Maastricht University

Institute for Transnational and Euregional cross border cooperation and Mobility / ITEM

Cross-border impact assessment 2018

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Dossier 5: The Social security of non-standard workers: a challenge at the national and European level

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5. The Social Security of the Non-Standard Worker: a National and European Challenge

Offering access to social protection is crucial for the economic and social safety of the workforce and well-functioning labour markets that create jobs and sustainable growth. Nevertheless, there is a growing number of people who, due to their type of employment relationship or form of self-employment, are left without sufficient access to social protection.[1]

1. Introduction

Now that more and more workers, in the Netherlands as well as in other Member States, can no longer be regarded as standard employees[2], it is useful to investigate the social security protection of this growing group of non-standard workers. Who are they? What protection do they have, what protection do they lack and what happens in a cross-border work situation? In addition, this dossier includes the work situations of platform workers as a special type of non-standard worker.

The dossier will start with a definition of a number of concepts as well as a description of the background of this research theme. *Non-standard workers* are workers who are no longer bound by a standard employment relationship. The standard employment relationship is still regarded as the benchmark in both labour and social security law. It assumes full-time employment with one employer for an indefinite period of time.[3] More and more workers, however, have part-time work, full-time intermittent work or a combination of multiple part-time jobs. Others have on-call contracts, whether or not in combination with a small job as a self-employed worker.[4] In short, variety among workers is large and growing. The legislation on labour and social security that is supposed to offer protection is either still lacking or out of sync with practice.

Major efforts are underway at the national and at the European level to offer this category of 'new' workers - which may turn out not to be that 'new' after all[5] - the appropriate protection. The key questions are: what is appropriate protection, who decides that, and on what basis? The government or the workers themselves? And: is there a common denominator for this large group of non-standard

[1] European Commission: Proposal for a Council Recommendation on access to social protection for workers and the self-employed, 13 March 2018, COM(2018) 132 final, p.1.

[2] The term 'employee' was chosen deliberately to distinguish them from the non-standard 'workers', whose situation will be addressed later in this dossier.

[3] K.V.W. Stone & H. Arthurs, 'The transformation of employment regimes: a worldwide challenge', in: K.V.W. Stone and H. Arthurs (eds.), *Rethinking workplace regulation: Beyond the standard contract of employment*, New York: Russell Sage Foundation 2013; see also European Commission: Proposal for a Council Recommendation on access to social protection for workers and the self-employed, 13 March 2018, COM(2018) 132 final, p.1.

[4] For the Netherlands: see CBS, search term: *Arbeidsdeelname* (labour market participation), key figures www.cbs.nl; for Europe, see European Commission, Proposal for a Council Recommendation, COM(2018) 132 final, p.3.

[5] See R. Knegt, 'De werknemerachtige vanuit historisch perspectief', in: J.H. Bennaars, J.M. van Slooten, E. Verhulp, M. Westerveld (red.), *De werknemerachtige in het sociaal recht. Een verkenning.* Deventer: Wolters Kluwer 2018, p.9 e.v.; See also S. Montebovi, A. Barrio en P. Schoukens, 'De sociale zekerheid en de niet-standaard arbeidsrelaties: ontwikkelingen in Europa en Nederland', Tijdschrift Recht en Arbeid (TRA), 2017/10, p.15.

workers? The Dutch Minister of Social Affairs and Employment Koolmees promised a solution to the, sometimes diffuse, distinction between employees and self-employed persons by 2020, so that pseudo self-employment and abuse of the legislation can be banned. Europe also has an open eye for the, sometimes dire, situations of non-standard workers. This is visible through various initiatives. These initiatives are not binding however.[6]

This dossier alternately uses the terms *non-standard workers* and *atypical workers* to cover the same group. The relevant national and international literature also alternates between both terms.

*Platform worker*s are a special type of non-standard worker, whose clients offer work, i.e. a product or service, on a platform, for the interested worker to perform offline or online. The *platform* is, in other words, the link between the supply and demand of work or services and has a huge potential range. Some of these platforms take the shape of a digital wall (e.g. *Werkspot* [a Dutch website linking the supply and demand of blue-collar work]), while others, such as Foodora and Deliveroo, assume the role of mediator. The great advantages of this form of division of labour are 1) the flexibility for both platform workers and the platform; 2) the low cost for the platform, as well as for the suppliers; 3) low prices for users due to stiff price competition, and 4) the speed of outsourcing and completing jobs.[7] The method also has several drawbacks however: 1) it introduces a 'race to the bottom', so that the price of the product or service delivered is often minimal, as is the social protection of the platform workers involved; 2) there is volatility and anonymity in the working relationships (which can also be an advantage sometimes); 3) the legal status of the workers is unclear[8]: their position is sometimes closer to that of an employee, sometimes to that of a freelancer or a self-employed person without employees (Dutch: *ZZP-er*) and is sometimes a combination of both statuses; and finally 4) platform workers depend on customer reviews and ratings and their interpretations by the platforms without the right of reply. In short: working through platforms is booming, but the legal framework lags behind.

