

# ATYPICAL WORK AND THE SOCIAL PROTECTION OF MIGRANTS IN EUROPE

AN ANALYSIS BASED ON REAL CASES

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# SUMMARY

In what cases, and according to what criteria, can the contractual relationship between an employee and their employer be defined as standard, hybrid or atypical? Why do social security institutions in European countries sometimes take into account periods of work the person has done in other countries and sometimes not? And above all, what specific impact can work with non-standard contracts have on the migration path of a person moving from one European country to another? For a migrant, can a non-standard job ultimately be a good stepping stone to a more stable professional integration or, on the contrary, does it entail the risk of being trapped in a second-class relationship?

This Policy Study will first clarify what is meant by atypical work and what the main differences are from standard work. Although there is no official definition of atypical work, the various concepts adopted at international and national levels have important points of convergence.

Next, we will broadly present the legal framework regulating the principle of free movement of workers in the European Union, highlighting the points that also apply, directly or indirectly, to third-country migrants.

In the last part, drawing on real-life testimonies and examples of migrants, both men and women, who have lived and worked in different EU countries, we will analyse in detail the effects that atypical work can have on social protection rights, especially unemployment and pensions, and on the protection of 'foreigner' status, such as access to host country nationality, family reunification and right of residence.

As we shall see, on the one hand, atypical contracts are increasingly widespread, especially among migrants. On the other hand, European and national social protection systems, born under the influence of the Fordist era of mass production, are still mainly built around the figure of the 'worker', with a full-time and open-ended contract, a regular professional career, generally a man with a family to support.

Consequently, social protection is weakened whenever the question arises as to whether a migrant worker is a 'worker' in the strict sense of the term. We conclude that it is above all the status of 'worker' that protects migrants, and it is precisely this status that is called into question when a person works with non-standard contracts.

# INTRODUCTION

The form of contract that governs an employment relationship always has an impact on the worker, their future and that of their family. This impact includes income, economic security, social protection and occupational safety and health, as well as access to training, inter-occupational mobility, trade union protection and collective bargaining.

In most cases, an employment relationship is considered 'standard' when it is firstly governed by a written contract, and if it is full-time and open-ended. This type of contract generally allows the worker to benefit from the rights that national and European social legislation grants to all workers, regardless of their origin or nationality, even if they are non-EU citizens. Above all, social security systems have been structured around this type of labour relations and this type of worker.

However, several other forms of work have developed, to different extents and in different ways, in all European countries in recent decades. Despite their great heterogeneity, all these new forms of work have three factors in common: less stability; fewer social rights; and lower wages.

Some research has also shown a link between flexible working and accidents and deaths at work. Contrary to what is often believed, accidents do not only occur in the construction, industry and agriculture sectors, but have recently become more widespread in the service sector, which is characterised by a high degree of labour flexibility.<sup>1</sup>

Another important feature is that these atypical employment relationships are usually more frequent among contractually weaker groups, such as young people, women, less-skilled workers and, above all, migrants.

Indeed, one of the paradoxes of economic migration is that people flee the precarious working conditions in their country of origin, only to find themselves forced to accept jobs in the host country without a contract, or with short-term contracts of just a few hours and low pay.

In European countries, immigrants are overall more likely than natives to have non-standard working hours. The gap between the foreign-born and the native-born is greater for women than for men in most OECD (Organisation for Economic Co-operation and Development) countries, with the notable exception of the Nordic countries (Norway, Sweden and Denmark). In some countries, such as Slovenia, Ireland and Italy, foreign-born women are about 15 per cent more likely to have atypical working hours than native-born women. In the Czech Republic, Estonia, Italy and Ireland, for example, the difference in the probability of non-standard working hours between immigrants and natives of the same sex is two to four times greater for women than for men. Non-standard working hours are particularly hard on women with children, as they do not allow for a satisfactory work-life balance.<sup>2</sup>

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1 Moffa, G. (2012). *La resistibile ascesa del lavoro flessibile*, Ediesse, Rome.

2 OECD (2020). *International Migration Outlook 2020*, OECD Publishing, Paris, <https://doi.org/10.1787/ec98f531-en>. In this context, atypical work consists of persons doing shift work and/or usually working in the evening and/or at night and/or on Saturdays and/or on Sundays.

Atypical working hours can have a significant impact on workers' well-being and work-life balance. For immigrants, shift work and night work also have an important impact on family and social relationships, and can therefore undermine processes of social inclusion, with important consequences for physical and mental health.<sup>3</sup>

Unionisation levels are also lower in those sectors with large shares of non-standard employment contracts, even when the system provides social incentives to join a union. This also has the consequence that immigrant workers, in addition to being less protected by trade unions, benefit less

than natives from any additional insurance benefits.<sup>4</sup>

Generally speaking, these problems affect all migrant workers, both those with European citizenship, who move within the framework of the free movement of workers, and – even more so – third-country nationals, who move in most cases under much more difficult economic and social conditions than European workers.

Many studies have already analysed these aspects, highlighting the risks, but also some advantages, that can be associated with so-called atypical work.<sup>5</sup>

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3 OECD (2020). *International Migration Outlook 2020*, OECD Publishing, Paris, <https://doi.org/10.1787/ec98f531-en>, p. 93; Costa, G. (1996). "The impact of shift and night work on health". In: *Applied Ergonomics*, vol. 27/1, pp. 9-16.

4 Spasova, S., Ghailani, D., Sabato, S., and Vanhercke, B. (2021). *Social protection of non-standard workers and the self-employed during the pandemic*, Brussels, ETUI, 2021, p. 115; Gschwind, L. (2020). "When free choice turns into a pitfall: conditional social protection for immigrants in voluntary unemployment insurance systems". In: *Journal of European Social Policy*, 31 (1), pp. 3-14.

5 To name but a few: Spasova, S., Ghailani, D., Sabato, S., and Vanhercke, B. (2021). cit.; Lagala, C. (2007). *Precariato e welfare in Europa. La tutela dei lavoratori precari in Belgio, Francia, Germania, Inghilterra e Spagna*, Rome, Ediesse; Zoppoli, L., Delfino, M. (eds) (2008). *Flexicurity e tutele. Il lavoro tipico e atipico in Italia e in Germania*, Rome, Ediesse; Berton, F., Richiardi, M., Sacchi, S. (2009). *Flex-insecurity. Perché in Italia la flessibilità diventa precarietà*, Bologna, Il Mulino; Militello, M. (2009). "La flessibilità normata: una storia lunga dieci anni". In: Altieri, G. (ed.), *Un mercato del lavoro atipico: storia ed effetti della flessibilità in Italia*, Rome, Ediesse, pp. 191-233; Burrioni, L., Carrieri, M. (2011). *Bargaining for social rights (BARSORI) country report Italy*, University of Teramo; ETUC, BusinessEurope, Union européenne de l'artisanat et des PME (UEAPME), Centre européen des employeurs et entreprises (CEEP) (2011). Study on flexicurity in the EU. <http://resourcecentre.etuc.org>; Carinci, M.T., (2012). "Il rapporto di lavoro al tempo della crisi. Modelli europei e flexicurity all'italiana a confronto". In: *Giornale di diritto del lavoro e di relazioni industriali*, no. 136, pp. 527-572, Stone, K.V.W., Arthurs, H. (2013). *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment*, New York, Russell Sage Foundation; Caldarini, C. (2016). "The 'Labour Mobility Package': A European Fraud against Mobile Workers and their Countries of Origin?". In: *E-Journal of International and Comparative Labour Studies*, volume 5, no. 2, <http://ejcls.adapt.it>; Nautet, M., Piton, C. (2019). "An analysis of non-standard forms of employment in Belgium". In: *NBB Economic Review*, June, [www.nbb.be](http://www.nbb.be). Among the Eurofound publications dedicated to this topic ([www.eurofound.europa.eu](http://www.eurofound.europa.eu)), see: Corral Alza, A. (2009). *Working conditions of non-standard workers*; Broughton, A., Biletta, I., Kullander, M. (2010). *Flexible forms of work: "very atypical" contractual arrangements*; Dribbusch, H. (2010). *Germany. Flexible forms of work: "very atypical" contractual arrangements*; Durán, J. (2010). *Spain. Flexible forms of work: "very atypical" contractual arrangements*; Eurofound (2010). *Very atypical work: Exploratory analysis of fourth European Working Conditions Survey*; Kraemer, B. (2010). *Crisis impacts usage of fixed-term contracts*; Vogel, S. (2010). *Development and structure of flexible forms of employment*; Kraemer, B. (2013). *Germany. Working conditions of young entrants to the labour market*.

