

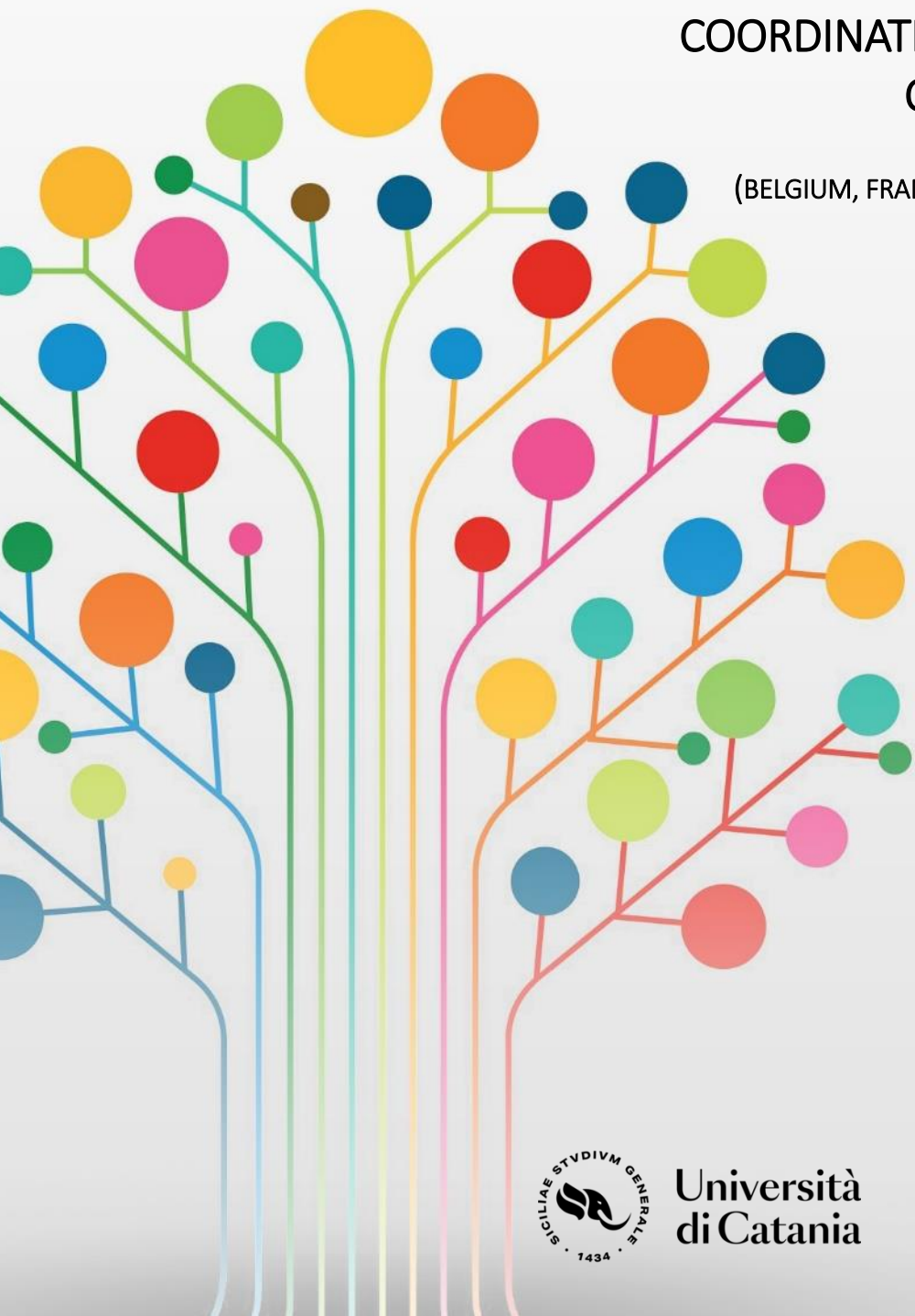
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## THE "PLACE" OF ATYPICAL WORK IN THE EUROPEAN SOCIAL SECURITY COORDINATION: A TRANSNATIONAL COMPARATIVE ANALYSIS

(BELGIUM, FRANCE, GERMANY, ITALY, SLOVENIA, SPAIN,  
SWEDEN, UNITED KINGDOM)

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# The “place” of atypical work in the European social security coordination: A transnational comparative analysis

(Belgium, France, Germany, Italy, Slovenia, Spain, Sweden, United Kingdom)\*

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The report, in presenting the results of the project, reflects only the opinions of the authors and the European Commission is not responsible for the use that might be made of the information given in it.

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## Foreword

This report presents the comparative analysis of the Accessor project, based on its enquiry into European social security coordination in the context of atypical work and in this short introduction we present the main areas of study, along with an executive summary of the key finding. Accessor is a European funded project led by INCA-CGIL UK, with INCA-CGIL and trade union partners from Belgium, France, Germany, Italy, Slovenia, Spain, Sweden and the United Kingdom and with the active participation of the ETUC. Its investigation into forms of employment reveals the growth of atypical work in every country of the study and a gradual movement from the standard form of permanent, full-time contract, towards more fragmented employment relationships. In all eight countries atypical contracts have increased over the last two decades and while there is limited standardised data to allow for accurate comparisons between Member States, the evidence supports the assessment that there is a proliferation of alternative forms of contract, a consequence of labour market deregulation, economic crisis and globalisation.

Accessor goes beyond just simply an examination of forms of atypical work. First, it provides an overview of the developments of European coordination to consider this issue in the context of freedom of movement. The aim has been to understand what the consequences are when workers move from one Member State to another with the aim of bettering their living and working conditions and where the form of employment relationship they then enter falls within one of the categories regarded as atypical. The EU rules of coordination have the stated aim of guaranteeing that persons moving within the Community and their dependents and survivors retain the rights and the advantages acquired and in the course of being acquired, also providing for the equal treatment of *benefits, income, facts or events*. However, the study has demonstrated how the coordination rules are inadequate when it comes to dealing with workers in atypical work relationships and that consequently the aims of coordination are not apparent when it comes to these groups. Furthermore, given that atypical work is closely identified with certain categories of worker, the failure of the coordination rules to provide adequate social security protection, risks offending non-discrimination principles, in particular, where these relate to gender, ethnicity, or age.

Freedom of movement is acknowledged as a fundamental principle of the Treaty and is enshrined in Article 45 of the Treaty on the Functioning of the European Union. It encompasses the right to look for a job in another EU Member State; to work there without the need for a work permit; to reside there and to remain even after employment has ended. It also encompasses a right to equal treatment with nationals of the destination Member State with regard to access to employment, working conditions and all other social and tax advantages. The emphasis on free movement of workers since the beginning of the European Economic Community has distinguished Community labour regulation from national labour laws of the Member States. Given that it represents such a fundamental principle of EU law it would be of concern if the rules regulating social security entitlement might in some way act as an inhibitor of free movement. Yet this is what the Accessor project has found in relation to free movement and atypical work. As this report demonstrates,

social security rules within the Member States which in almost every case take as their model the standard employment relationship, of full-time permanent employment, disadvantage those in atypical work. This means that the rules often operate so as to exclude or limit the rights to social security protection of workers in atypical employment and to this extent it might be argued that the coordination rules are not negated and that there is no issue of less favorable treatment in the context of freedom of movement, since social security regulations apply equally to nationals and non-nationals in atypical employment. However, the Accessor project suggests that there is the need for a more nuanced examination, as the predominance of atypical employment among those to move to a different Member State in search of work, means that they are more likely to be found in a disadvantaged group where they will be over-represented. Furthermore the complexity of the rules for acquisition of social security benefits in each of the Member States and the differences between them inevitably mean that those who migrate for work will be less aware and knowledgeable as to the rules and their application.

#### *Learning through Accessor*

Accessor had always intended to reach out beyond just an investigation of a problematic; its aims have been to provide in-depth training as well as detailed information to all of the partner organisations as well as to the participating trade union and related bodies. Thus, in addition to the exchanges of information that are at the core of any research project, Accessor developed a comprehensive training agenda delivered in three different stages. First it provided three days of intensive training to participants of the partner organisations, at a forum in London from 4 to November 2013. This training seminar explored in-depth the concept of atypical work and its spread throughout the participating countries; it also looked at social welfare provisions in the participating countries; and then turned to the issue of the protection of the rights of atypical workers who have crossed borders, looking at the social security coordination rules and at relevant case law. Following this seminar, training sessions were also organised in each of the participating countries. Here the aim was to spread the knowledge acquired in the course of the Accessor research beyond the partner organisations to provide *training for the trainers*, both INCA-CGIL and more generally. Representatives from trade unions and related bodies took part in these training sessions, each of one or two days' duration. The work of Accessor has been supported at all times by a panel of trade union and academic experts, right up to its concluding formalities: the Rome conference on 6th-7th February 2014 focusing on the presentation, assessment and use of the results, and a final session of internal project evaluation in London on 27<sup>th</sup>-28<sup>th</sup> 2014.

#### *Executive summary*

The key findings of the Accessor project are set out below and developed in Parts 1-3 of this report.

#### *The growth in atypical work relationships*

- Atypical employment contracts have increased in all of the Accessor countries, with a proliferation of alternative forms of contract;
- There is an absence of robust and comparable data on the forms of atypical work in the Member States making comparisons difficult. There are also different definitions of atypical work

although a common theme is that the concept is often defined in its relationship to *typical* or *standard* work; and

– Some categories of worker are more likely to be found in atypical work, particularly women, young people and migrant workers. These are all groups who ought to benefit from the protection of non-discrimination law at EU and national level.

*Social protection of atypical employment*

– The study acknowledges that atypical employment may represent a choice taken by some workers, in particular as a method of entering the labour market. However this choice has longer-term and negative consequences with respect to future social security entitlement and often the worker concerned is not aware of this likely consequence;

– Atypical work shares some common elements: lower levels of job security, lower and irregular salaries; less training and fewer career opportunities; worse health and safety protection; and fewer trade union rights. Thus it comprises elements that challenge the stability of working relationships for all of Europe's workers; and

– Social security regulations in relation to atypical work often exclude insurance coverage; make the aggregation of periods of entitlement more difficult; and prevent the exportation of unemployment benefits.

*The operation of the coordination rules*

– National social security systems and EU coordination were created during periods of industrial development, when employment was standard. Consequently the application of the coordination system continues to act as a barrier that prevents those in atypical work from accessing the protection offered by EU social security regulations;

– Atypical workers are more subject to partial or total restrictions on the exportability of rights to unemployment and the difficulties experienced by non-standard workers are largely due to structural gaps in protection that would not be counter-balanced by refinement to the coordination rules in isolation. Indeed the coordination legislation is inherently incapable of compensating, if an employment relationship fully or partially lacks social security coverage by the standards of the regulations in force in the Member State or if fragmented working lives mean that there is an inability to meet minimum national insurance requirements;

– The increase in temporary mobility in the form of workers moving from one Member State to another for work often has a negative impact on the level of social protection for the persons concerned and therefore might act as a barrier to freedom of movement;

– The concepts of worker and of employment relationship as developed and defined under EU law, while enabling the European Court of justice to take account of some forms of atypical employment relationship, such as part-time, fixed-term, however, they are less able to deal with other newer forms of atypical contract. Furthermore the concept of worker for social security law takes its definition from that in national legal systems;

– The use of residency rules, in particular with regard to non-contributory cash benefits, bars the exportation of benefits. Furthermore, the shift from the concept of a worker to that of a

person covered by insurance had brought about a gradual split in the work and the benefits-based concepts of workers; and

– The exclusion of social assistance and the non-exportability of special non-contributory benefits now tend to be more stringently checked by the European Court of Justice for the compatibility with the principles established by the treaty and with free movement, in particular in terms of compliance with the proportionality principle.



## Introduction

Despite the fact that it is a clearly significant matter, the issues raised by the difficulties classifying “atypical” or “non-standard” work in the European co-ordination legislation for national social security systems remain largely neglected by the copious amounts of specialist literature in the field. The number of jobs of this kind has increased rapidly in all of the Member States of the European Union in the last 20 years<sup>1</sup>. There is a widespread perception that atypical workers may be disadvantaged in a number of specific ways, including when accessing the transnational social security protection currently offered by regulations 883/2004 and 987/2009. Furthermore, the most commonly found application problems in the area of atypical work frequently appear in the judgements of the European Court of Justice, especially when it comes to unemployment and non-contributory benefits<sup>2</sup>. However, there seems to be the lack of a systematic investigation that starts with a comparative analysis of the social security legislation for the main types of atypical work covered by the national systems and seeks to give an initial critical evaluation of the most significant (and peculiar) issues emerging from application of the European social security regulations to non-standard workers.

This report aims to offer some initial reflection on methods and merits in this respect. Its objective is to carry out a comparative analysis of a substantial sample group of EU Member States and identify the main obstacles encountered by employed (or self-employed) non-standard workers, especially with regard to the limits of social security protection in the individual national systems, while making full use of the guarantees provided by the European co-ordination legislation for national social security systems.

The analysis was divided into three parts.

The comparative analysis in the first section of the report shows that there are clear signs of serious difficulties in the standard employment relationship model in all of the countries taken into consideration in the research, even though different political and legislative choices are made in the various national contexts examined. Full-time, open-ended employment based on a bilateral contractual relationship between an employer and an employee still accounts for by far the largest proportion of jobs in all of the countries examined, albeit with significantly different percentages. However, there is no denying that the main types of atypical work have spread significantly in all of the areas covered by the research, especially in recent years. Furthermore, in many of the countries, fixed-term jobs (either as an employee or in a self-employed role) are now by far the most common way to enter the employment market, especially – and disproportionately – when it comes to young people, women and immigrants.