The content of platform work varies greatly. The job may be physical (with offline orders), e.g. the taxi drivers at Uber or the participants in Werkspot.nl. It may also involve online commissioning, however, such as the translation of texts, the sorting of photos, the editing of certain information files, etc. through platforms like Amazon Mechanical Turk and Clickworker, which offer tasks that can be executed fast, cheap, worldwide and on-demand.

This 'working relationship' is clearly different from the standard working relationship, in that platform workers are not expected to work full-time with a single employer for an indefinite period of time. While

[6] See for example the European Pillar of Social Rights; the European Agenda for the Collaborative Economy; the 2018 Commission Work Programme; the White Paper on the future of Europe; the Proposal for a Recommendation on access to social protection for workers and the self-employed; and the Proposal for a Directive on transparent and predictable working conditions in the EU.

[7] See also European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European agenda for the collaborative economy,* COM(2016) 356 final, p.2. The European Commission did not use the terms 'pros' and 'cons', opting instead for 'new opportunities' and 'issues'.

[8] K. Frenken, 'Hoe kan de onduidelijke status van platformwerkers verhelderd worden?', *Me Judice*, 13 November 2017.

this difference in working relationship is inherent to this legal concept, what is lacking is a clear framework of rights and obligations in the fields of labour law and social security law. It is precisely for this reason that platforms, but also the workers themselves, frequently use of all sorts of constructions that are deemed highly attractive for one or both parties. Alongside freedom and economic gain, this leads to abuse, legal uncertainty, inequality before the law, lack of legal protection, etc.[9]

The debate on the social security position of non-standard workers is in full swing, and a concrete solution is not yet in sight. Several factors play a role and influence the search for a satisfactory solution. It is not possible to limit oneself to the existing social security schemes in finding out where a person is insured and against what exactly; fiscal and labour law aspects are of great importance as well. Some of the questions that one might pose and that the government obviously aims to address as well are: in which country are social security contributions due if a person's place of work and work hours are constantly changing, overlapping, or, worse still, are not transparent? Another question is how to deal with thresholds in taxation or social security, below which no contributions are due and no insurance is provided, or thresholds, below which no contributions are due but insurance *is* being provided, such as the Dutch resident schemes for old-age pensions and health insurance. Imagine someone who is combining three small, part-time jobs, whether or not through platform labour, and continually remains under the insurance threshold. This person may earn enough to live now but may not be able to save for later or for times of adversity, such as disease or a shortage of work. If this person lives in The Netherlands, (s)he will probably be able to fall back on healthcare arrangements and later on his or her statutory AOW old-age pension. The question is, however, how those benefits will continue to be financed if little or no contributions are paid. Another example is that of a person who is combining various statuses in different countries: a public servant in the Netherlands for one day, a self-employed worker in Germany for a day and a half and an on-call contract in Belgium. The current social security regulations, both national and European, are no longer sufficient to determine the position of these hybrid workers.

The lack of a coherent social security system for non-standard workers at national and European level constitutes a threat to social security. Not only the workers themselves, but also their clients and the state are faced with the insecurities and the legal vacuum associated with these non-standard workers.

Bottlenecks arise when law and practice are not in line (anymore). These bottlenecks can be divided into different categories, each requiring a different approach.[10] When it comes to social security for non-standard workers, those concerned again resort to creative approaches if the arrangements are not effective and efficient. These tend to benefit the clients or employers rather than the non-standard workers, and both groups are ultimately better served with a clear legal framework. This furthers the creation of a fair labour market, the free movement of persons, stronger European social inclusion and decent social security protection for all workers.

[9] Cf. the situations of workers at Deliveroo, Uber, Helpling, etc.

[10] For five categories of bottlenecks in cross-border traffic, see: S. Montebovi, *Activering en privatisering in de Nederlandse ziekte- en arbeidsongeschiktheidsregeling in grensoverschrijdende situaties,* Apeldoorn/Antwerpen: Maklu-Uitgevers 2016, p.400-401.