Even more numerous are studies on the employment and social security of migrants, which often highlight the benefits of migration flows for the host countries, both economic and cultural benefits, as well as the disadvantages for the countries of origin, mainly due to brain drain and the loss of labour and taxes.<sup>6</sup>

A recent FEPS study, for example, highlighted how European countries are increasingly economically dependent on migrant labour, particularly in certain sectors such as care and agriculture. Despite this dependence on migration, working conditions in both sectors leave much to be desired.<sup>7</sup>

The same FEPS study also points to a kind of vicious circle of social relations within European societies, where exploitation and abusive working conditions consolidate the social and economic exclusion of migrant workers, and this exclusion in turn generates increased racism and intolerance. Long working days in remote and isolated workplaces undermine migrants' opportunities to form local social networks and participate in community initiatives.<sup>8</sup>

Low wages, labour exploitation and lack of alternatives perpetuate the precariousness of migrant workers and, in the long run, often also hinder their geographical mobility, to the point of

making it impossible or at least difficult for them to return to their country of origin.

However, very few studies so far address atypical employment and social security of migrants simultaneously.<sup>9</sup>

Faced with increasingly heterogeneous national social security systems, these workers, characterised by high geographical mobility and low employment protection, are often confronted with two categories of obstacle at the same time: on the one hand, low wages and high income instability, and on the other hand, asymmetrical social rules which, instead of guaranteeing greater protection to the most precarious workers, in many cases exclude them from the benefits normally granted to other categories of mobile worker. As we will see in the following pages, this can have deleterious effects not only on people's social security, but also on other rights, particularly related to their status as 'foreigners'. This situation is hardly compatible with the idea of social protection for mobile workers, which is one of the fundamental pillars on which the European Economic Community (EEC) and then the current EU were founded.

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6 To name but a few: European Commission (2013). *A fact finding analysis on the impact on the Member States' social security systems of the entitlements of non-active intra-EU migrants to special non-contributory cash benefits and healthcare granted on the basis of residence*. <https://op.europa.eu>; Chojnicki, X., Ragot, L. (2012). *L'immigration coûte cher à la France [Qu'en pensent les économistes ?]*. Paris, Eyrolles; Manço, A., Barras, C. (eds) (2013). *La diversité culturelle dans les PME : accès au travail et valorisation des ressources*. Paris, L'Harmattan; Blauburger, M., Schmidt, S.K. (2014). "Welfare Migration? Free Movement of EU Citizens and Access to Social Benefits". In: *Research & Politics*, volume 1, no. 3, pp. 1-7; Dustmann, C., Frattini, T. (2014). "The Fiscal Effects of Immigration to the UK". In: *The Economic Journal*, volume 124, no. 580, pp. 593-643; Giulietti, C. (2014). "The welfare magnet hypothesis and the welfare take-up of migrants. Welfare benefits are not a key determinant of migration". Institute of Labor Economics (IZA), World of Labor, no. 37, <https://wol.iza.org>; Caldarini, C. (2016). "The 'Labour Mobility Package': A European Fraud against Mobile Workers and their Countries of Origin?". In: *E-Journal of International and Comparative Labour Studies*, volume 5, no. 2, <http://ejcls.adapt.it>; Manço, A., Gatugu J. (eds) (2018). *L'insertion des travailleurs migrants*. Efficacité des dispositifs, Liège / Paris, IRFAM / L'Harmattan; OCDE (2020). *Perspectives des migrations internationales*.

7 Mitchell, G. (ed.), Morav, A. (co-ed), Cohen, S., Bartolini, F., Fratsea, L.-M., Papadopoulos, A.G., Parker, M., Feduchi, J.S.V., Vergis, F., Vizán, C., Zaguire Altuna, A. (2022). *Migrant key workers and social cohesion in Europe: A Comparative Field Study*, FEPS Policy Study, January.

8 Ibid.

9 Caldarini, C. (2021). *Les effets de l'emploi atypique sur la protection sociale des travailleurs migrants*. Courrier hebdomadaire du CRISP; Caldarini, C., Giubboni, S., McKay, S. (2014). *The 'place' of atypical work in the European social security coordination: A transnational comparative analysis (Belgium, France, Germany, Italy, Slovenia, Spain, Sweden, United Kingdom)*. Centre for the Study of European Labour Law Massimo D'Antona (CSDLE), Working Paper, No. 2, <http://csdle.lex.unict.it>; Schoukens, P. (2019). "Social security coordination and non-standard forms of (self)employment". In: *Revue belge de sécurité sociale*, no. 1, pp. 81-112.

The aim of this Policy Study is to draw the attention of political, economic and trade union actors to some specificities of atypical employment relationships, often underestimated or completely ignored, that can have important effects on the social protection of migrant workers. On the one hand, the eventual advantages of atypical employment are in fact often immediately obvious, such as easier and more direct access to the labour market for people with low qualifications, or with qualifications that are not recognised in the host country, or even greater flexibility, both for companies and for workers if they so wish. On the other hand, the disadvantages of these forms of work may become apparent too late, when the consequences of social and welfare rights may be irreversible.

It is worth noting that the term 'migrant' will be used here for both EU and non-EU workers, as defined by the International Organization for Migration (IOM). This is to indicate a single phenomenon of geographical and social mobility, regardless of the nationality and status of the person concerned.<sup>10</sup>

Finally, a few words on method. In this Policy Study the author relies as much on studies and research as on real testimonies and examples of migrants, men and women, who have lived and worked in different EU countries and suffered losses in terms of social rights. To protect the privacy of these people, all examples cited in the text are anonymised by the use of fictitious names, usually names of MEPs from different EU countries and political groups.

## **1.1 The framework: free movement of workers**

One of the four fundamental freedoms enjoyed by EU citizens today is the freedom of movement.<sup>11</sup> This freedom includes both the right to enter and reside in another member state and the right to be treated on an equal footing with nationals.

For workers, this means the possibility of going to another member state and working or seeking work there under the same conditions as national workers. Therefore, it implies the elimination of any discrimination based on nationality as regards access to employment, pay and other conditions of employment and work. Nationals of a member state working in the territory of another member state must have the same social and tax benefits, trade union rights and access to housing, education and training as nationals of that member state.

In principle, these rights and protections against discrimination apply equally to all workers, whether they are permanent, seasonal or self-employed. They also apply to members of the worker's family, even if they are nationals of a third country which is not part of the European Economic Area (EEA). However, they do not apply to posted workers; in this case, European law considers that it is not the worker who makes personal use of their right to free movement, but his or her employer who benefits from the free movement of services when sending an employee abroad on a temporary basis.<sup>12</sup>

10 IOM (2019). *Glossary on Labour Migration*. Geneva, pp. 132 and 136.

11 Article 3(2) of the Treaty on European Union (TEU); Article 4(2)(a) and Articles 20, 26 and 45 to 48 of the Treaty on the Functioning of the European Union (TFEU).

12 These workers are covered by Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

In order to make this freedom of movement materially possible, social security 'portability' rules were established when the EEC was founded. These rules do not harmonise the different national systems, but make them interact with each other, according to a key principle established by European case law, which states that 'migrant workers must not suffer a reduction in the amount of their social security benefits as a result of having availed themselves of their right of free movement'.<sup>13</sup>

Logically, this body of rules has had to adapt over time to changes in labour markets, production and consumption patterns, global geopolitics and, consequently, the very idea of the welfare state. Originally, freedom of movement of persons had a strictly economic meaning and mainly concerned salaried workers who were European citizens.

As we will see below, a first important change occurred in the 1990s, when free movement was gradually extended to all EU citizens, including non-workers.<sup>14</sup> A second milestone was in 2003, when social security rules were extended to migrants who were third-country nationals.<sup>15</sup>

Today, freedom of movement and residence is one of the attributes of European citizenship, dissociated in principle from the condition of being a worker or not.

However, this freedom remains subject to certain conditions, which are still anchored in the original economic pillar of free movement of workers. In general, only two categories of person can today fully exercise their right to free movement within the EEA: on the one hand, those who have their own financial resources, so as not to depend on aid from the host country; and, on the other hand, workers, both employed and self-employed.

But if economic resources can, on balance, be counted and verified, determining who can and cannot claim to be a worker today can become a complicated matter.

## 1.2 Two real-life testimonies<sup>16</sup>

Mr Azmani, 39, arrived in Belgium in 2019 to work for a year as an intercultural mediator. He had already done the same job in another European country, France. At the end of his contract, in order to receive unemployment benefits under Belgian social legislation, Mr Azmani must prove that he has worked for at least 468 days in the last 36 months.

Ms Kaili, 38, is also unemployed after a year of work in Belgium. She also previously lived in another European country, Italy in this case, where she worked for a municipal administration.

13 See Case C-251/94 Lafuente Nieto [1996] ECR I-4187. See also : Directory of European Union domestic policy case law, 4.04: "Free movement of persons and services", <https://curia.europa.eu>. On the causes that led to the non-harmonisation of social rules in Europe, see: C. Caldarini, *Les effets de l'emploi atypique sur la protection sociale des travailleurs migrants*, Courrier hebdomadaire du CRISP, 2021, pp. 32-38

14 Several directives adopted in the 1990s aimed to grant the right of residence to persons other than workers: Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity; Council Directive 90/366/EEC of 28 June 1990 on the right of residence for students; Council Directive 90/364/EEC of 28 June 1990 on the right of residence for nationals of member states who do not enjoy this right under other provisions of Community law and their family members. To reinforce these various pieces of legislation and to take account of the abundant case law, a new directive of general application was adopted in 2004 and is still in force: Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states.

