginal activities, but when they do, this obviously depends on the evidence of such income provided by the migrant worker involved and the institutions of the other Member State. However, this should not be problematic from an assimilation point of view since the principle of assimilation cannot lead to objectively unjustified results or to the overlapping of benefits of the same kind for the same period.[220]

In France the assimilation of income obtained abroad could affect the entitlement to an old-age pension or its amount, as a certain yearly income received is a requirement to acquire trimesters of contribution. However, it is not clear whether the competent old-age institutions would apply Article 5 of Regulation (EC) No 883/2004 since it is not known whether they apply it to the rest of the migrant workers with low income and working in various Member States.

3.3 Totalisation (aggregation) of relevant periods and pro rata temporis

Aggregation rules (also known as rules on totalisation of periods) concern the 'legal qualification of facts'[221] and ensure that persons who have used their freedom of movement may access social security benefits under the legislations of other Member States. These rules should be differentiated from the rules on the calculation of benefits (especially the pro rata rule) which purpose is to ensure a fair share of payment of benefits between institutions of various Member States.

In the context of a rising number of non-standard forms of employment and self-employment, some of the current rules on aggregation and calculation of benefits may raise practical concerns and may need readjustment or improvement. This part of the

[218] Cases C-257/10, *Bergström*, EU:C:2011:839 (family benefits); C-256/15, *Nemec*, EU:C:2016:954 (invalidity pension).

[219] Article 53, 54 and 55 Regulation (EC) No 883/2004.

[220] See Preamble Recital 12 Regulation (EC) No 883/2004.

[221] F. Pennings, *European Social Security Law*, Intersentia 2015, p. 135.

report will summarise the important coordination provisions on aggregation and calculation of benefits (especially the pro rata rule for pensions). Secondly, where appropriate, the report will indicate potential problems and possible solutions to such problems

The legal basis for EU rules on aggregation and calculation of benefits is found in Article 48 TFEU,[222] while Article 6 of Regulation (EC) No 883/2004 provides for a general aggregation rule, ensuring that migrants fulfil the conditions to access short- and long-term benefits. It prescribes that if the acquisition, retention, duration or recovery of the right to benefits, the coverage by legislation, or access to or exemption from insurance is made conditional upon the completion of periods of insurance, employment, self-employment or residence, then the competent institution of a Member State will take into account other equivalent periods completed under the legislation of any other Member State. Apart from this general rule, there are specific additional provisions for some short-term benefits (i.e. unemployment) and for long-term benefits (i.e. old-age, survivors' pensions and invalidity benefits).

3.3.1 Special rules for unemployment benefits

For unemployment benefits a special rule is laid down in Article 61 of Regulation (EC) No 883/2004.[223] It makes a distinction between periods of insurance, employment or self-employment required by a national scheme and provides aggregation of these periods, to the extent necessary, in order to satisfy the conditions of the legislation of the competent State (usually the Member State of last activity).[224] Thus, Article 61(1) and 61(2) read together make the right to aggregation of periods conditional on the person concerned having the most recently completed relevant periods, in accordance with the legislation under which the benefits are claimed. This means that periods of insurance are counted if that legislation requires periods of insurance; periods of employment are counted if that legislation requires periods of employment; or periods of self-employment are counted if that legislation requires periods of self-employment. This requirement represents an important exception to the complete application of the principle of aggregation. However, it has been partially nuanced in Article 61(1) (2nd sentence), which could be specifically important in the context of non-standard workers. Article 61(1) (2nd sentence) specifies that "*when the applicable legislation makes the right to benefits conditional on the completion of periods of insurance, the periods of employment or self-employment completed under the legislation of another Member State shall not be taken into account unless such periods would have been considered to be periods of insurance had they been completed in accordance with the applicable legislation*."

Several practical problems could arise concerning aggregation of periods in relation to non-standard employment or self-employment.

The rule of Article 61(1) (2nd sentence) together with Article 61(2) in practice makes it possible that even periods of work which have not triggered the right to insurance in Member State of work A (e.g. due to a lack of the required threshold in working hours or remuneration) should be taken as relevant in the competent Member State B, where the unemployment benefit is claimed, under two cumulative conditions:

1) the competent Member State B makes the right to the benefit conditional on the completion of insurance periods, and

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[222] Article 48 TFEU calls for the adoption of measures that "*shall make arrangements to secure for employed and self-employed migrant workers and their dependants: (a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries".*

[223] See also Article 54 of the Implementing Regulation (EC) 987/2009.

[224] For more details see: F. Pennings, *European Social Security Law*, Intersentia 2015, p. 270-274. M. Fuchs, (Hrsg.), *Europäisches Sozialrecht*, 7. Auflage, Nomos 2018, p. 460-488.

2) under the legislation of Member State B periods of such work would have been considered as periods of insurance.