In its proposal of December 2016 to amend Coordination Regulations 883/2004 and 987/2009, the European Commission indicated a desire for the creation of simple, fair, effective and clear rules on the one hand, and for a better sharing of the financial and administrative burdens between Member States on the other hand.[11] Strangely enough, the pressing theme of social security for these new workers was not addressed anywhere in this amending proposal. There still appears to be insufficient political will or sense of necessity to achieve better coordination of this theme via mandatory additions to the Coordination Regulations. Europe has shown recent signs of interest, however, in this lack of social insurance for workers at national and cross-border level.[12]

2. Objectives & Method

2.1 Current or Future Effects: Ex-post

This cross-border impact assessment is an ex-post analysis of the social security position of non-standard workers, in that it is based on existing legislation only for lack of new legislation. The present Dutch schemes nor the European coordination rules have, in recent years, incorporated any concrete steps that might offer atypical workers more clarity on their current and future social security positions. While high on the agenda, the theme is complex and therefore not easily addressed.[13] EU Commissioner for Employment, Social Affairs, Skills and Labour Mobility Thyssen has indicated, however, that all workers deserve access to social protection.[14] Likewise, many experts in The Netherlands are reflecting on the legislative approach and on how to flesh out any ensuing legislation.[15]

The Netherlands has had several forms of atypical work for decades: part-time contracts, employment agency contracts, temporary contracts, etc. Platform workers and highly mobile workers are novelties, however, for whom the current legislation is inadequate or lacking altogether. The assessment below mainly focuses on these two groups of workers, since the current Dutch legislation is absolutely sufficient for part-time workers and workers on temporary contracts, provided that they have only one employer (as opposed to multiple employers) and do not work across borders too often.

2.2 Delineation

This dossier uses a broad interpretation of the term 'border region', including not only a certain border region within a certain Member State, for example the Dutch border region with the Flemish provinces, the province of Liège or Germany, but rather every part of the Netherlands where cross-border traffic

[11] Proposal for a Regulation of the European Parliament and of the Council, 13 December 2016, COM(2016) 815 final, pp.2-4; see also 2017 ITEM Cross-Border Impact Assessment, Dossier 3: Social Security.
[12] See also the introductory paragraphs.
[13] K. Frenken, 'Hoe kan de onduidelijke status van platformwerkers verhelderd worden?', *Me Judice*, 13 November 2017; see also the introduction to this report.
[14] European Commission press release of 21 December, 2017, accompanying the proposal for this Directive, COM(2017) 797 final.
[15] See, for example, the position papers written for the 'Werk in de platformeconomie' (Working in the platform economy) round-table discussions of the Netherlands House of Representatives Standing Committee on Social Affairs and Employment, The Hague, 16 November 2017.

may occur. This means that the 'border region', as referred to here, is not linked to certain Euregions or other definitions of a border region but comprises all territories in Europe where any form of cross-border work activity occurs and is studied from a Dutch perspective. The term border region is thus relevant for the classic cross-border workers who travel back and forth on a daily basis but also for workers who combine work in one Member State, e.g. the Netherlands, with a (digital) job in another European Member State.

The second definition is that of the group of workers covered by this study. Previous cross-border impact assessments addressed the mobility of labour on the basis of the percentage of EU citizens that actually crossed the border as a worker or as a self-employed person. Labour mobility has a different character in this report[16], however, as the new forms of work often no longer require physical traffic to another Member State. Labour mobility is low for those who mainly have digital working relationships; these new workers can perform paid work from their workplace, either at home or at another location of their choosing, and qualify as workers. This report thus pertains to a potentially large group of workers.

This dossier also studies other non-standard workers alongside platform workers (see Introduction). This group is quite varied and difficult to bring under a common denominator. It includes, for example, people who have successive intermittent temporary jobs, who combine several part-time jobs or who combine various statuses, i.e. those of public servant, employee, and self-employed worker. It also includes people who combine on-call contracts with a job as a freelancer or people who work at one company in Member State X but can also work for the same employer from home in Member State Y. This form of teleworking, while on the rise, remains a remarkable legal concept.

The third definition in this report is that of the object of research, namely the applicable social security legislation in atypical or non-standard, cross-border work situations. The specific bottlenecks and (proposed) measures concerning workers' rights or tax law are excluded.

2.3 The Dossier's Research Themes, Principles, Benchmarks and Indicators

2.3.1 Research themes

ITEM Cross-border Impact Assessments are delineated by the following three themes: European integration, sustainable and socio-economic development and Euregional cohesion.

Theme 2, sustainable development, is heavily dependent on quantitative data. It is difficult, however, to establish the number of people involved in the research object of this dossier, the capacity in which they are involved, and the share of the economy that they represent.[17] It is as yet unclear how many people work in non-standard working relationships and how many work in digital working relationships, and this may not be measurable in the future. In its Communication on 'a European agenda for the

[16] ITEM Cross Border Impact Assessment 2017, Dossier 3: Social Security.
[17] Cf. the Introduction section.

collaborative economy' the European Commission does state, however, that the 'collaborative economy is small but growing rapidly, gaining important market shares in some sectors.'[18] The European Commission estimated that the gross incomes of sharing platforms and their providers represented approximately EUR 28 billion in 2015. Their future contributions to the European economy could grow to between EUR 160 billion and EUR 572 billion, according to the European Commission in the same communication. The amounts and time paths mentioned remain rather opaque and broad, but the collaborative economy has nonetheless forged its role in society and the economy.

