

SOCIAL SECURITY COORDINATION AND NON-STANDARD FORMS OF (SELF)EMPLOYMENT

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INTRODUCTION¹

According to Eurostat data, approximately 40% of the active workforce works in one or another atypical (or non-standard)² form of work.³ The majority of the active workforce may be still contracted in a standard labour relation, non-standard work relations however have been growing over the last couple of decades.⁴ Standard work is in accordance with the European Labour Force Survey defined as full-time subordinated work for an indefinite period. Traditionally part-time work, work for a definite time period and self-employment were labelled as the main atypical work types.⁵ Yet recently the work organisation grew in complexity and labour markets increasingly face the emanation of a multitude of ‘new’ atypical forms of work (such as platform work, crowd work, portfolio work, etc.) that combine often simultaneously the main types of non-standard employment (part-time, defined work and/or self-employment) in a given work situation.⁶

Regardless of their status – standard or not – workers have in principle the right to move and migrate within the territory of the European Union (Article 45 of the Treaty on the Functioning of the European Union (TFEU)). In order to accommodate this movement, specific regulations that coordinate the various social security systems have been developed.⁷ Today we are celebrating the 60th anniversary of social security coordination in the European Union (EU) and one of the major questions is to what extent these regulations are still able to accommodate the growing complexity of forms of work present in the current labour market. Originally the coordination regulations

(1) This contribution reflects in chapter 3 a selected part of the analytical report the *Social security coordination and non-standard forms of employment and self-employment* which has been prepared within the MoveS network. The full analytical report can be consulted: Sturban, G., Carrascosa Bermejo, D., Schoukens P. and Vukorepa, I., *Social security coordination and non-standard forms of employment and self-employment. Interrelation, challenges and prospects*, Brussels, MoveS-European Commission, 69 p., 2018.

(2) For this contribution non-standard work and atypical work will be used as two synonymous concepts.

(3) See *European Labour Force Survey*, Eurostat.

(4) See on this e.g.: Barrio, A. and Schoukens, P., The changing concept of work: When does typical work become atypical?, *European Labour Law Journal*, 306-332, 2017.

(5) *Ibidem*.

(6) For a systematic overview of these atypical forms of work and their characteristics, see Barrio, A. and Schoukens, P., The changing concept of work: When does typical work become atypical?, *European Labour Law Journal*, (306), pp. 312-314, 2017.

(7) EU Coordination Regulation 883/2004 and its application Regulation 987/2009. For the purpose of this contribution these regulations will be abbreviated as Reg. 883/2004 and Reg. 987/2009 respectively.

were designed to support (only) the free movement of workers, which in turn had a rather standard work situation (of the full time – moving – worker) in mind as the default situation. Slowly different types of work found their way in to the personal and material scope of the Coordination Regulations.⁸ As such this may not come as a surprise; at the end of the day these EU regulations do nothing more than to coordinate national social security systems. If atypical forms of work are integrated into the national scope of the social security systems they consequently will have to be accommodated by the coordination corpus. However, the growth of atypical forms of work and the different ways of having them integrated into the national social security systems create some application issues for Reg. 883/2004 and 987/2009. This is mainly due to the fact that the coordination rules only make a distinction between two types of forms of work⁹: i.e. wage-earnship (working as an employed person) and self-employment (working as a self-employed person) whereas national systems have shown to be more creative in allowing ‘third types’ or “in-between” work categories going beyond the traditional ‘summa divisio’ of wage-earnship and self-employment. Moreover, new application problems occurred in cases where the atypical work is of a ‘marginal’ kind, leading to exclusion or a very reduced (work related) social insurance of the concerned work categories. Apart from the traditional demarcation between the major work categories (employment–self-employment) a new delineation issue started to emerge in social security legislation, i.e. between ‘non-work and ‘work’. When work is of a marginal nature (in numbers of hours and/or remuneration) can it then still be considered to be genuine work? And if not, to what extent are these persons then to be considered as non-working persons for the application of the coordination rules? This question is not without any consequences as the rules of coordination do differ considerably between workers and non-workers (e.g. to indicate the competent social security state). Another example showing that as the 60 years of EU coordination rules are approaching ‘pensionable’ age, is its approach towards work organisation: the coordination rules still rely upon a rather physical work organisation: ‘where are people standing (literally!) to work’, is still a key indicator to find out which social security system is in the end to be applied (see Articles 11ff Reg. 883/2004, indicating the competent state) whereas all kinds of new forms of work are organised over distance (telework) and/or (in the case of online platform work) virtually.

The rise in non-standard work creates problems for the application of Reg. 883/2004 and 987/2009. With this contribution we would like to highlight some of these application problems. In order to do so, we will first define what we understand by standard and non-standard work; secondly, as coordination is mainly starting from the definitions and the scope of application of the national social security systems, we

(8) With Regulation 1390/81 (self-employed persons) and Regulation 1606/98 (civil servants) as major legal initiatives to extend the scope of application; however the European Court of Justice played a similar crucial role to accommodate atypical forms of work within the regulatory framework of the Coordination Regulations (such as e.g. for telework Case C-137/11, Partena vzw v Les Tartes de Chaumont-Gistoux SA, EU:C:2012:593 or for home-based work Case C-570/15, X v Staatssecretaris van Financiën, EU:C:2017:674).

(9) If we make an abstraction of the specific situation of civil servant.

will sketch¹⁰ under which status non-standard forms of work are covered in national social protection systems: are they to be considered employees, self-employed persons or not professionally active for the sake of national social security legislation? This information should help us in answering the third part of the contribution: what kind of legal problems arise from applying the coordination rules (Reg. 883/2004 and Reg. 987/2009) to these new categories of non-standard work? For this contribution we will restrict ourselves to the title dealing with the coordination rules indicating the competent social security state in case of cross-border activities. The central question will be to what extent the traditional rules of indicating the competent state are still refined enough to deal with atypical forms of work. In the last part of this contribution we shed some light on the future and indicate possible pathways for modernising the coordination that could facilitate a better integration of non-standard forms of work into the current Reg. 883/2004 and 987/2009.