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<sup>1</sup> Cf. mainly F. Pennings, *European Social Security Law*, Intersentia, Antwerp-Oxford-New York, 2010; M. Fuchs (Ed.), *Europäisches Sozialrecht*, Nomos, Baden-Baden, 2013.

<sup>2</sup> For example, take the cases of *De Cuyper* (case C-406/04) and *Hendrix* (case C-287/05). For a systematic overview of the most recent judgements of the court on the matter, see W. Chiaromonte, S. Giubboni, *I regolamenti europei di sicurezza sociale nella recente giurisprudenza della Corte di giustizia*, soon to be published in *Rivista giuridica del lavoro*.

The first section of the report highlights the widespread failings of the social security protection for atypical work in the national systems that were examined. There is a specific weakness in social security protection which has an inevitable negative impact in many areas, including the effective functioning of the European co-ordination system. In many cases, it prevents access to the virtual protection provided by the regulations due to the huge gaps in social insurance coverage which are more likely to affect these categories of employment relationships because of the way they are governed on a national basis.

In the second part of the report, there is a proposal for a systematic attempt at a critical evaluation of the main obstacles which prevent the European social security regulations from being applied for atypical work. These obstacles are analytically grouped around five example hypotheses – of lack of insurance coverage, inoperativeness of the aggregation rules, benefits that cannot be exported (particularly unemployment and non-contributory benefits), lack of minimum insurance requirements and unfavourable benefit calculations – which clearly highlight that the main faults in the application of EU social security regulations (which are more likely to affect atypical workers than people with standard employment relationships) are largely caused by inadequacies in the protection provided by the national systems. The co-ordination technique is unable to deal with them due to what can be deemed its intrinsic limits. A reform of the co-ordination regulations (such as one that aimed to broaden the possibilities of exporting unemployment benefits or limiting the transnational impact of contributory fragmentation that disproportionately affects the insurance and professional paths of atypical workers) would not be enough by itself to plug the main gaps in social coverage for these figures.

In the third section, there is an overview of the developments in European co-ordination of national social security systems. It looks at how this scheme was originally conceived in the mid-1950s around the typical type of EU migrant at the time and has gradually spread its field of application in a way that has undeniably opened it up to the inclusion of other figures than the already dominant model of a full-time employee with an open-ended contract who will become a permanent part of the job market in their host EU Member State. It also reveals that the most significant developments when it comes to the inclusion of types of employment relationships that were originally excluded have basically concerned the personal scope of the regulations, which has shifted from a restrictive notion of employment to a universal definition of the categories protected by the co-ordination system. The historical developments that can be noted in the material scope of the regulations are not as significant. In this respect, they still seem to be based, albeit implicitly, the standard employment relationship model as the basic. The same applies for the central operational rules for co-ordination, such as the one for aggregation.

The report ends with a brief conclusion section and some initial suggestions and recommendations, that link with the policy lines emerging from the Accessor project. In the annexe, there is a brief summary that includes the atypical work situation, the measures of social protection and the main obstacles to the freedom of movement in relation to the eight countries of the project, as they result from our comparative analysis.

## PART 1

### Atypical employment contracts in the Accessor countries and generally within the EU

Sonia McKay

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In all of the eight Accessor countries atypical employment contracts are seen as having increased in number over the last twenty years. This has occurred through a proliferation of alternative forms of contract, in a context of economic crisis and globalisation; the development of new technologies; an overall decline in employment rights, with a focus on new strategies that promote flexibility and reduce labour costs. Deregulation is also cited as having led to a disruption of the labour market, in economies that traditionally have been strong, such as Germany. However, the impact of the economic crisis while encouraging the growth of some forms of typical work, in some countries has also led to a reduction in the more stable forms of atypical work in others. In Italy nearly two in every three contracts issued in recent years were for a fixed-term. In Sweden fixed-term contracts have grown to represent one in six (15 per cent) of all employment contracts, so that these now are considered almost the norm. There has also been a growth in on call and zero-hours' contracts, particularly in relation to young workers. In France the growth in atypical work is identified as developing from the 1980s onwards, with a six-fold multiplication in the number of workers on fixed-term contracts and a four-fold increase in the number third-party contracts, with similar increases in interneer or trainee contracts. In Germany, for example, it has been estimated that one in five young, qualified workers has completed at least one work placement and in half the cases there was no remuneration, while in the other half it was not enough to live on. There some nine million current contracts could be described as atypical. The Belgian expert also identifies atypical work as having its early manifestations towards the end of the 1990s but until 2010 was limited to two types – part-time work and fixed-term contracts. However more recently there has been a mushrooming of other forms of atypical work, including freelance, agency and sub-contracted work; seasonal and occasional work, together with domestic work under a new state supported system to encourage the formalisation of work in the domestic household sector. Seasonal work which is sometimes defined as atypical is more likely to be sector-specific, concentrated in the construction, agriculture, tourism and forestry sectors.

There is no definitive data on the extent of the variety of forms of atypical contracts. The national report from Italy suggests anywhere between 19 and 46, according to which organisation is making the calculation. The French national report lists eight forms of contract contained within the overall definition of a fixed-term contract. The UK report lists nine separate forms of contract, further divided dependent on the nature of the employment relationship. The Belgian national report lists six main types. The Slovenian report subdivides work in seven main types. The Spanish report identifies fixed-term contracts as the principle form of atypical work. In many of the Accessor national reports atypical work is associated with female employment as well as with low pay, creating a section of the labour force defined both by gender and by pay. However, while female labour is dominant in all countries among those in part-time employment, there is also evidence of a growth of male work under this type of contract. In Belgium, for example, the proportion of men in part-time work, while still representing less than one in ten of all part-time workers, nearly doubled in size between 1999 and 2010. In Germany low paid work has increased sharply over the last 15 years, thus increasing both atypical and very atypical work, with the proportion of those on low wages increasing from 17.7 per cent in 1995, to 23.1 per cent in 2010, a 30 per cent increase. Atypical types of contract are also identified as associated with young workers in practically all of the eight countries in the study, although some also refer to atypical work (in particular, fixed-term contracts) as being associated with older (over the age of 50) workers. In Belgium the phenomena of atypical work is increasingly associated with young workers at the

beginning of their entry into employment. In Slovenia precarious work is determined by gender (female) age (old and young) and social class.

While the focus of this report is on forms and typologies of atypical employment it is important to highlight that informal work – in other words work with no contract – is a factor of the labour markets in all of the countries in the study and impacts more generally to shape the labour market. At 2009 Eurobarometer survey suggests that around five per cent of workers in the EU27 had done at least some informal work over the previous year.

### **1.1. Definitions.**

A number of the national reports have provided a definition of atypical work in their country context. In the majority of cases, atypical work is defined in relation (or opposition) to typical work, with the latter seen as full-time, permanent, direct employment. The French expert report defines atypical work as 'types of employment which in one way or another, derogates from the norm of work based on a contract of indefinite length and full time'. The Slovenian expert report defines precarious work as where contracts 'have the capacity to reduce social security and work security'. The German expert report defines a job as atypical 'when it does not provide any old age insurance above the basic provision, or does not allow provision to be made for old age without State support'. The Belgian national report defines typical work as 'standard based on a work relationship, derived either from private law or statute, that is full-time, with an indefinite contract length, with relatively fixed hours, with a work relationship based on there being a single legal entity as the employer and that is linked to a specified work location and a career that can be programmed for'. Atypical work therefore consists of 'all forms of work which are set apart from the standard, either in relation to working hours, the geography of work or the degree of sub-ordination'. The French expert report categorises two work categories: 'those who are outside the norm in relation to their employment hours and their work stability and would include fixed-term, internee contracts and probationary contracts. The second category is distinguished from the norm based on the length of working hours and monthly salary.'

### **1.2. Data on atypical work.**

The Accessor national reports give some indication of the coverage of different forms of atypical work and this data has been supplemented by data taken from recent EU level surveys. The table below provides data for the eight countries in the study comparing it to the data for the whole of the EU.

It is important to note that while there has been a growth in atypical work in all of the countries of the study, and generally within the EU27, as the above demonstrates, standard employment continues to account for the overwhelming majority of contracts in the countries under study. In the UK, for example, the majority of UK workers continue to work on what might be termed 'typical' standard contracts - that is full-time permanent contracts, although full-time employment fell in the period 2007 to 2011, while part-time employment increased. In Germany, while the proportion has fallen, two-thirds of those of working age are employed on 'typical' contracts, although in 1998 this was nearer three-quarters.

The fact that a contract is not 'typical' does not mean per se that workers engaged under such contracts are necessarily disadvantaged, in terms of the social protection norms available to

them. In principal the obligation of 'no less favourable treatment'<sup>3</sup> should apply in all EU states in the case of part-time workers, those on fixed-term contracts and those on agency contracts, although Member State derogations apply in the case of the latter two forms, with the UK, for example, offering lower levels of protection to agency workers and excluding those on fixed-term contracts who are not in a direct employment relationship, from entitlement to equal treatment.

**Table 1: Data on the forms of contract in the study countries**

Country	Full-time employment	Part-time employment (2013)	Permanent contracts (2013)	Fixed-term contracts (2013)	Agency work (2006)	Self-employed (2010)
Slovenia	90%	10%	84%	16%	1%	
UK	74%	26%	93%	6%	5%	14%
France	82%	18%	84%	16%	2%	13%
Belgium	75%	25%	92%	8%	1%	16%
Sweden	75%	25%	85%	15%	2%	10%
Germany	73%	27%	86%	14%	1%	11%
Italy	82%	18%	87%	13%	<1%	21%
Spain	84%	16%	78%	22%	n/k	13%
EU27	81%	19%	86%	14%	1-2%	15%

Source: Accessor national reports, cross referenced with Arrowsmith (2006), the *Study on Precarious work and social rights*, and the European Labour Force Survey 2013<sup>4</sup>

### 1.3. Forms of employment contracts.

The term 'forms of contract' for the purpose of this report is used to identify the nature of the employment relationship between the individual performing the work and the individual or organisation for whom the work is performed. The principal forms of contract are thus:

The *standard form*: where work is performed directly for the individual/organisation which requires it. Such work may be typical, for example where it is full-time and of indeterminate length, however, it may also be atypical, dependent on the type of work contract as identified in the following section of this report. In all of the countries in the study the standard form of work includes both contracts of service and contracts for services; however, in the UK the law

<sup>3</sup> This principle is the basis of anti-discrimination provisions in the UK and requires that individuals be treated in the same way.

<sup>4</sup> [http://epp.eurostat.ec.europa.eu/portal/page/portal/employment\\_unemployment\\_ifs/data/database](http://epp.eurostat.ec.europa.eu/portal/page/portal/employment_unemployment_ifs/data/database)

distinguishes between these two forms, allocating a greater range of employment protection to the former in comparison to the latter<sup>5</sup>. All other categories of work draw on a model based on distanced relationships which generally result in a reduction in employment rights. These main forms are explored below.

*Forms of work within the category of distanced relationships.* The first category is those who work through *employment agencies*. A study by the European Foundation for the Improvement in Living and Working Conditions (Arrowsmith, 2006)<sup>6</sup> estimated that in the EU15 States plus Norway (there was no robust data for the EU12 States) in 2007 around one to two per cent of the labour force worked through agencies, accounting for between 2.5m and 3m workers and that temporary agency work had 'expanded rapidly in almost all countries, especially in the mid- to late 1990s'. The European Confederation of Private Employment Agencies (Eurociett) states that there are around 33,000 private employment agencies operating in Europe (Eurociett, 2012). Young people dominate within agency work. According to Eurociett on average 57 per cent of agency workers in Europe are aged less than 30 (Eurociett, 2012). Arrowsmith (2006) found that 31 per cent of the agency workforce in Germany consisted of those under the age of 25; 34 per cent in Spain; 31 per cent in France; 27 per cent in Italy; 46 per cent in Sweden (under the age of 31); and 51 per cent in the UK (under the age of 30).

In agency work workers will in theory have a degree of employment protection, at least in compliance with the Directive 2008/104/EC, although in the case of the UK, these rights have been narrowed through national legislation. However, despite the Directive, in practice, according to the Accessor national reports, agency workers often do not have all of the rights of those on typical contracts or do not have the capacity to access them. Over the last decade, the use of temporary agency work has increased markedly in most of the Accessor countries. In Sweden agency work was prohibited until 1993 as it had been opposed by the trade unions because they viewed it as a way of lowering wages. However, more recently a collective agreement has been signed with the agency employers. In Germany too, agency work is generally low paid, with wages in the sector having fallen over the last ten years. Periods of employment are also very short, with only half of all agency contracts in 2010 lasting more than three months.

Although agency work still accounts for just 1.5 per cent of all employment, this proportion has almost trebled in the last twenty years. Estimates by the European Confederation of Private Employment Agencies for the UK suggested that in 2005 there were some 6,000 officially designated employment agencies operating through 14,400 branches and sourcing 1.2 million workers a day

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<sup>5</sup> In the UK the 'typical' standard contract is normally defined as a 'contract of service' whereby the employee agrees to work, under the direction of the employer, in return for pay. A person who is employed under a contract of employment will have access to the full range of employment and social security rights, although these may be dependent on length of service (for example, for rights to protection against unfair dismissal<sup>5</sup> an employee must have worked for at least two years for the same employer and this is also the case with regard to redundancies<sup>5</sup>). Welfare rights may also be dependent on contributions made. A 'worker', in contrast is someone whose work is regulated under a 'contract for services'. Here the law tests whether the individual has a degree of control over her/his work, can for example determine how it is done and when, utilises their own equipment and takes responsibility for the payment of taxes and National Insurance. While this definition includes genuinely self-employed workers, the UK courts have often extended it to include workers who might otherwise be seen as being directly employed<sup>5</sup>. Those defined as 'workers' have limited employment and social security rights. They have for example, no right to protection against unfair dismissal (no matter how long the period of employment) and limited rights to welfare protection.