Theme 1, European integration, studies the cross-border impact that the current (inadequate) legislation on the European freedoms, European citizenship and non-discrimination has on citizens and businesses. Since this report seeks to clarify the applicable legislation on non-standard workers, its focus is on the discrimination or barriers that these workers encounter compared to workers who reside and work in a single Member State. Another topic for research is whether employers or clients encounter any obstacles in hiring non-standard workers and whether they are consequently more inclined to confine themselves to a national work situation. Note further that it is not always clear where platform workers are physically located. Offline assignments, such as taxi rides and food delivery, are of course performed in a particular location in a particular Member State. If these non-standard services are combined with other work activities in another Member State, however, the situation becomes opaque again and difficult to fathom.

Theme 3, Euregional cohesion, focuses on the cooperation of governments, citizens and entrepreneurs from a Euregional perspective. It might, for example, be investigated whether entrepreneurs on both sides of the border can work together in their own interest as well as in the interests of the workers they are trying to attract. There will be some overlap with theme 1 due to the research topic chosen.

[18] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European agenda for the collaborative economy,* COM(2016) 356 final.

2.3.2 Social Security Dossier: Principles, Benchmarks and Indicators for Establishing a Positive Situation in Border Regions:

Theme	Principles	Benchmark	Indicators
European Integration	**Free movement of persons** - Art.45 TFEU[19] - Art.48 TFEU - Recitals 1, 17 and 18, 29 Regulation (EC) 883/2004[20] - Recitals 6, 8, 9 and 22 Regulation (EC) 987/2009[21] - **Articles 11 and 13 Regulation (EC) 883/2004: applicable law** - Articles 6, 14 and 16 Regulation (EC) 987/2009 **Equal treatment** - Art.18 and 19 TFEU - Recitals 5 and 8 Regulation (EC) 883/2004 - Articles 4 and 7 Regulation (EC) 883/2004 **Ensuring adequate social protection and combating social exclusion** - Art.9 TFEU - Art.352 TFEU (to regulate the social protection of self-employed workers) **European citizenship** - Art.20 TFEU	1) *Comparison of non-standard workers and standard workers in a national work situation*: standard employees and standard self-employed workers are subject to the national social security legislation of their country of employment in non-cross-border work situations, and the outcomes are (mostly) clear. 2) *Comparison of non-standard workers in a national work situation with non-standard workers in a cross-border work situation*: the Coordination Regulations place non-standard employees and non-standard self-employed workers in cross-border situations under the social security legislation of the country of employment. But which state is the country of employment in atypical work situations? And why does the country of residence nevertheless take precedence sometimes, even though the country of work is the main link (e.g. when teleworking)? The	1) In a national work situation, the *standard* employee or self-employed worker is always classified under one of the existing pillars of the national social security scheme: the employee scheme, the self-employed worker scheme or another scheme, such as the intermediate worker scheme in the UK or the *Arbeitnehmerähnliche* (employee-like) scheme in Germany. Of *non-standard* workers, such as platform workers or self-employed workers, however, it is not always clear to which pillar they belong. Is the Deliveroo or Foodora deliverer or the Uber taxi driver an employee or a self-employed person or does he have another status? 2) Non-standard workers in cross-border work situations are still evaluated according to the work-state principle under existing European legislation (Art.11 and Art.13 883/2004), even if they change jobs frequently, engage in teleworking, and/or combine different statuses (of public servant, self-employed worker and employee). Sometimes they

[19] TFEU: Treaty on the Functioning of the European Union.
[20] Regulation (EC) 883/2004, also known as the Basic Regulation.
[21] Regulation (EC) 987/2009, also known as the Implementing Regulation.

		national legislation is always applicable in national work situations, regardless of the number of hours worked from home.	are evaluated according to the state-of-residence principle (art.13 883/2004), however, even if the ties with their country of employment are closer than those with their country of residence.
Sustainable development/ socio-economic development	- Article 3, paragraph 3, TFEU[22] - Art.151 TFEU - Protocol No 28 at TEU and TFEU	N/A	N/A
Euregional cohesion	**Economic, social and territorial cohesion** - Art.174 TFEU **Loyal cooperation:** - Art.4 TFEU **Closer cooperation between Member States** - Art.20 TFEU - Recitals 2, 8 and 9 Regulation (EC) 987/2009 - Chapter II Regulation (EC) 987/2009 **Europe 2020 strategy** **The European Commission's focus on social cohesion** European Commission, Communication: stimulate growth and cohesion in the EU border regions, COM(2017) 534 final/2	*1) Comparison of the non-standard workers with the standard workers in a national work situation* *2) Comparison of the non-standard workers in a national work situation with the non-standard workers in a cross-border work situation*.	1) Companies are departing for or are considering departure for non-EU territory where the rigid designation rules of Regulation (EC) 883/2004 do not apply. 2) Employers are avoiding cross-border work situations as they prove complicated. 3) Employees are confronted with discrimination on grounds of place of residence because working partially in the country of residence may affect the designation of applicable law. This is certainly an issue for cross-border workers and their employers, and thus for the border regions.

