Chapter 13
Social Law 4.0 and the Future of Social Security Coordination

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I. Introduction

The law of social security, or social law in a narrower sense,[1] is among the youngest branches of law. Although, it has evolved into a separate and fully-fledged legal field, some connections to labour law remain and certain connections to other fields of law, like tax law, family law or even criminal law were established.

Moreover, social law cannot remain static in the contemporary dynamic or fluid society.[2] One of the aspects of fluid society is challenging the traditional norms of work, its stability and predictable social security coverage. Traditional patterns of (organising) work and mobility, which used to be considered as a norm (standard), also when shaping social security systems after the Second World War, are changing. According to ILO Convention 102 concerning minimum standards of social security of 1952, the stan-

1 The definitions of social law may vary, e.g. in Belgium *droit social* or *sociaal recht* encompasses labour and social security law (although both fundamental pillars emancipated to a certain extent). *Debaenst, Bruno,* Belgian Social Law and its Journals: A Reflected History, in: C@hiers du CRHIDI. Histoire, Droit, Institutions, Société [En ligne], 37 (2015), https://popups.uliege.be:443/1370-2262/index.php?id=183. Accessed 15 May 2020. Similarly, the European Social Charter (in its initial and revised versions) addresses both fields of law. Conversely, in Germany *Sozialrecht* could more straightforwardly be translated as the law of Social Security, although it may cover some fields of law that are considered to be outside of its scope in some other countries, e.g. social compensation schemes. The latter are, for instance, outside the scope of social security law in Slovenia and within the broader field of social protection law. See *Strban, Grega,* Systematisierung des slowenischen Rechts der sozialen Sicherheit im Vergleich zur Systematisierung des deutschen Sozialrechts, in: Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht, 24/25 (2010/2011) 4, p. 353.

2 Nowadays, some authors discuss fluid borders, fluid services, work without boundaries, and fluid communications. *Hoencamp, Jeroen,* The Fluid Society, Working Without Boundaries, The Perspective Series, New Insights into the UK Workplace, Circle Research, Vodafone 2014.

dard beneficiary is a man with a wife and two children in a stable (full-time and permanent) employment relationship. Standard social security benefits should suffice for such a standard beneficiary. Nevertheless, work (organisation), movement and social security have become more non-standard or unstable (fluid), especially within the EU.[3]

Societal fluidity may be reflected in new forms of work or, more specifically, organisation of work. Standard employment is being replaced by non-standard forms of employment and new forms of self-employment. Among them are fixed-term contracts, part-time work (either temporary or on a more frequent basis, horizontal or vertical), temporary agency work, telework, traineeships and student work, as well as casual work, including on-demand work (including zero-hour contracts) and platform work (i.e. people working for digital platforms, without having a fixed workplace). Moreover, self-employment, especially involuntary, bogus, dependent, new[4] and part-time self-employment, or other country-specific non-standard contracts (mini-jobs, civil law contracts, etc.) may exist. The distinction between employment and self-employment is blurred to a certain extent also in EU law.[5]

Fluidity may also be associated with the problem of fraudulent forms of undeclared work, especially its grey zone, in the form of under-reporting of wages or hours worked. What is noticeable in the areas of platform work and IT networks is undeclared own-account work, i.e. self-employed work.[6] On many occasions, labour-intensive rather than capital-intensive platforms may not be required to declare the earnings of workers. Al-

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3 *Vukorepa, Ivana/Jorens, Yves/Strban, Grega,* Pensions in the Fluid EU Society: Challenges for (Migrant) Workers, in: da Costa Cabral, Nazaré/Cunha Rodrigues, Nuno (eds.), The Future of Pension Plans in the EU Internal Market, Financial and Monetary Policy Studies, 48, Cham: Springer 2019, p. 326.

4 New self-employed persons may fall between the two traditional, standard categories of dependent and subordinated workers (or employees) and independent self-employed persons (entrepreneurs) also in social security law.

5 Article 48, Treaty on the Functioning of the EU - TFEU, OJ C 202, 7 June 2016 (Title IV, Chapter 1 on the free movement of workers) referring to employed and self-employed workers. Such provision is indeed a bit odd, since self-employed persons are usually distinguished from workers and other provisions of EU law might apply to them, such as freedom of establishment and freedom to provide services in the internal market. However, this shows that workers and self-employed persons might no longer be clearly separable categories, especially in social security coordination law.

6 *Reinhard, Hans-Joachim*, Adjusting Old-Age Pensions to Match Employment Biographies – The German Case, in: Hohnerlein, Eva Maria/Hennion, Sylvie/Kaufmann, Otto (eds.), Erwerbsverlauf und sozialer Schutz in Europa, Berlin – Heidel-

though such platforms try to avoid being considered as employers, national courts may classify them as such,[7] which may lead to more comprehensive social security coverage.

Many of the mentioned forms of non-standard work or new, more flexible forms of work organisation are associated with various elements of precariousness. They may range from job insecurity, to employment record discontinuity, and lower earnings.[8] Moreover, they may be involuntary for persons performing such work.[9]

As much as it might be thought-provoking, the present paper does not analyse labour law aspects of non-standard forms of employment and self-employment. It rather focusses on the question how social law should follow the changes in social relations in order to provide effective social security to persons requiring it. Although persons performing various kinds of non-standard work or engaged in new forms of self-employment do not present a very homogenous group, they shall be defined as non-standard

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berg: Springer 2018, p. 577; *Becker, Ulrich*, Die soziale Sicherung Selbständiger in Europa, in: Zeitschrift für europäisches Sozial- und Arbeitsrecht, 17 (2018) 8, p. 307.

7 For instance, Italian Corte di Cassazione, judgment No. 1663 of 24 January 2020 qualifying riders delivering food to be considered as subordinated workers, https://www.lavorodirittieuropa.it/images/Cassazione_Foodora-.pdf. Accessed 15 May 2020. Similarly, French *Cour de Cassation* qualifying an Uber driver as a worker: Arrêt No. 374 du 4 mars 2020 (19-13.316) - *Cour de Cassation - Chambre Sociale*, FR:CCAS:2020:SO00374, https://www.courdecassation.fr/jurisprudence_2/chambre_sociale_576/374_4_44522.html, or in English: https://www.courdecassation.fr/IMG/20200304_arret_uber_english.pdf. Both accessed 15 May 2020.

8 *Schoukens, Paul/Barrio, Alberto*, The Changing Concept of Work: When does Typical Work Become Atypical?, in: European Labour Law Journal, 8 (2017) 4, p. 306; Kresal Šoltes, Katarina/Strban, Grega/Domadenik, Polona (eds.), Prekarno delo: Multidisciplinarna analiza (precarious work: multidisciplinary analysis), Ljubljana: University of Ljubljana, Faculty of Law and Faculty of Economics 2020; also: *Mandl, Irene/Biletta, Isabella*, Overview of New Forms of Employment – 2018 update, Eurofound, Luxembourg: Publications Office of the European Union 2018, doi: 10.2806/09266.

9 In 2017, one in three among the economically dependent self-employed wished to work as an employee. Hence, economically dependent self-employed persons most particularly wish to work as employees (32.6 percent). The corresponding percentage for the independent self-employed without employees is 17.4 percent, and for the self-employed with employees 10.5 percent. These results show that a strong relation exists between self-employed status and the willingness to change. See Eurostat, Self-Employment Statistics, November 2018, https://ec.europa.eu/eurostat/statistics-explained/index.php/Self-employment_statistics. Accessed 15 May 2020.

workers (unless a specific group would require specific mentioning) for the purpose of the present article.