1. WHAT IS (NON)STANDARD WORK?

In order to be able to define the atypical (or non-standard) form of work, we first need to know who the typical employee is and what is so typical about the employment relationship between the employee and the employer. Looking at the definitions¹¹ used by Eurostat¹² and the International Labour Organisation¹³ the concept of standard work(ers) refers to the regulatory model¹⁴ that formed the basis for the regulation of social law; moreover, the concept refers as well to the labour market model that is regarded as ‘standard’ in the existing employment relationships. Employment relationships that differ from this are consequently regarded as ‘atypical’.

From this point of view perhaps Walton¹⁵ provides the most complete description of the typical standard employment relationship. He defined it as the “stable, open-ended and direct arrangement between a dependent, full-time employee and their

(10) This general comparison is based upon the answers which have been received by the national experts of the MoveS network at the occasion of the preparation of the study on non-standard work and EU Regulation 883/2004: Strban, G., Carrascosa Bermejo, D., Vukorepa, I. and Schoukens, P., *Analytical report. Social security coordination and non-standard forms of employment and self-employment: Interrelation, challenges and prospects*, EU Commission – MoveS, Brussels, 68 p., 2018.

(11) See Barrio, A. and Schoukens, P., The changing concept of work: when does typical work become atypical, *l.c.*

(12) Cf. *European Union Labour Force Survey – Annual Results*.

(13) International Labour Organisation, *Recommendation 198: Employment Relationship Recommendation* in 95th Session International Labour Conference, Genève, ILO, 2006.

(14) In contrast to the deregulating model that is now gradually being used as a standard, for instance, flexicurity. See Deakin, S., *Addressing labour market segmentation: the role of labour law*, Genève, International Labour Office, p. 4., 2013.

(15) Walton, M.J., The shifting nature of work and its implications, *Industrial Law Journal*, 45/2, pp. 111-121, 2016 with reference to Stone, K.V.W. and Arthurs, H., The Transformation of Employment Regimes: A Worldwide Challenge, in Stone, K.V.W. and Arthurs, H. (eds.), *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment*, New York, Russell Sage Foundation, pp. 1-20, 2013; Freedland, M., Burying Caesar: What Was the Standard Employment Contract?, in Stone, K.V.W. and Arthurs, H. (eds.), *Rethinking workplace regulation: Beyond the standard contract of employment*, New York, Russell Sage Foundation, p. 82, 2013.

unitary employer.” The definition not only contains the traditional elements of the employment relationship (the personal subordination, the bilateral nature of the relationship, the wage as a source of income, the economic dependency, the reciprocity of the commitments and the place where work is carried out; together the first characteristic), but also implies qualitatively the job security (second characteristic) and income security (third characteristic) that are the objective of the permanent employment relationship.

Below is a brief explanation of the three characteristics.

1.1. THE ELEMENTS OF THE STANDARD EMPLOYMENT RELATIONSHIP (FIRST CHARACTERISTIC)

a. Personal subordination

The first, and perhaps most important, element is the personal subordination of the employee to the employer. Legally, subordination is traditionally interpreted as the control and supervision that the employer has over the employee.¹⁶ As the work becomes more intellectual in nature (for example with highly educated employees), the nature of the instructions and control also changes. For example, the functional coordination of the work and the degree of integration of the work gradually dominates in the labour organisation of the employer. Control over the duration, the formal organisation and the scope of the work prevail over the substantive control by the employer.¹⁷

b. Bilateral employment relationship

The unequal bargaining position lies at the (normative) basis of labour law aimed at protecting employees. According to Freedland and Controuris, this is intrinsically linked to the bilateral contractual nature of the standard employment relationship whereby one of the parties, the employee, is in an economically weaker position and therefore needs more protection.¹⁸

c. Reciprocity of the commitments

The contractual relationship between employee and employer in turn leads to a reciprocal relationship. Employers pay wages in exchange for the work delivered by employees and are therefore obliged to provide (sufficient) work so that employees can obtain sufficient income security and can further develop their skills (to strengthen their position in the labour market and to earn more). On the employee’s side this implies being available to perform the work on offer.

(16) Veneziani, B., The employment relationship, in Hepple, B. and Veneziani, B. (eds.), *The transformation of labour law in Europe: A comparative study of 15 countries 1945-2004*, London, Hart Publishing, 109, 2009.

(17) Eurofound, *Time Constraints and Autonomy at Work in the European Union*, Luxembourg, Publications Office of the European Union, 1998. Applied to the increasing autonomy of translators see Fraser, J. and Gold, M., “Portfolio workers”: Autonomy and Control amongst Freelance Translators, *Work, Employment and Society*, 15/4, pp. 676–697, 2001.

(18) Freedland, M. and Contouris, M., *The Legal Construction of Personal Work Relations*, Oxford, Oxford University Press, p. 370, 2011.

d. Salary (remuneration)

An essential component in the (regulation of the) employment relationship is the salary that is paid to the employee in exchange for the work done. In view of the intended (income) security, the salary is extensively protected.¹⁹ After all, it must enable employees to generate an income that leads to sufficient social security for them and their family. In turn that income offers companies (employers) and the economy in a broader sense, consumption assurance. Thus there is a reciprocal interest in income.

e. Economic subordination

Salary dependency leads to the economic subordination of employees towards their employer. The employment relationship is the most important, sometimes even the only source of income for employees. This means they are not in a position to sufficiently spread the economic risks of earning income.²⁰

f. At the employer's workplace

Finally work is generally undertaken at the employer's workplace. This is an element that follows from a traditional Fordism,²¹ but that became relatively less important in light of the increasing possibilities to spread the work geographically.²² Some argue that the workplace is not an essential part of the traditional standard employment relationship (see below).

1.2. WORK STABILITY (SECOND CHARACTERISTIC)

The traditional employment relationship leads to work and income security (the social function of the employment relationship). Work stability covers two elements. The employment relationship is permanent. It can only be terminated under certain conditions or for certain reasons such as incompetence, bad behaviour or economic reasons. This long-term solidarity between employees and employers can manifest further into permanent training facilities that might create an increasing autonomy on the part of employees within the company.²³ Mutual trust and loyalty in this sense therefore become important elements in the employment relationship between both

(19) Knegt, R., The Employment Contract as an Exclusionary Device, in Knegt, R. (ed.) *The Employment Contract as an Exclusionary Device: An Analysis on the Basis of 25 Years of Developments in the Netherlands*, Antwerp, Intersentia, p. 3, 2008.