<sup>6</sup> Arrowsmith, J., 2006. *Temporary Agency Work in an Enlarged European Union*. Luxemburg: Office for Official Publications of the European Communities.

(5% of the national workforce). The Commission on Vulnerable Employment (COVE)<sup>7</sup> suggested that, as a proportion of all temporary work, agency work accounted for 17.1 per cent of all temporary work in the UK in 2007, compared with 13 per cent in 1997. In Germany the number of recruitment operators increased from 6,910 in 1994 to 16,600 in 2010. There too agency work has grown from employing around 170,00 workers in 1996, to nearly 900,000 by 2011. In Slovenia there are estimated to be more than 160 registered agencies, with around 6,500 workers registered through them. In Belgium agency work is only a small fraction of atypical work even though it is more likely to diverge from the standard, in particular when it concerns information technology, consultancy work, events' organiser and so forth. The Italian Accessor report points to increased employment costs from this form of contract. Agency work is identified in the Accessor national reports with an increase in the number of labour law violations.

*Subcontracted work* is also a form of contract where the relationship between end user and employee is at a distance. The Accessor Belgian report states that this is primarily used for temporary work cover but is now also used as a probationary period for all young workers.

The third category consists of *self-employment*, sometimes categorised as 'false self-employment' where the actual employment relationship is based on dependency and where self-employment is in reality nominal, mainly aimed at the avoidance of tax and social insurance. Both the Spanish and the UK national reports refer to false self-employment as a form of atypical contract and in the case of the former the number of those self-employed workers who are included within the national insurance system is relatively stable, at around 13 per cent of all workers in the scheme. Self-employed workers are often, in reality, tied to a single client, particularly in the transport of goods as well as in certain forms of franchising. Such workers are falsely self-employed in so far as their work relationship resembles that of dependent workers, with fixed hours and paid holidays. They can also be found in professional types of employment, such as in private schools, large companies and even within the journalism profession. In Spain the trade unions have challenged this form of false self-employment, with more than 3,000 claims taken each year, but, according to the Spanish Accessor report 'even this could represent just the tip of the iceberg'. The Italian Accessor report uses the term 'para-subordinate' to refer to this employment form and asserts that this form of employment is only independent in a technical form and assumes a position of vulnerability on the part of the worker. Reference was also made to freelance work where workers find themselves in a grey area between dependent and non-dependant work.

#### 1.4. The typology of atypical contracts.

As already noted the range of atypical contracts is very wide and in some countries a large number of types of contract have been identified as within the category of atypical contracts. To give just one example, the Italian expert report lists 26 typologies of subordinate work: *'Dependent fixed-term work; fixed-term work; fixed-task work; seasonal; special contract terms in agriculture; indeterminate, part-time horizontal; indeterminate part-time mixed; indeterminate part-time vertical; fixed-term part-time horizontal; fixed-term, part-time mixed; fixed-term, part-time vertical; training contracts; retraining contracts; work and training contracts; apprenticeships: 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> type; fixed-term management contracts; indeterminate length management contracts; on call*

<sup>7</sup> TUC Commission on Vulnerable Employment (2008) *Hard work hidden lives*, [www.vulnerableworkers.org.uk/files/CoVE\\_full\\_report.pdf](http://www.vulnerableworkers.org.uk/files/CoVE_full_report.pdf).



*work; zero hours contracts without the obligation to take up work; job sharing; private household work; and homeworking.'*

However, for the purposes of this report these categories will be reduced to *two main typologies of atypical contract*. The first consists of: *fixed-term contracts* – whether based on time or on project completion; and *part-time contracts* – where hours contracted to work are less than the standard full-time work. These two types are subject to specific legal regulation guaranteeing an element of employment protection to workers.

The second typology draws on Broughton's definition of '*very atypical contracts*' and consists of six main categories which are analysed below.

With regard to all of these typologies of contract, whether or not they promote precariousness depends on the nature of the contract. For example, part-time work that is subordinate and where the worker is employed directly by the employer; where the type of work has been freely chosen by the worker; and where the hours available meet the workers' economic and social needs; where social insurance contributions are made; and where there is entitlement to welfare benefits; may not amount to precarious work. However, where the contract is through a subcontractor or other third party agent; where part-time work is involuntary; or where the hours are too few to sustain a decent standard of living, then part-time work would be assessed differently and might bring it into the category of '*very atypical contracts*'.

*Part-time contracts* In most Accessor States the definition of part-time work generally includes all working fewer than full-time hours. Females are much more likely to be working part-time than are males in all of the Accessor countries. In France females are four times more likely than men to be in part-time work and young people are also more likely to work part-time. Part-time work in France is also seen as providing the greatest evidence of precarity for female workers and the average working hours of part-time workers are 23 hours a week, compared to 41 hours for a full-time worker. In Sweden part-time work is also predominantly female and mainly confined to certain sectors, like cleaning and caring for the elderly and although there is a right to no less favorable treatment, in practice for those on short hours' contracts it has proved hard to enforce their rights. In the UK part-time workers are normally defined as where contracts provide for less than 30 hours a week, and such contracts may be permanent or temporary. In Belgium full-time working hours have declined in the last two decades, whereas part-time working hours have increased, so that the gap between the two has reduced from 22 hours in 1984 to 17 in 2009. Forty-four per cent of women work part-time, compared to nine per cent of men. Eighty per cent of those undertaking part-time work is female and is almost always carried out in female-dominated sectors. Indeed Belgium is one of the EU Member States with the highest proportion of women working part-time (44 per cent), compared to the medium for the EU15 of 37 per cent and of the EU27 of 32 per cent. The expert report for Belgium points out that while in the main it is associated either young workers, part-time work is also undertaken by those over the age of 50, in situations where they are reaching the end of their working life. In the UK 74 per cent of all part-time workers are female, although the number of men working part-time has grown. The expert reports also note a growth in involuntary part-time work. In the UK nearly one in five workers on a part-time contract (18 per cent) was working under such arrangements because they could not find a full-time job.

*Fixed-term/fixed-task (temporary) contracts* Defined as contracts whose duration is determined by either a period of time or by a fixed task are also subject to regulation through the transposition of Directive 1999/70/EC which limits the number of renewals of fixed-term contracts and which provides a right to no less favorable treatment. Such contracts can either be based on a fixed-term or a fixed-task – the latter being where the length of the contract is not determined at the start but is based on the time needed to perform the contractual task. Temporary work increased its share of overall paid employment in the EU (then 15, now 27) countries over the last twenty years from 8 per cent to 14 per cent<sup>8</sup>. In all temporary work represented 30 per cent of all paid jobs created between 1987 and 2007<sup>9</sup>. In those Accessor countries where national law was seen as operating effectively then problems were not associated with fixed-term/task work. As the Swedish expert report notes: 'where fixed-term contracts are substituting for workers away from work or are for seasonal work there are no major problems since the work is well-regulated through the law and collective agreements, which actually include provision for time for workers to map out their career paths.' In Slovenia too, fixed-term/task work is primarily used to cover for absent workers.

Most of the expert reports identified women as being a majority among fixed-term workers, with the French expert report noting that 'women are more often employed on fixed-term contracts than are men'. In Spain fixed-term/task work is predominantly young, compared to the other typologies of employment, where the ages range throughout the period of working life. In the UK just over one and a half million workers (1.595m), representing 6.3 per cent of the all employees work under fixed-term contracts. This is an increase on the 5.3 per cent in 2008, as calculated by Broughton<sup>10</sup>. Four in ten of those on temporary contracts (40.2 per cent) were working under those arrangements because they could not find a permanent job. In Germany the proportion of those on fixed term contracts grew by 50 per cent, from six per cent at the start of the 1990s to around nine per cent by 2008, with most of the growth among young workers in the 25 to 34 age group, where fixed-term contracts rose from 8.2 per cent to 18.8 per cent, a 129 per cent growth. The majority of new hires are now employed in fixed-term contracts. The growth in fixed-term employment has been assisted through legislative intervention, for example, in Italy the laws of 1997, 2003 and 2012.

It is sometimes argued that fixed-term work, while of itself more precarious, leads to offers of permanent employment, but none of the national expert reports suggest that this has occurred. Indeed in relation to Germany, the national expert cites data showing that between 10 per cent and 15 per cent of those on fixed-term contracts are unemployed within a year.

### 1.5. Very atypical contracts.

Broughton,<sup>11</sup> in her Eurofound study, defines very atypical contracts as those 'based on the principle of 'absolute' divergence from the standard employment relationship' and as encompassing three main categories of workers:

- Workers with no employment contract;

<sup>8</sup> [www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/fixedtermwork.htm](http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/fixedtermwork.htm)

<sup>9</sup> *Study on Precarious work and social rights*, Final report.

<sup>10</sup> Broughton, A. (2010) *Flexible forms of work: very atypical contractual arrangements*, European Foundation for the Improvement of Living and Working Conditions

<sup>11</sup> *Ibid.*

- Workers who report working a very small number of hours (less than 10 hours a week);
- Workers who hold a temporary employment contract of six months or less;

To these three categories can be added apprentices, unpaid family members and those in free-lance or false self-employment.

Other categories which could be added, based on the Accessor study, are students and those in mini jobs. The German national expert cites the measures introduced by the Hartz Commission, and in particular 'Agenda 2010', as creating mini jobs, although the point is also made that the labour market reforms which Germany has experienced are not solely as a result of the Hartz measures. Nevertheless those in mini jobs are almost all low paid (86%) and are also more likely to be in agency work (68%), young (51%) and in fixed-term contracts (46%). Additionally for workers in atypical contracts such as those described in this section, working life often consists of movements across different typologies of atypical contract, rather than moving from atypical to typical. As a consequence they dominate among those who are low paid, young and female. As the French expert report notes: *'Such diverse forms of employment are not only, from on point of view or the other, outside the norm. They are also characteristic of an instability which assimilates precarity and is a response to unemployment. It is therefore often the same people who oscillate between fixed-term, agency, odd jobs and unemployment.'*

*Workers on zero hours contracts* come into the first categorisation of Broughton's very atypical workers. These are contracts with no specified working hours but where employees work only when requested by the employer and where there is no contractual obligation to offer a specific amount of work. There is little data as to the number of workers on zero hours' contracts. The Italian expert report points to the presence of such contracts which 'give no protection or employment rights to subordinate workers'. They may also include occasional workers who, on the basis of an amendment to the law in 2012 if earning no more than 5,000€ in a year can be paid in kind. The Swedish expert report states that, in relation to zero hours and on-call work, there is no collective bargaining coverage. There are no rights associated with more standard forms of employment and there are cases where workers are called in by text message and must respond to the call. Most of these are young workers, with 53 per cent of all workers on such arrangements being aged between 16 and 24. They are also more likely to be female than male. Broughton, analysing the 2004 WERS survey for the UK, suggested that around five per cent of workplaces employed at least some workers on zero hours' contracts. More recent data suggests that in the UK up to one million workers could be employed on zero hours contracts. Zero hours contracts are often tied to a lower level of social insurance contribution and this is one of the factors that make this type of contract attractive to employers, according to the Slovenian expert report.

*Workers on a very small number of hours* In some countries these may also be referred to as mini-jobs, where the state provides financial incentives to employers to recruit workers either for short periods of time or for few hours. In Germany, for example, this form of contract which provides basic welfare entitlements along with a very low hourly rate of pay has been used as a method to encourage young people into the labour market. Hakim (2004)<sup>12</sup> calculated that for the UK this around eight per cent of the UK workforce worked fewer than ten hours a week, suggesting that more than 2m people were working in contracts that offer a very small number of working hours.

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<sup>12</sup> Hakim, C. (2004) Key Issues in Women's Work: Female Diversity and the Polarisation of Women's Employment (Contemporary Issues in Public Policy).

Recent ONS data shows that 470,000 people had usual working hours of less than six hours a week between December 2012 and February 2013. Women are much more likely to have contracts with very short working hours and of the 470,000 identified in that category 161,000 were male (34 per cent) and 309,000 (66 per cent) were female<sup>13</sup>. In Germany, women are more likely than men to be found in mini jobs, being over-represented in the sector of exclusively marginal, part-time work.

*Temporary contracts of six months or less* The Office of National Statistics reported in May 2012 that there had been a substantial move towards temporary workers, seeing 'quite marked increases over the last four years'<sup>14</sup>. There is little data on the length of fixed-term contracts in the EU. Broughton suggested that most fixed-term contracts in the UK will be of less than 12 months in duration.

*Para-subordinate workers* working by project or, as in the Italian case, as *co.co.co* who may either not be paid at all or be paid in kind, for example through vouchers.