However, we can identify several situations where periods of non-standard employment or self-employment would not be aggregated and hence would be 'lost' for the purpose of accrual of unemployment benefits, e.g.:

- If a person worked in Member State A as a self-employed person and Member State A recognises those periods as relevant, while competent Member State B makes the right to benefits conditional on the periods of employment (and does not recognise periods of insurance nor periods of self-employment).
- If a person worked in Member State A as a non-standard worker and Member State A recognises those periods as relevant, and then moved to Member State B where s/he worked as a self-employed person. Member State B has separate schemes for employees (obligatory coverage) and self-employed persons (voluntary coverage). To acquire unemployment benefits in Member State B under the scheme for self-employed persons, relevant are only self-employment periods which are counted to a qualifying period.
- If neither Member State A, nor competent Member State B recognises periods of non-standard employment or self-employment as relevant (e.g. if the person first worked during one year in Member State A as an on-demand worker, earning an income below the required threshold, and then moved to Member State B and worked there occasionally as a freelancer, which is considered as self-employment; Member State B does not provide coverage for self-employed persons).

Therefore, a possible solution to these problems concerning aggregation of periods could be amending the Regulation (EC) 883/2004, so that the application of the general aggregation rule prescribed in Article 6 of Regulation (EC) No 883/2004, which would oblige the competent Member State under whose legislation the unemployment benefit is claimed, to validate or recognise all the periods of insurance, employment or self-employment when these were already recognised as relevant by the legislation of another Member State.

Although this rule would help in the context of non-standard work and coordination rules, it would nevertheless not rectify the situation in which an activity was performed in a Member State where that activity has not been covered by the scheme. Namely, it would not solve the basic problem of 'lost' periods, if an activity was performed in a Member State where due to the activity type (e.g. Member State covers only employees, but not self-employed persons), or working time threshold (e.g. for certain part-time workers) or income threshold (e.g. for casual workers) the person would not be covered by the unemployment scheme; hence that period would not be aggregated in the competent Member State (usually the Member State of last activity). Therefore, from the point of view of the migrant worker, it would be useful if parallel to the basic aggregation rule, *mutatis mutandis*, Article 61(1) (2nd sentence, 2nd part) would be applicable. However, such extended proposal for full aggregation, even if always in favour of the migrant worker, might not be supported by the Member States' financial interests and may run counter to the fair sharing of the financial burden between Member States.

Furthermore, Member States reportedly interpret differently Article 61(2) of Regulation (EC) No 883/2004. Most of them apply the aggregation rule as soon as the period of insurance, employment, or self-employment has been completed (the so-called 'one day

rule'), whereas others make the aggregation subject to a prior condition of insurance, employment, or self-employment of weeks or even months.[225]

Hence, it is very important also to mention the planned changes to the aggregation rules for unemployed benefits proposed by the European Commission on 13 December 2016.[226] The current Article 61 (with the so-called 'one-day rule' and special aggregation rules) is proposed to be replaced by new rules. These would on the one hand ensure application of the general aggregation rule prescribed in Article 6 of Regulation (EC) No 883/2004, while on the other hand they would limit the possibility to aggregate due to a condition of a minimum qualifying period of three months of insurance, employment or self-employment in accordance with the legislation under which the benefits are claimed. Furthermore, proposed Article 61(2) regulates situations where an unemployed person does not satisfy the three-month period, because the total duration of his or her most recently completed period of insurance, employment or self-employment in that Member State is less than three months. In this case, the proposal provides that such a person should be entitled to unemployment benefits in accordance with the legislation of the Member State where s/he had previously completed such periods [227] The proposed qualifying period of three months may affect non-standard workers with shorter periods of work (e.g. fixed-term, on-call, temporary agency workers) to a higher extent than other workers.

The aggregation of periods could be even more complex in practice for an unemployed person residing in a Member State other than the competent Member State (including frontier workers[228]), i.e. a person who obtains his or her income from a working activity in one Member State and maintains residence in another Member State. The current Article 65 of Regulation (EC) No 883/2004 makes a distinction between a "partially or intermittently unemployed" and a "wholly unemployed" person and between a "frontier worker" and a person "other than a frontier worker, but residing in a Member State different from the Member State of last employment" (i.e. other cross-border workers). Hence, if a person was working in Member State A and resided in Member State B, the competence would be allocated as follows:

1) For the "wholly unemployed" "frontier worker" Member State B would be competent (Member State of residence, also in charge for the payment of unemployment benefits in accordance with its legislation, subject to reimbursement rules in Article 65(6) and (7).

2) For the "wholly unemployed" person "other than a frontier worker" Member State A would be competent (Member State of last activity, also for the payment of unemployment benefits) with some exceptions provided for in Article 65(5)(b).

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[225] J-P. Lhernould, The Commission's proposal amending social security coordination regulations: how to combine Union citizens' rights and social security institutions' needs?, ERA Forum, June 2017, Volume 18, Issue 2, p. 159.