It might be recalled that also during its establishment and over the course of history, social security had to be modified in order to fulfil its function, i.e. provide (income) security to people. Basically, it has always followed the industrial revolutions.[10] The response to the Industrial Revolution 4.0 has to be modernised social law, hence designated as Social Law 4.0.

Even though Member States have transferred the execution of certain sovereignty rights to a supranational organisation, such as the EU, they remain exclusively competent to determine the substance of their national law of social security. They should find their own solution and shape Social Law 4.0, whereby they might be supported by the EU.[11] National solutions are bound to be distinctive. They always reflect various historically conditioned and rather distinctive structural (e.g. educational, living and working conditions) and cultural elements (e.g. powers of trade unions or civil movements)[12] and policy preferences of each Member State. Today, the courts of law might remind the legislature that the rule of law de-

10 The first one presenting manufacturing and focusing on a more optimised form of labour performed through the use of water- and steam-powered engines and other types of machine tools. Industrialisation and urbanisation led to the establishment of social security schemes. The second industrial revolution introduced steel and the use of electricity in factories, enabling mass production on the assembly lines. In the third one, electronic and eventually computer technology was introduced in factories, moving from analogue to digital technology and automation software. The fourth industrial revolution is based on the interconnectivity through the Internet of Things, access to real-time data, and the introduction of cyber-physical systems, i.e. connecting physical with digital, allowing for better collaboration and access across departments, partners, vendors, products, and people. See EPICOR, What is Industry 4.0 – the Industrial Internet of Things (IIoT), https://www.epicor.com/en-ae/resource-center/articles/what-is-industry-4-0/. Accessed 15 May 2020.

11 See e.g. The European Pillar of Social Rights, Principle 12 on Social Protection, emphasising that regardless of the type and duration of their employment relationship, workers, and, under comparable conditions, the self-employed, have the right to adequate social protection, https://ec.europa.eu/commission/sites/beta-political/files/social-summit-european-pillar-social-rights-booklet_en.pdf. Accessed on 25 May 2020; Also *Schoukens, Paul/Barrio, Alberto/Montebovi, Saskia*, The EU Social Pillar: An Answer to the Challenge of the Social Protection of Platform Workers?, in: European Journal of Social Security, 20 (2018) 3, p. 219.

12 *Berghman, Jos*, The Invisible Social Security, in: Van Oorschot, Wim/Peeters, Hans/Boos, Kees (eds.), Invisible Social Security Revisited, Essays in Honour of Jos Berghman, Tielt: Lannoo 2014, p. 37.

mands of them to follow the changes in social relations with its normative action.[13] Hence, the law of social security is not only one of the youngest, but is also bound to be one of the most rapidly changing areas of law.

In the present article, one additional element is added when considering the most appropriate modifications of social law, or when discussing Social Law 4.0, namely the element of cross-border movement. Fluidity within EU society is reflected also in the changing trends of mobility. Patterns of mobility of (non-standard) workers have become more diverse. The traditional long-term mobility of moving from home Member State to host Member State and working there for a longer period of time has been partially replaced or supplemented by mobility characterised by multiple shorter-term movements to other Member States.[14]

Therefore, the research question is: How should the coordination of national social security systems be modified in order to follow the development of non-standard forms of employment and self-employment? This includes higher digitalisation and ITC-supported work patterns, which might be boosted even more by the recent pandemic[15] with a higher ratio of home office work and telework and remote (or blended) schooling,[16] which is not occurring only within one Member State, but is bound to entail a cross-border element in certain cases.

13 E.g. Decision of the Slovenian Constitutional Court U-I-69/03, 20 October 2005, OdlUS XIV, 75; *Strban, Grega*, Country Report on Slovenia, in: Becker, Ulrich/Pieters, Danny/Ross, Friso/Schoukens, Paul (eds.), Security: A General Principle of Social Security Law in Europe, Groningen: Europa Law Publishing 2010, p. 412.

14 *Fries-Tersch, Elena/Jones, Matthew/Böök, Birte/de Keyser, Linda/Tugran, Tugce*, 2019 Annual Report on Intra-EU Labour Mobility, European Commission 2020, p. 13.

15 The WHO declared the outbreak of the new coronavirus Covid-19 (caused by SARS-CoV-2 virus) a pandemic in Europe on 12 March 2020, http://www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid-19/news/news/2020/3/who-announces-covid-19-outbreak-a-pandemic. Accessed 15 May 2020.

16 See the outcome of the European Institute of Social Security, Blended Courses in Social Security, https://www.eiss.be/training%20and%20education/blended%20courses.html. Accessed 25 May 2020.

II. Coordination of Social Security Systems

1. The Objective

In highly mobile societies,[17] where movements are more frequent, last shorter and include various destinations, the reminiscence of the principle of territoriality can hardly be justified.[18] One of the major objectives of the EU, which should enable the functioning of the internal market, is the promotion of free movement of EU citizens, and all kinds of professionally active persons and workers in particular. Without an effective, uniform social security coordination mechanism, such free movement could be seriously hampered. Nevertheless, Member States are still free to shape the substance of their social security systems, i.e. to determine the scope of entitled persons, kind and scope of benefits and conditions for their entitlement. However, the shaping of national social security is not an island outside of EU law. The latter must still be taken into account, e.g. when treating national and Union citizens alike in national social security systems. The Court of Justice of the EU (CJEU) tries to construe the secondary legislation as a whole in order to achieve the desired result[19] and uphold the fundamental values of the EU.

As already noted above, the social security system is first and foremost regulated by national law. The more similar national social security systems are, the easier their coordination might be. However, it seems that national social security systems are growing apart, making their coordination more complex. In order to guarantee the free movement of workers (Article 45 of the Treaty on the Functioning of the European Union, TFEU) and Union citizens in general (Article 21 TFEU) social security systems have to be legally and administratively connected, interlinked, coordinated. Similar to national social law, EU social security coordination law has to be adapted to the new and more fluid 4.0 social relations, based on digitalised and non-standard forms of employment and self-employment.

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17 Notwithstanding temporary restrictions to contain the pandemic in 2020.

18 For instance, ILO Social Security (Minimum Standards) Convention No. 102 of 1952 foresees that a benefit to which a person protected would otherwise be entitled may be suspended for as long as the person concerned is absent from the territory of the Member State (Article 69). Also, the European Court of Human Rights ruled that such restrictions can no longer be justified, ECHR of 07 February 2014, Application No. 10441/06, Case of Pichkur v Ukraine.

19 E.g. one of the latest decisions: CJEU of 2 April 2020, Case C-802/18, Caisse pour l'avenir des enfants v. FV and GW, ECLI:EU:C:2020:269.

2. Two Paradoxes

It is correct that EU law does not unify national social security systems. However, paradoxically, their coordination is achieved through a regulation, which is by itself a unifying measure. It is generally and directly applicable and binding in its entirety in all Member States.[20] The attribute of direct applicability is linked to the doctrine of supremacy. In principle, it is not open to Member States to interfere with the direct application of a regulation in the national legal order. However, social security systems are not unified, at least not in their substance. Rather, the part of formal social security law, governing the application of the substantive social security law in transnational situations is unified among all the Member States.[21]

Historically, the text on linking or coordinating social security systems of the six EU founding Member States[22] was agreed upon in the form of an international convention. However, it was decided to make the coordination rules operational as soon as possible to avoid the time-consuming procedure of ratification. Hence, already agreed rules were passed in the form of a regulation. In fact, this was done in the form of the third regulation ever adopted by the (current) EU, i.e. Regulation (EEC) No. 3 concerning social security for migrant workers.[23] It was the first real legal instrument in the EU.[24] Regulation (EEC) 4/58 was the Implementing Regulation, mainly containing rules of behaviour of the institution responsible for social security coordination.[25]

Choosing a regulation over the traditional international convention has important implications. It gives the CJEU the possibility to interpret secondary legislation and establish its conformity with the Treaties,[26] or in fact apply the Treaties directly to the situations under the material scope of EU law. Later on, the initial Social Security Coordination Regulations

20 Article 288 TFEU.

21 *Strban, Grega*, Social Rights of Migrants in the European Union, in: Malfliet, K./Abdullin, A. I./Shaikhutdinova, G. R./Davletgildeev, R. Sh. et al. (eds.), Regional Aspects of Integration: European Union and Eurasian Space, Moscow: Statut 2019, p. 73.