(20) Davidov, G., Freelancers: An Intermediate Group in Labour Law?, in Fudge, J., McCrystal, S. and Sankaran, K. (eds.), *Challenging the Legal Boundaries of Work Regulation*, London, Hart Publishing, pp. 171-185, 2012.

(21) Reflecting the work organisation introduced by Ford and referring to stable employment based upon an open ended, full time and direct arrangement with a unitary employer leading to the necessary job-security allowing in its turn to the necessary amount of consumerism and economic activities affording the (further) development of our welfare states.

(22) Vleminckx, J.E. and Rojot, J., The Fissured Workplace in France, *Comparative Labor Law & Policy Journal*, 37/1, p. 165, 2015.

(23) Zekic, N., Job Security or Employment Security: What's in a Name?, *European Labour Law Journal*, 7/4, p. 568, 2016.

parties. In addition, work stability refers to the full-time nature of work that translates into a working week established in advance (standardised working hours).

1.3. INCOME SECURITY (THIRD CHARACTERISTIC)

In turn work stability creates the intended income security for employees. Income security relates to earning a salary that is sufficient to provide for livelihood security, but also to the expectation of sufficient social protection when there is a risk of loss of income due to unemployment or incapacity for work (role of social security as income replacement). Income security allows people to consume and plan in the long(er) term, making long-term investments once again possible.²⁴ The government also assumes (macro) income security since it guarantees stable income through taxation. It enabled Europe to develop the welfare state after World War II.²⁵

1.4. ATYPICAL FORMS OF WORK

Generally speaking, typical for atypical forms of work is that they lack one or more of these typical work relation characteristics, such as legal subordination, economic dependency, working at the employer's workplace or the lack of security in the provision of income or work. We refer to this evolution as external challenges to the work organisation. Nevertheless, it may be that all the typical work characteristics are present, but that the characteristics themselves are subject to developments; these are then called internal challenges. Below we first discuss the internal changes followed by a discussion of the external changes.

a. Internal developments

The traditional characteristics of the standard employment relationship can themselves be subject to evolution. The employment relationship retains its traditional characteristics, but the content-specific interpretation of the element evolves. For example, work is no longer necessarily undertaken at the employer's workplace, but it can be spread out geographically or undertaken at the employee's home (home-based work or more recently teleworking). The working conditions that relate to the workplace will have to be adapted to this situation (consider, for example, the establishment of working hours, rest times, but also the suspension of the employment contract in the event of a technical defect at the workplace).

Similarly, the interpretation of the element legal (personal) subordination has also evolved. For example, the service economy is increasingly characterised by more complex forms of work that require a high level of education on the part of employees. The employer depends more than ever before on the intellectual autonomy of the employee. Consequently, the assessment of legal subordination will focus more on

(24) Bosch, G., Towards a New Standard Employment Relationship in Western Europe, *British Journal of Industrial Relations*, 42/4, pp. 619-620, 2004.

(25) Gottfried, H., Insecure Employment: Diversity and Change, in Wilkinson, A., Wood, G. and Deeg, R. (eds.), *The Oxford Handbook of Employment Relations: Comparative Employment Systems*, Oxford, Oxford University Press, pp. 541-570, 2014.

the functional context within which the employee is active (and the possible freedom that the employee has within the organisational framework: working hours, use of equipment, use of rooms made available by the employer, etc.). The characteristics of standard work therefore also come under pressure 'from within' and must, where necessary, be given a new interpretation, adapted to social and/or technological evolutions.

b. External developments

More important for this contribution is the evolution in which the traditional elements of the standard employment relationship come under external pressure. Atypical work can also be regarded as an external development of typical work caused by the absence of one or more characteristics.

Atypical work is not a recent phenomenon. In a certain sense it is of all times and it is precisely in the standard employment relationship that it finds its rationale. After all, as soon as work is done in which one or more elements typical to the standard relationship are absent, we are dealing with atypical work.

Originally, these atypical forms found their origin in the absence of a legal subordination (independent work) and/or because of the absence of a stable employment relationship (fixed-term work) or income security (part-time work). It is also these forms of atypical work that are still the most prevalent in Europe. For example, roughly speaking, 60% of the working population in the European Union is still employed on the basis of a permanent contract²⁶ and employment in the form of temporary and/or part-time work is 'limited' to 14% and 19% respectively of the workforce (combined or not), while self-employed work occupies a share²⁷ of 15%²⁸. However behind these figures there are some interesting trends to be observed. For example, these three main forms of atypical work account for one third of all employment relationships in the Organisation for Economic Co-operation and Development (OECD) countries and account for half of the net employment growth since the 1990s.²⁹ In Italy, France and Germany the percentage of professional activity in the age group between 15 and 24 years on the basis of a standard employment relationship has dropped by 30 to 40 per cent in the period 1985-2015.³⁰ In the Netherlands, half of the workforce is employed in some form of atypical work situation (self-employed, part-time or in a defined work

(26) Eurostat (2015c), European Union Labour Force Survey – Annual Results 2014, retrieved August 2016, [http://ec.europa.eu/eurostat/statisticsexplained/index.php/Labour_market_and_Labour_force_survey_\(LFS\)_statistics](http://ec.europa.eu/eurostat/statisticsexplained/index.php/Labour_market_and_Labour_force_survey_(LFS)_statistics).

(27) Some of the workers combine one or more of these atypical forms of work, meaning that e.g. they can work part-time and at the same time are self-employed.

(28) Largely this figure can be further broken down into 10% solo self-employed and 5% self-employed persons working with employees. This last group seems to be in decline over the last couple of years, whereas solo self-employment grew strongly in countries such as the Netherlands and the UK.

(29) OESO, *In It Together: Why Less Inequality Benefits All*, Paris, OECD Publishing, pp. 137-139, 2015.

(30) Stone, K.V.W., The Decline in the Standard Employment Contract: A Review of the Evidence, in Stone, K.V.W. and Arthurs, H. (eds.), *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment*, New York, Russell Sage Foundation, p. 374, 2013.

contract).³¹ These figures indicate that atypical forms of employment are (again) in the ascendant. But perhaps more important than the bare figures is the increasing variety under which atypical work manifests itself.