[22] TEU: Treaty on the European Union.

3. Evaluation of the theme of European Integration

The positions of non-standard workers in general and platform workers in particular are determined by national and European rules or the absence of these rules. Previously, when a standard employment relationship was usually limited to one workplace, it was easier to establish the social security position of workers; this was done on the basis of national law or European Coordination Regulations, where the work-state principle is still leading.

A cross-border outlook is needed now more than ever, however, as non-standard workers, including platform workers, obviously no longer restrict themselves to working within one and the same country. It is no longer exceptional, for example, for part-time workers to (be asked to) temporarily step in in another position in a neighbouring country. In addition, (young) people are attracted by the 'digital nomad culture', in which they are temporarily on the move - sometimes for years -, working in different places around the world from their laptops.[23] These people often no longer feel bound to a country or nationality and move across Europe and further with ease. The European Coordination Regulations (EC) 883/2004 and 987/2009 can no longer protect these new workers under the existing, relatively rigid rules. Work and labour relations have become (overly) complex, to the detriment of social security protection.

The effects on the border region are significant but difficult to reveal, as non-standard work is quite varied in terms of size and numbers of people involved. The Netherlands has had a large number of part-time workers for decades, while the group of self-employed workers without staff has also increased significantly. Both groups of workers are non-standard workers because they are not bound by a full-time, indefinite employment contract with one employer. Alongside these atypical workers, there are online and offline workers, many on-call contracts, zero-hours contracts, short-term employment contracts, etc. In other words, there is great mobility and variety among workers, which makes it difficult to produce figures per category. In addition, some jobs are very temporary or so limited in terms of size or revenues that it is questionable whether they end up in the statistics. Platform work, which sometimes involves jobs of only fifteen minutes or one hour, is by definition not very transparent about revenues and contributions.

Each worker who physically or digitally crosses the border may become subject to another national social security system, as laid down in the Coordination Regulations (EC) 883/2004 and 987/2009. The current rules, however, still assume physical presence at a workplace. Both national law and the European Coordination Regulations rely on physical movement and presence when determining the applicable social security law.

Current Dutch social security legislation, labour legislation and tax legislation are facing qualification problems and enforcement issues. Especially pseudo self-employment, which is not a legal term by the way, and non-standard work situations stand in the way of a smooth labour market that is transparent

[23] Trouw, 'Digitale nomaden: overal thuis', 31 March 2018.

about social protection. First of all, the legal classification is unclear to workers themselves: are they employees or self-employed workers? And what are the implications for social security protection? In addition, clients are often uncertain about how to classify non-standard workers and about the steps they can or must take concerning social security protection: are they dealing with an employee or a self-employed worker? And which obligations does a client have toward the workers? Thirdly, it is not clear to the government who are active in the labour market under which status. Are platform workers employees or self-employed workers? And are the many temporary contractors sufficiently protected against social risks?

The Dutch government is aware of these pressing issues surrounding non-standard work situations. This is apparent from the Coalition Agreement[24] and from the fact that Minister of Social Affairs Koolmees tasked the Parliamentary Committee on Social Affairs with organising a hearing/round-table discussion entitled 'Working in the platform economy' on 16 November 2017 '.[25]

In recent years Europe has been initiating proposals and plans that emphasize the importance of the developments in the (European) labour market as well as the need to counter the abuse of, suppression of or exclusion from social protection schemes. One of the recent proposals, for example, is the proposal that recommends social protection for all workers.[26] This European initiative is based on principle 12 of the European Social Rights pillar[27] and thus aims to offer adequate social protection to workers, regardless of the nature and the duration of their employment relationships. As such, this proposal is definitely aimed at atypical workers and self-employed workers.

In addition, the European Commission launched a proposal for a Directive on transparent and predictable working conditions in the EU.[28] European Commissioner for Employment, Social Affairs, Skills and Labour Mobility Thyssen stated about this proposal: 'With today's proposal we are taking action to improve transparency and predictability of working conditions. The world of work is changing fast with a growing number of non-standard jobs and contracts. This means that more and more people are at risk of not being covered by basic rights anymore, starting from the right to know the terms under which they work. Increased transparency and predictability will benefit to both workers and businesses.'[29]

The proposals or communications issued by the European Commission on better social protection or transparent working conditions have no legislative or mandatory character. Coordination Regulations (EC) 883/2004 and 987/2009 do legal force but, unfortunately, fail to mention atypical workers. Social security regulations are still mainly based on the work-state principle, and it is still difficult to apply the