22 The founding Member States were Belgium, France, Germany, Italy, Luxembourg and The Netherlands.

23 OJ L 30/561, 16 December 1958.

24 Regulations No. 1 and 2 dealt with the use of languages and the form of the *laisser passer* to the Members of the European Parliament, respectively.

25 Both Regulations 3 and 4/58/EEC became applicable as of 1 January 1959.

26 Treaty on EU (TEU) and TFEU, both published as consolidated versions in OJ C 202, 7 June 2016.

were replaced by Regulation (EEC) 1408/71 and its Implementing Regulation (EEC) 574/72. Interestingly enough, the currently applicable Regulation (EC) 883/2004 was passed only a couple of days before the largest enlargement of the EU so far. The 15 Member States agreed on the wording of the Regulation on 29 April 2004.[27] The 10 States joined the EU on 1 May 2004 and the unanimity of 25 (and later 27) Member States would be required.[28] The Implementing Regulation was passed only in 2009, in the form of Regulation (EC) 987/2009,[29] which shows the resistance of the Member States to give more competence in the field of social security to the EU and difficulties on agreeing on a complex social security coordination mechanism within the EU.

Another paradox of a regulation might be detected when comparing it to a directive. The latter has to be transposed into national law,[30] whereas a regulation applies directly. Hence, the reader of national law might be readily aware of the directive rules, but not of the regulation rules, since they have to be studied in addition to national law. This is very much evident also in the field of social security coordination, more specifically in the law of cross-border healthcare. The rules of Directive 2011/24/EU on the application of patients' rights in cross-border healthcare[31] had to be transposed into national law (in 2013), whereas the Regulation (EC)

27 OJ L 166, 30 April 2004.

28 After the Lisbon Treaty came into force in December 2009 (OJ C 306, 17 December 2007) the unanimity requirement was mitigated, but not completely abolished. According to the ordinary legislative procedure votes of a qualified majority in the Council as a rule suffice for the legislative act to be passed (Articles 48 and 294 of the TFEU). However, a so-called "alarm procedure" or "brake procedure" has been installed in the TFEU. In case the Commission proposal affects important aspects of its social security system (including its scope, cost or financial structure) or affects the financial balance of that system, the Member State may refer the matter to the European Council. In this case, the ordinary legislative procedure is suspended and the European Council may accept or reject the proposal. Nevertheless, the European Council as a rule adopts the decisions unanimously. The right of Member States to a veto has not been completely abolished, it has merely been modified. Moreover, if no decision is taken in four months, it is deemed that the act originally proposed has not been adopted.

29 Regulation (EC) 883/2004, OJ L 284, 30 October 2009. The latest proposal for the revision of the Coordination Regulations was presented in December 2016: European Commission, Proposal for a Regulation of the European Parliament and of the Council, COM (2016) 815 final.

30 A directive is binding, as to the result to be achieved, upon each Member State at which it is addressed, but leaves to the national authorities the choice of form and methods (Article 288 TFEU).

31 OJ L 88/45, 4 April 2011.

833/2004 has been directly applicable since May 2010. Yet, the discussion was much more vivid when the Directive was transposed into national law and a very limited discussion (if any) was noticeable when the new social security Coordination Regulation became applicable.[32]

Some principles of the EU social security coordination law can be deduced already from primary law (the Treaties),[33] others from the secondary law – most notably from the Coordination Regulations. These principles are the principles of equal treatment, unity of applicable legislation, protection of the rights in course of acquisition (by aggregating all relevant periods), the protection of acquired rights (by the export of benefits) and good and sincere administrative cooperation.[34]

III. Distinctive Definitions

One of the core problems related to social security of moving non-standard workers might be their distinctive treatment in various Member States. The concept of worker may be defined either by national or by EU law. It constitutes an autonomous concept specific to EU law, unless the EU instrument in question makes express reference to definitions under national law (at the same time attributing the EU meaning to such concept).[35]

There is a distinction in EU law between a free movement definition of a worker, and a social security definition.[36] According to settled CJEU case

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32 *Strban*, *Grega*, The Right to Health in the EU, in: Brameshuber, Elisabeth/Friedrich, Michael/Karl, Beatrix (eds.), Festschrift Franz Marhold, Wien: Manz 2020, p. 843.

33 Articles 18, 21, 45 and 48 TFEU.

34 The present article is too limited in scope to analyse all the facets of administrative cooperation among the Member States. Suffice it to note that a huge project on the electronic exchange of social security information (EESSI) is under way and the first electronic documents were exchanged between Slovenia and Austria in 2019. See General Secretariat of the Council of the European Union, Electronic Exchange of Social Security Information (EESSI): state of play – Information from the Commission, 28 February 2019, 6986/19, p. 3, https://data.consilium.europa.eu/doc/document/ST-6986-2019-INIT/en/pdf. Accessed on 19 June 2020.

35 See: CJEU of 19 March 1964, Case C-75/63, Unger v Bestuur der Bedrijfsvereinigung voor Detailhandel en Ambachten of Nijenoord 1 a, ECLI:EU:C:1964:19.

36 For instance, in the Coordination Regulations there is a reference to insurance under national social security systems, disregarding nationality (Regulation (EU) No. 1231/2010). However, according to the free movement perspective, the migrant worker concept is only applied to EU nationals. See also CJEU of 14 October 2010, C-428/09, Union syndicale Solidaires Isère v Premier Ministre, Min-

law, there is an autonomous EU concept of migrant worker linked to free movement[37] that follows a factual perspective, i.e. services must be performed for and under the direction of another person in exchange for remuneration.[38] Such definition explicitly excludes persons who do not perform activities considered genuine and effective, but perform them on such a small scale as for them to be considered marginal and ancillary.[39]

Conversely, Regulation (EC) 883/2004 does not provide a definition of worker or of a self-employed person.[40] It refers to national law when activities of employed and self-employed persons have to be determined.[41] Such EU definition in the form of referral to national law is relevant, especially with respect to non-standard workers, since national legislatures are free to determine the conditions under which non-standard workers are covered by their respective social security law.[42]

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istère du Travail, ECLI:EU:C:2010:612. For more on the concept of worker in labour law and social security law, see: *Lhernould, Jean-Philippe/Strban, Grega/Van der Mei, Anne Pieter/Vukorepa, Ivana,* The Interrelation between Social Security Coordination Law and Labour Law, FreSsco Analytical Report 2017, European Commission 2017, p. 15.

37 See e.g. CJEU of 3 July 1986, Case C-66/85, Lawrie-Blum v Land Baden-Württemberg, ECLI:EU:C:1986:284; CJEU of 23 March 1982, Case C-53/81, Levin v Staatssecretaris van Justitie, EU:C:1982:105.