15 Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality.

16 The surnames of the persons in question have been changed. In order to protect the privacy of each individual, all our examples will always be anonymised by the use of fictitious names.

In both cases, periods of work in Belgium are not sufficient to give entitlement to unemployment in that country. However, Mr Azmani receives his unemployment benefit, whereas Ms Kaili is only entitled to social assistance. The difference between these two persons is that in France, Mr Azmani had a standard employment contract, entitling him to social security for employees, whereas in Italy, Ms Kaili had a 'para-subordinate' contract, ie a hybrid employment relationship, half way between employment and self-employment.<sup>17</sup>

Applying European rules, the Belgian National Labour Office therefore takes into account all of Mr Azmani's periods of work as if they had been completed entirely in Belgium, whereas for Ms Kaili it

only takes into account the periods of work actually completed in Belgium.

But how can the employment relationship between an employee and his or her employer be described as standard, hybrid or atypical? Why do national labour offices sometimes take into account periods of employment in other countries and sometimes not?<sup>18</sup>

And above all, what specific impact can work with non-standard contracts have on the migration path of a person moving from one European country to another? Can atypical work ultimately be a good stepping stone towards a more stable professional integration or, on the contrary, does it entail the risk of being trapped in a second-class relationship?

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17 As regards Italian para-subordination contracts, see Azaïs, C. (2009). "Les enjeux de la relation formation-emploi en Italie : la place du travail et des territoires". In: *Espaces et sociétés*, no. 136-137, pp. 63-77; Bertolini, S. (2005). "Entre travail salarié et indépendant : les formes de travail hybrides en Italie". In: *Formation Emploi*, no. 90, pp. 21-35; Lamine, A., Rocca, M. (2017). "Subordination and para-subordination in Italy, France and the United Kingdom. Aspects of comparative law". In: Gilson, S. (ed). *Subordination and para-subordination: between legal and economic dependence*, Louvain-la-Neuve, Anthémis, pp. 83-122.

18 In this policy brief, the terms 'atypical employment' and 'non-standard employment' will be used synonymously. On this topic, see Schoukens, P., cit.

## 2. Definitions of non-standard forms of work

According to the OECD, non-standard work includes casual or intermittent work, work provided by a temporary employment agency or subcontractor, apprenticeship or trainee contracts, so-called 'dependent self-employment' and, in some emerging countries, informal work.<sup>19</sup>

For the International Labour Organization (ILO), the concept of 'non-standard employment' applies to all forms of work that do not fall within a typical employment relationship, ie full-time and open-ended.<sup>20</sup>

In some cases, in order to determine whether an employment relationship can be defined as 'standard', the 'place of work' is considered important, which must be different from the employee's home. If this last characteristic is taken into account, an even wider range of relationships falls within the scope of atypical work, including all forms of telework which, in the light of certain ways of combating the Covid-19 pandemic, may be destined to become a constitutive element of our societies.<sup>21</sup>

The European Foundation for the Improvement of Living and Working Conditions (Eurofound) distinguishes between 'atypical' and 'very atypical' work.<sup>22</sup> Atypical work includes all fixed-term

contracts, part-time contracts and temporary contracts. Since the end of the 1980s, these three contractual arrangements have begun to be regulated by rights and protections similar to those of standard contracts, through national laws and, above all, European framework agreements, which have since become European directives, in particular the 1997 framework agreement on part-time work<sup>23</sup> and the 1999 framework agreement on fixed-term work.<sup>24</sup> Very atypical work includes very short fixed-term work of less than six months, very short part-time work of less than ten hours a week, zero-hour or on-call work, and non-contractual work.

Very atypical forms of work are particularly flexible and precarious. They more easily escape social consultation, and thus the scope of both national laws and European directives on employment protection. This leads to a patchwork of situations that make access to social security even more difficult when workers move from one national system to another.

This mosaic is well illustrated in a 2014 trade union comparative study, where, to represent the situation in the eight participating countries (Belgium, France, Germany, Italy, Slovenia, Spain, Sweden and the UK), each national report adopts the definition of

19 OECD (2019). *OECD Employment Outlook 2019. The Future of Work*, Paris, [www.oecd.org](http://www.oecd.org), p. 251.

20 ILO (2016). *Non-standard employment around the world: Understanding challenges, shaping prospects*, Geneva. See also: ILO (2015). *Atypical Forms of Employment*. Report for discussion at the expert meeting on non-standard employment (Geneva, 16-19 February 2015), [www.ilo.org](http://www.ilo.org), p. 1.

21 ILO (2016). cit, p. 7. On the situation of atypical work during the Covid pandemic, see: Spasova, S., Ghailani, D., Sabato, S., and Vanhercke, B. (2021). Cit.

22 Broughton, A., Biletta, I., Kullander, M. (2010). cit.; Riso, S. (2010). *Very atypical work: Exploratory analysis of fourth European Working Conditions Survey*. Background paper. Eurofound, [www.eurofound.europa.eu](http://www.eurofound.europa.eu).

23 Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC (*Official Journal of the European Communities* L 14 of 20 January 1998).

24 Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (*Official Journal of the European Communities*, L 175, 10 July 1999).

atypical work that seems most appropriate to its own political and industrial relations context.<sup>25</sup>

Despite the diversity of situations, all these national reports converge in stating that atypical contracts are, in general, characterised by less job security, lower and uneven wages, fewer training and career opportunities, poorer psycho-physical well-being conditions and fewer trade union rights. And as far as social security is concerned, they have in common poor coverage, especially unemployment benefits, and great difficulties in building up a decent old-age pension. In short, the impossibility of making life plans.<sup>26</sup>

All these reports also agree that some forms of atypical work are, on balance, comparable to standard work in that they are sufficiently protected by social legislation and provide all or almost all social security rights. The same cannot be said of the so-called very atypical forms of work, which are characterised by high economic instability, low collective bargaining coverage and much more fragmented and ephemeral social protection, and where the employer/worker relationship deviates considerably from the norm of the standard employment contract.

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25 Caldarini, C. , Giubboni, S., Mckay, S. (2014). cit.

26 Ibidem.

### 3. Removing obstacles to the free movement of workers

The Treaty of Rome, signed on 25 March 1957, lists as one of the common commitments, to be implemented from the entry into force of the Treaty, the elimination of obstacles to the free movement of workers (Articles 48 to 51). An arsenal of legislative measures gradually developed around this principle.

First of all, in 1958, the EEC Council, limited at that time to the governments of the six founding countries,<sup>27</sup> as its first act of a political nature adopted a European regulation establishing a common system of social security coordination for migrant workers.<sup>28</sup> This was followed in 1968 by a regulation implementing the free movement of workers<sup>29</sup> and a directive removing transitional restrictions on the movement and residence of workers and their families, and in 1971 by the application of social security schemes

to employees and their families moving within the EEC.<sup>30</sup> In the 1990s, several other directives aimed to grant the right of residence to persons other than workers.<sup>31</sup>

With the advent of the 2000s, a new general directive established the right of EU citizens (and their family members if they are not EU citizens) to move and reside freely within the territory of the member states.<sup>32</sup> Most importantly, social security coordination rules are extended for the first time to third-country nationals.<sup>33</sup> This reform is complemented by the coming into force of new regulations aimed at 'modernising' the coordination of social security systems.<sup>34</sup>

27 Belgium, France, Italy, Luxembourg, the Netherlands and the Federal Republic of Germany.

28 Council Regulation No 3 of 16 December 1958 on social security for migrant workers (*Official Journal of the European Communities*, 16 December 1958).

29 Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (*Official Journal of the European Communities* L 257, 19 October 1968).

30 Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (*Official Journal of the European Communities*, L 257 of 19 October 1968).

31 Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity (*Official Journal of the European Communities* L 180 of 13 July 1990); Council Directive 90/366/EEC of 28 June 1990 on the right of residence for students (*Official Journal of the European Communities* L 180 of 13 July 1990); Council Directive 90/364/EEC of 28 June 1990 on the right of residence (*Official Journal of the European Communities* L 180 of 13 July 1990).

32 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (*Official Journal of the European Union* L 158 of 30 April 2004).

33 Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by these provisions solely on the ground of their nationality. This regulation extends the social security coordination rules to third-country nationals (TCNs) who are authorised to work in an EU country and who move within the EU. Family members and survivors of these people are also covered if they are resident in the EU.

34 Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (*Official Journal of the European Union* L 166 of 30 April 2004).