[226] European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 883/2004 on the coordination of social security systems and regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004, COM(2016)815 final, 2016/0397 (COD), Strasbourg, 13.12.2016.

[227] The proposed Article 61 (Special rules on aggregation of periods of insurance, employment or self-employment) reads as follows: "(*1) Except in the cases referred to in Article 65(2), the application of Article 6 shall be conditional on the person concerned having most recently completed a period of at least three months of insurance, employment, or self-employment in accordance with the legislation under which the benefits are claimed. (2). Where an unemployed person does not satisfy the conditions for the aggregation of periods in accordance with paragraph 1 because the total duration of his or her most recently completed periods of insurance, employment or self-employment in that Member State is less than three months that person shall be entitled to unemployment benefits in accordance with the legislation of the Member State where he or she had previously completed such periods under the conditions and subject to the limitations laid down in Article 64a."* Article 64a represent a newly proposed Article that would provide special rules for unemployed persons who moved to another Member State without fulfilling the conditions of Article 61(1), i.e. the newly proposed three-month rule, and conditions of Article 64, i.e. conditions for unemployed persons going to another Member State in order to seek work there.

[228] Pursuant to Article 1(f), "frontier worker" means any person pursuing an activity as an employed or self-employed person in a MS and who resides in another MS to which he/she returns as a rule daily or at least once a week.

3) For the "partially or intermittently unemployed" person Member State A would be competent (Member State of last activity, also for payment of benefits in accordance with its legislation).[229]

Hence, it is clear that in the case of a frontier worker, the rule deviates from the basic rule that the Member State of last activity (where the person became unemployed) is the competent State. Instead, the Member State of residence is competent. This rule is usually perceived as "*problematic, in particular, for less prosperous countries when their inhabitants go to work as frontier workers in rich neighbouring countries*".[230] However, in the context of non-standard workers, the problem might also be perceived problematic from the point of view of the migrant worker.

An example might be when a person was self-employed in Member State A and resides in Member State B, which does not provide for benefits for the self-employed. Hence, due to the application of the legislation of the Member State of residence, the person could stay without unemployment benefits. On the contrary, if the legislation of the Member State of last activity were applicable (here in our example the legislation of Member State A) then the person would probably be entitled to the unemployment benefit, since Member State A covers self-employed persons and would have to apply the aggregation rule as well. Furthermore, in this context it is useful to mention the European Commission's proposal for the revision of current Article 65 of Regulation (EC) No 883/2004.[231] Apart from removing the distinction between frontier workers and other cross-border workers, the proposal makes the Member State of the most recent employment/self-employment responsible for the payment of unemployment benefits, but only if the worker (frontier worker or cross-border worker) has worked in that country for at least twelve months. Otherwise the responsibility remains with the Member State of residence as if s/he had completed all periods of insurance under the legislation of that Member State.[232]

Possible solution:

- Application of the general aggregation rule which would oblige the competent Member State under whose legislation the unemployment benefit is claimed, to validate or recognise all the periods of insurance, employment or self-employment when these were recognised by the legislation of another Member State. In addition, from the point of view of the (especially non-standard) migrant worker, it would be useful if parallel to the basic aggregation rule, *mutatis mutandis*, Article 61(1) (2nd sentence, 2nd part) would be applicable.

3.3.2 Special rules for pensions and pro rata temporis

In addition to the general rule in Article 6, Articles 45 and 51 of Regulation (EC) No 883/2004 contain special provisions on the aggregation of periods for old-age, survivors' pensions and invalidity benefits. It is specified that if granting certain benefits is conditional upon the periods of insurance having been completed only in a specific activity as an employed or self-employed person or in an occupation which is subject to a special scheme, then periods completed in another Member State under the corresponding scheme have to be taken into account. Otherwise, these periods should be taken into account for the

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[229] See also D. Carrascosa Bermejo, Good practices regarding the concept of the frontier worker and his unemployment protection under EU coordinating regulations, in C. Sánchez-Rodas Navarro (Dir.), *Good Practices in Social Law*, Thomas Reuters, 2015.

[230] F. Pennings, *European Social Security Law*, Intersentia 2015, p. 276.

[231] European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 883/2004 on the coordination of social security systems and regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004, COM(2016)815 final, 2016/0397 (COD), Strasbourg, 13.12.2016

[232] See also J-P. Lhernould, The Commission's proposal amending social security coordination regulations: how to combine Union citizens' rights and social security institutions' needs?, ERA Forum, June 2017, Volume 18, Issue 2, p. 163-164.

purpose of providing the benefits of the general scheme. Furthermore, if the right to entitlement is conditional upon the person being insured at the time of the materialisation of the risk, then this condition shall be regarded as having been satisfied if that person has been previously insured under the legislation or specific scheme of that Member State and is, at the time of the materialisation of the risk, insured under the legislation of another Member State for the same risk or, failing that, if a benefit is due under the legislation of another Member State for the same risk.