38 See also CJEU of 17 July 2008, Case C-94/07, Raccanelli v Max-Planck-Gesellschaft, ECLI:EU:C:2008:425.

39 On the scope of these undefined terms (marginal and ancillary) in the Member States see *O'Brien, Charlotte/Spaventa, Eleanor/De Coninck, Joyce*, The Concept of Worker under Article 45 TFEU and Certain Non-Standard Forms of Employment, FreSsco Comparative Report 2015, European Commission 2016.

40 Which avoids complex annexes with specifications of these definitions. See Annex I of previous Regulation (EEC) No. 1408/17; *Jorens, Yves/Van Overmeiren, Filip*, General Principles of Coordination Regulation 883/2004, in: European Journal of Social Security, 11 (2009) 1-2, p. 55.

41 Article 1(a) defines "activity as an employed person" as any activity or equivalent situation treated as such for the purposes of the social security legislation of the Member State in which such activity or equivalent situation exists. See e.g. CJEU of 3 May 1990, Case C-2/89, Kits van Heijningen v Bestuur van de Sociale Verzekeringsbank, ECLI:EU:C:1990:183; CJEU of 30 January 1997, Case C-221/95, Hervein v Inasti, EU:C:1997:47; CJEU of 30 January 1997, Case C-340/94, De Jaeck v Staatssecretaris van Financiën, ECLI:EU:C:1997:43.

42 Of course respecting the EU Law at the same time. See cases CJEU of 12 July 1979, Case C-266/78, Brunori v Landesversicherungsanstalt Rheinprovinz, ECLI:EU:C:1979:200; CJEU of 24 April 1980, Case C-110/79, Coonan v The Insurance Officer, ECLI:EU:C:1980:112; CJEU of 30 January 1997, Case C-340/94, De Jaeck v Staatssecretaris van Financiën, E ECLI:U:C:1997:43.

For historical reasons, the best social security coverage and hence all social security coordination rules apply to persons who are defined as or are equivalent to full-time workers under national law. If persons are excluded from such national definition, due to work being considered as marginal or merely ancillary, they are also not subject to any social security coordination for workers. They might be covered as non-actives, if they are covered at all by the national social security law. If covered as non-actives, distinctive social security coordination rules would apply to them as compared to those of workers. Alternatively, if a national social security system covers all residents, the problems of classification of economic activity might not be as pertinent.

Although the number of cases across Europe (re)qualifying platform workers as employees for the application of their social insurance schemes has risen,[43] it is hard to tell under which status these workers eventually fall. Depending on the concrete organisation of their work, they might be considered either as employed or as (dependent) self-employed persons. However, what is clear though is that a multitude of these workers are formally hired as self-employed yet in reality work as wage-earners (bogus self-employed).[44] In some Member States platform work as such is not regulated yet and it does not offer social security coverage due to the ample use of minimum (insurance) thresholds.[45]

Hence, problems that may cause difficulties for coordinating distinctive social security systems for non-standard mobile workers might be related to distinct classifications in various Member States. Moreover, classification in one Member State may not be recognised in another Member State. Especially thresholds related to certain income levels or working hours, for being covered by the social security system and subject to (traditional) coordination rules may cause problems for non-standard workers.

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43 *Strban, Grega/Carrascosa Bermejo, Dolores/Schoukens, Paul/Vukorepa, Ivana*, Social Security Coordination and Non-Standard Forms of Employment and Self-Employment: Interrelation, Challenges and Prospects, MoveS Analytical Report 2018, European Commission 2020, p. 25, https://ec.europa.eu/social/main.jsp?catId=1098&langId=en, Accessed 15 July 2020. And recent judgments of e.g. Italian and French courts, as mentioned above.

44 See e.g. an example of massive requalification to wage-earner in Spain: https://elpais.com/economia/2019/07/28/actualidad/1564322291_541124.html. Accessed 15 May 2020.

45 *Strban, Grega/Carrascosa Bermejo, Dolores/Schoukens Paul/Vukorepa, Ivana*, Social Security Coordination and Non-Standard Forms of Employment and Self-Employment: Interrelation, Challenges and Prospects (fn. 43), p. 25.

Therefore, social security coordination law, adjusted to the Social Law 4.0, should disregard the thresholds concerning the level of income or number of working hours for mobile non-standard workers, since the adding of income or hours worked (e.g. simultaneously) in two or more Member States may de facto present genuine and effective activities, and not only marginal and ancillary ones. Moreover, the distinction between activities as a worker and as a self-employed person might be abolished and a person's entire income or duration of work should be considered in its entirety. In order to achieve this, information should be readily exchanged among the Member States involved, e.g. for a person who is simultaneously self-employed in two or more Member States and works part-time for one or more platforms.

Moreover, a classification of economic activities might be essential for determining which Member State's legislation should be applicable to a non-standard worker.

IV. Applicable Legislation

The rules on applicable legislation, designated also as collision or conflict rules, differ between working and non-working groups and between employees, self-employed persons and civil servants. Consequently, Title II of Regulation (EC) 883/2004 on the rules for determining the applicable legislation is not neutral concerning the eventual qualification of activities.

1. Impact of Qualification to Collision Rules

As a rule, each of the Member States on whose territory professional activities are performed by a non-standard worker is competent to determine the nature of these activities. The competent Member State will then be assigned by the social security coordination rules. For instance, a non-standard worker, performing the same activities in two Member States may be qualified as a self-employed person in one and as an employed person in the other. The outcome is that the Member State of employment, which has priority over self-employment, will be competent due to the application of Article 13 (3) of Regulation (EC) 883/2004.[46] Only in the case of

46 Similarly, civil servant activities prevail over employee and self-employed activities, according to Article 13 (4) of Regulation (EC) 883/2004.

posting does the country from where the worker is posted retain its competency to qualify the respective activities.[47]

The question might be whether each of the Member States concerned should remain competent for determining the nature of activities performed on its territory. If the purpose of social security coordination is to avoid negative consequences of the principle of territoriality and improve the legal position of a moving (also non-standard) worker, it could be argued that the Member State solely competent for the social security of such worker should have the sole responsibility for qualifying all activities. In the above case of employment and self-employment, the Member State of employment should have the competence to qualify the person's activities in both Member States as (dependent) employment for social security purposes.

Moreover, due to a larger fluidity and flexibility of work patterns, more people than before are combining different activities, which may also be performed across national borders. It might not always be easy to determine at what point a certain activity becomes an economic or professional activity. Some Member States might not consider very minor activities as work, while others might. It is important in determining the legislation of the respective Member State responsible for social security whether a person is qualified as a worker or as a non-active person. In the first case, the *lex loci laboris* rule becomes applicable, while in the second it is the *lex loci domicilii* rule.[48]

These rules on determining the legislation applicable are based on the geographical aspect of work. This is being emphasised also by the CJEU, which mentions the location of the employed or self-employed activity as a main criterion for social security coordination.[49] However, Social Law 4.0 is based more on digital platforms and remote (i.e. tele-) working (boosted by the Covid-19 pandemic), also from different Member States.[50] Geographical stability between a worker, his/her employer and a Member State is no longer guaranteed in all cases, which might complicate the coordina-

47 Article 12 of Regulation (EC) 883/2004.

48 Article 11 of Regulation (EC) 883/2004.

49 CJEU of 27 September 2012, Case C-137/11, Partena v Les Tartes de Chaumont-Gistoux SA, ECLI:EU:C:2012:593.

50 See in this respect CJEU of 13 September 2017, Case C-570/15, X v Staatssecretaris van Financiën, ECLI:EU:C:2017:674 (also the opinion of Advocate-General Szpunar, ECLI:EU:C:2017:182).

tion of national social security systems.[51] Gainful activity from a distance may no longer be of a merely marginal and ancillary nature.