New forms of atypical work come to the fore, deviating from the other elements of standard work, including for example (the lack of) salary, reciprocity or economic subordination. For example, non-paid forms of work such as internships, apprenticeships or doctoral fellowships are increasingly being used, whereby the doctoral student is qualified as a student for the application of employment and social security law. Also in the ascendant are forms of employment in which the employee is increasingly paid on the basis of the return of the operating capital and less in proportion (or 'reciprocity') to the work done.³² Similarly, the remuneration by companies of 'popular' participants in social networking sites is increasing; people with many followers or friends are regarded by companies as (potential) trend-setters and paid in proportion to success - and not to the work done.

Furthermore, it is striking that new forms of work increasingly contain more different atypical work elements at the same time. Atypical work has generally developed into a combination of temporary, part-time and self-employed work, possibly even further supplemented by other atypical elements, including for example the lack of reciprocity, bilateral legal relationship or economic subordination. Crowd work is a good illustration of this, being a type of work that is often seen in relation to the growing platform economy. In the situation of crowd work, a commissioner or client posts an offer to undertake remunerated activities ('work') on an online platform; the offer is done in an undefined manner, meaning that for the commissioner it is not so important who in the end will carry out the activity. Typical to crowd work is the low level of skills required to do the activity. Rather than who is doing, it is more important that someone will do the activity in the end. The work can be performed offline (Uber, Deliveroo, TaskRabbit, etc.) or (immediately) online (Amazon Mechnic Task). Depending on the platform, there are different levels of control carried out on the established legal relationship and/or the delivered result. For example, the high level of control and pricing exercised by Uber is increasingly becoming an element that is taken into account in the case-law to nevertheless qualify the 'atypical' employment relationship as paid employment.³³ Crowd work is often undertaken on a self-employed basis; the person doing the activity, is only contracted for minor defined tasks (defined work) and is seldom doing the job on a full-time basis (part-time work).

(31) Eurostat, *Part-time Employment as Percentage of the Total Employment, by Sex and Age*, retrieved August 2016, http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=lfsa_eppga&lang=en.

(32) In 2013, the Employee Shareholder Status was introduced in the UK, where the employee opts for a share in working capital in exchange for a loss of employment protection against dismissal and severance pay. Likewise, the large numbers of self-employed workers in Belgium that are organised in company form and that pay themselves an income that is set at a fixed rate independently of the work done.

(33) In this sense, for example Federal District Court San Francisco 11 March 2015 and London Central Employment Tribunal, *Aslam and Farrar v Uber*, 28 October 2016.

2. NON-STANDARD WORK AND SOCIAL SECURITY

2.1. OVERALL CHALLENGES FOR SOCIAL SECURITY SYSTEMS

Due to the increase in atypical forms of work and the simultaneous application of several atypical work characteristics in each of these types, more and more challenges arise for the organisation of social security. Given the limited structure of this contribution, we cannot here examine each atypical group individually. Without being exhaustive, we list a number of atypical elements that require a review of social security, at least if we want to keep the atypical workforce in the system.

Many atypical forms of work do not (any longer) entail (full time) work activities that are performed in exchange for wages (reciprocal commitments). The relationship between work activity and income is called into question (see above examples of the employee shareholder, the non-work-related activities on social networking sites that generate income, etc.). It will become increasingly difficult to determine when the 'activity' can be considered as a work activity to be taken into account for the application of work-related social security schemes. Conditions that are determined in terms of the number of hours worked or other work volumes in social security law (access conditions, contribution provisions in respect of which the amount is related to the number of hours worked) are harder to apply to atypical forms of work. It can be expected that as work becomes more flexible, the income factor will play a greater role in determining the (scope of) social security rights and obligations and that this will be at the expense of the work (volume) element.³⁴

What is more, many atypical forms of work appear to be based on work that is not paid or is paid only marginally (reduction of the income security and salary elements). It becomes more difficult to determine whether the activity performed has the underlying objective of generating income (livelihood security), or focuses rather on a different (non-mercantile) objective, such as learning more during an internship. To what extent can these forms of work (still) be included in work-related social security?³⁵ What minimum thresholds will we apply for taking work into account for accruing entitlements to social security?³⁶ How far can we go in financially supporting this type of (non-economic) activity (role subsidies, in-work benefits)? Thresholds are exclusive and therefore less desirable as work flexibility increases. It might be necessary to switch to more transparency, with every euro earned from an activity creating entitlement to social security. There is also the observation that the Nordic two-pillar system has fewer problems protecting atypical forms of work (in particular non-economic activities) due to the general protective function of the first universal pillar. Yet, here attention should be given to the financing side, as atypical forms of work such as platform work

(34) In turn this can affect the rules of Reg. 883/2004 and Reg. 987/2009 when they take into account quantitative elements such as work time in their coordination rules (e.g. Article 13 regulating the competent state in the situation of the performance of simultaneous activities; see further below).

(35) And what does this mean for the application of Reg. 883/2004 and Reg. 987/2009, as the Coordination Regulations mainly refer to the national social security definitions? See further below.

(36) An initial comparative study shows us that Member States deal very differently with the definition of 'marginal' work and that the minimum thresholds for accessing social security schemes in Europe vary widely.

may for the moment not be well enough incited to pay in proper taxes/contributions for social security purposes.

Atypical forms of employment deviate more from the bilateral relationship with one employer. For example, multiple clients can be considered to be the employer (see platform work, temporary work, agency work, etc.). In traditional social security, the employer still has an important (administrative) position, for example with regard to collecting the contributions or with regard to the final conditions for the granting of benefits during illness and unemployment. Who will take on this role or duty with regard to the non-traditional forms of work? The client, the customer, the platform at the centre of the sharing economy, the state? When there are multiple clients (see crowd work) the question arises as to how this client responsibility can be spread. Alternative forms will have to be thought up to accommodate the declining role of the employer. With regard to this, inspiration can be drawn from the solutions implemented in numerous systems for agency workers in Europe.³⁷

Atypical forms of work are at risk of presenting an increasing qualification problem (absence of traditional legal subordination). In a derived form, this qualification conflict threatens to culminate in a growing number of sham employees who can be deployed for the client more 'cheaply' (because they are less protected). To prevent this, efforts must be made to guarantee full social protection for all forms of work, taking into account the uniqueness of the form of work in each of the work groups. For this purpose, a link can be sought with the distinction between work status neutrality (neutral basic principles in designing social security protection) and specificity as refined and applied for self-employed workers (labour form adapted social security).³⁸

2.2. HOW ARE NON-STANDARD WORKERS INTEGRATED IN (WORK RELATED) SOCIAL SECURITY: AS EMPLOYEE, SELF-EMPLOYED PERSON OR AS 'IN-BETWEEN' CATEGORY?