### 3.1 Freedom of movement and coordination of social security to the present day

Today, the free movement of persons is organised around two pillars in particular:<sup>35</sup> European citizenship (Articles 18 to 25 TFEU) and the free movement of workers (Articles 45 to 48 TFEU). Two pieces of secondary legislation mainly define the socio-legal framework: Directive 2004/38 on the right of EU citizens to move and reside freely and Regulation (EC) No 883/2004 on the coordination of social security systems.

Directive 2004/38 sets out a number of non-discrimination criteria for EU citizens, which also apply, it is important to stress here, to family members who are not EU citizens. This directive establishes inter alia the right of residence in the territory of another member state for employed and self-employed persons, limitations on the expulsion of nationals who have entered the territory of a member state in order to seek work and protection against expulsion in the event of recourse to social assistance.<sup>36</sup>

Over the years, free movement has effectively become a fundamental right for all EU citizens, including non-workers. But this right in principle is subject to conditions, designed to protect not individuals but the social protection systems of states. For example, unemployed people who receive a benefit following an employment relationship of less than one year only temporarily retain the right of residence linked to their status as workers. Other 'economically inactive' persons are entitled to residency provided they have health insurance and sufficient resources not to become an 'unreasonable

burden' on the social assistance system. In short, the EU citizen is entitled to social assistance if he or she has the right of residence, but loses the right of residence if he or she benefits from the social assistance system.<sup>37</sup>

As regards Regulation 883/2004, it guarantees the continuity of social security rights for people in a situation of mobility through four key principles, transposed by bilateral and multilateral agreements concluded under the auspices of the ILO in the 1930s:<sup>38</sup>

1. Equal treatment (or the principle of non-discrimination). This is the right to reside in the territory of a member state and be subject to the same duties and rights as citizens.
2. Uniqueness of the applicable legislation. Everyone is subject to the legislation of only one country, normally the country of employment.<sup>39</sup>
3. Preservation of rights in the course of acquisition (aggregation of periods). The possibility of using all periods of work completed in one state to establish a right in another state.
4. Retention of acquired rights (possibility of exporting benefits). This is the possibility of moving to another country while continuing to receive certain cash benefits from the member state of origin.

As the founding countries of the EEC excluded a priori any harmonisation of their social standards, the aim of this set of principles is not to standardise the various national social security systems, but only to make them 'talk' to each other, in order to limit

35 Outside of these two pillars, the issue of international – not intra-European – migration is mainly addressed at European level as a 'drama', 'tragedy', 'exceptional problem', 'border protection', etc. (cf European Commission, 'Report on the state of implementation of the European Agenda on Migration', Communication to the European Parliament, the European Council and the Council, COM(2019) 481 final, 16 October 2019, <https://eur-lex.europa.eu>).

36 Cf Caldarini, C. (2016). "Belgique. Citoyenneté européenne: de la liberté de circulation à la liberté d'expulsion". In: *Chronique internationale de l'IRES*, no. 153, pp. 3-20.

37 Neven, J.-F. (2014). "Citoyens européens, CPAS et expulsions : le mode d'emploi de l'Office de étrangers". In: *La Revue nouvelle*, no. 4-5, [www.revuenouvelle.be](http://www.revuenouvelle.be).

38 See ILO, Convention No 48 on the preservation of migrants' pension rights, 22 June 1935.

39 However, there are important exceptions to this principle, for example for posted workers. For more information, see the website <https://ec.europa.eu>.

the loss of workers' social rights and thus facilitate labour mobility.<sup>40</sup>

It is thanks to this cross-border dimension that, for example, if a person has worked in Belgium and then in France, it is the latter country which must pay the unemployment benefits (uniqueness of applicable legislation), as it would for its national workers (equal treatment) and as if the person concerned had worked all their periods of employment in a single country (aggregation of insurance periods), and this without exception or restriction. Moreover, if this person is currently unemployed in France and wishes to return to Belgium to find a new job, he or she is entitled to keep their French unemployment benefit for at least three months<sup>41</sup> (exportability of benefits).

However, according to the established case law of the Court of Justice of the European Union (CJEU), all these principles can be reduced to one, namely that “migrant workers must not suffer any reduction in the amount of social security benefits because they have exercised their right to free movement”.<sup>42</sup>

These rules, originally designed to facilitate the intra-European mobility of workers, also apply to non-EU workers. As already mentioned, in 2003 European coordination opened the door to third-country nationals, thereby protecting the social security rights of all migrant workers, including their family members and survivors, whether European or non-European, regardless of their nationality.<sup>43</sup>

Potentially, this body of rules therefore now covers 18 million EU citizens living in a country of which they are not nationals, almost 1.5 million cross-border workers, and around 20 million third-country nationals living, working and studying in an EU country, of whom more than 100,000 are seasonal workers, moving several times a year to different European countries.<sup>44</sup>

In addition to these coordination rules within the European Union, each member state concludes bilateral social security agreements with third countries. The objectives and principles of these bilateral agreements are similar, but not identical, to those applicable within the European Union.

Both sets of agreements aim to ensure the continuity of social security rights for people in a situation of mobility, and are based on the same basic principles as the first bilateral agreements concluded in the 1930s under the auspices of the ILO, namely equal treatment, single applicable legislation, preservation of acquired rights, and preservation of rights in the process of being acquired. Both European standards and international social security conventions coordinate the application of national legislation, but do not change it. As each convention is an autonomous legal instrument, it is not uncommon for its characteristics to vary or for a clause to be applied differently from one country to another. Moreover, there is no international court that can impose particular interpretations in this field.

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40 Caldarini, C. (2021). cit.

41 The three-month period may be extended by the competent institution up to a maximum of six months (Article 64 of Regulation (EC) No 883/2004 mentioned above).

42 Directory of European Union domestic policy case law, 4.04: “Free movement of persons and services”, <https://curia.europa.eu>.

43 Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by these provisions solely on the ground of their nationality.

44 European Commission (2019). Annual Report on Intra-EU Labour Mobility. Final Report. Directorate-General for Employment, Social Affairs and Inclusion, <https://ec.europa.eu>.

## 4. The main problems posed by non-standard work to the social protection of migrant workers

Like the national social security schemes, European regulations were born under the influences of the Fordist era of mass production. Their purpose was mainly to protect full-time, permanent workers, generally men with families to support, against the risks of illness, unemployment, accidents and old age. This corresponds to a model of society in which the course of people's lives and the accidents that may occur are predictable and consequential, since they are determined by distinct social stages, roles and status: birth, study, work, inactivity and death. In a worker.

Today this model represents only a part, though still an important one, of the world of work. In all countries, to varying degrees, new employment relationships have emerged that depart from the standard rules, and therefore from the social protection and insurance normally reserved for employees.

To compensate for this lack of social protection, national social protection systems have gradually made way for other forms of extraordinary, partial, hybrid, complementary, in a word atypical, and above all less robust forms of protection.

It is the very place of work in society that is being questioned. Today, it can happen that work occupies

only a very small part of a person's life, or that income from work is only an ancillary and complementary element of one's resources. The very status of 'worker' has become fluid. It is no coincidence that the CJEU is regularly called upon to pronounce on whether or not a person should be regarded, in his or her particular circumstances, as an employee, a self-employed person or an inactive person, within the meaning of existing European law.<sup>45</sup>

At the same time, the nature of migration has changed. Until the early 1970s, the migrant was the male worker who took a full-time job and returned to his or her country of origin at the end of their working life. Today, the typology of migration is much more diverse, including managers, specialists, many more women and a high degree of cross-border mobility.<sup>46</sup>

So, in concrete terms, what happens when a person is in an internationally mobile situation while working with an atypical status? What risks are they exposed to during their migration journey?

As we will see in the Section 5, the problems are diverse and complex. To be brief and clear, we have divided them into four main categories. In reality, however, they do not occur one by one. On the contrary, they often overlap, and the same person

45 See, as examples, the CJEU judgments of 11 April 2019 (Case C-483/17: Tarola v Minister of Social Protection), of 19 June 2014 (Case C-507/12: Jessy Saint Prix v Secretary of State for Labour and Pensions), of 21 February 2013 (Case C-282/11, Salgado Gonzalez v Seguridad Social), of 22 November 2012 (Case C-385/11, Isabel Elbal Moreno v Seguridad Social), of 11 November 2010 (Case C-232/09, Danosa v LKB Līzings SIA) and of 12 May 1998 (Case C-85/96, Martinez Sala v Freistaat Bayern).

46 Jorens, Y. et al (2008). *Think Tank Report 2008. Towards a New Framework for Applicable Legislation: New Forms of Mobility, Coordination Principles and Rules of Conflict*. Universiteit Gent (UGent), <https://biblio.ugent.be>; Roberts, S. (2010). "A short history of social security coordination". In: Jorens, Y. (ed.), *50 years of social security coordination - Past, present, future*. European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities.

can easily be exposed to more than one risk at the same time.