*Apprentices on government or employer training schemes* In many Accessor countries there has been a growth in apprenticeships in response to the economic crisis and its particular impact on young people. There is a gender imbalance in some countries, in terms of who has access to an apprenticeship. For example, in France, 62 per cent of those aged under 25 holding apprenticeships are male. However, often the contractual rights that apply are very limited. In Italy, Art 1 of the law 92/2012 states that apprenticeships should be the primary model for the entry of young people into the world of work. In the UK the rise in apprenticeships between 2012 and 2013 was in the order of 30.5 per cent. In Belgium those on training contracts do not have access to all employment and social rights. The Spanish expert report highlights two forms of contrast which exclude workers from welfare rights: *training contracts and contracts for researchers and interns*, estimating that around 150,000 are in the second category. The former cover those workers aged between 16 and 25 who are without qualifications. The latter group consists of workers with qualifications and until recently this group had no social protection. The German expert report also observes a growth in internships particularly after completion of a period of study

*Freelance or false self-employment* This takes account of situations where the worker declares or is declared to be self-employed and therefore excluded from the obligation for the worker or the employer to pay social insurance or tax, but where consequently she/he is also excluded from a range of welfare protection. There are no accurate figures as to how many workers fall under this category but according to the UK expert from the 4.204m persons who were declared as being self-employed in February 2013, three million were working full-time. In Germany the expert reports surveys demonstrating the inappropriate use of service contracts, based on false self-employment, although the scale of false self-employment is difficult to measure. Males are more likely to be declared as self-employed than females, and in the UK 70 per cent of all self-employed workers are male. In some sectors, for example, construction, false self-employment is widespread, whereas in others, like the media, freelance contracts operate so as to provide little social protection to workers under such contracts.

Some of the Accessor expert reports refer to *de-localised work*, for example, work in call centers or work for sub-contractors as a type of atypical contract which is increasing. In Belgium, for

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<sup>13</sup>Usual weekly working hours: [www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcm%3A77-260600](http://www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcm%3A77-260600)

<sup>14</sup> [www.ons.gov.uk/ons/dcp171780\\_266351.pdf](http://www.ons.gov.uk/ons/dcp171780_266351.pdf)

example, such workers may be placed in an organisation to work, but contractually may be employed by a third party. Homeworking or telework can be another form and data from Belgium suggests that around 13 per cent of workers do at least some of their work from home. There is also a gender dimension to this type of contract, with more men than women carrying out tele or home working. As the expert report from Slovenia notes, this type of contract often brings with it problems of social isolation and a lack of demarcation between work and private life, although despite this the law there guarantees no less favorable treatment.

The geographical location of a Member state will determine the extent of *cross-border working* and some of the Accessor expert reports refer to cross border work as a form of atypical employment. For example, the expert report from Slovenia points to its borders with Austria, Italy, Hungary and Croatia as a magnet for workers seeking higher rates of pay, but often excluded from social protection in the country where work is conducted. It has been estimated that more than 2,000 workers (out of a total workforce of around 700,000 works across the border from where they live.

Unpaid family members A few of the Accessor expert reports focus on family employment, identifying it as atypical, as for example in the Belgian expert report this type of work is described as 'carrying high risks of precarity, particularly in cases where there are family disagreements'. In the UK in February 2013 just over 100,000 people were identified as unpaid family members, a figure which had risen by 5.7 per cent over the previous year. In this category workers are unlikely to have access to social security rights available to employees or even to workers.

### 1.6. Atypical workers.

As the previous sections have demonstrated, the growth of atypical work does not imply that all sections of the labour force have been equally affected. All of the Accessor expert reports, together with the wider EU data, confirm that some workers are more likely to be negatively affected by having only atypical contracts available to them. Within these categories, women, young workers, in some cases older workers and migrants are dominant within the typologies of atypical work. This raises the question of its potential discriminatory impact on these sections of the labour force, particularly given the existing protections that should apply in relation to sex, age and ethnicity. Young workers are almost always identified with atypical work and in Belgium, for example, for those aged under 30, permanent work fell from 75 to 72 per cent between 2005 and 2010 and the proportion of young workers who feared that they might lose their jobs, has nearly doubled from 13 per cent to 22 per cent. Students are another group of workers more likely to be found in atypical employment as a consequence of their age, their need to provide for themselves financially and their limited choices for work that will allow them to combine it with their studies. The Slovenian expert report points to the fact that work contracts which are established for students are often abused by offering them to non-students as they do not come with the same levels of welfare contribution that otherwise would apply.

Migrant workers are more likely to be found in atypical employment, in particular in agency and temporary work. For example, in the UK by the end of December 2012 nearly 15 per cent of the workforce had a country of birth outside the UK. Non-UK country of birth workers had a lower employment rate than did UK workers, although for those from other EU countries the rate was higher than for the UK. In Spain the economic crisis has impacted on migrant workers, in terms of wage cuts and reductions in job protection.

### 1.7. The key features of atypical contracts.

The fact that these contracts are considered as 'atypical' does not necessarily imply that they do not have access to the same labour rights as apply to workers on full-time permanent contracts but there is a greater likelihood that this will be the case where contracts diverge from the standard. Broughton<sup>15</sup> suggests that the consequences of atypical work are: lower pay; higher risk of mental health problems; greater job insecurity; less access to training and career opportunities; and low quality of jobs. However, what the Accessor study also shows is that atypical work is in constant evolution as new forms emerge bringing more workers into the ambit of atypical work. This is summed up in the expert report from Italy: *'All of these contracts have in common the fact that they are more flexible, less protected, cheaper, and together make up a labour market which is particularly segmented and operates negatively in the case of young workers who are condemned to live in conditions of flex-insecurity.'*

Atypical work is also described as 'nomadic' with workers moving from job to job, and from one category of contract to another. It is also sector specific, concentrated primarily in agriculture, construction, public administration, education, health and domestic care. It is, as already emphasised, gender biased, affecting women more than men; while the young are also disproportionately affected. Given that this pattern is observable in all eight of the Accessor countries, it implies that atypical work is structural to certain sectors or types of work. In every country in the study atypical work contracts are also on the increase and save in a few isolated cases, the national experts reported that atypical contracts have increased as a result of the economic crisis. In France the data suggests a growth from 16 per cent of all contracts in 1990 to 25 per cent in 2012, with part-time work increasing from 1.5m workers in 1980 to more than 4m workers by 2003. At the same time it is clear that atypical work contracts are often taken because there are no alternatives, not because this is the chosen type of contract. For example, evidence from France shows that in 2011, 28 per cent of those taking up part-time work had been seeking full-time employment. Under-employment is thus a major feature of atypical work, in particular affecting women workers, young workers and those without qualifications. The European Labour Force Survey 2012 finds that the proportion of under-employed part-time workers in the EU27 in 2012 increased to 21.4 per cent, amounting to in excess of nine million workers<sup>16</sup>. This results in a waste of productive work potential and furthermore is one that is exacerbating. Spain, as the Eurostat European Labour Force Survey 2012 demonstrates, is the Member State with the highest proportion of those in part-time work (54%) who would like to increase their working time.

Atypical contracts are more likely to be verbal, without a written form, and according to the Italian expert report this is twice as likely, in the case of those in atypical contracts, than in typical contracts. Furthermore atypical work is generally low paid working, placing workers in poverty. As the expert report from France notes, atypical work 'has become the symbolic characteristic of gender division in the labour market and has produced a large number of workers, above all poor women workers'.

The question to be raised is whether there are strategies that might combat the negative elements of atypical work, in particular its exclusion of social and employment protection. This is the focus of the followings sections of this report, but already it can already be observed, from the

<sup>15</sup> Broughton (2010) [www.eurofound.europa.eu/ewco/studies/tn0812019s/uk0812019q.htm](http://www.eurofound.europa.eu/ewco/studies/tn0812019s/uk0812019q.htm)

<sup>16</sup> [http://epp.eurostat.ec.europa.eu/cache/ITY\\_PUBLIC/3-19042013-BP/EN/3-19042013-BP-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/3-19042013-BP/EN/3-19042013-BP-EN.PDF)

existing data, that where collective bargaining is promoted, as in the case of Sweden, the negative consequences of atypical contracts can be eliminated or at minimum reduced.

## PART 2

### Social protection of atypical employment and obstacles to freedom of movement

Carlo Caldarini

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In the previous section, we focused on the difficulties experienced by atypical workers in their respective national employment markets. The detailed information gathered in eight countries by the Accessor project's experts and specialist witnesses support and complement an overview that had already been partially identified in numerous international research projects and studies<sup>17</sup>: in just a few decades, the global expansion of atypical contracts has radically altered prospects of entering the employment market, especially for younger workers in what is now known as the "precarious generation". It is important to note that in some cases workers may make a conscious decision to accept atypical employment, or it may be a result of a voluntary and explicit agreement between an employer and an employee. For example, it may be a choice that gives people greater freedom with respect to their working hours, enables them to continue their studies or allows them to combine the job with other activities or sources of income. This happens in areas such as in the media world and in newer professions. However, situations such as these are in the minority. In most cases atypical work is associated with precariousness and it is not a voluntary choice. The latter forms of employment are covered by this report and the Accessor project in general.

The main justification for the widespread use of these kinds of contracts was that they helped to create new jobs which were stepping stones to more stable or standard forms of employment, especially for younger people. It should be noted that this reasoning can be deceptive. As with young people, many older workers are now forced to accept atypical and precarious work, simply because there is nothing else available on the employment market. The transition to better forms of employment often remains nothing but a forlorn hope for them.

There are a variety of atypical contracts to be found in the countries of Europe, but they have many things in common: less job security; lower, irregular salaries; fewer training and career opportunities; worse health conditions; and fewer trade union rights. There is little social security coverage, especially in terms of unemployment benefits, while it is very hard to build up a decent old age pension. Essentially, it is impossible to plan for the future. To varying degrees, workers with atypical contracts in all European countries have to deal with social legislation that does not give sufficient consideration to their specific situation and thus once again leaves them worse off than standard workers. Most social security systems are based on an old model of industrial society in which families had a guaranteed income thanks to continued full-time, permanent employment and welfare measures associated with it. In this model, people's lives were mapped out and based on clear, distinctive roles, periods and phases which basically consisted of study, work and inactivity. It was possible to foresee the difficulties which were likely to arise in life and they were mainly associated with the risks of injury, unemployment, illness and disability<sup>18</sup>. Quite simply, this model no longer works.

The national Accessor reports highlight another side to the problem which is just as significant but nonetheless almost always neglected by both scholars and political decision makers. With the globalisation of the markets and the expansion of the European Union from six to 28 countries helping to break down borders, throughout their lives increasingly mobile atypical workers have

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<sup>17</sup> See, for instance, also for bibliography: Working Lives Research Institute and London Metropolitan University (2012), *Study on Precarious work and social rights*; Eurofound (2010), *Very atypical work: Exploratory analysis of fourth European Working Conditions Survey*.

<sup>18</sup> Caldarini C. (2007), "L'approccio europeo a welfare e corso di vita", in *Rivista delle Politiche Sociali*, no.3, 2007, p. 279-300.

to deal with many different national social security systems. They each have their own rules for the allocation of rights and in many cases these too could be classified as atypical and flexible.

As far as the conditions for the application of the European social security regulations are concerned, problems at different levels can be identified, and are summarised as follows, based on a comparative reading of the eight national reports:

1. Lack of insurance coverage This is mainly the problem of mini-job contracts, i.e. with no contribution obligation or with insurance coverage only for some social security sectors. These contracts obviously make the aggregation of working periods impossible in the case of free movement.
2. Impossibility of aggregating periods. even when insurance contributions have been made. The problem arises when the insurance periods accrued in one Member State do not have an equivalent in the insurance scheme of the other Member state, due to special limits established under the national legislation of one of the two states. This is especially the case with those contracts with an intermediate status, between salaried work and self-employment.
3. Unemployment benefits that cannot be exported. This is a consequence of the increasingly frequent tendency to protect workers with atypical contracts through partial and special measures without contributions. As well as bringing about impoverishment, these measures cause problems when unemployed workers, entitled to non-contributory benefits, want to look for employment in other Member States.
4. Lack of the minimum insurance requirements. Another obstacle to the free movement of atypical workers is the range of different minimum insurance requirements required in order to have the right to some benefits. In some countries the requirements are relatively minimal, while in others they are high and complex, meaning that they are hard to satisfy for people who have had partial, fragmented careers in a number of countries.
5. Calculation methods for benefits. In some cases, the actual calculation method for benefits penalises people with short or "incomplete" periods of insurance (or residence) in a number of countries.

The main problems lie in the aggregation of working periods, especially for unemployment benefit and old-age pensions, and in some cases in exporting unemployment benefits (when they are paid under special regimes). More specifically, problems are often created by the application conditions for the following articles: art. 6 of reg. 883/2004 (aggregation of periods), art. 51, 56 and 57 of reg. 883/2004 (old-age pensions), art. 7, 61, 63, 64 and 65 of reg. 883/2004 (unemployment), art. 12 of reg. 987/2009 (aggregation of periods), art. 54, 55, 56 and 57 of reg. 987/2009 (unemployment) and art. 70 of reg. 883/2004 (special non-contributory cash benefits).

This supposed classification of the main application obstacles of European social security regulations to atypical contracts (here divided into five problem areas for the sake of clarity) does not mean that atypical workers are facing these obstacles "one at the time". The issues to be analysed in the following pages, which were gathered "in the field", do not exclude each other, but on the contrary may be compounded.

## 2.1. Lack of insurance coverage.

The first aspect concerns contracts with no obligation to make contributions or only partial national insurance coverage that cannot be extended to all of the branches of the social security system.

The German mini-job (*Geringfügige Beschäftigung*) case is the best known example. These contracts were originally conceived to give some legal coverage for casual work conducted by students and unemployed women or for small second jobs done by people who already have social insurance coverage from their main employment. However, they have become a mass phenomenon, especially among women<sup>19</sup>.

EXAMPLE In Germany people who work for no more than €450 a month<sup>20</sup> (most of whom are women) are only insured against accidents at work, while they are exempt from making insurance contributions for all of the other social security benefits. It is clear that according to the European social security co-ordination regulations any working period without insurance contributions is ineligible for aggregation with insured working periods in other Member States.