From previous research³⁹ we learned that most non-standard workers are for the application of national social security law considered to be employee or self-employed

(37) Likewise for the application of Reg. 883/2004 and Reg. 987/2009 one could ask who in the end is to be considered as employer. See further below.

(38) See on this distinction: Schoukens, P., A comparative presentation of the national social security systems for the self-employed: outstanding issues of coordination, in Ministry of Labour and Social Security and European Commission (eds.), *The free movement of the self-employed within the European Union and the co-ordination of national social security systems*, Athens, Greek Ministry of Labour and Social Security, (195), 210-212, 2000. At that occasion it was defended that the EU regulations should also be 'labour form neutral' as to the design of their main rules; yet at the same time make sure that in the application of these neutral rules, they are adapted to the specific labour form situation of the (atypical) self-employed worker.

(39) Schoukens, P., A comparative presentation of the national social security systems for the self-employed: outstanding issues of coordination, in Ministry of Labour and Social Security and European Commission (eds.), *The free movement of the self-employed within the European Union and the co-ordination of national social security systems*, Athens, Greek Ministry of Labour and Social Security, 195 ff, 2000; Barrio, A., Montebovi, S. and Schoukens, P., The EU social pillar: An answer to the challenge of the social protection of platform workers?, *European Journal of Social Security*, 219-239, 2018 and G. Strban, D. Carrascosa Bermejo, P. Schoukens and I. Vukorepa, *Social security coordination and non-standard forms of employment and self-employment. Interrelation, challenges and prospects*, Brussels, MoveS-European Commission, 69 p., 2018.

(and hence are consequently socially insured in that manner). Their classification follows largely the criteria in use to distinguish between wage-earnership (legal and/or economic dependency) and self-employment (absence of a dependent work relationship). Much will be dependent upon whether the person concerned performs his or her work in a status of personal or economic dependency. If this is the case the person concerned must be considered as an employee, if not, as a self-employed person. This delineation applies mainly for labour law, but is largely present too in social security law.

In many Member States there is no overall definition present of flexible forms of work such as casual work, on-demand work and intermittent contracts. Some forms might even be considered as illegal or are not allowed by the Labour Inspectorates.

For non-standard work specific adaptations will have to be made in the legislation in order to clarify the eventual status of the worker. These adaptations reflect the specific working circumstances of the non-standard worker. In temporary agency work e.g., the agency might be considered as the employer and hence the agency workers might have social security coverage as employees. 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 system.

In some systems a presumption is made that for non-standard forms of work, such as on-demand work, telework and domestic work a contract of dependent labour is concluded; consequently they are considered to be employees for the application of the social security provisions. Teleworkers providing services in personal dependency are in many Member States subject to social security law for employees. An exception may be that the rules regarding the employer's workplace, like accident-at-work insurance, are not applicable.

Although in recent times, platform work has been growing strongly in most European countries, not many specific regulations are to be found governing their specific working environment. Platform work as such is not specifically regulated in social security law. However many of the persons active on a platform are not considered to be a genuine 'worker' and hence are not covered in the (work related) social security schemes. The activities underlying platform work, at least when reported, are often too marginal of a kind, to be considered as regular professional activities. Hence they will not be taken into account for the application of (work related) social security schemes. The qualification of the (platform) activity is here of another kind (than the traditional question whether the activity is of an employee or of a self-employed kind); the issue boils down to the mere essential question: can the activity be considered as a professional activity or not? Is the person providing platform activities a worker?

In general in relation to non-standard work (such as part-time work and defined forms of work), elements such as the level of income or working time, may indeed affect the eventual access to social protection schemes. For instance in relation to part-time and fixed-term work the pay and/or working hour thresholds (minimum threshold of earnings to become insured) might be too demanding for some of these workers

and consequently may exclude them from social security coverage. Part-time workers and fixed-term workers may thus be protected for labour law, but may not be socially insured in the end.

Similarly as with wage-earnings, the self-employed activity has been growing in diversity. Traditional self-employed groups are tradesmen, craftsmen, liberal professions and farmers. Yet at the same time the self-employed system is constructed as a 'residual' system accommodating all forms of work that are not active in (legal) subordination. Especially the group of freelancers – as it is defined in a flexible manner (professionally active persons working not in subordination of their principal) – has been absorbing some new independent labour forms (e.g. emerged in the platform economy). Overall the traditional standard self-employed professions diminished in number; conversely more solo self-employed emerged, some of them dependent upon only one principal (and hence economically dependent) and some others formally registered as self-employed yet factually (still) active in legal subordination (employee); in the last situation we are strictly speaking not dealing anymore with self-employed (bogus self-employment). Moreover, also self-employed persons might perform work on a part-time basis.

Countries sometimes use the concept of 'economically dependent self-employed person', being self-employed who is mainly dependent on one client but is for social security purposes to be treated as an employed person (labelled as a 'small scaled self-employed' or 'dependent self-employed', providing services to one or two employers. In this case the rules on social security contributions being shared between the self-employed person and his or her 'commissioner', and the social security system for employees might become applicable (in full or sometimes only for some risks).

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 under an indefinite contract. This also means that the employer has to pay social security contributions and potentially administrative fines for not registering a worker. 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.

3. NON-STANDARD WORK AND COORDINATION REGULATIONS 883/2004 AND 987/2009

3.1. SCOPE OF APPLICATION

Since the introduction of Reg. 883/2004 and Reg. 987/2009, the nature of work is not so relevant anymore. Before the application of these latest Coordination Regulations it was important to know the professional status of the covered persons. Until 1981, the Coordination Regulations were only applicable to the employees; from that year

onwards⁴⁰ the scope extended to employees and self-employed but was still limited to the group of professionally active persons⁴¹.