Concerning long-term benefits, reportedly the majority of the Member States did not encounter any specific problems regarding aggregation of periods in relation to non-standard employment or self-employment.

Nevertheless, several potential problems could be identified regarding the obligation to provide pension and the pensions actually provided. Some are related to the precarious nature of the work and its lower market-related remunerations, while others could be connected to the existing coordination rules.

Among the more general problems, a first problem arises when in insurance-based and earnings-related pension systems workers perform some non-standard form of work and are not insured, hence they also do not accrue pension benefits. A second problem relates to the pension adequacy: the future pension amount is often adversely affected, since certain forms of non-standard employment or self-employment usually provide a lower income and are less stable, hence also resulting in less contribution density (e.g. fixed-term employment, casual work, agency work). In addition, where the insurance period is an important element in the benefit calculation, some countries apply a recalculation method to full-time equivalents (for part-time work e.g. in ES, IT, HR, SI) or they average it to some pecuniary threshold (e.g. FR, HR,[233] HU) or a specific type of time-related threshold (e.g. PT,[234] UK). Although this may seem as a fair solution compared to 'standard' workers, provided that it does not exclude them from the right to pension entitlement, it nevertheless affects the future level of benefits.

In relation to coordination rules, based on Article 50 of Regulation (EC) No 883/2004 the total amount of pension may consist of several pensions based on the periods of insurance completed in each of the Member States of employment or self-employment (so-called partial pension method).[235] For the calculation of the actual pension amount from each of the Member States, Article 52 prescribes a two-step process: a) calculation of the "independent benefit" based on the national legislation alone, and b) calculation of the "pro-rata benefit" based on the "theoretical benefit" which a person could claim if all insurance or residence periods would be completed under the legislation of that State.[236] The person is entitled to the higher amount of the two (independent benefit and pro-rata benefit).[237]

However, in the case of insurance periods of less than one year, Article 57 of Regulation (EC) No 883/2004 contains a special rule in order to simplify the administrative procedure

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[233] In Croatia for casual work based on a contract for a service or an author's contract.

[234] E.g. in Portugal for all forms of part-time work, the working time considered will be determined on a daily basis – one day for each six hours worked or declared. Furthermore, for all beneficiaries, one given year is considered valid for pension purposes if there is a minimum of 120 days of registered pay slips.

[235] F. Pennings, *European Social Security Law*, Intersentia 2015, p. 216.

[236] Member Statescould waive the right to a pro rata calculation provided that the "independent benefit" invariably results in being equal to or higher than the pro rata benefit. Such situations are listed in Part 1 of Annex VIII and concern the following countries: DK, IR, CY, LT, LI, NL, AT, PL, PT, SK, SE, UK. In addition, a pro rata calculation is not applied in schemes that provide benefits in respect of which periods of time are of no relevance for the benefit calculation. In practice, this manly concerns contribution-funded schemes operated by pension funds. Such schemes are listed in Part 2 of Annex VIII and concern the following countries: BG, CZ, DK, EE, FR, HR, LT, HU, AT, PL, PT, SI, SL, SE, and UK.

[237] Article 52(3) Regulation (EC) No 883/2004.

and reduce costs related to the payment of very low pensions.[238] The rule prescribes that the Member State is not required to provide benefits in respect of periods completed under the legislation it applies which are taken into account when the risk materialises, under two cumulative conditions: 1) the duration of the said periods is less than one year, and 2) when taking only these periods into account no right to benefit is acquired under that legislation.[239]

These periods of less than one year are usually not totally lost, since Article 57(2) stipulates that they are proportionally taken over by all the other Member States concerned, since they have to take them into account for the purposes of Article 52(1)(b)(i), i.e. when calculating a theoretical benefit (i.e. a basis for the pro rata benefit that will actually be paid). In *Vermaut*,[240] the CJEU specified that the national competent institution must take into account periods of insurance of less than a year completed by the worker under the legislation of other Member States, even if the right to a pension arises under national legislation alone.[241]

However, it seems that in practice there could be a problem of 'losing' these periods of insurance of less than one year in the event that these other Member States waived the pro rata calculation. [242] Taking into account the exact wording of Article 57(2), it obliges the competent institutions of each of the other Member States to take these short periods into account only for the purpose of Article 52(1)(b)(i), i.e. for the pro rata benefit. Therefore, it can be concluded that Member States which waived the pro rata calculation of the benefit are excluded from sharing the financial burden of taking over the short periods of insurance. For example, if a person first worked in Member State A for eleven months with no acquired right to a benefit, and then for two years in Member State B, which waived the pro rata calculation, and then for four years in Member State C, the result might be the following: Member State A would not be required to pay any benefit, Member State B would be required to pay an independent benefit calculated on the basis of two years of insurance, while Member State C would be required to pay the higher amount of both benefits, i.e. its independent benefit (for the four years) and the pro rata benefit (that was calculated on the basis of the theoretical benefit for the six years and eleven months of insurance).