The situation in Germany is the best known example, but there are similar cases in other countries. In the United Kingdom, weekly earnings of less than £109 (approximately €550 a month) are exempt from National Insurance contributions (Small Earnings Exception), so that workers are not eligible for some state benefits. In Slovenia, the mini-job rule applies for temporary and part-time work (*malo delo*), with maximum limits of 60 hours a month and a gross annual income of €6,300. Contracts of the same type also exist in Austria (for pay up to € 386.80 per month, from 1 January 2013) and in Switzerland (2,300 francs a year, from 1 January 2011).

The same problem can often be found with hybrid training/work contracts, which lead to extremely complex insurance situations. Although they cannot strictly be considered “employment contracts” in a legal sense (which is why we have used the word “hybrid”), in practice a large proportion of European employment – especially for younger people – is now regulated by an array of national schemes for transition between school and work (such as apprenticeships and internships) with insurance coverage that is complete in some countries, partial in others and completely non-existent in others.

For example, in Slovenia apprentices (*vajeniska pogodba*) have to make reduced contributions (six months of contributions for every year of work) which only give them the right to insurance against accidents at work and occupational diseases. In Belgium, the social security coverage provided by apprenticeship contracts (there are at least 18 types of apprenticeship contracts) varies with the age of the apprentices. Up to the age of 18, there is only mandatory coverage for paid annual holidays, accidents at work and occupational diseases. Apprentices over 18 years of age have to contribute to the general social security scheme for employees, although they are exempt

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<sup>19</sup> According to the figures of the Confederation of German Trade Unions (DGB), there are 7.5 million mini-jobs in total (almost one out of every five jobs). Over 63% of the workers are women. Approximately 2.5 million of the workers also have other (social or employment-based) sources of income which also provide insurance coverage, but a mini-job is the only source of working income for at least 5 million of them (*IAQ Institute for Work, Skills and Training*).

<sup>20</sup> Up until 2012 the limit was €400 a month.

from some supplementary social security contributions that are normally compulsory, such as those for second pillar pensions, active employment policies and training. France is another country where apprentices (with *contrats d'apprentissage*) have the same social security coverage as salaried workers.

The Spanish national report highlighted the difficulties of apprentices (*contratos para la formación*), as well as interns and researchers (*becarios y investigadores*). The former have to pay a fixed monthly contribution (not based on their income) which gives them reduced benefits, even if the contributions are aggregated in accordance with the European regulations. Meanwhile, interns and researchers until recently had no right to benefits whatsoever. However, following a general strike on 29 September 2010, the Spanish government agreed to have talks with workers' representatives about possible changes to the work and pensions reforms. One of the few measures that the trade unions managed to obtain was the right to contributions from interns and researchers with scholarships (*Real Decreto* 1493 of 2011), who now have to make the same mandatory, reduced contributions as apprentices, with the exclusion of the relevant contributions (and therefore the benefits) for unemployment, wage guarantee funds and professional training.

EXAMPLE In theory, a worker who does an internship in Belgium or France at the age of 19 could subsequently move to another country and later aggregate the period for the purposes of both unemployment and pension contributions.

However, the right to do so would not be available if he did the internship in Slovenia, while it would be available only to a lesser extent in Spain.

## 2.2. Impossibility of aggregating periods even when insurance contributions have been made.

The right to aggregation can be impossible to exercise even when insurance contributions have been made, especially when it comes to satisfying the time requirements for unemployment benefits and old-age pensions.

In terms of unemployment, the problem emerges when the periods of insurance contributions in one Member State and those in another do not correspond. It is a particularly important issue for work which, in one Member State is considered to be halfway between employment and self-employment, and definitely is considered as self-employment in another. Article 61 of regulation 883/2004 states that "the periods of employment or self-employment completed under the legislation of another Member State shall not be taken into account unless such periods would have been considered to be periods of insurance had they been completed in accordance with the applicable legislation".

For example, take the "semi-subordinate" contracts in the Italian system which are more generally known as "co.pro." or "project-based contracts". Although they are legally considered to be a "sub-species" of self-employment, they are subject to a special insurance regime in Italy (separate management) which gives workers some basic rights, similar to those of salaried workers. *They include a one-off payment at the end of the contract*, which is a sort of minimal unemployment benefit payment, or, as it is widely viewed, as a small payment for the conclusion of the

working relationship, It is an example of one of the many atypical social security benefits provided by Italy for its large number of atypical workers, in partial compensation for their perceived socio-economic weaknesses, such as low income, lack of a direct relationship with the market and frequently a contractual relationship with just one hierarchically superior client, upon whom they are economically dependent. The problem is that this recognition may not (and generally does not) have an equivalence in other European countries, making the aggregation of insurance periods impossible.

EXAMPLE In January 2012, an Italian 32-year-old woman moves to Belgium to look for a job. In her first year and a half in Belgium she has different jobs, with different employers, always on temporary contracts, the last of which ending in June 2013. On 01 July 2013 she applied for an unemployment allowance in Belgium where she was living and where she had last worked. The requirement for the allowance is at least 312 working days in the last 21 months. This requirement could actually be shown by adding together the insurance periods paid in Belgium (310 days) and those paid in Italy between October and December 2011 with project-based contract (3 months). However ONEM, the Belgian national employment centre, rejects her application as the Italian project-based contracts in Belgium are similar to self-employment, and unemployment allowance does not cover this.

EXAMPLE In 2012, a 31-year-old Belgian researcher moved to Italy, where she worked for six months for a single client (an Italian public research body) with a project-based contract. During that time, she earned €18,000 and made the legally required social security contributions into the Italian special separate management regime. In 2013, she was given a fixed-term contract by a university in Brussels and she returned to Belgium. However, after eight months her research project was cancelled and she found herself unemployed. Having paid contributions for more than 312 days in the last 18 months, the researcher would have been entitled to the Belgian unemployment allowance. The contributions paid in Italy, however, are considered as an insurance period of self-employment, thus denying the right to unemployment allowance in Belgium. If she had stayed in Italy, she would have been entitled to the “one-off” Italian unemployment payment with just a month of her project-based contract to go. Because she had moved to Belgium – where she paid insurance contributions for further eight months – she was neither eligible for Belgian benefits nor for Italian ones.

To give another example, in Spain self-employed people have to pay a monthly national social security contribution of 29.8%, which is based on a minimum contribution of €858.60 and a maximum of €3,425.70 (these are the figures for 2013), as chosen by the interested parties, regardless of their actual net income or turnover (obviously the benefits paid will be in proportion to the contributions). There are numerous self-employed workers with just one client, so the Spanish law 20/2007 introduced the concept of an economically dependent self-employed worker (*trabajador autonomo economicamente dependiente*) into the Spanish social security system. These persons have to make mandatory sickness and unemployment contributions in accordance

with the same system as salaried workers<sup>21</sup>. Going back to the Italian system, they are similar to *co.pro.* workers but their social security coverage is included within the general regime rather than special separate management. As a general rule, this means that the working periods of economically dependent Spanish self-employed workers could be aggregated for unemployment purposes with those in a country like Belgium, where Italian *co.pro.* workers do not have the same rights.

EXAMPLE Going back to the previous case, if, under the same conditions the Belgian researcher had worked in Spain instead of Italy, when she had gone back to Belgium she would have been eligible for unemployment allowance by aggregating her 6 months of economically dependent self-employment in Spain and the 8 months of salaried work in Belgium.

The example of semi-subordinate Italian workers is also enlightening when it comes to old-age pensions. Contributions into the separate management system can be used to claim the right to a pension along with contributions in other Member States. However, as established in 2010 by the Administrative Commission<sup>22</sup>, this must be done in accordance with the limits imposed by the national system in which the contributions are used. For example, the Italian legislation states that it will not always be possible to aggregate contributions for a period of work abroad prior to 1 January 1996 with contributions under the separate management system, which came into force on that date, as a result of Italian law no. 335/1995. Italian workers with other social security contributions in Italy have to use the national aggregation system to benefit from all of their contributions.

### 2.3. Unemployment benefits that cannot be exported.

The report from the United Kingdom highlights the general tendency to protect workers with atypical contracts using special non-contributory measures: basic economic subsidies that generally aim to provide protection to anyone who is not covered by standard social security provisions. As well as resulting in impoverishment, these measures cause problems when unemployed atypical workers entitled to substitute non-contributory unemployment benefits want to look for employment in other Member States.

The new social security co-ordination regulations contain a definition of the notion of special non-contributory benefits (art. 70 of reg. 883/2004) which is based on extension of the general co-ordination principles (equality of treatment and facts) and exclusion of the exportability rule. However, benefits of this kind remain a grey area in EU law which still marks the always fuzzy boundary between genuine social security benefits which have been included in the regulations since the start and assistance measures which are still excluded from the regulations that are in force today<sup>23</sup>.

<sup>21</sup> Ley 20/2007, de 11 de julio, del Estatuto del trabajo autónomo.

<sup>22</sup> Administrative Commission for the Co-ordination of Social Security Systems, Decision no. H6 of 16 December 2010. *Administrative Commission for the Coordination of Social Security Systems, Decision n. H6 of 16 December 2010.*

<sup>23</sup> Tesse (2011), I nuovi regolamenti europei. Analisi delle nuove norme Ue di coordinamento dei sistemi di sicurezza sociale Implicazioni e interpretazioni, elementi di forza e debolezza, 1° Atelier transnazionale. Tesse (2011), Les nouveaux règlements européens.

In general, the new social security co-ordination regulations apply to all contributory and non-contributory social security legislation (art. 3 of reg. 883/2004). The simple fact that a benefit is not based on contributory criteria is not enough to exclude it from the material scope of the co-ordination rules.

However, art. 70 of the regulations states that some special non-contributory cash benefits with the characteristics of both social security legislation and social assistance legislation only apply in a person's place of residence, so they cannot be exported from the Member State that establishes and provides them. Annex X of regulation 883/2004 lists all of the benefits in the respective national systems which are *non-exportable*, meaning that the rights acquired cannot be conserved. Many of the benefits are associated with unemployment and they are based on income rather than contributory requirements. For example, this applies to benefits to cover subsistence costs under the basic provision for job seekers in Germany, jobseeker's allowance in Ireland, state unemployment allowance in Estonia, the so called employment market support benefits introduced in Finland with the Act on Unemployment Benefits (1290/2002), income-based jobseeker's allowance in the United Kingdom and the non-contributory mixed benefits in the event of unemployment provided for by the cantonal legislation in Switzerland<sup>24</sup>.

Other benefits are deemed to consist entirely of social assistance, so they are automatically considered to be non-exportable even if they do not appear in the above-mentioned Annex X. For example, this is the case with Belgium's integration income (*Revenu d'intégration / leefloon*). There are no insurance requirements for the awarding of this social benefit, which is instead given to people who are shown to have insufficient resources. It is provided by the social services of the municipality where the recipients reside if they have no access to other sources of income, such as employment, social security payments or maintenance payments.

Special benefits such as the above-mentioned Belgian integration income and the others listed in Annex X are often used on a national basis as a form of income support when unemployed workers are unable to access general unemployment benefits, either because they have not made sufficient contributions during their working lives or because other restrictions mean that they are not eligible.

EXAMPLE For example, this is the case with the income-based jobseeker's allowance in the United Kingdom. It replaces contribution-based jobseeker's allowance, which can be claimed for a maximum of six months. Basically, unemployed workers go from the initial benefit, which is based on the amount of contributions that they have made, to flat-rate payments which are not based on contributions but which are set at a lower level. However, when it comes to free movement, it prevents the workers in question from exercising their right to mobility and moving to look for work in another country while remaining eligible for a benefit which would otherwise be available for a period of three to six months (article 64 of reg. 883/2004).

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Les nouvelles normes de coordination des systèmes de sécurité sociale. Interprétations et implications, éléments de force et de faiblesse, 1<sup>o</sup> Atelier Transnational.

[www.osservatorioinca.org/30-657/tesse/bruxelles,-242522011.html](http://www.osservatorioinca.org/30-657/tesse/bruxelles,-242522011.html)

<sup>24</sup> See also: 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.

<http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=1980&furtherNews=yes>

De Cortazar et al. (2012), Coordination of Unemployment Benefits. Think Tank Report, tress.

[www.tress-network.org/EUROPEAN%20RESOURCES/EUROPEANREPORT/trESS\\_ThinkTankReport2012.pdf](http://www.tress-network.org/EUROPEAN%20RESOURCES/EUROPEANREPORT/trESS_ThinkTankReport2012.pdf)

It should be noted that this is a widespread phenomenon which is not just found in one country. The switch to these palliative measures is often tacitly accepted by the beneficiaries, either because they have little alternative or because at times the amount can sometimes be reasonably similar to the amount paid for full unemployment benefit (if one stays in the country where the benefit is provided).

#### 2.4. Lack of the minimum insurance requirements.

Another set of obstacles to the free movement of atypical workers is the range of different minimum insurance requirements in order to have the right to some benefits. Some are more stringent than others, but all European countries set minimum insurance requirements for access to benefits such as unemployment, maternity and paternity payments<sup>25</sup>. Could be seen as reasonably natural and it is to be expected in an insurance-based regime.

Once again, the problem lies in the inequality of treatment in the different national regimes. In some countries the requirements are relatively minimal, so they are potentially accessible even to people who have had short, fragmented careers. For example this is the case in France, where the general minimum requirement for unemployed people is four months of work (122 days or 610 hours) over the previous 28 months. However, it is not like this everywhere.