The personal scope of the coordination Regulations has thus constantly evolved to cover ever more insured persons. Regulation 883/2004 now encompasses all nationals of EU Member States who move or have moved within the EU and are or have been subject to the social security legislation of an EU Member State (Article 2). This is an explicit expression of the coordination system's concurrence with developments in the field of European citizenship, promoting the unhindered free movement of any EU citizen, regardless of engagement in an economic capacity.

3.1.1. Socially insured EU nationals moving between Member States

First of all, Regulation 883/2004 applies to nationals of an EU Member State who are or have been subject to the social security legislation of one or more EU Member States and who are moving or have moved between EU Member States. The movement implies thus a movement between at least two Member States of the EU. A movement within a single Member State (e.g. between two regions of that state) is thus not enough to fall under the scope of Regulation 803/2004.

Regulation 883/2004 refers explicitly to EU nationals. Third country nationals are thus not directly covered by Regulation 883/2004.⁴²

3.1.2. Primary insured, and dependent family members and survivors

Although the coordination Regulation covers all socially insured EU citizens one still has to make a distinction between the primary insured persons and the family members dependent upon the primary insured. The coordination rules differ across those two groups. Dependent family members cannot e.g. only rely upon some coordination provisions which are aimed at workers only. This means, e.g. that they

(40) With the coming into force of Reg. 1390/81 extending the scope of application to self-employed as well; as the legal basis (Article 48; back then Art. 51 TEEC) was only referring to workers (in the sense of wage earners, recourse had to be made to Article 352 TFEU. In a first time it was thus required to know for the delineation of the personal scope who could be considered as employee; later on with the extension to self-employed people, who was working (as employee or self-employed) and who was not working or who did not have a link with an employee or self-employed person (as depending person).

(41) Understood in a broad sense; persons on income replacement benefits, who were previously professionally active were assimilated to workers; so were persons who were dependent (as spouse, family member, etc.) upon the worker.

(42) As to third-country nationals, i.e. people who do not have the nationality of one of the EU Member States, a distinction between three different categories has to be made. The first category consists of stateless persons and refugees who are or have been subject to the social security legislation of an EU Member State, who move or have moved in the EU and who reside in an EU Member State (thus they have to meet a residence criterion). Regulation 883/2004 is applicable to them, as well as to their family members and their surviving family members. Secondly, family members of an EU national, a stateless person or a refugee who together with him move or have moved to another Member State are covered by the coordination Regulations as well, irrespective of their own nationality. In other words, the coordination Regulations treat non-EU dependent family members in the same way as EU dependent family members. Thirdly, other third-country nationals: with the exception of the relations with Denmark and the UK, third country national can invoke the coordination rules on the basis of Council Regulation (EEC) No 1231/2010, at least if they stay legally in the territory and (have) move(d) between at least two Member States.

cannot rely upon the chapter “unemployment benefits”. in relation to health care and family benefits. Family members⁴³ and survivors of EU nationals who are moving or have moved together with the EU national to another Member State are thus covered by Regulation 883/2004; yet they fall under specific coordination rules.

The primary insured persons refer to the professionally active persons or persons who have been professionally active and who are on benefit now. Here as well a distinction has to be made between the professional categories activities of the persons concerned, being mainly wage-earners, self-employed persons and civil servants. Different coordination rules are in place according to these activity groups as will become clearer below. Analogously as to the family members, these concepts refer as to their concrete contents, to the national law of the state on the territory of which the activities are (have been) pursued (see Article 1(a) and (d) Reg. 883/2004).

3.2. APPLICABLE LEGISLATION

3.2.1. Different qualification of professional activities

Whether a person works or not (or is considered as an employee or self-employed person) is still important for the application of the coordination rules. This is true 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 competent to make the eventual qualification of the professional activity. The Zinnecker case⁴⁴ 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 883/2004, the country from where the worker is posted retains the qualification competency over the activities.⁴⁵

(43) For the definition of family member, reference is made to the concerned national legislation (Article 1(i) Regulation 883/2004). Here we can read that family member means any person defined or recognised as a member of family or designated as a member of the household by the legislation under which benefits are provided. If the legislation of a Member State does not make a distinction between the members of the family and other persons to whom it is applicable (e.g. a social security benefit that is provided to all people who reside in that country, regardless whether they work or are depending upon a worker), the spouse, minor children, and dependent children who have reached the age of majority shall be considered members of the family.

(44) Case C-121/92, Staatssecretaris van Financiën v A. Zinnecker, EU:C:1993:840.

(45) Case C-390/98, Banks, EU:C:2001:456.

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 what extent the competent Member State will have to respect the legal qualification made by the other relevant Member State? More specifically, if an artist is self-employed for his or her activities performed in 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.⁴⁶ So it may be that our artist, considered to be self-employed in Member State A, may be requalified for that activity (performed in 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, that 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, which makes it problematic when applied to atypical forms of work that are qualified differently for the application of national social security legislation.

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 be 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 in 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 an activity turns to become a professional and which Member State decides upon this? Because of its minor or irregular nature, countries may decide that the activity is not to be considered as work, yet at the same time others may have it considered as a genuine work activity. Which of the involved countries is then to decide whether the person is working or

(46) Conclusion discussion Administrative Commission, 21 December 2017. See for a comment Nerinckx, S., Social security status and simultaneous activities: some clarifications, *Expatriate News*, No 2 (February), 1-3, 2018.

not? The answer to this question is important for the purposes 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 forms of work 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 upon the underlying default situation that the physical place where the person is working ultimately determines the Member State competent for social security. As the CJEU stated in the Partena-case⁴⁷, it is clear from 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” and that the criterion should be derogated from only in exceptional circumstances (obs. 49). 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 still be upheld now 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 activities 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 home-based work to be taken into account as well for the indication of the location where physically someone is carrying out 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 the other hand will become more virtual and hence will further complicate the applicable law rules in their application.⁴⁸ A first indication of how the applicable law rules may have to deal with home-based work is to be found in the recent case X v Staatssecretaris van Financiën.⁴⁹ 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 3.2. occasional and marginal work).

(47) Case C-137/11, Partena vzw v Les Tartes de Chaumont-Gistoux SA, EU:C:2012:593.

(48) 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.

(49) Case C-570/15, X v Staatssecretaris van Financiën, EU:C:2017:674.