#### 4.1. Difficulties in claiming one's periods of work

According to the European social security coordination rules, insurance bodies must, in order to calculate benefits (eg unemployment benefits), 'add up' all the periods of employment and insurance of the person concerned, including those completed in other EU countries or in third countries with which an agreement has been established.

This principle cannot be applied when the periods of work carried out in another country are not subject to compulsory social security contributions or the obligation only concerns certain areas of social security.

In such cases, if a person works for a period of time without any obligation to pay social security contributions in member state A, where he or she may benefit from certain social advantages reserved for this type of employment, and then moves to member state B, he or she loses the benefits to which he or she was entitled in member state A, and does not acquire any new rights in member state B.

The most well-known case is that of so-called marginal occupational activities, known mainly as 'mini-jobs' (*Geringfügige Beschäftigung*). Present in the German Social Security Code since the 1970s, this type of work was reorganised and strengthened in 2003, within the so-called Hartz reform.

Until 2012, workers whose mini-jobs did not exceed the salary threshold of €400 per month and the hourly limit of 15 hours per week were only insured against occupational accidents. Today, the salary threshold is set at €450, the 15-hour limit has been

abolished, and exemption from social security contributions has been made 'optional' (ie the employer can propose to the worker to waive his or her social security rights).

Originally designed to provide a secondary income for married women whose social security is provided by their spouse, or to legalise casual work for employees already covered by social security in the general scheme, mini-jobs are now a mass phenomenon in Germany. According to statistics from the *Bundesagentur für Arbeit*, there were 7.5 million mini-jobs in Germany in 2014, or almost one in five jobs. More than 63 per cent of these jobs were held by women. About a third of the workers concerned also had other sources of income, social or professional, and other insurance coverage, but for at least 5 million of them, a mini-job was the only source of income from employment.<sup>47</sup>

Similarly, in the UK, wages below £183 per week benefit from the *small earnings exception*, which exempts the worker from social security contributions and thus logically excludes him or her from any insurance scheme. Contracts without compulsory social security contributions, similar to those existing in Germany and the UK, can also be found in Austria, Slovenia and Switzerland.<sup>48</sup>

In Spain, in August 2010 the socialist government of José Luis Rodríguez Zapatero received a letter from the European Central Bank suggesting the creation of 'mini-jobs' similar to the German ones, with wages of €400, significantly lower than the Spanish minimum wage, which was €541 at the time. This was one of the conditions for the European Central Bank to continue buying Spain's debt.<sup>49</sup>

Another sector where the problem of the absence of social security contributions often arises is that of hybrid training/work contracts (apprenticeship, traineeship, etc). Here we enter a real social

47 <https://statistik.arbeitsagentur.de>

48 Caldarini, C. (2014). "Social protection of atypical employment and obstacles to freedom of movement". In: C. Caldarini, S. Giubboni, S. McKay, cit, pp. 32-33.

49 The ECB letter did not push the Zapatero government to change labour legislation in this direction, but was taken into account in a subsequent agreement reached between the Socialists and the Popular Party to enshrine the binding principle of fiscal discipline in the Spanish Constitution (El Pays), 'ECB asked Spain for wages cuts in return for bond purchases Madrid', 7 December 2011.

### Example 1

Ms Castaldo, 28, Italian, and her partner Mr Nafaa, 33, Moroccan, normally resident in Italy, settled in London in 2018, in search for work. Finding nothing better, they work occasionally in the restaurant sector, benefiting from the *small earnings exception*.<sup>50</sup>

With the arrival of the Covid-19 pandemic, the entire restaurant industry goes into crisis. As a result, Ms Castaldo and Mr Nafaa lose their jobs and decide to return to Italy.

If they had stayed in the UK, they would both have been entitled to *Income-based Jobseeker's Allowance*, ie a non-contributory unemployment benefit paid on the basis of income. In Italy, however, unemployment benefit is contributory only and therefore the work they did in London does not open up any entitlement.

They both then applied for *Reddito di cittadinanza*, a non-contributory minimum income. However, their application was rejected by the Italian National Social Security Institute (INPS), as one of the conditions to access this benefit is to have resided in Italy for at least 10 years, the last two of which must have been continuous.

In short, if instead of emigrating to London they had remained in Italy, Ms Castaldo and Mr Nafaa would have been entitled to the *Reddito di cittadinanza*. If, once emigrated, they had maintained their residence in London, they would have been entitled to *Income-based Jobseeker's Allowance*.

In other words, contrary to the principles of the CJEU, the fact that these two people have exercised their right to free movement leads to a reduction in their social benefits.

insurance jungle, where protection may be complete in one country, partial in another and totally non-existent in a third.

To give a few examples, in Slovenia, on the one hand, apprenticeship contracts (*vajeniskapogodba*) are subject to a reduced contribution obligation (only six months of contributions are paid for one year), but this only entitles them to insurance against accidents at work and occupational diseases. In France, on the other hand, apprentices enjoy the same social

protection as employees. In Italy, apprenticeships entitle them to family allowances, insurance against occupational accidents and diseases, disability allowance, old-age pension and, only since 2013, unemployment benefits under the same conditions as other employees. However, apprentices are excluded from economic unemployment (*wage compensation fund*) and sickness benefits.

In Belgium, apprenticeship contracts are covered by a partial social security system, which varies

<sup>50</sup> This example is from 2018 and Brexit had not yet had an effect. In any case, it is interesting to note that these EU rules were not suddenly abolished in the UK in 2020. In many cases, depending on the individual's situation, they still apply. See on this subject: 'Guidance relating to the UK's operational implementation of the social security coordination provisions of Part 2 of the EU Withdrawal Agreement: Citizens' Rights', updated 29 November 2021, [www.gov.uk](http://www.gov.uk).

according to age: as a general rule, until the age of 18, the apprentice is only covered for paid holidays, accidents at work and occupational diseases. It is only at the age of 19 that all these forms of contract are, in principle, subject to the same contribution obligations as the general employee scheme, including old age and unemployment insurance. But from then on, it is a real patchwork. For unemployment, the apprenticeship allowance is not considered by the National Labour Office as pay. Therefore, days worked under a work immersion agreement will not count towards unemployment entitlement on the basis of work.

Although legally they cannot be considered strictly as employment contracts (in this sense they are considered hybrids), in practice these agreements are often used as forms of cheap wage labour.

## 4.2. Difficulties in valuing one's social contributions

The vast majority of legal systems in the world provide for a 'binary division' between employment and self-employment, with employment serving as the basis for labour regulation. However, some employment relationships can be ambiguous if the rights and obligations of the parties involved are unclear, or if there are grey areas in the law.

In these cases, the ILO uses terms such as 'economically dependent work' or 'legally independent but economically dependent work' to refer to all relationships in which the worker provides services to an enterprise under a contract other than a salaried contract, while depending for his or her income on one or two clients/employers, from whom he or she receives instructions on how the work is to be performed. The worker is thus classified as self-employed, independent, when in fact he or she is in an employment relationship.<sup>51</sup>

As a result, workers do not enjoy the protection offered by labour law, particularly as regards minimum wages, social security and sick leave. Moreover, in many cases they risk being deprived of the full exercise of certain fundamental rights usually reserved for employees, such as freedom of association and the right to collective bargaining.

If the person working with one of these statuses is a migrant, or at least a person who is likely to migrate in the future, he or she is involuntarily exposed to further discrimination, which occurs when insurance periods acquired in one country are not recognised in another. Indeed, European social security coordination states that periods of work completed under the legislation of one state are only taken into account in another state if those periods would also have been considered as periods of insurance under the legislation applicable there.<sup>52</sup>

The so-called 'para-subordinate contracts' introduced into Italian labour law in the 1990s are an example in this respect.<sup>53</sup> Under Italian law, the status of a 'para-subordinate' worker is equivalent to that of a self-employed person for tax purposes, while the nature of the employment relationship with the client/employer is comparable to that of an employee. As far as social security is concerned, these workers are affiliated with the self-employed scheme, with the addition of a 'mini-insurance' in case of job loss, but this does not offer the same level of protection as employees. As this is a hybrid form of social insurance, created specifically for the domestic labour market, for a person who has worked in a para-subordinate job in Italy and is subsequently unemployed in, say, Germany or France, his or her periods of work in the Italian para-subordinate scheme are treated by the insurance bodies of the other states as self-employment, and the contributions paid by this person are not taken into account for unemployment purposes.

51 ILO, Recommendation on Labour Relations No. 198, 15 June 2006.

52 Article 61 of the above-mentioned Regulation (EC) No 883/2004.

53 Raitano, M. (2018). "Italy: Para-subordinate workers and their social protection: What Works for Non-standard Workers?". In: *The Future of Social Protection*, pp.145-170 (DOI:10.1787/9789264306943-9-en).