2. *Rules on Marginal Activity*

Nevertheless, many non-standard workers struggle to earn enough income to survive and the Coordination Regulation itself applies a concept of marginal activities which refers to the limited amount of working time and/or remuneration.[52] However, there is no clear rule on what marginal activity may be. As an indicator the Administrative Commission for the Coordination of Social Security Systems proposes that activities accounting for less than five percent of the worker's regular working time and/or less than five percent of his/her overall remuneration should be regarded as marginal.[53] However, it seems that this rule applies only when activities in two or more Member States are performed simultaneously, not generally in all cases.

Nevertheless, even if applicable only to simultaneous activities,[54] odd results may be produced for non-standard workers. As already discussed, employed activities prevail over self-employed activities, and this might even be the case when a person is only marginally employed (e.g. slightly over five percent)[55] in one Member State and genuinely, effectively and predominately self-employed in another Member State. Does then the closest link to the Member State of employment really exist?

Moreover, when simultaneous employments, which are rather popular in some Member States,[56] are performed in two or more Member States, the one where the non-standard worker resides might be competent if sub-

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51 *Strban, Grega/Carrascosa Bermejo, Dolores/Schoukens, Paul/Vukorepa, Ivana*, Social Security Coordination and Non-Standard Forms of Employment and Self-Employment: Interrelation, Challenges and Prospects (fn. 43), p. 31.

52 Article 14 (5) (b), (7) and (8) of Regulation (EC) 987/2009.

53 European Commission, Administrative Commission for the Coordination of Social Security Systems, Practical Guide on the Applicable Legislation, December 2013, p. 27.

54 Article 13 of Regulation (EC) 883/2004 and Articles 14 to 16 of Regulation (EC) 987/2009.

55 In CJEU of 13 September 2017, Case C-570/15, X v Staatssecretaris van Financiën, ECLI:EU:C:2017:674, marginal employment was 6.5 percent.

56 E.g. in 2018, there was a sharp decrease in postings, but at the same time a sharp increase in simultaneous employments in Slovenia. The reason was that the law of cross-border provision of services only regulates posting (among other things

stantial activity is performed in this Member State of residence. However, it might not always be easy to determine the quantitatively substantial part (i.e. at least a quarter) of all activities. 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).[57] Some interpretation issues in determining the substantial part of activities might arise, especially with regard to platform work.[58]

3. *Minimum Coverage for a Legislation to be Applicable?*

Social law coverage for non-standard workers differs among the Member States. Many of them exempt non-standard workers from social security schemes, or reduce coverage to certain basic insurances.[59] As a rule, social security coverage depends on the social law arrangements of the Member State of work. In cross-border situations decisions of the CJEU have to be taken into account. Following the Petroni principle (or principle of

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requiring for all taxes and other duties to be paid, before A1 form can be issued), but not simultaneous activities.

57 Article 14 (8) of Regulation (EC) 987/2009.

58 Leaving aside the question of determining residence. For non-standard workers another question might be raised due to salary thresholds, i.e. would they be considered as workers or would they have to satisfy the sufficient resources and comprehensive health coverage conditions of the Free Movement Directive, i.e. Directive 2004/38/EC on the Right of Citizens of the Union and their Family Members to Move and Reside freely within the Territory of the Member States, OJ L 158, 30 April 2004.

59 For instance, so-called "Mini-Jobs" in Germany and in Austria are excluded from the scope of the social security system. In the UK, if a person is employed, but earns less than £116 a week, the latter will not be eligible for social security. In some Member States non-standard workers 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 against accidents at work and occupational diseases is compulsory for TRADEs and voluntary for other self-employed persons. *Strban, Grega/Carrascosa Bermejo, Dolores/ Schoukens, Paul/ Vukorepa, Ivana*, Social Security Coordination and Non-Standard Forms of Employment and Self-Employment: Interrelation, Challenges and Prospects (fn. 43), p. 39.

favourability),[60] the CJEU reduced the exclusive and binding effect of the applicable law rules.[61] From the *Bosmann* case[62] onwards,[63] the Court has been allowing an insured person to fall back on the social security system of the Member State of residence, in case the applicable legislation of the Member State of work does not provide certain social security benefits or when these benefits are too limited.[64]

Contrary to its previous case law,[65] the CJEU seems to be no longer upholding the rule on one single legislation applicable for a moving person at the same time, in order to avoid positive and negative conflicts of national laws. Deviations are allowed, at least if it is *in favorem laboratoris*. Moreover, it seems that social security systems are no longer perceived in their entirety, but rather that specific social security schemes, such as family benefits or pensions,[66] are being compared.

Nevertheless, the CJEU seems to insist on the *lex loci laboris* rule, even when it does not provide comprehensive social security coverage *ratione materiae*. In the *Franzen* case[67] the CJEU recalled that the general principle of *lex loci laboris* means that a resident of a 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 Member State of employment both on the days on which he performs the employed ac-

60 In CJEU of 21 October 1975, Case C-24/75, Petroni v Office national des Pensions, ECLI:EU:C:1975:129, the CJEU argued that workers moving in the EU should not be worse-off than those who are not moving.

61 Legislation of a single Member State only shall apply despite any territorial conditions of national systems.

62 CJEU of 20 May 2008, Case C-352/06, Bosmann v Bundesagentur für Arbeit, ECLI:EU:C:2008:290.

63 See also the following cases: CJEU of 12 June 2012, Case C-611/10, Hudzinski & Wawrzyniak v Agentur für Arbeit, ECLI:EU:C:2012:339; CJEU of 23 April 2015, Case of C-382/13, Franzen v Raad van bestuur, ECLI:EU:C:2015:261; CJEU of 19 September 2019, Case of C-95/18, van den Berg, Giesen and Franzen v Sociale Verzekeringsbank, ECLI:EU:C:2019:767.

64 *Strban, Grega*, Family Benefits in the EU: Is it Still Possible to Coordinate Them?, in: Maastricht Journal of European and Comparative Law, 23 (2016) 5, p. 787.

65 CJEU of 19 June 1980, Case C-41/79, Testa v Bundesanstalt für Arbeit, ECLI:EU:C:1980:163; CJEU of 12 June 1986, Case C-302/84, Ten Holder v. Nieuwe Algemene Bedrijfsvereniging, ECLI:EU:C:1986:242; CJEU of 10 July 1987, Case C-60/85, Luijten v Raad van Arbeid, ECLI:EU:C:1986:307.

66 Apart from the concrete case of Ms Franzen, C-382/13 integrated two other similar (national) cases, i.e. Giesen and van den Berg, where access to the Dutch universal pension scheme (AOW) was under consideration.

67 CJEU of 23 April 2015, Case of C-382/13, Franzen v Raad van bestuur, ECLI:EU:C:2015:261.

tivities and on the days on which he does not. However, due to the irregular and low income earned from her activities, Ms *Franzen* was only covered by one scheme (i.e. accidents at work) in the competent Member State. She was excluded from other parts of social security law, such as child benefits, which she could also not claim in her Member State of residence, since it was not a competent Member State. The CJEU argued that the amount of time devoted to employment, and also the existence of an employment contract and the type of employment, whether partial or casual, were irrelevant for determining the competent Member State.