[24] 2017 Coalition agreement, 10 October 2017, *Vertrouwen in de toekomst*, pp.22-26.
[25] 'Werk in de platformeconomie' round-table discussion, 16 november 2017, Dutch House of Representatives. See also www.tweedekamer.nl.
[26] European Commission, 13 March 2018, Proposal for a Council Recommendation on access to social protection for workers and the self-employed, COM(2018) 132 final.
[27] The European Pillar of Social Rights, COM(2017) 251.
[28] European Commission, December 21, 2017 Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union, COM(2017) 797 final.
[29] European Commission press release of 21 December, 2017, accompanying the proposal for this Directive, COM(2017) 797 final.

current designation rules in the Regulations to atypical workers. In short, the existing legislative frameworks offer inadequate or varying degrees of protection to certain categories of workers. The workers affected are hybrid workers, i.e. workers who sometimes have one status, sometimes another and sometimes multiple statuses at the same time: those of employee, self-employed and public servant; the economically dependent self-employed, who actually have only one or two clients and are thus approaching employee status; the temporary contractors who, voluntarily or not, alternate between short, intermittent working relationships and sometimes find themselves in a legal vacuum when in between jobs; as well as workers who alternately work in their country of residence and state of employment.

Neither the Dutch nor the European legislation has been properly fleshed out to cover the potential cross-border nature of teleworking. This not only limits the legal certainty of employers and employees, it also hinders the free movement of persons. Striving for a national work situation is, after all, easier, clearer and more efficient for employers, employees and governments (e.g. tax authorities, social security bodies). National legislation would apply without debate and there would be no need to heed the shift in applicable social security legislation for employees who had worked on the other side of the border a bit 'too much', thereby activating European law.

The Regulations expressly stipulate that the applicable social security legislation cannot be chosen by the parties involved (employers, workers, self-employed workers, public servants, agencies, etc.) but is designated by the conflict rules of Title II of the Basic Regulation, i.e. the designation rules have exclusive effect. Indeed, this is often the most appropriate solution for standard workers. The Member State where most of the work is done is almost always the starting point for applicable legislation.[30]

Employers and employees (usually) also embrace these rules in standard work situations. Sometimes, however, the rules are inadequate or no longer adequate, and non-standard work situations are increasingly common.[31] While some of these situations dovetail nicely with the work-state principle, a concrete situation may sometimes require derogation from this work-state principle, creating difficulties for employers and employees while applying the, then mandatory, country-of-residence principle. The bottlenecks are obvious in the cases of teleworking or working from home in another Member State. Although teleworking has already been identified as a bottleneck under theme 3, it is a bottleneck under theme 1 (European integration) as well.

Given their commitment to the country of employment and their preference for a clear and transparent legal situation, employers and employees both usually prefer application of the work-state principle, as laid down in Article 13 of Regulation (EC) 883/2004, to teleworking that also allows employees to work from home (in another Member State). In these situations, the main seat of the company is considered leading in the application of the work-state principle. Correct application of the current European legislation (Council Regulations (EC) 883/2004 and 987/2009), however, implies looking at the number

[30] There may be exceptions to this rule, for example, for public servants, soldiers, non-active persons, …
[31] For examples, see the Introduction.

of substantial activities performed in the country of residence. The criterion in Article 13, paragraphs 1 and 2 of the Basic Regulation and Article 8 of the Implementing Regulation is based on physical presence during the implementation of (substantial) work. In other words, the applicable legislation may shift from country of employment X to state of employment and residence Y if a company allows its employees to work from home as part of modern management and maintaining a good work-life balance. It is currently (still) essential that employer and employee are both well aware of the maximum number of hours to be worked from home, as the work-state principle will give way to the state-of-residence principle even slightly above that number. This means that employees who work from home for one out of 3 or 2 out of 5 days, for example, will no longer be covered by social insurance under the legislation of the state where their main workplace is located or where their employer is based, but that the legislation of the country of residence will be (or become) the applicable social security legislation instead. This is an issue, particularly for companies with many cross-border workers. This anomaly thus burdens some companies more than others, particularly those in the border regions or those (outside the border regions) that employ cross-border workers.