## Example 2

Ms Delli, 32, is a researcher who lives in Belgium but has the nationality of a non-European country. She moved to Italy in 2014 to participate in a six-month project for a public research organisation. During this period, her total gross salary amounted to €18,000 and her social security contributions were paid into the insurance fund for para-subordinate workers. In 2015, she obtained a fixed-term contract at a university in Brussels. After eight months, this research project also ended, and Ms Delli became unemployed.

According to the Belgian Labour Office, the contributions she paid in Italy are the result of a period of insurance for self-employed persons, which does not entitle her to unemployment benefit in Belgium. If she had remained in Italy, she would have been entitled to a mini unemployment benefit, specifically provided for this purpose. Having moved to Belgium, where she continued to pay her social security contributions, the researcher is not entitled to her benefits either in Belgium or in Italy.<sup>54</sup>

Contrary to the principles of the CJEU, the fact that this person has exercised her right to free movement leads to a reduction in her social security benefits, which would not have occurred if her status as an employee had not been contested.

As we see in Example 2, this type of problem does not only concern Italian workers. In fact, there are many workers from third countries who work in Italy with contracts of this type, and who in times of crisis migrate back to other European countries where the economic situation is more favourable.

In Spain, in order to achieve effective equality in terms of social protection between self-employment and dependent work, Law 20/2007 introduced the status of economically dependent self-employed worker (*Trabajador autonomo economicamente dependiente*). People working with this status pay compulsory contributions to the *Cese de actividad*, an

insurance benefit equivalent to unemployment for employees.

The working periods of Spanish economically dependent self-employed workers must be taken into account for unemployment purposes, in Spain and in the other EU countries. If, other things being equal, Ms Delli had worked in Spain rather than Italy, she would have been entitled to combine her six months of work in Spain with her eight months of work in Belgium, without the exercise of her right to free movement leading to the loss of her social security benefits.

<sup>54</sup> This case shows, among other things, that it is generally unfounded to claim that foreign workers represent a cost for the social protection systems of host countries. According to an OECD report on international migration, the 'net contribution' of migrants, ie the difference between the social and tax contributions paid and the social benefits received, is positive in almost all countries (OECD, *International Migration Outlook*, 2013, pp. 133-173). In Belgium, the net contribution of migrants is €9,159 per year for native households, €5,560 for migrant households and €16,830 for mixed households. See also Caldarini, C. (2016). cit.; Dustmann, C. , Frattini, T. (2014). cit.; Giulietti, C. (2014). cit.; European Commission (2013). cit.

### 4.3. Difficulties in exporting unemployment benefits

In the UK, *Jobseeker's Allowance* (JSA) is a benefit paid to people who are not working, or who are only working part-time, and who are actively seeking work. There are two types of JSA. *Contribution-based* JSA is a traditional contributory unemployment benefit, ie it is provided on the basis of a certain minimum period of work for which social security contributions have been paid. *Income-based* JSA is a non-contributory benefit; it is granted to a jobseeker who is not entitled to contributory benefit, either because he or she did not pay sufficient social security contributions, or was self-employed, or because his or her contribution-based JSA has ended. Under certain conditions, the beneficiary of a non-contributory JSA may also be entitled to financial assistance to pay part of the mortgage or rent. This is because non-contributory JSA is more like social assistance than unemployment benefit: the person's (and their partner's, if applicable) savings must not exceed £16,000, the benefit is only available to a claimant in a couple if their spouse works less than 24 hours a week on average, and so on. Contributory JSA is paid for a maximum of 182 days, after which the jobseeker can only claim non-contributory benefit. For many workers employed on non-standard contracts in the UK, the non-contributory JSA is the only unemployment benefit actually available.

Similarly, in an increasing number of countries, social protection for the most precarious workers has been progressively limited to palliative measures, more akin to social assistance than to social security. In most cases, these are job-loss allowances, but access to them is based on income verification rather than social contributions. Examples include the basic jobseeker's security in Germany (*Arbeitslosengeld*

*II, Sozialgeld*), the jobseeker's allowance in Ireland, unemployment assistance in Estonia (*töötutoetus*), the so-called labour market support benefits introduced in Finland (Unemployment Benefits Act 1290/2002), or non-contributory mixed benefits in case of unemployment under cantonal legislation in Switzerland.<sup>55</sup>

In addition to the material impoverishment that these measures entail, the unpleasant surprise comes when, in order to find work in another country, the jobseeker is forced to give up exporting their unemployment benefit. In fact, within the framework of European social security coordination, a person unemployed in one country can move to another country to look for work, keeping their benefits for up to three months.<sup>56</sup> This so-called export principle, however, only applies to contributory benefits.<sup>57</sup> Among the non-exportable benefits, there are many that are formally means-tested and not contributory, but are *in fact* unemployment benefits.

Even if recourse to these palliative measures is sometimes tacitly accepted by the beneficiary, either because there is no alternative or because the amount of the benefit may even be close to that of a real unemployment benefit, forcing the worker to choose between their benefit and their migration project is contrary to the very spirit of the European regulations and creates a clear break between freedom of movement and the right to social security. Moreover, since it is a social assistance and not a real unemployment insurance, further restrictions can be imposed depending on the nationality and residence of the person. In Germany, for example, several categories of foreigners are not entitled to basic social assistance for jobseekers: those who have resided in the country for less than five years; those whose right of residence is based solely on job-seeking; those whose right of residence is

55 European Commission (2013). cit; De Cortazar, G., Rentola, E. (eds) (2012). *Coordination of unemployment benefits. Think Tank Report 2012, Training and Reporting on European Social Security (TRESS)*, [www.tress-network.org](http://www.tress-network.org).

56 The three-month period may be extended by the competent institution to a maximum of six months.

57 To be more precise, the regulations on social security coordination apply in principle to all social security legislation, both contributory and non-contributory (Article 3 of Regulation 883/2004 cited above). The mere fact that a benefit is not based on contributory criteria is not sufficient to exclude it from the objective scope of coordination. However, Regulation 883/2004 stipulates that some non-contributory benefits remain subject to the residence clause and therefore cannot be exported outside the member state that establishes and grants them (Article 70 and Annex X).

directly or indirectly based on their children's right to attend school; and asylum seekers.<sup>58</sup> This is an eloquent example of cumulative disadvantage.

#### 4.4. Difficulties in meeting eligibility requirements

In general, almost all countries impose minimum insurance requirements for access to social security benefits, be it unemployment, maternity and paternity benefits, old-age pensions or other. This is, at least, the common rule in insurance-type systems.<sup>59</sup> Here again, the problem lies in the unequal treatment in the different national implementation systems. In some countries, these requirements are less stringent, and thus potentially accessible to workers with short and fragmented careers. But in most countries, they are strict and complex, and therefore difficult to achieve if the person concerned has been navigating the social security systems of several countries for a long time, with atypical and particularly fragmented careers.

For example, in order to be entitled to unemployment benefit in Belgium, you must have worked a certain number of days during a specific period before registering for unemployment (this period is called the 'reference period'). For persons recognised as refugees or stateless persons, work carried out in any country in the world can be taken into account as long as it is work which, had it been carried out in Belgium, would have opened up the right to unemployment benefit and the person can prove that they have worked in Belgium for at least three months. Consequently, a person aged 50 must meet one of these three conditions: (1) 624 days in the last 42 months; (2) 312 days in the 42 months plus 1,560 days in the 10 years preceding these 42 months; or (3) 416 days in the 42 months plus, for each day missing to reach 624 days, eight days in the 10 years

preceding these 42 months. In France, the same person aged 50 must prove 130 days of work in the last 24 months. In Spain, he or she must prove 360 days in the six years preceding the unemployment situation in Spain. In Germany, irrespective of age, the person must prove 12 months of work in the last 30 months; but if the person has worked mainly in short-term jobs, for which he or she obtained fixed-term contracts of maximum 10 weeks, a period of work of six months may be sufficient.<sup>60</sup>

For many workers with casual contracts, this lack of harmonisation leads to an obstacle course with no end in sight, where social security coverage is an unattainable goal. The fact that the conditions for entitlement differ considerably from one country to another can lead to discrimination and thus prevent equality between workers in different countries who, for the same contributions, may or may not be entitled to a benefit, depending on the social security system to which they are ultimately subject.

For example, in Italy, a special one-off unemployment benefit was introduced in 2013 for certain categories of worker with atypical contracts (para-subordination). In order to be entitled to this mini-allowance, the applicant has to prove: to be insured only as a para-subordinate worker; to have worked, during the previous year, with only one client; to have earned, during the previous year, a gross income not exceeding €20,000 from para-subordinate work alone; to have had a period of unemployment without benefits of at least two months during the previous year; to have been insured during the previous year for the payment of at least four months' salary.

These conditions are so strict and complex that, in practice, almost nobody can access them. In other situations, it is the method of calculating benefits that disadvantages people with incomplete periods of insurance, work or residence completed in

58 See [www.stmas.bayern.de](http://www.stmas.bayern.de).

59 Denmark, Finland and Sweden are partial exceptions to this rule. In fact, their pension systems have a first pillar consisting of a universal scheme subject to a simple residence condition, supplemented by an income element not linked to a working career. This may also create additional difficulties for people who have interrupted their residence to combine several small work contracts in other countries.