However, a migrant worker who is subject to the legislation of the Member State of employment is not to be precluded from receiving, by virtue of national legislation of the Member State of residence, social security benefits from the latter State. This seems to be only the case if benefits in the Member State of residence are provided on the mere fact of residing in that country. For contributory social security systems the Court still upholds the competence of a single Member State.[68] Nevertheless, such double designation rule may cause problems in practice. The question is whether it should be verified in each case which benefits are provided to non-standard workers in the Member State of work and which are provided in the Member State of residence. Another question is whether the legal nature of the benefits should be compared, i.e. whether they are residence- or insurance-based.

It might be better to condition the application of the *lex loci laboris rule* on certain minimum standards, meaning that it can only be applied if comprehensive social protection is provided. If not, the Member State of residence might be exclusively competent for non-standard workers, since it also provides social assistance, recourse to which might be necessary for many non-standard workers. Minimum standards are explicitly mentioned in the Recommendation on access to social protection for workers and the self-employed,[69] and non-standard workers (regardless of the form of employment or self-employment) should be covered at least against the social risks of unemployment, sickness, parenthood (maternity and paternity), invalidity, old age, decease, accidents at work and occupational diseases. All non-standard workers shall be mandatorily covered. Alternatively, all self-employed persons should have at least voluntary access to such mini-

68 CJEU of 19 September 2019, Case of C-95/18, van den Berg, Giesen and Franzen v Sociale Verzekeringsbank, ECLI:EU:C:2019:767.

69 Point 1.2. of the Recommendation on Access to Social Protection for Workers and the Self-Employed, OJ C 387, 15 November 2019.

mum standard coverage,[70] which brings us to another problem: voluntary insurance.

4. *Only Voluntary Insurance for Non-Standard Workers?*

Some Member States may offer non-standard workers only voluntary access to (certain) social insurance schemes, especially if they receive a rather low remuneration.[71] Voluntary schemes related to social risks covered by the Coordination Regulations[72] do fall under their material scope. Nevertheless, specific rules for such schemes exist.

The general rule stipulates that the applicable law rules[73] are not applicable to voluntary insurance (or optional continued insurance), unless only voluntary insurance for a certain branch exists in a Member State.[74] The question might be whether for non-standard workers to have voluntary access to a certain social security scheme could be argued to be for them the only voluntary insurance for a specific branch. In this case it would be subject to EU social security coordination law and linked to other mandatory schemes. However, if the rule were to be construed as a mandatory scheme for (standard) workers, and hence as not the only scheme for a specific branch, it might not be subject to the social security coordination rules for non-standard workers. The latter interpretation should be avoided in order to provide social security also to cross-border non-standard workers accessing a certain scheme on a voluntary basis.

Moreover, if a non-standard worker is covered by a compulsory scheme in one Member State s/he should not be covered voluntarily against the same social risk in another Member State. However, an exception exists for pensions (or more generally, benefits in respect of invalidity, old-age and decease), where a non-standard worker may be compulsorily and voluntarily insured in two Member States, respectively. Nevertheless, a connection to the previous insurance has to exist in the Member State of voluntary in-

70 Point 8 in relation with point 3.2. of the Recommendation.

71 *Strban, Grega/Carrascosa Bermejo, Dolores/Schoukens Paul/ Vukorepa, Ivana*, Social Security Coordination and Non-Standard Forms of Employment and Self-Employment: Interrelation, Challenges and Prospects (fn. 43), p. 40.

72 CJEU of 9 July 1987, Joined Cases of C-82 and 103/86, Laborero and Sabato v OSSOM, ECLI:EU:C:1987:356.

73 Articles 11 to 13 of Regulation (EC) 883/2004.

74 Article 14 Regulation (EC) 883/2004.

surance.[75] However, if in both concerned Member States access to a given scheme is voluntary, a non-standard worker may avoid the coercive (*ius cogens*) rules on applicable legislation and opt for a scheme of his or her choice.[76] Only the interpretation that both schemes, not entire social security systems, should be voluntary would be coherent for the entire article of the Regulation 883/2004 on voluntary insurance.

In cases where the competent Member State provides only for restricted social protection, also the CJEU is tempted to accept additional access to the social security system of the other Member State involved (usually linked to residence) when under its national law this is made possible.[77]

V. *Equality of Treatment*

Rules on applicable legislation are, in principle, neutral and apply to all non-standard workers in that Member State, just as for national workers.[78] Hence, moving to another Member State might provide for more or less advantageous social law for a mobile non-standard worker, but the principle of equal treatment has to apply.

Moreover, if no coverage is provided in the Member State of employment, the equal treatment principle might be applied in the Member State of residence, e.g. in case of family benefits not provided in the Member State of employment.[79] Another situation might be related to the rules on applicable legislation, i.e. to the question in which Member State a non-standard worker, who is teleworking, should be covered and treated the same as other workers. Should it be the Member State of the company s/he is teleworking for or the Member State s/he is residing in? Additionally, should it be verified where such a worker habitually resides and where the

75 Article 14, Paragraph 3 Regulation (EC) 883/2004.

76 Article 14, Paragraph 2 Regulation (EC) 883/2004.

77 See cases already mentioned above, i.e. C-352/06, Bosmann, EU:C:2008:290 and following.

78 Article 4 of Regulation (EC) 883/2004. More: *Becker, Ulrich*, Die Bedeutung des gemeinschaftsrechtlichen Diskriminierungsverbots für die Gleichstellung von Sachverhalten im koordinierenden Sozialrecht, in: Vierteljahresschrift für Sozialrecht, 18 (2000) 3, p. 221.

79 See under the previous point mentioned cases C-352/06, Bosmann, EU:C:2008:290; C-382/13, *Franzen*, EU:C:2015:261; and C-95/18, van den Berg and Giesen, EU:C:2019:767.

centre of his or her activities is located?[80] In order to avoid focus on the physical location of work, a special designation rule for applicable legislation might be applied and, in any case, minimum income thresholds for social security coverage should be abolished.

Specific problems might relate to unemployment insurance if a non-standard worker was covered by such a scheme in one Member State, but after moving to another Member State s/he is not covered anymore (either excluded with no possibility to voluntarily join the scheme, or because such possibility was not exploited). Should such non-standard workers be treated equally with national non-standard workers only in the Member State of last employment, hence depriving them of unemployment benefits? Even if this were the case, previous insurance periods from the Member State of previous employment should not be lost. They should either be taken into account as relevant periods in the Member State of last employment, or the competent Member State should be the one, where such insurance periods were completed. In any case, different treatment of the same activities across Member States raises more questions than the Coordination Regulations provide answers for.

However, a solution might be found in the emanations of the equal treatment principle, i.e. equal treatment of benefits, income, facts or events.[81] If certain circumstances occur on the territory of another Member State, they should be taken into account by the competent Member State as though they had taken place on its own territory. The competent Member State should grant access to social security coverage or enable higher social security benefits.[82]

Hence, national social security administrations should also consider income (or benefits) acquired in a different Member State when assessing the status of a non-standard worker. Certain income thresholds applicable to grant worker status in the competent Member State should also include income generated in other Member States. By doing so, non-standard workers might reach the minimum level and be considered as genuine work-

80 Should *corpus* and *animus manendi* be verified? See Article 11 of Regulation (EC) 987/2009, also the Administrative Commission for the Coordination of Social Security Systems, Practical Guide on the Applicable Legislation, Brussels, European Commission, EU 2013, p. 41.

81 Article 5 of Regulation (EC) 883/2004.

82 See also *Pöltl, Manfred/Eichenhofer, Eberhard/Garcia de Cortázar, Carlos*, The Principle of Assimilation of Facts, FreSsco Analytical Report 2016, European Commission 2016.

ers.[83] The CJEU already established that income earned in a different Member State must be considered when calculating benefits.[84] It would be only reasonable to adopt this approach also in the granting of access to social insurance.