4. Evaluation of the theme of sustainable/socio-economic development

Evaluation of the sustainable and socio-economic development requires figures on the number of workers (not) subject to the Coordination Regulations. This in fact requires the collection of figures on all cross-border employment of atypical workers. In addition, given the heterogeneity of the group of non-standard workers, it is impossible to draw meaningful comparisons with standard workers or even to draw any general conclusions. There are large differences between Member States, regions, sectors and even generations in the prevalence of 'non-standard forms of work' and ‘self-employment’.[32]

The European Commission does, however, offer some indication of the relative share of these workers compared to all workers in the labour market in figures of 2016: 14% of workers in the EU are self-employed; 8% are full-time temporary workers, 4% part-time temporary workers, 13% part-time employees on a permanent contract and 60% are full-time employees on open-ended contracts.[33]

The standard working relationship, i.e. a full time, open-ended employment contract, is still by far the most common employment relationship within the European Member States. There is no ignoring the rise of the new forms of work and labour agreements, though, such as on-demand work, irregular part-time work, voucher-based work, platform work, (pseudo) self-employed work, etc.[34] This evolution in

[32]European Commission, Proposal for a Council Recommendation on access to social protection for workers and the self-employed, 13 March 2018, COM(2018) 132 final, pp.3-4.
[33]European Commission, Proposal for a Council Recommendation on access to social protection for workers and the self-employed, 13 March 2018, COM(2018) 132 final, p.3.
[34]European Commission, Proposal for a Council Recommendation on access to social protection for workers and the self-employed, 13 March 2018, COM(2018) 132 final, p.2.

the last 20 years will pose a threat to the long-term social and economic sustainability, and thus the financial sustainability, of our social security systems.[35]

There are currently no figures available to support whether atypical working relationships are hindering or promoting the sustainable economic development of the border regions. The question is whether this will be measurable in the future as the group of non-standard workers is so diverse and sometimes even invisible in the statistics. These figures will not always correspond to reality, especially those on short-term jobs (the gig economy is on the rise) or combination jobs.

Coordination Regulations (EC) 883/2004 and 987/2009 on social security offer no direct support for sustainable development in the border regions as social security legislation remains a national competence and responsibility, only subject to the rules of the Regulations in cross-border situations.

5. Evaluation of the theme of Euregional cohesion

The Euregions are subject to the same coordination rules as the other regions of the EU. In other words, the designation rules of the social security Regulations apply as soon as a cross-border work situation arises, regardless of the regions or Member States involved. The exact nature and location of this cross-border element are not important. The country of employment and country of residence may thus be different countries, but there may also be two or even more countries of employment involved, as well as one or more employers. In short, as among the group of non-standard workers, there is great variation here too.

Articles 11 and 13 of the Basic Regulation determine which national social security legislation is applicable in any particular cross-border situation. In this sense, (the designation rules of) the Regulations do not affect Euregional cohesion directly. It is possible, however, for Member States to collaborate closely and possibly even conclude bilateral or multilateral agreements supplementing the current regulations. The underlying principle of the free movement of persons must of course be respected and any barriers to this freedom must be removed. The additional collaboration thus sought and agreed on by Member States cannot alter the existing coordination principles, such as the export of benefits, the aggregation of time periods, the removal of the residency requirement and the option of cross-border healthcare.

Nor is the highly relevant *determination of the applicable legislation* principle negotiable. This means that the relevant parties must apply the designated social security legislation, even in cross-border situations where it is not the most logical or most practical legislation. The only way to escape the

[35] See also Proposal for a Council Recommendation on access to social protection for workers and the self-employed, 13 March 2018, COM(2018) 132 final, pp.1 -2.

designated legislation is to shape the actual situation in such a way that the designation rules point to another applicable social security legislation.[36] Concrete examples may clarify this:

One example is that of a large company in the Dutch border region that also employs workers from Belgium and Germany. Given its international character and the language skills of its staff, this company likes to work with different nationalities. This company struggles, not with its employees or Dutch legislation, but with European legislation: the cross-border work situation within the company causes the applicability of Regulations (EC) 883/2004 and 987/2009 to the many employees who live outside the Netherlands. As a consequence, Articles 11 and 13 of the basic regulation, in particular, are used to determine the applicable social security legislation. If there is only one country of employment involved, i.e. the Netherlands, there is no problem and Dutch social security will be applicable to this work situation (pursuant to Article 11 Basic Regulation). If employees may, can, or must work from home as well, there are two works states: the Netherlands and Belgium (or Germany or any other country of residence, for that matter). This would lead to the invocation of Article 13 Basic Regulation, which obliges employees and employers to consider the amount of work performed in the country of residence. If this amount is substantial, the legislation of the other country, i.e. country of residence Belgium or Germany, replaces that of the country of employment as the applicable legislation. The definition of 'substantial' has been laid down in the Regulations (see Article 13 basic Regulation and Article 14(8) Implementing Regulation). In short, Dutch social security legislation is replaced by the relevant Belgian or German legislation if a person performs 25% or more of his work (expressed either in amount of time or remuneration) in the country of residence. This means that working from home has consequences for both employers and employees, as the physical work environment remains decisive in the Regulation, even if employees are constantly connected with their employers via digital work environments.