60 See the website of the Beauftragten der Bundesregierung für Migration, Flüchtlinge und Integration, Gleichbehandlungsstelle EU-Arbeitnehmer, [www.eu-gleichbehandlungsstelle.de](http://www.eu-gleichbehandlungsstelle.de).

several countries. For example, in a system such as Sweden – which in other respects is considered a model welfare state – the aggregation of different periods of work can lead to a disadvantageous result when the person has worked in several countries, accumulating short periods of low pay.

The Swedish case is illustrative, but obviously not the only one with this kind of complication. The problem, as we have already pointed out, is that national social protection systems still reflect, in many respects, an old model of industrial society based on full-time, open-ended employment, and their benefit systems often follow the same logic.

### Example 3

In Sweden, the old-age insurance (*allmän pension*) comprises three compulsory pillars: a basic old-age pension (*inkomstpension*), based on a pay-as-you-go system and financed by social security contributions; a supplementary pension, financed by capitalisation (*premiepension*); and a guaranteed pension (*garantipension*), paid on the basis of income and financed by taxes, for the benefit of people with no other pension or a small occupational pension (this guaranteed benefit only reaches the full rate with 40 years of residence in Sweden).

Mr Milazzo, 65 years old, has lived in Sweden since he was 35 years old. Before settling in Sweden, he worked for several years in Italy, under training and work contracts, which were exempt from social security contributions. During the first ten years of residence in Sweden, he studied and attended vocational training courses, which were unpaid. During the next 20 years he worked occasionally in restaurants and pizzerias. During eight years of residence in Sweden, he returned to Italy for three months every summer to work as a seasonal worker (24 months in total).

In Italy, having completed only 48 weeks of social security contributions, Mr Milazzo is not entitled to any pension. In Sweden, having paid 12 years of contributions, he is entitled to a small basic old-age pension, but not to a supplementary pension. As far as the guarantee pension is concerned, it is only granted on the basis of 28 years of residence in Sweden; he therefore receives the equivalent of 28/40. If Mr Milazzo had always lived in Sweden and had only paid his small contributions in Sweden, his pension would be much higher today. He is therefore a person who has lost his social security rights by the mere fact of having exercised his right to free movement, and by having done so through several atypical contracts of short duration.

Two judgments of the CJEU have highlighted the discrimination that people who have worked under atypical contracts may face in different EU countries, particularly with regard to the system for calculating pensions.<sup>61</sup>

In its judgment of 22 November 2012 in case C-385/11 (*Isabel Elbal Moreno v Seguridad Social*), the CJEU states that making the calculation of contributions paid conditional on the number of hours actually worked does not allow part-time workers to reach the minimum number of contributions required to qualify for a pension. The calculation is clearly discriminatory according to the Court, as the minimum contribution periods differ considerably from one country to another, thus preventing equality between citizens of different countries who, with the same contributions, may or may not be entitled to a benefit, depending on the social security system to which they are currently subject.

For its part, the judgment of 21 February 2013 in Case C-282/11 (*Salgado González v Seguridad Social*) is

closer to the principle of aggregation enshrined in European regulations. Ms Salgado González had paid social security contributions in Spain to the special insurance scheme for self-employed workers (*régimen especial de trabajadores autónomos*) for a total period of 3,711 days, and in Portugal for a total period of 2,100 days. Applying its national rule, the Spanish institution calculated the pension benefit on the basis of contributions paid over a period of 15 years, taking into account only the 10 years of contributions actually paid in Spain, and completing the calculation period with five years of notional value, which in the case of a self-employed worker is equal to zero. Thus, as the CJEU points out, there is clear discrimination between a worker who has worked in more than one country and one who has contributed for the same period in only one country. Similarly, part-time work, when poorly paid, can lead social institutions to question the status of the person concerned, thereby nullifying a whole range of rights reserved exclusively for workers, as illustrated in Example 4.

#### Example 4

Ms Tax, a Dutch national, has lived with her two children in the UK since January 2005, where she works part-time and earns £65 (about €71) per week. She also receives *Child Benefit* of £28.40 (€32) per week and *Child Tax Credit* of £72.38 (€80) per week.<sup>62</sup> After living with friends for a while, Ms Tax rented a flat in July 2006 and applied for housing benefit, a benefit to which a British citizen in her situation would be entitled.

The local authority argued that the part-time work performed by this person could not be described as 'actual and real' within the meaning of Community law. However, the Administrative Appeals Chamber granted Ms Tax's request, holding that she had the status of a 'worker', even though she had applied for social assistance, and that the competent local authority should therefore grant her the assistance she had requested.

61 Caldarini, C., Giubboni, S., McKay, S. (2014). cit, p. 77-80.

62 Since 2003, there have been two child benefit schemes in the UK, the *Child Tax Credit* and the *Working Tax Credit*. They have the dual purpose of helping to eliminate child poverty and making work pay. The *Child Tax Credit* is means-tested and paid to the primary carer. The *Working Tax Credit* supports workers, including the self-employed, by helping them to supplement their income. It includes a childcare element, which helps cover the costs of registered or approved childcare (cf *Commission of the European Communities, Modernising social protection for more and better jobs. A comprehensive approach to making work pay*, Communication to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, COM(2003) 842 final, 30 December 2003, <https://eur-lex.europa.eu>, p. 13).

## 4.5. Obstacles to the right of residence and the status of foreigners

Due to the fluidity of their socio-economic status, the instability of their employment and the resulting low income, people working on non-standard contracts in countries of which they are not nationals find it more difficult to access certain rights linked to their foreign status. In the following we will examine three main aspects of the problem: family reunification; acquisition of nationality; and residence permit. We will take the case of Belgium as a reference, but similar situations can also be found in other EU countries.<sup>63</sup>

In order to reunite his or her family, the applicant must generally prove a stable income of at least a certain amount, established in each country according to the income thresholds that would otherwise entitle the applicant to social assistance. In other words, he or she must be able to support themselves and their family members so that the arrival of the family does not entail social costs for the host country.

In Belgium, this income must be equivalent to at least 120 percent of the social integration income, ie a minimum of €1,774 net/month (amount as of 1 March 2022).

Only the income of the applicant is taken into account, not that of the family members to be reunited. Intermittent and low-paid workers obviously have more difficulty in reaching this minimum threshold. Moreover, not all employment income is equal before the law. Income from temporary employment is only taken into account if it has been continuously employed for at least one year or if it has been obtained after a period of unemployment. Income from a socio-professional integration contract is

completely excluded, as if it were social assistance instead of work.<sup>64</sup>

In the eyes of case law, this interpretation is unjustified, so much so that it was rejected in 2018 by the Council for Alien Law Litigation. The Council first noted that a socio-professional integration contract, even if different from a standard contract, is to all intents and purposes an 'employment contract'. The law on employment contracts is applicable to it and consequently the status that the person acquires is to all intents and purposes that of 'worker'. The Council also expresses its opposition to restrictions that are automatically applied to any other type of contract that is not open-ended: 'it cannot be ruled out that a replacement contract will lead to an open-ended contract, that a fixed-term contract will be renewed or lead to an open-ended contract, or that an open-ended contract will be abruptly terminated'. However, the Aliens Office persists in ignoring this case law.<sup>65</sup>

Also with regard to access to nationality, in addition to the various conditions of residence and social integration, in each EU country the applicant must generally demonstrate that he or she has adequate financial resources to provide for themselves and for their family.

In the Belgian nationality code, one of the conditions laid down is to 'economic participation [...] by having worked at least 468 days in the last five years as an employee'. Until 2016, days worked under a socio-professional integration contract were not taken into account, as if this type of work were not 'real work'. In January 2017, the Hainaut Court rejected this interpretation, stating that days worked under such a contract are fully eligible for the purposes of obtaining citizenship.<sup>66</sup> Based on this case law, this

63 Caldarini, C. (2021). "Travailler sous contrat article 60 : ascenseur vers le chômage ou vers l'emploi ?". In: Manço, A., Scheuret, L. (eds). *Inclusion des personnes d'origine étrangère sur le marché de l'emploi*. IRFAM, L'Harmattan, pp. 63-74.

64 It is an employment contract established by the Law of 8 July 1976, which allows Public Social Welfare Centres (CPAS) to provide work to a person in order to reintegrate him/her into the social security system and the labour market. The duration of the contract is established in accordance with the legislation on unemployment benefits.