In Germany, anyone who wants to claim unemployment benefit must show that they have made 12 months of working contributions in the last two years. This is also the case in Romania. In Belgium, the requirement varies with the age of the applicant. For example, up to the age of 36 312 days of work in the last 18 months are required. In the United Kingdom, to claim contribution-based jobseeker's allowance the requirement is to have made at least 26 weeks of class 1 national insurance contributions in one of the last two tax years before the application is made (notional contributions are not taken into account in the calculations). It is also necessary to show that at least 50 weeks of actual or notional contributions have been made in the last two tax years prior to the application. In Sweden, income-based unemployment benefit may only be claimed by people who have worked for at least six months during the 12 months before they found themselves unemployed, and for at least 80 hours per calendar month. To receive full parental benefits, the parent must have been covered by the sickness insurance regime for at least 240 consecutive days prior to the birth of the child.

For many workers with short-term contracts, all of this constitutes a continual obstacle course where they have no hope of reaching the finishing line and being given social security coverage.

EXAMPLE A 42-year-old Spanish waiter has worked in Spain, Italy and France, always with short-term seasonal contracts. He moved to Belgium to work as a waiter in October 2012 and in March 2013 he lost his job. In accordance with Belgian law, to obtain unemployment benefits a worker must be able to demonstrate 468 working days in the last 33 months (the waiter can only show 412), or alternatively 624 days in the last 42 months (he can only show 580) or 5 years of work (1,560 days) in the last 10 years (he can only show 1,470). Even if he adds together all of his working periods, the waiter has no right to any unemployment benefits in Belgium.

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<sup>25</sup> For further details, see: <http://ec.europa.eu/social/main.jsp?catId=858&langId=it>



In Italy, to take another example, to be eligible for already mentioned *one-off payment*, project-based workers are required to show *such strict requirements* that, in practice, hardly nobody can have access to it: they would have to have worked for a single employer in the year before unemployment, have taxable income in the previous year of less than € 20,000, have at least one monthly contribution in the year of application, at least two months unemployment in the year preceding the application and at least three months contribution in the year before that of the application (2013). The Italian case highlights a problem affecting other countries, too: the problems of accessing social protection with which the atypical workers have to face do not exclude each other, but on the contrary they are cumulative.

### 2.5. Calculation methods for benefits.

In other cases, the actual calculation method for benefits penalises people with short or “incomplete” periods of insurance (or residence) in a number of countries. As stated in the introduction, the problem is that in many ways the national social security systems are still based on an old model of industrial society with continual full-time, permanent employment, and their benefit calculation systems often follow the same thinking.

EXAMPLE The UK national report outlines the case of a Dutch citizen who moved to the UK with her two children in 2005. She found a part-time job working 13 hours a week for £5.00 an hour, so she only earned £65.00 a week. She also received child benefit of £28.40 a week and child tax credit of £72.38 a week. After living with friends for a while, in July 2006 she moved with her children to a rented flat and applied for housing benefit, something for which a UK citizen would be eligible in her circumstances. The local council claimed that her part-time work was not “effective and genuine” in accordance with EU law. The Administrative Appeals Chamber disagreed and accepted her application because she was in any case a worker, even though she had asked for social assistance.

The national report from Spain gave the example of two recent rulings by the Court of Justice of the European Union which revealed discrimination – especially in the pension calculation systems – against citizens that have worked in non-standard employment in a number of EU countries.

With its judgement in case C-385/11 (*Isabel Elbal Moreno vs. Seguridad Social*) of 22/11/2012, the court ruled that the treatment of part-time workers was discriminatory because basing the calculation of contributions paid on the number of hours actually worked did not allow the person in question to arrive at the minimum number of contributions to have the right to a pension. The calculation methods for eligibility are clearly discriminatory because the minimum contribution periods vary significantly from one country to the next, thus preventing equality between citizens of different countries. With the same amount of contributions, they may or may not have the right to a benefit, depending on the social security regime that applies to them at that time.

The other judgement was in case C-282/11 of 21/02/2013 (*Salgado González vs. Seguridad Social*). It related more specifically to the principle of aggregation ratified by the European regulations.

EXAMPLE Ms. Salgado González paid contributions in Spain to the Special Scheme for Self-Employed Persons (*Régimen Especial de Trabajadores Autónomos*) for a total of 3,711 days from 1 February 1989 to 31 March 1999 and in Portugal for a total of 2,100 days from 1 March 2000 to 31 December 2005. When it calculated her pension, the Spanish social security body applied the national rules and based it on the contributions made during the 15 years preceding payment of the last contribution by Ms. Salgado González in Spain, but it only considered the 10 years of contributions paid in Spain and completed the calculation period with five years at a notional value, which for a self-employed person is zero. As the court noted, by doing so it resulted in clear discrimination between people that have worked in more than one country and those who have worked for the same amount of time in just one country.

The report from Sweden also provides a clear example of how the aggregation of working periods can penalise workers who have exercised their right to free movement. The case in question refers in particular to the part of the state pension which is based on periods of residence (*garantipension*). This portion is used to supplement pensions for people who do not have pension rights based on income and those with pensions based on very low incomes. The guaranteed benefit is calculated in fortieths according to residence and it reaches the full rate after 40 years of residence in Sweden between the ages of 16 and 64.

EXAMPLE The Swedish national report outlines an example that well summarises all the difficulties and the obstacles that have been examined individually up to this point. It is the specific case of a 65-year-old waiter who spent lots of short periods working in Italy and Sweden. From the age of 25, he worked in Italy with training and internship contracts through which no contributions were made. At the age of 35 he moved to Sweden, where he continues to live. For his first 10 years living in Sweden he studied and did labour market integration courses, without any income. In the following 20 years he worked occasionally on an hourly rate of pay as a waiter in restaurants and pizzerias. During eight of his years residing in Sweden he returned to Italy for three months in the summer (24 months in total) to do seasonal work for an hourly rate.

In Italy, he only has 48 weeks of contributions, so he does not meet the minimum requirement of 52 weeks and he therefore does not have the right to receive a pension. In all of his time in Sweden, he only had an annual income of more than 42.30% of the basic income rate (meaning that he paid contributions that are valid for a pension) in 12 years (the years when he did not do seasonal work in Italy). This means that in Sweden he will receive a very low pension which would have been supplemented by the full “guaranteed pension” (*garantipension*) if he had resided in Sweden for 40 years. Instead, only 28 years of residence will be taken into consideration (30 years less the two years in total which he spent in Italy). He will therefore receive 28/40 of the guaranteed pension (the full amount would be 7,046 Swedish kronor for married people and couples with children or 7,899 Swedish kronor for other people). The person in question will not meet the requirements for an Italian pension and he will have a very low Swedish pension. If he had resided in Sweden all of the time, even with nothing but atypical contracts, his pension would be considerably larger.

Swedish citizens (or people from other Member States who move to Sweden at the age of 16) who work occasionally with a number of atypical contracts in Sweden until the age of 65 have the right to a substantial supplement to their pensions, even though they have erratic, fragmented and poorly paid careers. Meanwhile, people who are born in Sweden and spend time living and working in other Member States with atypical contracts before returning to Sweden have very low contribution-based Swedish pensions when they retire, along with a very low guaranteed pension because it is based on their years of residence in Sweden. Because they exercise their right to free movement, their pensions are lower than those of people with the same amount of contributory periods who stayed in Sweden.

## 2.6. To conclude...

They are like a dog biting its own tail. On one side: workers with atypical contracts are more likely to migrate to other countries in search of better economic and social conditions and on the other side atypical employment is most common among immigrants from EU Member States and third countries. The resulting imbalance between standard workers and atypical workers means that the latter group suffers discrimination not just once but in three different ways: they have low, precarious incomes when they work; they have little coverage from the social security systems in their home countries; and they lose some of their rights when they move to a different EU country.

These three factors together can easily lead workers with atypical contracts into a sort of *trap*.

A clear example of a *trap* is given by the UK report, where it is explained how foreign atypical workers have more difficulties in fulfilling the necessary contribution requirements to be eligible for JSA (*Job Seekers' Allowance*). Since they have a low wage, if they cannot find anything better, they tend to leave their precarious job to go back to their country or move to a different one. Should this happen, even if they fulfil the contribution requirements, they will not be entitled to the benefit either in the host country should they remain to look for another job, or in any other country if they leave, since they "voluntarily" left their job.

And even when theoretically these rights are formally granted to atypical workers they cannot be accessed in practice, not so much because of cultural and language difficulties often discussed, but rather because of the objective complexity of the rules. The two new European regulations on social security coordination enforced in 2010, for example<sup>26</sup>, consist of 188 articles and 16 annexes, overall more than 200 pages<sup>27</sup>. And the puzzle of national regulation is certainly more complex.

Like the national social security systems, the European social security co-ordination regulations were mainly created to protect standard workers from traditional social risks. At the time of the early European regulations, in the 50ies, 60ies and 70ies, the migration processes mainly involved the working class, essentially from the South to the North of Europe. And the social protection systems of Member States were, despite differences in their structures, substantially

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<sup>26</sup> Regulation (EC) nr. 883/2004 and Regulation (EC) nr. 987/2009

<sup>27</sup> According to a trade union survey of more than 800 EU and non-EU migrants carried out in 2012 in six European countries, seven out of every ten interviewees know nothing about the EU regulations, two know that they exist but are unaware of their content and just one is really familiar with them ([www.osservatorioinca.org/33/esopo.html](http://www.osservatorioinca.org/33/esopo.html)).

homogeneous in their organization. So the founding fathers chose to go down the road of *coordination* rather than *harmonisation*<sup>28</sup>.

In the last 20 or 30 years, as new forms of atypical work have emerged, thousands of workers have been gradually marginalised by welfare systems. The only action taken has been to adopt measures – which are also of an atypical nature – to ensure that minimal support is extended to non-standard workers. This may come in the form of remuneration for their precarious employment or supplements for their insufficient social security contributions, either through the national insurance system or in the shape of assistance funded by general taxes. It is important to underline that these are “minimal” measures. They do not alter the general structures of social security systems, which continue to revolve around standard workers, nor do they provide sufficient income support. These measures are often at or beyond the boundaries of the models used to create and establish the structure of the European co-ordination systems.

Paradoxically, having rejected all forms of social harmonisation of the national welfare systems in favour of co-ordination, it is now impossible to apply the co-ordination principles to a growing group of atypical and precarious workers whose size, characteristics and needs are unknown. And also the third generation of social security co-ordination regulations enforced in 2010 (for the sake of streamlining and modernisation) has not reduced the problem from this point of view, despite an over 7-year incubation period.

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<sup>28</sup> Caldarini C. (2013), *Il coordinamento dei sistemi di sicurezza sociale. Ovvero, perché in Europa i regimi di welfare sono così diversi tra loro*, in corso di pubblicazione; Holloway J. (1981), *Social Policy Harmonisation in the European Community*, Farnborough, Gower; Roberts S. (2010), "Bref historique de la coordination de la sécurité sociale", in Jorens Y. (édit.), *50 ans de coordination de la sécurité sociale*, Commission européenne, p. 8-29

## PART 3

### Work, and atypical work, in the EU co-ordination of social security

Stefano Giubboni

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The restrictive definition of the personal scope of the co-ordination system is a traditional barrier that has always prevented people in atypical work (i.e. employment other than full-time, open-ended jobs with bilateral contracts<sup>29</sup>) from accessing the protection offered by the EU social security regulations. Since the original, highly selective structure of regulations 3 and 4 of 1958, the co-ordination legislation has evolved enormously and the personal scope of protection has become much more universalised. It now strives much more to include “atypical” work (as an employee or a self-employed figure) within its subjective scope.

It is well established that this complex affair is intertwined with the only partially overlapping matter of the parallel extension of the field of application of the regulations on the free movement of workers in the common market. In this brief report it is not possible to go into great detail about the complex legislative and jurisprudential developments, so only a short overview will be provided of the core factors that play a key part in the analysis that have been made in the first and second parts of the report.

Firstly, it should be noted that the only genuine EU concept of an “employment relationship” (as interpreted by the jurisprudence of the European Court of Justice due to the lack of a regulatory definition) may only be applied when marking out the scope of the current art. 45 of the TFEU (and the correlative secondary legislation) and not for the purposes of the co-ordination of the national social security systems, as governed at present by regulations no. 883 of 2004 and no. 987 of 2009. In its interpretation of the right to the fundamental freedom of movement of workers in the common (and internal) market, the European Court of Justice has stated that “the essential feature of an employment relationship is that a person performs services of some economic value for and under the direction of another person in return for which he receives remuneration”<sup>30</sup>. The EU notion of “employment” is based on this idea.

The broad functional definition of the objective criteria for the concept of employment allows for the broader, uniform application of art. 45 of the TFEU. The need for the concept to be definitively set in stone across the EU (without prejudice to the right of the national judiciary to concretely establish the inherent requirements of the case in hand) has been underlined ever since the first rulings on the matter. In the famous *Unger* case, the court stated that the term “worker”, as referred to in the current articles 45-48 of the TFEU, has “a community meaning”: “the establishment of as complete a freedom of movement for workers as possible” forms part “of the ‘foundations’ of the community” and the need for the uniform application of these essential principles would be at risk if it were left to national legislators to establish the scope of the rules that enforce them. “If the definition of this term were a matter within the competence of national law, it would therefore be possible for each Member State to modify the meaning of the concept of ‘migrant worker’ and to eliminate at will the protection afforded by the treaty to certain categories of person.”<sup>31</sup>

In its judgements, the European Court of Justice constantly refers to three objective criteria (meaning that they apply to the employment relationship regardless of how it is seen or described by the parties concerned) to establish the scope of art. 45 of the TFEU. They are: a) the “effective

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<sup>29</sup> Further details are provided in the second part of this report on the conventional notion of atypical work used for the comparative analysis (given the lack of a common regulatory definition) and the different possible “levels of atypicalness” in employment relationships.

<sup>30</sup> European Court of Justice, 03 July 1986, Case 66/85, *Lawrie-Blum*.