Furthermore, if the effect of Article 57(1) of Regulation (EC) No 883/2004 were that all the institutions of the Member States concerned would be relieved of their obligations to provide benefits, then Article 57(3) specifies that benefits shall be provided exclusively under the legislation of the last of those Member States whose conditions are satisfied, as if all the periods of insurance and residence completed and taken into account in accordance with the aggregation rules had been completed under the legislation of that Member State. Hence, as a final solution to the problem of several 'mini-periods', the Regulation previews a transfer of the burden of pension payment to the last Member State (i.e. the Member State of last employment or self-employment).

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[238] For more details see C. Janda, Alters un Hinterbliebenenrenten, in M. Fuchs (Hrsg.). *Europäisches Sozialrecht*, 7. Auflage, Nomos 2018, p. 452-456.

[239] Relevant case law in relation to Article 57 of Regulation (EC) No 883/2004 does not exist so far. Nevertheless, based on the equivalent Article 48 of the old Regulation (EEC) No 1408/71 several cases have been adjudicated. They will be mentioned where necessary. In the *Borella* case, which concerned survivors' pension, the CJEU ruled that Article 48(1) of Regulation (EEC) No 1408/71, which corresponds to Article 57(1) of Regulation (EC) No 883/2004, cannot be applied where the right to benefits of a migrant worker or his survivors already arises solely from the provisions of the legislation of the Member State in question (Case C-49/75, *Borella*, EU:C:1975:158.).

[240] Case C-55/81, *Vermaut*, EU:C:1982:68.

[241] Further on, in *Chuck*, it has been established that the fact that a person is a resident in a non-Member State at the time of the submission of the pension claim is of no relevance for the calculation of the benefit (case C-331/06, *K.D. Chuck*, EU:C:2008:188).

[242] Waiving is allowed pursuant to Article 52(4) and countries are listed in Part 1 of Annex VIII: DK, IR, CY, LT, LI, NL, AT, PL, PT, SK, SE, UK.

Exactly this final rule provided by Article 57(3) might also be perceived as problematic and burdensome in the future in the context of the rising number of persons working on subsequent short non-standard working assignments under the applicable legislation of various Member States. The last Member State would have to pay the benefit for all the other Member States in which the person worked but has accumulated less than one year of insurance. In some drastic examples of high mobility this rule could in practice be perceived as very burdensome (e.g. if in the course of a lifetime a person was subject to legislation of 20 different Member States, but altogether has accumulated nineteen years of insurance, in each State less than one year; hence the last Member State would have to pay a pension for all the nineteen years). Since the current system neither provides for the reimbursement of contributions between Member States nor from the worker,[243] such a result might not equitably distribute the financial burden among the Member States (in the case of high mobility).

Taking all of the above into account, we can think of two potential solutions to the problem:

A first solution might be the introduction of an additional rule which would still keep the rule that the last Member State should pay the total pension benefit, while at the same time providing for a yearly proportionate reimbursement of benefits by the competent institutions of the other Member States to the institution of the 'last' Member State, which has actually been paying the benefit. However, being aware that this proposal might go against the desired administrative simplicity, in order to reduce administration and transaction costs between the institutions, the reimbursement period could be extended to more than one calendar year.

The second, more drastic solution would be to abolish the 'less than one year' rule prescribed by Article 57 of Regulation (EC) No 883/2004. This solution might contribute to legal clarity and a fair distribution of the financial burden, especially in the event of high mobility. From the mobile worker's perspective, it would also ensure that no period is lost. However, a potentially negative side of the coin would be increased administration for very low benefits.

Possible solutions:

- To explore options to address the problem related to the specific part of the 'less than one-year' rule, which in the context of several short periods of insurance puts the whole burden for the payment of the pension on the last Member State (prescribed by Article 57(3) of Regulation (EC) No 883/2004). This would seem unfair in the context of highly mobile workers with short insurance or residence periods. In order to reach the goal of a fair financial burden this rule might be improved by the duty of reimbursement of benefits between competent institutions of various Member States.

3.4 Export of benefits

The export of social security benefits is essential for the protection of already acquired (vested) social security rights. It applies to cash benefits. They are not subject to any reduction, amendment, suspension, withdrawal or confiscation, when the beneficiary or the members of his or her family reside in another Member State.[244] As analysed below, it could be argued that there is a certain export in the case of benefits in kind as well. They cannot be exportable as such, since e.g. healthcare is provided for in the Member State of residence or stay. However, the right to healthcare is in a way subject to export rules.

[243] C-55/81, *Vermaut*, EU:C:1982:68, paragraph 15.

[244] Article 7 Regulation (EC) No 883/2004.

Healthcare may be provided in another Member State and paid for by the competent Member State.