Another reason for assimilating conditions might be given if facts or events are alike[85] in both Member States concerned. Provisions do not have to be identical and assimilation has to be applied on a case-by-case basis whenever similarity can be detected.[86] Hence, coverage under unemployment insurance in one Member State should be treated as a like fact also in the competent Member State.[87]

Nevertheless, equal treatment of benefits, income, facts or events has its limits. It must not interfere with the rules on applicable legislation[88] and it cannot lead to objectively unjustified results or to the overlapping of benefits of the same kind for the same period.[89] Moreover, it should be differentiated from the aggregation principle.[90]

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83 Member States might be obliged to report income on a Structured Electronic Document – SED or Portable Document – PD, which would make assimilation of income more transparent.

84 CJEU of 15 December 2011, Case C-257/10, Bergström v Försäkringskassan, ECLI:EU:C:2011:839 (family benefits); CJEU of 15 December 2016, Case C-256/15, Nemec v. Republika Slovenija, ECLI:EU:C:2016:954 (invalidity pension).

85 Article 5 of Regulation (EC) 883/2204 mentions "like facts or events".

86 On broad interpretation see CJEU of 21 January 2016, Case C-453/14, Knauer v Landeshauptmann von Vorarlberg, ECLI:EU:C:2016:37 and CJEU of 18 December 2014, Case C-523/13, Larcher v Deutsche Rentenversicherung Bayern Süd, ECLI:EU:C:2014:2458.

87 Assimilation of income, benefits, facts and events could also turn out to be negative for the non-standard worker, e.g. by landing him or her above the social assistance threshold. See CJEU of 28 June 1978, Case C-1/78, Kenny v Insurance Officer, ECLI:EU:C:1978:140. Due to assimilation of facts, the Slovenian Supreme Court denied the right to a pro-rata old-age pension to a person still insured in Austria, see Case VIII IPS 169/2010, SI:VSRS:2011:VIII.IPS. 169.2010.

88 See Recital 11 of the Preamble to Regulation (EC) 883/2004.

89 See Recital 12 of the Preamble to Regulation (EC) 883/2004.

90 See Recital 10 of the Preamble to Regulation (EC) 883/2004, also Decision H6 by the Administrative Commission for the Coordination of Social Security Systems, OJ C 45, 12 February 2011.

VI. Aggregation of Periods

The social security coordination rules on the aggregation (or totalisation) of periods[91] concern the "legal qualification of facts"[92] and ensure that persons who have used their freedom of movement may access social security benefits under the legislation of the competent Member State. These rules should be differentiated from the rules on the calculation of benefits (especially the *pro rata temporis* rule) which ensure a fair share of payment of benefits between institutions of various Member States, corresponding the time being insured under each of the legislations.[93]

Specific rules might apply to unemployment benefits[94] and non-standard workers might benefit from them. They make a distinction between periods of insurance, employment or self-employment required by a national scheme and provide for aggregation of such periods, to the extent necessary, in order to satisfy the conditions of the legislation of the competent State (usually the Member State of last employment).[95] Hence, if periods of employment or self-employment are considered under the unemployment insurance of the competent Member State, they should be aggregated with equal (employment or self-employment) periods from another Member State, even if in that Member State they would not be leading to unemployment insurance.[96]

Conversely, it should be prevented that periods of unemployment insurance recognised as such in a Member State other than the competent

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91 See Article 48 TFEU and Article 6 of Regulation (EC) 883/2004.

92 *Pennings, Frans*, European Social Security Law, Cambridge – Antwerp – Chicago: Intersentia 2015, p. 135.

93 *Strban, Grega/Carrascosa Bermejo, Dolores/Schoukens, Paul/Vukorepa, Ivana*, Social Security Coordination and Non-Standard Forms of Employment and Self-Employment: Interrelation, Challenges and Prospects (fn. 43), p. 54.

94 Article 61 of Regulation (EC) 883/2004, Article 54 of Regulation (EC) 987/2009.

95 For more details see *Pennings, Frans*, European Social Security Law (fn. 93), p. 270; Fuchs, Maximilian (ed.), Europäisches Sozialrecht, 7th edition, Baden-Baden: Nomos 2018, p. 461.

96 Article 61 (1) Regulation (EC) 883/2004 specifies that "*when the applicable legislation makes the right to benefits conditional on the completion of periods of insurance, the periods of employment or self-employment completed under the legislation of another Member State shall not be taken into account unless such periods would have been considered to be periods of insurance had they been completed in accordance with the applicable legislation*." More: *Strban, Grega/Carrascosa Bermejo, Dolores/Schoukens, Paul/Vukorepa, Ivana*, Social Security Coordination and Non-Standard Forms of Employment and Self-Employment: Interrelation, Challenges and Prospects (fn. 43), p. 55.

Member State are disregarded and hence lost. This could be the case when a non-standard worker is covered as a self-employed person in one Member State, but moves to a different, i.e. competent Member State, which does not recognise periods of self-employment under its unemployment insurance. Another case might be that the same activity is recognised as employed activity in one Member State and as self-employed activity in the competent Member State, the latter of which aggregates only periods of equal legal nature (in this case self-employment).

The solution could be mandatory recognition of all periods of insurance, whether in employment or self-employment, by the competent Member State in cases where such periods were already recognised as unemployment insurance periods by the legislation of another Member State. To this end, the social security Coordination Regulations should be amended. The current proposal for amending them in fact envisages the insertion of a new article. It should provide that only the periods which are taken into account under the legislation of the Member State in which they were completed for the purpose of acquiring and retaining the right to unemployment benefits shall be aggregated by the competent Member State.[97] Another problem might lie in the requirement of an uninterrupted period of insurance for a Member State (of the last or penultimate activity) to be competent.[98] It might be more difficult for non-standard workers to satisfy the requirement of an uninterrupted insurance period.

Specific aggregation rules exist also for invalidity benefits and (old-age and "survivors") pensions.[99] Regulation (EC) 883/2004 still contains the special rule that a Member State is not required to provide benefits in respect of periods of less than one year completed under its legislation, if no benefit can be acquired under its legislation for such short period of time.[100] The rule is tuned to longer-term (or professional life-time) mobility from one Member State to another and may cause problems with short-

97 European Commission, Proposal for a Regulation of the European Parliament and of the Council, COM (2016) 815 final.

98 Proposal of the new Article 61 of Regulation (EC) 883/2004; ibid.

99 Articles 45 and 51 of Regulation (EC) 883/2004.

100 Article 57 of Regulation (EC) 883/2004. See also CJEU of 20 November 1975, Case C-49/75, Borella v Landesversicherungsanstalt Schwaben, ECLI:EU:C:1975:158.

term mobility – especially for non-standard workers, who might be more flexible also concerning movements to other Member States.[101]

Periods of less than one year are usually not completely lost, since they are proportionally taken over by Member States, which have to aggregate all periods of insurance or residence in order to calculate a theoretical pension amount and pay a *pro-rata temporis* pension.[102] However, in practice such short periods may be disregarded when a Member State concerned pays only a national pension, a so-called independent benefit[103] (and not a pro-rata one). Still, they would have to be considered in such a case.[104]

The Coordination Regulations provide a solution for many periods shorter than one year. In such cases, the Member State of last employment is solely competent,[105] which can be rather financially burdensome if no reimbursement from other Member States is received. The one-year rule might be abolished altogether even if this increases the administrative burden of the Member States involved.