<sup>31</sup> European Court of Justice, 19 March 1964, 75/63, *Unger*.

and genuine” nature of the work personally done; b) the fact that the person is working under the direction of another person (this is what actually defines the employment relationship); c) remuneration for the services provided (i.e. payment in any form for the work done). Only the second criterion identifies and establishes the fact that it is an employment relationship, thus distinguishing it from categories of services provided by self-employed persons. The first and the third basically serve to identify the effective economic (and remunerative) nature of the services provided by the worker, albeit with regard to different profiles. The crux of the definition lies in these two essentially converging criteria. It is no coincidence that the European Court of Justice has shown ongoing reluctance to give a precise definition of what is involved in providing a service “under the direction” of another person. The impression given by the vast number of cases is that the court uses a concept of employment that is very broad and flexible, or “weak” as it has sometimes been described<sup>32</sup>. It should come as no surprise that in the brief art. 45 of the TFEU, when defining the concept of employment, the Court gives greater importance not to the employment relationship itself but to the remuneration involved – with a very flexible notion of payment – and above all to the effective and genuine nature of the services provided by the person in question.

It is thanks to its broad interpretations of these criteria that the European Court of Justice has comfortably been able to cover the varied mass of flexible, atypical and non-standard work which has gradually emerged in the national systems and began to be brought to the attention of the judges in Luxembourg back in the late 1970s. Despite growing uncertainty about qualification within the national systems (the experiences in the UK and Italy are illustrative, albeit for very different reasons)<sup>33</sup>, the court has had no problems including within the scope of art. 45 of the TFEU part-time, intermittent, casual, temporary and seasonal workers, as well as those doing training or *internships*. In other words, the main difficulties do not lie in establishing whether the activity in question constitutes employment (the answer to which is generally yes), but whether it can be called “effective and genuine”. For example, when deciding whether part-time workers should be allowed freedom of movement in accordance with art. 45 of the TFEU, the court considered whether an obstacle to this is presented if workers earn less from their economic activities than the minimum income deemed necessary to survive by their host country or if they have to supplement their income with social assistance from the country’s benefits system. The court has established that – excluding services on such a small scale as to be purely marginal and ancillary, which therefore cannot be deemed genuine economic activities – these elements do not impede the application of art. 45 of the TFEU on as broad a scale as possible, given that it is a fundamental freedom<sup>34</sup>.

On the whole, the resulting concept of a “worker” in accordance with art. 45 of the TFEU and the rules on freedom of movement (now consolidated in Directive 2004/38/EC and regulation no. 492/2011) is broad. As has been effectively noted, the definition has been deliberately limited to the “bare minimum” of “a reciprocal relationship, in which one party is under the direction of another”<sup>35</sup>.

<sup>32</sup> Cf. P. Tosi, F. Lunardon, *Introduzione al diritto del lavoro. 2. L’ordinamento europeo*, Laterza, Roma-Bari, 2005, p. 93 ff.

<sup>33</sup> Cf. N. Countouris, *The Changing Law of the Employment Relationship*, Ashgate, Aldershot, 2007, p. 57 ff.

<sup>34</sup> Cf. more recently European Court of Justice, 7 September 2004, Case C-456/02, *Trojani*.

<sup>35</sup> L.S. Rossi, *I beneficiari della libera circolazione delle persone nella giurisprudenza comunitaria*, in *Foro italiano*, 1994, I, c. 97 ff., here c. 102.

The definition in the field of application '*ratione personae*' of the co-ordination regulations for the national social security systems has followed a different path but to some extent the results are similar<sup>36</sup>. There were different difficulties when including atypical employment relationships in the personal scope of the regulations. This was mainly due to two factors. Firstly, the co-ordination regulations for the national social security systems were originally drawn up solely in reference to employment relationships in the strictest sense of the term. Secondly, in this area there is no genuine EU concept of "workers", because the regulations (in particular no. 3/1958 and no. 1408/71) always referred to the definitions given by the national legal systems. Regarding the first matter, the original limits in application no longer apply thanks to regulation no. 883/2004, which establishes the rules for protection in accordance with the European citizenship of individuals and no longer bases them on employment or professional status. However, when it comes to the concept of "workers" (and the limits that it continues to reveal in terms of social security co-ordination), the restrictions imposed by the referral to the national systems are still in place. In contrast with the above-mentioned situation, with regard to art. 45 of the TFEU, this prevents a genuine EU definition of "workers" from being introduced.

It is worth looking at these two aspects in detail.

### 3.1. Atypical work, in the personal scope of EU social security regulations

The personal scope of EU social security regulations has gradually expanded and its range of coverage has now generally applicable as a result of regulation no. 883/2004. Prompted by the rulings of the European Court of Justice, which has played a key driving role, the EU legislators initially extended the scope of the regulations to self-employed workers (almost entirely transferring the rules that originally only applied to employees) before gradually expanding the scope of co-ordination, including types of employment relationships that are only partly encompassed in the system, while also reaching beyond the boundaries of employed and self-employed work to embrace even economically inactive persons such as students. The universalisation of subjective coverage by the co-ordination regulations was finalized under art. 2 of regulation no. 883/2004, which applies '*ratione personae*' to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors. The field of application '*ratione personae*' of regulation no. 883/2004 contains no reference to the occupational *status* of the person in question, a factor which was had been included in regulation no. 1408/71. Instead, it is universally based on the dual condition that the person in question must be a national of a Member State (or a stateless person or refugee) and be (or have been) subject to the social security legislation of an EU country.

Bearing in mind that (subject to certain conditions) the co-ordination rules also apply to nationals of other countries that legally reside and work in an EU Member State, the core of the definition of the field of application '*ratione personae*' is shifted towards the coverage of individuals by the social security legislation of Member States. Therefore, as will be shown in greater detail below, the range of coverage of affiliation to national social security systems affects the actual degree of extension of the regulations to atypical workers and economically inactive individuals. Conversely, the issue of establishing whether a worker is employed or self-employed is moved "downstream"

<sup>36</sup> A broader discussion of these aspects can be found in S. Giubboni, G. Orlandini, *La libera circolazione dei lavoratori nell'Unione europea. Principi e tendenze*, Il Mulino, Bologna, 2007, p. 174 ff



in the new system of social security regulations and mainly serves to determine which law applies (see art. 11 of regulation no. 883/2004).

It should immediately be noted that in this new structure, a restriction of the *personal scope* of regulation no. 883/2004 may be caused by the *objective* limits of its applicability (*ratione materiae*) pursuant to art. 3. In this respect, the ongoing exclusion of social assistance from the objective sphere of the regulations may have a negative impact on their effective universal extension to all citizens, including economically inactive ones. The same is true of the limitation to the branches exhaustively listed in art. 3, par. 1 of regulation no. 883/2004 in terms that are only slightly more up to date than in the previous regulation, no. 1408/71.

From this point of view, a particularly big limiting effect may result from the exclusion of the general social protection systems which are not related to any of the above-mentioned branches. This is the case with the guaranteed minimum income schemes that exist in some national systems. Even when they fall within the sphere of application of the regulations, these schemes are normally classified as special non-contributory cash benefits (as mentioned in Annex X of regulation no. 883/2004). This means that the residency clauses are revoked and the benefits cannot be exported. Consequently, the subjective universalisation of the sphere of personal application of the co-ordination system – as concluded under regulation no. 883/2004 charting a long-term trend in this direction – is in danger of producing a number of gaps and being affected by the ongoing limits in the material scope of the regulations, to the detriment of atypical workers.

### 3.2. The concept of worker.

It is also worth taking a closer look at the second factor which was traditionally used to define the boundaries of the personal scope of the regulations until the reform in 2004. As mentioned above, the concept of “workers” used for the purposes of freedom of movement in accordance with art. 45 of the TFEU is different from the one developed by the European Court of Justice for the application of the co-ordination rules for the national social security systems. Only the former is a genuine EU concept, while the latter basically refers to the national benefits systems<sup>37</sup>. Over time, the “benefits-based” concept of workers – which applies in EU co-ordination rules – has moved away and “left behind” its initial foundations in employment. It has shifted under the influence of needs which are complementary but different from those of art. 45 of the TFEU. The split between the two concepts has occurred with the move from the idea of the “worker” to that of a “person covered by social security systems”, as could already be seen with the above-mentioned *Unger* judgement. The *Unger* case made it clear that the concept of migrant workers refers “to all those who, as such and under whatever description, are covered by the different national systems of social security”. When the EU legislators systematically reformed the co-ordination rules for the first time by replacing regulation no. 3/1958 (on which the European Court of Justice based its ruling in the *Unger* case) with regulation no. 1408/71, they simply took note of the *acquis communautaire* that had developed in the meantime and codified it in art. 1 of the 1971 regulation. The term “worker” is defined by the regulation as “any person who is insured, compulsorily or on an optional continued basis, for one or more of the contingencies covered by the branches of a social security scheme for employed persons [...]”.

<sup>37</sup> More generally, see Giubboni, *La nozione comunitaria di lavoratore subordinato*, op. cit., p. 53 ff., and Countouris, *The Changing Law of the Employment Relationship*, op. cit., p. 177 ff

This “shift from the concept of a worker to that of a person covered by insurance”<sup>38</sup> has brought about a gradual split in the work and benefits-based concepts of “workers”. They have moved in two main directions, both of which are in keeping with the functions of the EU rules for the co-ordination of national social security systems. Firstly, there has been substantial renationalisation of the benefits-based concept of “workers”. Due to the continual rulings of the European Court of Justice, it can be deemed to be an EU concept in a much more restricted sense than the corresponding notion in accordance with art. 45 of the TFEU. Secondly, as the benefits-based idea has moved on from references to contracts and employment relationships in the split between the two concepts, it has been given a significant push towards expansion, or rather the gradual generalisation of the subjective confines of the co-ordination system for the national social security regimes. As mentioned above, this push was completed by regulation no. 883/2004.

### 3.3. The atypical work, in the material scope of EU social security regulations.

As mentioned above, the universalisation of the subjective references in EU social security regulations goes beyond the status of employed or self-employed workers and focuses on citizenship. Its scope has been restricted by the limits that are still in force for the sphere of application ‘*ratione materiae*’ of regulation no. 883/2004.

Regulation no. 883/2004 has given rather limited extensions to the field of application ‘*ratione materiae*’ of the previous co-ordination rules set out by regulation no. 1408/71. First and foremost, in contrast with the proposals made by the European Commission in 1998, art. 3 of the new regulation still has a specific, closed list of the types of benefits included within the objective protection offered by the transnational co-ordination system. The European Commission went as far as to propose a list with just some examples of the matters – or rather the sectors – covered by the social security legislation of the Member States that fell within the material scope of the regulations. However, in the end the EU legislators proved to be extremely cautious and only made limited extensions to specific types of benefits, without altering the operational basis of the system. The structure of art. 3 of the new regulation (no. 883/2004) is therefore basically the same as that of art. 4 of the previous regulation (no. 1408/71). Furthermore, the extensions simply rationalise the regulatory framework that was already in place due to the interpretative rulings of the European Court of Justice, so they are not authentic qualitative expansions of the material scope of the co-ordination system.

The decision made by the EU legislators in 2004 is not surprising, as the establishment of the material scope of the regulations has always in some way been the aspect that has presented most resistance to the expansive interpretative tendencies shown in the rulings of the European Court of Justice. In the debate between the European Court of Justice and the legislators, the greatest battles have involved the boundaries of the material scope of the co-ordination regulations. While the tendency for a gradual personal widening in scope has been essentially backed on the legislative front, the material expansion of the regulations has met with much greater opposition from Member States. Perhaps the most significant example in this respect is the episode that led to the introduction of the idea of special non-contributory cash benefits, with an established system that overrides the general rule regarding the exportability of benefits.

<sup>38</sup> A. Andreoni, *Sicurezza sociale. Sistemi nazionali e armonizzazione*, in A. Baylos Grau, B. Caruso, M. D’Antona, S. Sciarra (a cura di), *Dizionario di diritto del lavoro comunitario*, Monduzzi, Bologna, 1996, p. 527 ff., here p. 533.

In accordance with art. 4 of regulation no. 1408/71, the co-ordination rules apply to all social security branches for sickness and maternity benefits, invalidity benefits, old-age benefits, survivors' benefits, benefits in respect of accidents at work and occupational diseases, death grants, unemployment benefits and family benefits. In the list in art. 3 of the current regulation no. 883/2004, "equivalent paternity benefits" have been included alongside maternity benefits (letter b) and "pre-retirement benefits" have been added (letter i). Including these benefits is the only really innovative extension, and in any case it is rather limited in practical terms. Regulation no. 883/2004 only covers pre-retirement schemes that have been established and are regulated by law. It does not cover those governed by collective bargaining, which are more common in Europe. In addition, the principle of aggregation of the insurance periods does not apply to them. As stated in the 33rd point under "whereas" at the start of the regulation, this is because "only a very limited number of Member States have statutory pre-retirement schemes". Furthermore, the new regulation does not contain an explicit expansion of its material scope to benefits for people who have to rely on the assistance of others in their daily lives. However, their inclusion in regulation no. 883/2004 could be deemed implicit based on the cumulative rulings of the European Court of Justice, which have held them to be equivalent to sickness benefits<sup>39</sup>.