Another relevant issue in this case is that this employer seeks to give all employees the same administrative treatment and insure them under the same social security legislation, a desire not only driven by administrative convenience, but also by support for the notion of equal treatment; he simply wishes to treat all employees who are doing the same work in the same way. The situation is further complicated by his wish to meet the desire for more flexible working, which has recently turned into a legal obligation.[37] Employees must be granted permission to work from home more often under certain conditions (see the *Wet Flexibel Werken* - Flexible Work Act). This employer wanted to offer the option of working from home anyway because the nature of the work (teleworking) allows it. At the same time, however, he aims for the equal treatment of all employees and the application of Dutch social security legislation. This in fact implies that too much working from home must be avoided and employees are required to travel to the Netherlands to carry out work because, as mentioned above, the current

[36] For the sake of completeness: Article 16 procedures (see Art.16 of EC Regulation 883/2004) are also used sometimes to achieve derogation from the appropriate legislation. This means, however, is reserved for exceptional situations beyond the scope of this contribution.

[37] *Wet flexibel werken* (Flexible Work Act), originally in Stb. 2000, 114 (as amended and applicable since 2016).

Regulation is still based on physical presence. The balancing act that this employer is thus forced to perform is not conducive to European integration or Euregional cohesion.[38]

A second example is that of the worker who combines two or three part-time jobs, for example, one as on-demand staff, one as a small business entrepreneur and one as a platform worker. These types of situations or variants thereof will become increasingly common and should therefore not be overlooked in the discussion of social security issues. Depending on the legislation in the Member States, 'marginal' work may or may not, for example, lead to periods of insurance, whereby 'marginal work' stands for work that is only carried out for a small number of hours per week/month or that yields only a limited amount of wages or income. Persons in 'marginal' jobs may thus accrue few social security rights or none at all under applicable national law.[39] People who have had 'marginal' jobs for a long time thus face limited or no social security accrual because they have always remained under the threshold that gives entitlement to a regular social security position. People who combine these types of jobs with other short-term or small jobs in other Member States may also face interrupted accrual of social security benefits in the various time periods as it is unclear and unsure whether, where and which social security rights have been accrued and recorded.

6. Conclusions and recommendations from a Euregional perspective

6.1 Substantive Conclusions:

The current rules at national and European level have not (yet) been adapted to the new types of working relationships that are becoming increasingly common in the labour market. In the Netherlands, for example, the debate about the qualification of platform workers is in full swing. Are they employed or self-employed workers? Might this depend on the type of platform as well? Other non-standard working relationships such as on-call contracts, zero-hours contracts and temporary contracts are on the rise and differ from the 'standard' social security structure linked to 'regular' labour relations. Abuse or clever use of the existing rules and the current vacuum lead to undesirable situations of pseudo self-employment, but also of lacking social protection for an increasing number of people. Both young and old, employees and self-employed workers may face changing jobs and working relationships. Sometimes intermittent work can be a nice stepping stone towards another, more permanent working relationship, and sometimes accepting an assignment as a freelancer is a conscious choice. Since the social security positions of an increasing number of non-standard workers are uncertain, unclear and involuntary, however, it warrants the conclusion that the current national legislation needs to be tightened or adapted.

The current European rules also fail in addressing the cross-border work situations of non-standard workers. The rules in Regulations (EC) 883/2004 and 987/2009 are still based on the work situations of decades ago, assuming a long-term relationship with an employer or a self-employed person with a clear

[38] For the applicable labour law and social security law, see also M. Houwerzijl, 'Arbeid en arbeidsrecht in de digitale platformsamenleving: transnationale dimensies en dilemma's', *TRA* 2017/59.
[39] Franzen judgment, ECJ EU, 23 April 2015, ECLI:EU:C:2015:261.

and reasonably comprehensive pattern of work activities. One look at the current labour market, however, shows us that today's reality no longer corresponds to this paper reality. The Coordination Regulations deserve a makeover. This makeover does not seem to be in the making for quite some time, however, since the proposed amendments up for debate in 2017 and 2018 are silent on new designation rules for non-standard work situations. The current rules are rigid and not aimed at today's strong and ever increasing labour mobility. National and European law are (still) not suitable for those who opt for (or are sometimes forced into) a combination of jobs and thus non-standard working relationships.

The gig economy that is gaining ground, in any case, does not contribute to the legal certainty of and clarity for non-standard workers, nor does it usually contribute to a decent legal position for these workers, certainly not in cross-border working relationships.

6.2 Outlook

This cross-border impact assessment has identified the bottlenecks for non-standard workers who work across borders, either physically, by moving between several Member States, or via online activities, such as platform work or teleworking. Although no figures on the exact size of this type of work are available, it is possible to obtain an overall picture of the rules that are lacking and the ones that are overly restrictive. It is important that future research continue to monitor and evaluate the various initiatives at national and European level. Reports such as this one can contribute to the debate about and development of better legal frameworks for the social security of non-standard workers.

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