Interesting were the considerations of Advocate-General Szpunar when 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 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)”⁵⁰. In line with the opinion of the Advocate-General the CJEU decided that the activities (i.e. the ones performed at home) were too marginal of nature to be taken into account for the concerned applicable law rules of Reg. 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”⁵¹. Conversely, if the activities at home are not marginal (in time/or gain), are followed in a structured manner and are agreed upon with the employer they may have to be considered for the application of Title II. It is evident that in absence of concrete rules in the current coordination rules, the CJEU will have the task of deciding how this circumstance of working partially at home (or at distance from the regular working place) though IT facilities, will have to be taken into account for indicating the competent social security state (Adv-Gen Szpunar, obs. 38). More on the effect of marginal activities for the application of Title II Reg. 883/2004, will be addressed below under 3.2.3.

3.2.2. 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 split between employees – who are in a subordinated relation with their principal – and self-employed persons, those who are 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 traditional self-employed persons. The best known example of these in-between groups is economically dependent self-employed persons, as introduced in quite a number of countries.⁵²

(50) Opinion Adv-Gen Szpunar, case C-570/15, X v Staatssecretaris van Financiën, EU:C:2017:182.

(51) Ibidem.

(52) 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 the point of view of social security law, 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.

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 apart from employees and self-employed persons works with 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 rule only works with two categories of professional activities: employees or self-employed persons?

Some guidance in answering the above question can be found in the case *Van Roosmalen*,⁵³ 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” for the application of the Coordination Regulations, 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 livelihood) and that there was “no subordinated relationship” (no employee).

(53) Case C-300/84, *Van Roosmalen*, EU:C:1986:402.

Of similar relevance are the (even older) cases Unger,⁵⁴ De Cicco,⁵⁵ Janssen,⁵⁶ Brack⁵⁷ and Walsh,⁵⁸ 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.

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

(54) Case C-75/63, Unger, EU:C:1964:19.

(55) Case C-19/68, De Cicco, EU:C:1968:56.

(56) Case C-23/71, Janssen, EU:C:1971:101.

(57) Case C-17/76, Brack, EU:C:1976:130.

(58) Case C-143/79, Walsh, EU:C:1980:134.

gained. This group often struggles to reach the income⁵⁹ and/or working hour⁶⁰ 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.⁶¹ In some countries both are applied together: special treatment contributions and reduction in social coverage. Marginal workers are largely to be found in the rapidly growing platform economy, being characterised by its 'gigs' or small-sized tasks made available through the intermediary platforms to an indefinite group of persons potentially interested in undertaking the micro task.⁶²

Interestingly in some countries the minimum income threshold is determining the definition of a worker.⁶³ 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

(59) In the Czech Republic e.g. the minimum income threshold (monthly) to be affiliated to the social security system is CZK 10,000 (EUR 400), in Germany it is EUR 450, in Austria EUR 438.05. In Latvia the monthly amount is EUR 70 for seasonal workers (in the agricultural sector) and EUR 50 for self-employed persons. In Malta there is a minimum annual threshold set for self-employed people, which amounts to EUR 910; in the UK in the case of self-employed, persons with earnings from self-employment of less than GBP 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 EUR 38 a week, in Cyprus EUR 174.38 a week and in the UK this amount is equal to GBP 116 a week for employees (while those between GBP 116 and GBP 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 EUR 50 per month.

(60) 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.

(61) In Latvia e.g. self-employed persons with a low income (less than EUR 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 EUR 15,893 for sick pay and EUR 4,569 for the pension scheme).

(62) Schoukens, P. and Barrio, A., The changing concept of work. When does typical work become atypical?, *European Labour Law Journal*, Vol. 8, issue 4, 2017.

(63) 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 EUR 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.

the performed activities or the size 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 have their professional activities performed 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. 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 or not the activity is of a professional nature?

3.2.3. 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 for which s/he receives the remuneration.⁶⁴

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 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 determine 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.

(64) 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.

a. 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 X⁶⁵). 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”.⁶⁶ 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).⁶⁷ 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 X⁶⁸ 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).

(65) Case C-570/15, X, EU:C:2017:674.

(66) Administrative Commission, *Practical guide on the applicable legislation*, Brussels, Commission EU, 27, 2013.

(67) 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).

(68) Case C-570/15, X, EU:C:2017:674.

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 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' in 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 do not need to 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). Here, as before, it may be 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.

b. 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 forms of work (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 forms of work? 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 the internet and their cloud activities).

3.2.4. 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 insurance and/or provide (only) voluntary access to the main social insurances.⁶⁹

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 case⁷⁰ 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,⁷¹ 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

(69) 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 GBP 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 falls 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.

(70) Case C-352/06, Bosmann, EU:C:2008:290.

(71) 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.

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) only provided 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.⁷² Especially in cases where the eventual competent Member State provides only for 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, and also in the Franzen case,⁷³ non-standard forms of work 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 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 Franzen⁷⁴ was only covered for one scheme (accidents at work) in the competent Member State, excluding the person from other protection, such as child care benefits. Due to the exclusive effect of the applicable law rules, access to child care 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

(72) 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.

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

(74) 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.

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.⁷⁵ 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 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.

3.2.5. Voluntary insurance

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.⁷⁶

Leaving aside the question of 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 Regulations⁷⁷ do fall under the material scope, 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

(75) 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.

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

(77) CJEU, joint cases C-82 and 103/86 *Laborero and Sabato*, EU:C:1987:356.

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 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 does not have 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.

4. ALTERNATIVES FOR THE FUTURE?

The study of non-standard work quickly questions the major fabrics of the Coordination Regulation. Are they still up to the new challenges, the greater flexibilisation of work organisation, the virtual character of a growing number of atypical forms of work, etc. Consequently some of the older proposals to have a radical reform on social security coordination have been put again under discussion.⁷⁸ Could they be an alternative for the future as sketched before? Here we restrict ourselves to the 'old' idea of the 13th state which possibly could be an alternative coordination rule for very mobile (virtual) workers. With regard to virtual (platform) work, reference should be made as well to the proposal made by E. Weber to introduce a digital (collection of) social security (contributions) to be distributed in a consecutive manner to the involved national system(s); the collection of the contribution is to be done by a supranational (international or European) body, such as e.g. the EU; the contributions are to be paid by the platforms mediating work from providers to users.⁷⁹ Here we restrict ourselves to the idea of the European social insurance (the 13th state) which in version 2.0

(78) The 'older' proposals refer to the idea of introducing a proper social insurance for migrant workers, the so-called 13th state (see below) and the idea to have installed a clicking system for mobile researchers: see more on this idea: *The social security of moving researchers*, Berghman, J. and Schoukens, P. (eds.), Leuven, Acco, 142 p., 2011.