The rule that cash benefits are exportable is subject to several exceptions. On the one hand for several social security benefits where a specific activity of the beneficiary is required, like searching for a job or acting according to doctor's orders, there are certain limitations to export. This applies for unemployment benefits. Although it might sound odd, it could be argued that *the right* to healthcare can be exported, albeit under certain conditions. Firstly, it has to exist in the competent Member State (i.e. Member State of insurance or affiliation). If such right exists, the competent State issues, for example, the European Health Insurance Card (EHIC) for necessary treatment, which can be used during a temporary stay in another Member State. The competent State also authorises planned medical treatment in another Member State (and in both cases, it covers the costs). By allowing medical treatment in another Member State, residence clauses are waived and it could be argued that *the right* to healthcare is ''exported''.[245] Moreover, in the Member State where healthcare is provided the equal treatment principle comes to the forefront.[246]

Specific export and anti-overlapping rules apply also to family benefits.[247]

On the other hand, it might also be interesting to observe which cash benefits are not at all subject to export rules. Most notably this would be general social assistance, which is outside of material scope of the Regulation (EC) 883/2004[248] and so called categorical social assistance, for which specific rules apply, excluding it from the exportability provisions. The latter is being qualified as special non-contributory cash benefits (SNCBs) for the purpose of Regulation (EC) No 883/2004[249] and might be considered as social assistance also under the Free Movement Directive, i.e. Directive 2004/38/EC.

Reportedly, in many Member States there are no peculiarities concerning the export of social security benefits, i.e. of course those granted to non-standard employed and self-employed workers. In some Member States there might be certain difficulties in relation to unemployment benefits which are provided under very distinct national (mandatory or voluntary) regimes (e.g. in BE, HR, NL, SI). Where unemployment benefits are related to the length of the insurance period, non-standard workers with interruptions in their careers or not full-time insurance record might enjoy certain benefits for a shorter period of time. Hence, also the duration of the export might be guaranteed for a much shorter period than for standard employed and self-employed workers.

Nevertheless, in some Member States mobile non-standard workers might be in a better position comparing to non-mobile non-standard workers. For instance, in Belgium, in case of family benefits the Belgian social security authorities qualify non-standard forms of employment as a professional activity, which is sufficient to be entitled to family benefits and so export of the benefit is possible.

Another example might be related to sickness benefits in kind, i.e. the right to healthcare. In Slovenian mandatory health insurance there are problems with withheld rights due to non-payment of social security contributions by self-employed persons and assimilated

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[245] See also Y. Jorens, F. Van Overmeiren, General principles of Coordination Regulation 883/2004, *EJSS* (11) 1-2, p. 69 or R. Schuler, Allgemeine Bestimmungen, Artikel 7, in M. Fuchs (Hrsg.), *Europäisches Sozialrecht*, 7. Auflage, Nomos, 2018, p. 194.

[246] See further also G. Strban, Patient mobility in the European Union: between social security coordination and free movement of services, ERA Forum 14 (2013) 3, p. 391. See also G. Strban et al, Access to healthcare in cross-border situations – FreSsco Analytical Report 2016, http://ec.europa.eu/social/main.jsp?catId=1098&langId=en&moreDocuments=yes, June 2018.

[247] See further also G. Strban, Family benefits in the EU: Is it still possible to coordinate them?, *Maastricht journal of European and comparative law*, 23 (2016) 5, p. 775.

[248] General social assistance (as well as medical assistance) is excluded by Article 3(5)(a) of Regulation (EC) No 883/2004.

[249] See Article 70 of Regulation (EC) No 883/2004, which is an explicit exception to its Article 7.

groups (all paying social security contributions by themselves). However, such persons may nevertheless ask for and receive an EHIC. A request for EHIC is dealt with as a request for urgent treatment, where the rights (to urgent healthcare) are exempted from a system of withheld rights, since urgent treatment shall always be provided. Whether medical treatment in another Member State was urgent or necessary (the latter might be more than urgent) cannot be verified from the claims between the Member States. Therefore, necessary medical treatment is as a rule paid by the Health Insurance Institute of Slovenia, although the same treatment might be considered as outside of the scope of urgent treatment and not provided to self-employed (and assimilated) non-payers of social security contributions in a purely Slovenian legal situation.

More problematic might be the export of SNCBs, which might prove to be an obstacle to the free movement of non-standard employed and self-employed workers. Such restriction should not go beyond what is required to achieve the legitimate objective pursued by the national legislation.[250]

It should be emphasised that non-standard workers may often be poor workers. For instance, when they retire, they might turn into poor pensioners with smaller or limited pension benefits. This situation could indeed affect their free movement right. The free movement right of pensioners, as inactive persons, is based on two characteristics:

- they usually have, through their pension, enough income so that they do not become an (unreasonable) burden on the social assistance system of the host Member State during their period of residence, and

- they usually have comprehensive sickness insurance cover in the host Member State as proven by means of Portable Document S1, guaranteeing the payment of the healthcare abroad by the Member State that is paying their pension (Article 7 Directive 2004/38/EC).