VII. Export of Benefits

Providing social security benefits in a Member State other than the competent Member State is essential for the protection of already acquired (vested) social security rights. Such export of benefits applies predominately to cash benefits.[106]

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101 The initial goal seems to be to simplify the administrative procedure and reduce costs related to the payment of very low pensions; *Janda*, *Constanze,* in: Fuchs, Maximilian (ed.), Europäisches Sozialrecht (fn. 95), p. 452.

102 Article 57 (2) refers to Article 52 (1) (b) (i) of Regulation (EC) 883/2004.

103 See Article 52 (1) (a) of Regulation (EC) 883/2004.

104 In CJEU of 18 February 1982, Case C-55/81, Vermaut v Office national des Pensions, ECLI:EU:C:1982:68, it was argued that the national pension institution must take account of periods of insurance of less than a year completed by the worker under the legislation of other Member States even if the right to a pension arises under national legislation alone.

105 Article 57 (3) of Regulation (EC) 883/2004.

106 They are not subject to any reduction, amendment, suspension, withdrawal or confiscation, when the beneficiary or the members of his or her family reside in another Member State. Article 7 Regulation (EC) 883/2004. On specific export and overlapping rules for family benefits: *Strban*, *Grega*, Family Benefits in the EU: Is it Still Possible to Coordinate Them? (fn. 64), p. 792.

However, general social assistance, even when provided in cash, is excluded from the social security coordination rules.[107] Also not exported is the so-called categorical social assistance (special non-contributory cash benefits) for which specific coordination rules apply.[108] The latter might be considered as social assistance also under the Free Movement Directive, i.e. Directive 2004/38/EC and qualified as social advantage under Regulation (EU) 492/2011.[109]

Non-export of special non-contributory cash benefits might prove to be especially troublesome for non-standard workers, who might be paying low social security contributions resulting in low benefits, or who might even have to rely on (general or categorical) social assistance. Therefore, they might not satisfy the residence condition of sufficient means and comprehensive social insurance cover.[110]

Although it might be considered controversial, categorical (and possibly general) social assistance should be provided also outside of the competent Member State.[111] It might be phased out in the former Member State and gradually phased in in the new Member State of residence (according to the "closest link" principle). Alternatively, the approach applied for family benefits could be used, meaning that if the new Member State of residence provides social assistance, the former Member State would have to cover half of it (up to the actual amount of assistance) in the initial several (as a rule five)[112] years of residence. Social assistance and family benefits might have similar characteristics. They are of a non-contributory legal nature, and might be perceived as assistance to (or promotion of) the family (or household) community.[113]

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107 General social assistance (as well as medical assistance) is excluded from the material scope by Article 3 (5) (a) of Regulation (EC) 883/2004.

108 Article 70 of Regulation (EC) 883/2004.

109 OJ L 141, 27 May 2011.

110 Article 7 Directive 2004/38/EC.

111 See also the Nordic Convention on Social Assistance and Social Services, e.g. https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-1995479-om-nordisk-konvention-om-socialt_sfs-1995-479. Accessed 25 May 2020.

112 Article 16 Directive 2004/38/EC; see CJEU of 19 September 2013, Case C-140/12, Brey v Pensionsversicherungsanstalt, ECLI:EU:C:2013:565 and the following cases.

113 Some German authors call them *Hilfs- und Förderungssysteme*. More: *Von Maydell, Bernd Baron*, Binnenstruktur des Sozialrechts, in: Von Maydell, Bernd Baron/Ruland, Franz/Becker, Ulrich (eds.), Sozialrechtshandbuch (SRH), 5th edition, Baden-Baden: Nomos 2012, p. 51.

Moreover, benefits in kind may not be exported as such, but the right to them, e.g. the right to healthcare, may be "exported" and healthcare provided in another Member State at the expense of the competent Member State.[114] The competent Member State should strive to issue to all non-standard workers the European Health Insurance Card (EHIC), regardless of the legal basis they are insured upon.[115] This would enable not only urgent, but necessary healthcare in other Member States.[116]

VIII. Conclusions and Proposals de lege ferenda

To paraphrase Heraclitus, the only constant in society is change. As societal relations evolve, so should social law and consequently its coordination law. For the latter, it might be more difficult to fulfil its function today than it was in the past, since a number of very distinct national social security systems have to be linked. It could be argued that coordination is much easier if social security systems are similar and, in turn, that diversity adds to its complexity. It should be recognised that the single breadwinner is no longer the common model and cannot present the ideal of a standard beneficiary.

Solutions to contemporary challenges could and should be found in order to promote not only freedom of movement of standard, but also of non-standard workers (who in some Member States might already present a new standard). They might include coverage of all mobile (employed and self-employed) workers regardless of the amount of activity, by abolishing income and working time thresholds. Already existing social security coordination rules could be subject to a more dynamic interpretation, e.g. in terms of equal treatment of facts and event, income and benefits from other Member States.

Some other solutions might require a targeted modification of the Coordination Regulations. For instance, rules on applicable legislation

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114 *Strban*, *Grega*, The Right to Health in the EU (fn. 32), p. 841.

115 More on EHIC at https://ec.europa.eu/social/main.jsp?catId=559. Accessed 25 May 2020.

116 E.g. EHIC is issued to all self-employed persons in Slovenia, even if contributions are not paid. It has been conceived to provide urgent treatment (to which anyone is always entitled), although all necessary treatment may be provided as well; *Strban, Grega/Carrascosa Bermejo, Dolores/Schoukens, Paul/Vukorepa, Ivana*, Social Security Coordination and Non-Standard Forms of Employment and Self-Employment: Interrelation, Challenges and Prospects (fn. 43), p. 63.

should consider an economically active person as one legal subject, not giving priority to a classification of employed activities over self-employed activities. Moreover, in order to apply the *lex loci laboris* rule, the competent Member State should provide at least a minimum standard of social protection to non-standard workers. Previously recognised periods of insurance or employment should be fixed and recognised in all other Member States in order to avoid losing insured periods and to erase any obstacles to free movement. Social security coordination rules should be rethought and fine-tuned also to the social and legal reality of non-standard workers. Hence, the one-year rule could be abolished and social assistance schemes should be included in the material scope of EU social security coordination law. It would be said too lightly that if a person does not contribute (enough), no benefits are due.

Social Law 4.0 should make use of the technology provided by the Industrial Revolution 4.0, and so should social security coordination law. There should be no obstacle (technical or other) to sharing all the information of a moving non-standard worker. One contribution to this end could be the introduction of a European Social Security Number (ESSN).[117] More competencies on the part of the EU might be required in order to establish a truly uniform internal single market. Some attempts are visible within the European Unemployment Benefits Scheme (EUBS),[118] and the proposal for a separate EU social security system for mobile persons[119] is not new.

We should bear in mind that non-standard workers are gainfully active workers, too, and they should be treated as such and not as inactive persons with all the possible limitations that are linked to such status. They, too, must be able to enjoy the fundamental human right to social security, and this should not be limited solely because they make use of the freedom of movement within the EU.

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117 See https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1222-European-Social-Security-Number. Accessed 25 May 2020.

118 See https://www.ceps.eu/ceps-publications/legal-and-operational-feasibility-european-unemployment-benefits-scheme-national-level/. Accessed 25 May 2020.

119 Today it could be called the 28th social security system, next to 27 national social security systems. See *Pieters, Danny/Vansteenkiste, Steven*, The Thirteenth State - Towards a European Community Social Insurance Scheme for Intra-Community Migrants, Leuven: Acco 1993.