65 Council for Alien Litigation, Judgment No. 200 882, 8 March 2018.

66 Tribunal de première instance du Hainaut (division de Mons), order, 11 January 2017. See Wautelet, P. (2017). "Travailler pour devenir Belge : à travail égal, accès égal à la nationalité belge ?". In: *Revue@dipr.be. Revue de droit international privé*, no. 1, [www.dipr.be](http://www.dipr.be), pp. 124-132.

obstacle should, in principle, have been removed. However, according to the testimonies gathered for the purposes of this publication, the Court's order only partially modified the practice of the Aliens Office. In fact, persons who have worked under a socio-professional integration contract must prove 624 days of work, instead of the 468 normally required, as if one day of work of this type were equivalent to three quarters of a day under a standard contract.<sup>67</sup>

Other restrictive interpretations may directly affect a worker, up to the point of ordering the expulsion of the worker from the national territory if they work under a non-standard contract without having a permanent residence permit.

Thus, between 2008 and 2019, almost 17,000 EU citizens, or family members of such a citizen, were deprived of their right of residence, and many of them received a removal order from Belgian territory. In short, they were expelled.<sup>68</sup> These expulsion orders concern persons who have been resident in Belgium for more than three months but less than five years and who are considered to be a burden on the state because they do not have sufficient income to support themselves. Even if not materially expelled from the country, these persons deprived of their residence permit cannot work legally, nor do they have access to social services such as housing or unemployment benefits.

Several thousand such persons were in Belgium as workers, whether employed or self-employed, or as recipients of unemployment benefits after short periods of work, or as casual workers, alternating between short periods of work and periods of social assistance. In short, the argument used is that these people have no 'real' economic activity and therefore cannot be considered as 'workers', or that they are

considered an 'unreasonable burden' to use the Belgian social assistance system.<sup>69</sup>

In this respect, Articles 7(1) and 14(4) of EU Directive 2004/38 state that any EU citizen, or any family member accompanying or joining an EU citizen, has the right to reside in the territory of another member state and may in no circumstances be expelled 'if he/she is an employed or self-employed person'. However, as this is a directive and not a regulation, the implementation of this provision has to be done through an act of transposition into national law. This leaves member states a margin of appreciation, which can easily lead to arbitrary or even abusive decisions.

Thus, the Belgian authorities systematically revoked the right of residence of hundreds of foreign workers whose professional status might suggest that they were not 'real workers': artists, intermittent workers, lower-income self-employed workers, and other forms of low-income work alternating with periods of unemployment or compensated by supplementary allowances and, until a few years ago, people working under a socio-professional reintegration contract, dependent on a Public Assistance Centre. The Aliens Office considers that these people are not 'real workers' and are rather an 'unreasonable burden' on the national social system.

In this regard, it should be recalled that, according to Article 7 of Directive 2004/38, an EU citizen who has involuntarily lost his or her job 'retains the status of worker' and therefore 'has the right of residence in the territory of another member state' if he or she has worked 'for at least one year'. This means that an EU citizen exercising his or her right to free movement, or the family member of such a citizen, irrespective of nationality, acquires once and for all the status of 'worker', and with it a right of permanent residence, even if he or she subsequently becomes involuntarily unemployed.

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67 We have not been able to identify the legal basis that could justify this practice.

68 Caldarini, C. (2016). cit.; Van Den Bogaard R.M. et al (2021). *Moving to Belgium as an EU citizen*. Brussels, Myria.

69 Caldarini, C. (2016). cit.

## 5. Conclusion

Non-standard contracts are increasingly common, while social protection systems, both European and national, still function mainly around the figure of the standard 'worker'. It is mainly the status of 'worker' that protects migrants, and it is this status that is called into question when a person works with non-standard contracts.

Can we at least say that non-standard work, even with its disadvantages, can be a stepping stone to more stable, better-paid and quality work? Or does it risk trapping the individual, condemning him or her to be stuck in a second-rate labour market?

According to some authors, a significant proportion of people employed on a fixed-term contract subsequently obtain a permanent contract, and the rate of access to training for these people may even exceed the national average in some cases.<sup>70</sup>

Other authors believe that this merits further investigation, since Eurostat data on the probability of transition from short-term to permanent employment seem to show the opposite, especially in some countries.<sup>71</sup>

In any case, this does not prevent us from assuming that, indeed and in general, working, whatever the conditions, increases the chances of finding a job.

This may be particularly true for people whose socio-professional integration pathway is difficult: foreigners, jobseekers who are furthest from the labour market, who are poorly qualified or, more often than not, who have qualifications, even excellent ones, but whose particularities are systematically devalued in our labour markets. Moreover, it is only when a person is working that he or she has the best chance of finding a job, and a CV full of experience,

even of short duration, is in most cases preferable to an empty CV. Moreover, setting foot in the labour market, whatever it may be, helps to understand one's living space, situate oneself in society, take a stand, hone one's ability to communicate, negotiate, cooperate, respect deadlines and instructions. It is by working that one learns to deal with other working people and to become familiar with the language of contracts. It is also where you join a trade union, if necessary, and learn to respect and enforce the rights of those you work with. With a bit of luck, these new encounters make it possible to 'fill one's address book': to increase what sociologists call 'social capital'. In this sense, and one could continue the list, starting work with an atypical contract can actually help the person to integrate better into the labour market.

However, the non-standard labour market in its current state is a second-rate market, which can push workers towards or even below the poverty line, especially young people, women, foreign nationals and, more generally, people whose skills and creativity are difficult to exploit in the conventional labour market. It is easy to assume, for example, that for a significant number of these people, the transition from temporary employment to a stable contract is most often the consequence of a substitution effect: the employer wants to hire a person on a permanent basis but, due to the abolition of the probationary period, the person is first put on probation with fixed-term contracts. In this case, the fixed-term contract, instead of being a real stepping stone, is used as a hidden probationary period and only serves to delay the entry into force of a permanent contract.

It is foreign workers, and non-European workers in particular, who are most likely to be employed

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70 Nautet, M., Piton, C. (2019). cit.

71 Caldarini, C. (2021). cit.

on short-term contracts, often at wages below the poverty line. For these people, having one contract after another creates additional instability and a greater risk of poverty. It also means that integration into the world of work, connections with other working people, learning from experience, and so on, often take place in extreme, marginal, demobilising, community situations. And, not surprisingly, non-unionised. In short, one job is not the same as another, and the mere fact of having a job, regulated by a contract, does not automatically open the door to integration and social protection.

In short, non-standard work is, or can become, a vehicle for socio-professional inclusion, provided the individual is well informed and aware of the advantages and risks that can be expected. For foreign workers, these disadvantages and risks are more numerous and evident than for others, and they add up to a cumulative effect. The image that comes to mind is that of a dog chasing its tail. On the one hand, it is mainly workers with atypical contracts who are pushed to migrate to other countries in search of better economic and social conditions. But on the other hand, once arrived in a new country, it is precisely in non-standard work that migrants most often find their first concrete job opportunities. Restrictions on social security and free movement rights should not be underestimated, and their possible effects should be known and anticipated if possible. According to some analysts, the health crisis caused by the Covid-19 pandemic revealed the 'double punishment' mechanism to which atypical workers are exposed: they are actually less protected, both when they are working (they do not benefit, for example, from the limitation of successive fixed-term contracts) and when a crisis deprives them of their job (they have little access to unemployment benefits).<sup>72</sup> One might add that when these workers are also migrants, the penalties they face are seven instead of two:

1. They have low and unstable incomes when working.
2. They are poorly covered by social security systems when they lose their jobs.
3. They lose some of their social rights when they move from one national social security scheme to another.
4. They are more likely to end up with an atypical contract when they move to another country.
5. They find it more difficult to build a full career and thus obtain a decent pension at the statutory retirement age.
6. As foreigners, they find it more difficult to access certain rights, such as acquiring the nationality of the host country or organising family reunification, if they so wish.
7. They risk being considered an 'unreasonable burden', and therefore expelled from the host country, if their income is deemed insufficient and not stable enough.

Companies, or at least an increasing number of them, need or prefer greater flexibility. And they are entitled to a certain margin of manoeuvre in relation to fluctuations in demand, which are difficult to predict. It is clear that non-standard work is one of the answers to this legitimate demand. In a free market, or in a market we would like to be free, this would have a cost. In a pure logic of demand and supply, and if the power relations were not disproportionate, a demand for flexible work would logically correspond to a supply, with a consequent price.

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72 Mechelynck, A. (2020). "La crise sanitaire révèle les faiblesses de la protection sociale des travailleurs précaires au chômage". Université libre de Bruxelles (ULB), Centre de Droit public. *Carnet de crise*, No. 17, <https://droit-public.ulb.ac.be>.

The paradox, in our view, is above all that this flexible and poorly protected work is less well paid than stable and well protected work. In sectors where the balance of power is not exaggeratedly disproportionate (eg oil platforms), the cost of labour is in fact proportional to the economic, social and health risks to which the worker is exposed. Rather than costing more, atypical work is cheaper

than standard work. Moreover, this makes the socio-professional integration process particularly fragile and vulnerable: the problem is not so much that of having worked on atypical contracts, but that of having worked in forms of work that, being economically undervalued, also end up being socially devalued.

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