(79) See for a summary Weber, E., *Setting out for digital social security*, Geneva, ILO, 14 p., 2018, <https://www.iab-forum.de/en/setting-out-for-digital-social-security/>.

could address some of the issues related to the social security coordination of mobile workers.

4.1. THE 13TH STATE

The ‘thirteenth state’ scenario referred to the European Community⁸⁰ and can best be summarised as the establishment of a European social security system for intra-community migrants, existing alongside the national social security systems. Since, at the time the idea was developed, there were 12 Member States, this European system was referred to as the system of the thirteenth state, which would function alongside those of the twelve Member States. For today’s European Union, we should refer to it as the 29th state, or, in the near future, as the 28th state; but since the idea is more important than the name, we prefer to continue calling it the ‘thirteenth state’.

The European ‘thirteenth state’ system would, in principle, be open exclusively to intra-community migrants. The European system would offer a complete system of social insurance covering all social risks in the field of social insurance. The method applied here should lie somewhere between harmonisation and coordination. The creation of a European social insurance system clearly goes beyond coordination alone. On the other hand, the ‘thirteenth state’ method falls outside the definition of harmonisation, since it does not, in principle, change national law.⁸¹

In principle, the thirteenth state system will only be open to persons who change their competent state in accordance with the rules of the Coordination Regulation. The system of the thirteenth state could, however, also address other categories of the population with regard to its scope of application *ratione personae*. In addition to intra-Community migrants, for example, employees of companies operating in more than one Member State would fit well into the social security system of the thirteenth state⁸².

4.2. THE 13TH STATE, EDITION 2.0

The Coordination Regulations attach great importance to the place of work, the *lex loci laboris*, as the standard for establishing the competent state. However, by realising the free movement of goods and services in an integrated market, simultaneously with the inclusion in the Union of countries from Central and Eastern Europe, many companies have shifted the base of their operations to these new Member States. This

(80) Although the scenario of the ‘thirteenth state’ was designed with an eye to the European Community, while the name refers to the situation in the European Community, the method of the ‘thirteenth state’ could also be applied in another multinational context.

(81) The method applied in the scenario of the ‘thirteenth state’ was and is not entirely new in the law of the European Community/European Union. After all a ‘European social security system’ has been set up especially for European Community civil servants; see Regulation (EEC, Euratom, ECSC) 259/68 of 29 February 1968, JO L56 of 4 March 1968; cfr. also DG IX, La protection sociale des agents des Communautés européennes, in Association des Rencontres européennes des fonctions publiques, La protection social des agents publics en Europe, La Documentation française, Paris, p. 409 ff., 1993.

(82) Cfr. on this possibility Pieters, D. and Vansteenkiste, S., *The Thirteenth State...*, o.c., p. 106.

evolution is particularly noticeable in certain sectors; let us only mention here the international transport of goods. But even in what are at first glance less mobile sectors such as construction, social protection is often arranged from within a new Member State, with lower wages and modest benefits. As such, a supporter of free movement cannot argue with this, were it not for the fact that it results in more and more people effectively working in the territory of a state, without being socially insured there. In other words employees can be working on the same site all having a different social security status: one might be insured in the country of employment, while another, as a result of posting is insured under a foreign social security system. All kinds of attempts to counteract undesirable competition or ‘social dumping’, are confronted with the difficulty of distinguishing abuse of the use of free movement and with the sometimes very conflicting interests of Member States in this.

But there is more, the place of work is also becoming increasingly difficult to identify in a highly computerised world: where does, for instance, the person, residing in Kortrijk (southwest Flanders/Belgium) who works in an office of his British employer just across the border in Lille (France), but who works from home two days a week, actually work in the sense of the Coordination regulations? Where does the controller responsible for the planning of slots at Edinburgh Airport (UK) operating from Lund (Sweden) and going to Edinburgh twice a month, work? We could give many more examples that are neither imaginary nor far-fetched.

The network or shared economy has added a dimension to this: it is becoming less and less clear when we do work or otherwise earn income in a way that is socially insurable. What about the person who, in the border region, passes on the prices of specific products in supermarkets on both sides of the border to a parent company of one of the large department store chains established in a third country, doing so for a small amount per transferred price and without being bound through agreement or (labour) contract?

Does the thirteenth state offer a solution to all these problems? Certainly not, but it would be a way of offering a good solution for specific sectors or activities that are by nature cross-border or that are difficult to locate. It is therefore worth investigating whether we could not introduce the 13th state system for specific groups of professional activists. Here we consider, for instance, the workers and self-employed workers in the international transport sector, scientists, researchers and university professors (from the Union or from outside the Union), intra-corporate transferees etc.

OUTLOOK

The nature of work is changing. A stronger diversity in atypical forms of work is proof of this development. Platform work by incorporating various elements of atypical work challenges probably the most traditional characteristics of work (personal subordination, indefinite time, full time, and its outcome in security work). Especially online platform work is the most difficult work type to capture in social security schemes that have been around traditional forms of work. Due to its virtual nature it can be performed wherever in time and at whatever place. Moreover it is hard to find out who are the different parties involved (intermediary platform,

several commissioners as clients or employer). As the tasks are of tiny 'gig' nature some utter that platform activities are not even to be considered as work activities and hence disqualify them from the traditional professional social security schemes. A new qualification indicating the nature of activities emerges: from which moment an activity becomes a professional activity.

It is exactly this question which challenges to a large extent the actual design of the coordination rules in Title II 883/2004 (indicating the competent state), which largely differentiates between workers and non-workers. Platform workers apparently sit largely in between the two categories. This and the fact that many of the online platform activities are of a virtual kind, potentially reaching out to the global world, ask (again) for a rethinking of the coordination rules. Probably we have to start to accept that some types of work of an intrinsically mobile nature cannot be assigned to the territory of a given state but are simply 'European' in their kind asking for truly European answers. It is maybe time after 60 years of social security coordination in the EU, to accept the existence of a genuine 'European worker' enjoying his/her social protection in a truly European scheme.

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