However, in the case of pensioners who have been non-standard workers, they may not fulfil one or both of these requirements in order to enjoy the right to reside in the host Member State. Their annual income could be below the threshold for being entitled to non-contributory pensions or supplements in the host Member State and/or they may not have comprehensive health insurance cover, or this cover may not be free of charge for them.

Therefore, this would be a problem during the initial five years of legal residence, as far as the requirements of Directive 2004/38/EC would apply and the pensioner would neither be entitled to SNCBs nor to healthcare coverage provided by the host Member State. Such situation could endanger the free movement of pensioners, if pensioners with low income resulting from non-standard forms of employment are considered a burden for host Member State.[251]

Although it might be regarded controversial, the best possible way to export SNCBs (and possibly also general social assistance) should be found. In this sense, one possible solution could be fading out of social assistance in the former Member State and gradually fading it in into the new Member State of residence. Alternatively, the technique applied for family benefits could be used also for social assistance. This would mean that if the new Member State of residence provides social assistance, the former Member State would have to cover half of it (up to the actual amount of assistance) in the initial several years of residence. Both social assistance and family benefits might have similar characteristics. Both are of non-contributory legal nature, and might even be social assistance based in some Member

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[250] E.g. case C-287/05, *Hendrix*, EU:C:2007:494, where the national court declared the non-export clause as non-applicable. Y. Jorens, F. Van Overmeiren, General principles of Coordination Regulation 883/2004, *EJSS* (11) 1-2, p. 71.

[251] See case C-140/12, *Brey*, EU:C:2013:565, and the following cases.

States. Moreover, both could be perceived as assistance to (or promotion of) the family (or household) community.[252]

However, after the period of several years (i.e. five according to Directive 2004/38), the pensioner could be considered a permanent legal resident and, as such, s/he could have access to both SNCBs and healthcare provided by the host Member State, for example by ceasing to pay for healthcare coverage in the Member State that pays his or her pension. In order to achieve such result, the text of the Regulation (EC) 883/2004 would have to be amended and modified.

Possible solutions:

- The EHIC should be provided to all persons active in non-standard forms of employment or self-employment, in order for them to benefit from necessary healthcare (e.g. emergencies) in the Member State of stay.

- Social assistance schemes, which might be especially important for non-standard employed and self-employed workers, should be included in the material scope of social security coordination, and the best way to export the SNCBs and possibly also the general social assistance should be found. Fading out (in one Member State) and fading in (in another Member State) or sharing social assistance costs between the Member States concerned could be agreed upon.

4. POSSIBLE SOLUTIONS AND PROPOSALS

Certain possible solutions and proposals have already been presented above. The present chapter provides a summary of possible solutions to identify social security coordination for non-standard employed and self-employed workers.

In the majority of the Member States the situation concerning the social security coverage of persons performing non-standard forms of employment and self-employment is not so dramatic. Workers in non-standard forms of employment are as a rule covered as workers/employees or self-employed persons under national law and hence also for social security coordination purposes. They might also be covered by the social security coordination mechanism as non-actives, which might sometimes appear as unjust. For instance, a person could have several marginal activities in several Member States, where s/he might not be covered by national social security systems and as a consequence may fall outside of the social security coordination, despite the fact that s/he might be fully productive within the EU. Such cases could present obstacles to free movement and solutions have to be found, e.g. by covering all mobile (employed and self-employed) workers regardless of the amount of activity.

One of the more important solutions would be to do away with the thresholds concerning hours of work performed or income gained in order to qualify as an economically active person. Especially persons active in more than one Member State, i.e. non-standard mobile workers, might be active to an extent beyond marginally or ancillary when considering the activities in all Member States. A solution could be an agreement between Member States in the Administrative Commission to apply already existing rules on the equal treatment of facts, events, income and benefits from other Member States.

Moreover, the status of a (standard) worker is still the most 'valued' in social security coordination, e.g. prevailing over self-employment in another Member State. Hence, the

[252] Some German authors (e.g. Hans F. Zacher) call them *Hilfs- und Förderungssystemen*. More B. Baron von Maydell, Binnen Struktur des Sozialrechts, in B. Baron von Maydell, F. Ruland, U. Becker (Hrsg.), Sozialrechtshandbuch (SRH), 5. Auflage, Nomos 2012, p. 51.

best protection would be provided to non-standard employed or self-employed persons when treating them as workers for the purpose of insurance-based social security coordination, since they are also economically active and contributing to the advancement of society. Under residence-based schemes they should be treated as residents.

In order to be able to continue the distinction between the working groups, i.e. employees and self-employed persons, but also the growing group of in-between work categories, the social security coordination Regulations would have to be adapted. Member States might have to define more in detail the concepts of 'employee' and 'self-employed person' in an annex to the Regulation in order to ascertain that all professional active persons who make use of the coordination Regulations are appropriately qualified as employees, self-employed persons and civil servants for the application of Regulation (EC) No 883/2004. This would be especially important for the so-called 'in-between categories'.

Moreover, rules on applicable legislation might be made neutral as much as possible with regard to the professional status of non-standard workers. In certain cases, the Member State of residence might have to be(come) the competent one. In case where there is a doubt as to the qualification of the professional group, the CJEU will eventually have to fall back on the European definition in place for the free movement of workers also for social security coordination (certain concepts are already applied in an EU manner, e.g. residence).

In order to reduce the side effects of the *Bosmann-Franzen* case law and to safeguard the protection of mobile non-standard workers, the application of the *lex loci laboris* rule is to be made subject to a minimum protection condition. Non-standard workers should be given access to a minimum number of social security schemes in order for the Member State of work to be the competent one. If this is not the case, the competent/closest linked/most favourable Member State will (remain/become) the Member State of residence, which is apart from the coordination Regulation, normally, also the Member State governing the (general and categorical) social assistance schemes of its residents. Such subsidiary connections in conflict rules are not completely new. There could be a specific rule of conflict for this type of workers or an Administrative Commission decision or recommendation clarifying the application of the general rule, *lex loci laboris*, in these situations, i.e. with regard to the increasing phenomenon of virtual workers. Teleworkers, their employers and the national administrations involved would probably appreciate more legal certainty in these cases.

Moreover, social assistance schemes, which might be especially important for non-standard employed and self-employed workers, should be included in the material scope of the social security coordination mechanism, and the best way to export SNCBs and possibly also general social assistance should be found. Fading out (in one Member State) and fading in (in another Member State) or sharing social assistance costs between the Member States (similar to already sharing the costs of family benefits) could be agreed upon. This might also solve problems of denying or revoking the right to reside due to a lack of resources and health insurance cover (according to the Free Movement Directive) of non-standard workers without sufficient income, who have to rely on social assistance. However, such situations might be avoided if income from another Member State is always taken into account, regardless if it leads to social security in the Member State where it is earned. The coordination rules might have to clarify that non-standard workers cannot be considered inactive persons and should not be treated as such.

Moreover, social security coordination rules might require Member States granting the benefit to consider all periods of employment or self-employment that were relevant in the Member State in which they were completed. More precisely, once recognised, periods should remain recognised also after non-standard workers move to another Member State. Conversely, not counting such periods might present an obstacle to free movement. Hence, 'fixing' the periods once they are already recognised might be agreed upon within the Administrative Commission. Moreover, there are valid reasons for applying the minimum one-year-rule, especially for long-term benefits of standard workers. However, it might be

obsolete and abolished for non-standard workers with short periods of social security coverage in more Member States (with the possible application of recalculation to full-time equivalents). In this sense, the Regulations might have to be adjusted to the situation of non-standard workers.

Whatever solution will be proposed, information-sharing and cooperation between Member States is of the utmost importance for the proper functioning of the EU social security coordination rules. Information should be shared, especially on classification, in particular on income and working hours, and on multiple activities, e.g. a person being simultaneously self-employed, working part-time for one or more IT platforms etc. Migrant workers should, in any case, be informed in advance of possible social security coverage gaps in the *lex loci laboris* rule.

5. CONCLUSIONS

With rising numbers of non-standard forms of employment and self-employment, the relation between work, income and social security also becomes non-standard. For standard workers it used to be clear that standard, full-time work for indefinite period of time leads to standard income and standard social security. This linear thread has been shredded, since very intensive, long hours work may lead to low income or not very time intensive work may lead high income, and in both cases traditional social security schemes might not offer the best protection.

In the design of modern social security schemes and their supranational coordination it can no longer be neglected that it is becoming more difficult to draw a line between traditional work and economic risk-taking, employment and self-employment. This calls for a rethinking of many social security coordination rules which are 'work'-related, not least the ones indicating the competent Member State. In practice, it is becoming more difficult to delineate professional activities (work) from non-professional activities (non-work). Also, the geographical origin of income is less important for the social security financing and the benefit provision.

The social security coordination principles and rules work smoothly so long as the national social security systems are similar. However, with more non-standard forms of employment and self-employment and various legislative reflections of such new societal reality, social security systems become more distinct. This may apply as to their various new ways of financing, not any more related solely to the income from work, and their level of protection of non-standard workers, which might be missing or be incomplete in comparison to standard workers.

It has become clear that the fundamental freedom of movement of (employed and self-employed) workers cannot be limited to 'standard' workers. The single breadwinner model as a valid starting point after the Second World War is outdated. Social security systems have to adapt to the new reality and so does EU social security coordination law. Obstacles to the mobility of a growing number of non-standard workers have to be eliminated. Among them are thresholds, voluntary social security schemes or voluntary inclusion in some of them, considering non-standard workers as non-actives and not coordinating social assistance schemes.

Solutions could be found in the dynamic interpretation of already existing rules, possibly supported by the decisions of the Administrative Commission for the Coordination of Social Security Systems, and possibly targeted modifications to the social security coordination Regulations.

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