Article 3, paragraph 5 of regulation no. 883/2004 establishes (like article 4, paragraph 4 of the 1971 regulation) that the measures do not apply to "social and medical assistance". Therefore, in the 2004 regulation the traditional exclusion of social assistance from the material scope of the co-ordination overlaps with the extension '*ratione personae*' of the rules to economically inactive individuals who are covered by a social security regime in one or more Member States. The clear tension between these two apparently contradictory options is diminished by the fact that the concept of social assistance that applies when establishing the boundaries of the material scope of the social security regulations has been prominently restricted by the rulings of the European Court of Justice to a narrow area of application. . Due to the cumulative rulings of the European Court of Justice, as long as there is a connection to one of the branches that are now listed in art. 3 of regulation no. 883/2004, the realm of "social security" covers all benefits provided to people by national systems because they have a legally defined status. This means that the issuing body has no discretion to make personal, individual assessments of the person's needs. In contrast, social assistance involves this element of discretion and people's needs are assessed on an individual basis. It is only this factor that allows application '*ratione materiae*' of the regulation to be excluded legitimately.

With legally defined judicial situations and subjective rights to a benefit related to one of the branches listed in art. 3 of regulation no. 883/2004, any affinity with the concept of social assistance in national systems is not enough to exclude the benefit from the European co-ordination regime. This is what lies behind the principle of "attraction" of social assistance benefits<sup>40</sup>. The growing force of attraction of the European regulations on "mixed" or "hybrid" benefits (i.e. benefits that are somewhere between social assistance and social security) drove the EU legislators to create the intermediate category of special non-contributory benefits that has been mentioned a number of times above. Regulation no. 1247/92 was the first to introduce

<sup>39</sup> The new regulations continue to exclude conventional supplementary benefits. For a more in-depth look at the prominent issues with these exclusions, see S. Giubboni, *Coordinamento europeo della sicurezza sociale e regimi di previdenza complementare*, in *Rivista del diritto della sicurezza sociale*, 2010, p. 193 ff.

<sup>40</sup> Regarding all of these matters, see R. Foglia, *La sicurezza sociale*, in *Trattato di diritto privato supervised by M. Bessone*, Vol. XXVI, *Il diritto privato dell'Unione europea*, edited by A. Tizzano, vol. II, Turin, Giappichelli, 2006, p. 1166 ff.

a sort of intermediate category of social security benefits which was subject to a special sub-system of co-ordination. It was a compromise made in response to the demands presented by the rulings of the European Court of Justice. The content of the 1992 regulation was substantially endorsed by the subsequent alterations to the co-ordination rules (most recently art. 70 of regulation no. 883/2004). It based the special status of the benefits (which are now comprehensively listed in Annex X of the regulation in force) on the fact that the right to export them did not apply. This meant that it was only possible for people to receive them in their Member State of residence, where they must have earned the right to them in accordance with the *lex loci domicilii*.

It should be emphasised that these ongoing objective limitations on the application of the regulation (the exclusion of social assistance and the non-exportability of special non-contributory benefits) now tend to be more stringently checked by the European Court of Justice for their compatibility with the principles established by the treaty on citizenship of the European Union and free movement of people, in particular in terms of compliance with the proportionality principle. This is an unquestionably innovative trend which has already significantly cut down on the exceptions to exportability allowed for non-contributory benefits. Because of the rulings, the exceptions can no longer be automatically applied by Member States.

In the abovementioned *Hendrix* case<sup>41</sup>, the European Court of Justice reversed previous decisions<sup>42</sup> and ruled that in principle art. 45 of the TFEU and art. 7 of regulation no. 1612/68 do not prevent the introduction of national regulations as to the implementation of art. 4, art. 2a and art. 10a of regulation no. 1408/71 (the current art. 70 of regulation no. 883/2004), which states that a special non-contributory benefit<sup>43</sup> can only be given to people who reside in the Member State. However, as the court innovatively specified, “implementation of that legislation must not entail an infringement of the rights of a person in a situation such as that of the applicant in the main proceedings which goes beyond what is required to achieve the legitimate objective pursued by the national legislation”<sup>44</sup>. It is therefore down to national judges (who must apply the rules of their own systems while giving an interpretation that complies with EU law) to assess whether workers have fully maintained their economic and social links to their Member State of origin even if they now reside elsewhere. If this is found to be the case, even though the ban on exporting non-contributory benefits is part of the social security regulations, it would clearly be in contrast with the fundamental principles of the treaty on the free movement of workers (and more generally EU citizens as a whole) within the European Union.

This judgement exemplifies more widespread jurisprudential efforts to guarantee complete equality of treatment in transnational access to the social rights of European workers (and citizens) within the EU, even going beyond the established restrictions which are formally placed

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<sup>41</sup> *Supra*, note 2.

<sup>42</sup> See European Court of Justice, 6 July 2006, case C-154/05, J.J. *Kersbergen-Lap* and *D. Dams-Schipper*, in which the Court clearly stated that benefits provided for by Dutch legislation for young people with disabilities that prevented them from working could only be given to people residing in the Netherlands, as they are special non-contributory benefits as mentioned in Annex 2a of regulation no. 1408/71.

<sup>43</sup> The benefits in question were those for disabled young people in the Netherlands mentioned in the previous footnote.

<sup>44</sup> Point 58 of the *Hendrix* judgement.

at the disposal of Member States by secondary law and in particular by the co-ordination regulations for national social security systems<sup>45</sup>.

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<sup>45</sup> For a broader analysis, see S. Giubboni, *Diritti e solidarietà in Europa. I modelli sociali nazionali nello spazio giuridico europeo*, Il Mulino, Bologna, 2012, p. 177 ff

## The “place” of atypical work in the European social security regulations: a first conclusion

The “place” of atypical work within the European co-ordination system for national social security regimes has undoubtedly grown over the course of the long evolution of transnational regulations. This is because of the gradual universalisation of the scope of the legislation – which was finalised with the reforms introduced by the 2004 and 2009 regulations – and the expansion of the range of application '*ratione materiae*'. However, there are significant restrictions in the latter area, especially in terms of atypical work. As has been made clear by the analysis in previous sections of the report, atypical workers are more subject to the (partial or total) restrictions on the exportability of rights to unemployment benefits and special non-contributory benefits.

It is also necessary to bear in mind that the increase in temporary mobility in the form of workers moving abroad to provide a service often has a negative impact on the level of social protection of the persons concerned, especially when it is based on exploiting the different social protection conditions between the country of origin (to which the worker will continue to belong for social security purposes) and the place where the service is to be performed.

As was clarified in the analysis in the second and third parts of the report, the difficulties experienced by non-standard workers in gaining access to effective transnational social security protection are largely due to structural gaps in protection that would not even be counter-balanced by the further refinement of the rules imposed by EU regulations. By definition, the co-ordination system does no more than introduce inter-communication and synchronicity between the social security systems, which essentially continue to be determined and defined on a national basis. Consequently, it cannot, of itself, make up for the gaps in protection that originate in the systems of the Member States. The co-ordination legislation is inherently incapable of compensating if an employment relationship fully or partially lacks social security coverage by the standards of the regulations in force in the worker's Member State of origin or if the fragmented, irregular working lives of atypical workers mean that they are unable to meet the minimum insurance requirements to access the national social security benefits of a certain country.

Even if the time requirements for access to EU aggregation were to be fully neutralised, in situations like this it is clear that the co-ordination technique by itself would be unable to guarantee adequate levels of protection in the spirit of art. 34 of the Charter of Fundamental Rights of the European Union<sup>46</sup>. The only way to achieve a result of this kind would be to introduce a small amount of uniform protection around a core of fundamental social security rights for the entire European Union, in a process of regulatory harmonisation or standardisation.

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<sup>46</sup> Regarding this matter, there is plenty of material in S. Rodotà, *Il diritto di avere diritti*, Laterza, Rome-Bari, 2012, p. 38 ff.

## Some suggestions and recommendations

A first suggestion is that if this vast “seismic” area of national job markets is to undergo effective, substantial reinforcement of the protection guaranteed by the European regulations through the co-ordination approach, it will be necessary to take “upstream” action, with a small degree of harmonisation between the national social protection systems or the introduction of common minimum protection standards.

It goes without saying that this option would be extremely difficult to implement. It is in contrast with the EU’s long-standing approach to social security measures<sup>47</sup>, not to mention the choices made recently by EU legislators with the atypical work directives (for part-time, fixed-term and agency work)<sup>48</sup>. Nonetheless, it is crucial to bear in mind that the co-ordination method can achieve very little for forms of atypical work that are fully or partially exempt from social security obligations, as is the case with the significant examples taken from the national reports. As such, the method is structurally incapable of providing transnational protection for employment relationships that are essentially excluded from the social security circuits in the systems of the EU Member States.

The path to partial harmonisation – which is theoretically allowed pursuant to Art. 153, par. 1 (c) and par. 2 (b) of the TFEU – is probably the most difficult route, due to the substantial differences between the national social protection systems, including in terms of welfare and social security for atypical workers. These organisational differences mirror structural diversities among the national systems, which are well documented in comparative literature about the *welfare state* models in Europe.

There is a rather clear cut-off which still seems to ‘differentiate’ between the various national systems. The Member States can be classified according to the social security model that they adopt, which will either be universalistic or category-related, with a mainly insurance-based approach (for instance, take the differences between countries such as Italy and Sweden in this respect). Another important distinguishing factor, as universally highlighted in the national reports, concerns the connection of social protection schemes for atypical workers to each country’s overall system, i.e. the role of social protection for the workers in question in the framework of special systems, with varying degrees of difference – and disadvantageousness – compared to the general system. Partly connected to this issue is the separate matter of the eligibility of atypical work for social security purposes. Whether it is deemed subordinate or self-employed work can make a big difference.

These significant differences in the arrangements of the Member States – in addition to the others highlighted by the national reports – constitute a serious obstacle to the idea of even partial harmonisation, which for the above-mentioned reasons should have an impact on the broader “institutional infrastructures” of national social security systems. The latter are increasingly

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<sup>47</sup> All of this was covered most recently in C. Caldarini, *Il coordinamento dei sistemi di sicurezza sociale. Ovvero, perché in Europa i regimi di welfare sono così diversi tra loro*, forthcoming, in *Quaderni di Rassegna Sindacale* and S. Giubboni, *L’azione comunitaria in materia di sicurezza sociale in prospettiva storica. Omaggio a Lionello Levi Sandri*, in A. Varsori, L. Mechi (Eds.), *Lionello Levi Sandri e la politica sociale europea*, Franco Angeli, Milan, 2008, p. 175 ff.

<sup>48</sup> Of the many publications, it is perhaps worth reading S. Giubboni, *La protezione dei lavoratori non-standard nel diritto dell’Unione europea. Note introduttive*, in *Studi in onore di Tiziano Treu*, Jovene, Napoli, 2011, vol. III, p. 1449 ff.

differentiated today following the enlargement processes that have taken place over the last decade.

Therefore, it seems more feasible to plan a regulatory standardisation pathway around the lowest common denominator of fundamental principles. The fundamental principle on which the European Union and its Member States should focus is guaranteed access to social security systems – irrespective of their structure – that is also available to atypical workers, thus overcoming the typical gaps and exclusion in many national systems, which are also detrimental to the transnational mobility of such workers. The only exceptions should be for objective reasons specifically identified by the Member States, with regular checks as to whether the conditions still apply.

This principle would require an obligation to provide social protection on a par with the national system for any working activity, including “atypical” jobs. It should then be complemented by equality with standard workers in terms of social security, in accordance with the current European directives concerning part-time, fixed-term and agency work. Once again, exceptions could apply for any provisions that are objectively justified by differences in the working relationship, such as the ‘*pro rata temporis*’ criterion.

Given their fundamental nature (and bearing in mind the provisions of Art. 34 of the Charter of Fundamental Rights of the European Union), these principles should be established by a binding directive, although a first draft could be envisaged as a recommendation, in connection with the open co-ordination tools which are basically responsible for the implementation of the *flexicurity* policies within the “Europe 2020” strategy.

The second *policy* suggestion concerns the co-ordination of national social security systems, as required by EU regulations. For instance, many national reports highlight how difficult it is for atypical workers to effectively qualify for the aggregation of insurance or working periods due to the restrictive rules for pensions and unemployment benefits pursuant to Articles 51 and 61 (respectively) of Regulation no. 883/2004. If the general provisions of Art. 6 of the regulation were applied with no limitations, it would be possible to apply for aggregation without being subject to the equivalence requirements which in all probability disproportionately penalise atypical workers. Reforming the regulations in order to remove this detrimental condition – at least for atypical workers – might lead to a strategy to strengthen their (transnational) social protection within the framework of co-ordination of national social security systems.

Another line of action mainly involves the sensitiveness and helpfulness of trade unions and institutions providing advice and social assistance. It consists of more active use of the interpretative resources currently available to legal practitioners, following innovative paths of *strategic litigation* that are developed in accordance with atypical workers’ social security needs. In this case, it is difficult to make specific suggestions, but useful input is provided by the national reports.

It is only really possible to make the general observation that interpretation of the social security regulations – especially when their application is specifically detrimental to certain categories of people – always needs to take into account the general principle that the coordination technique for national systems typified by Art. 48 of the TFEU must serve as the principal guarantee of free movement for workers, pursuant to Art. 45 of the TFEU and Art. 15 of the Charter of Fundamental Rights of the European Union. In well-known cases (albeit ones unrelated to atypical work), the European Court of Justice has proved to be willing to overcome the restrictions of the regulations



when they present unjustifiable obstacles to effective access to the transnational social security of the workers entitled to the fundamental right of free movement. For example, take the case that led to the full extension of the regulations to public employees, even those covered by special social security systems, along with the gradual legal expansion of the abovementioned freedom of movement for these individuals.

It is necessary to consider active use of the rules (whose general principles have already been significantly revised) and the fundamental provisions of the Treaties and the Charter of Fundamental Rights of the European Union, in an attempt to open fresh social security channels for the new subcategories of protection that can be identified in the varied sphere of atypical work.

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## BE (Belgium)

### *Overview of atypical employment contracts*

The expansion of atypical work began in the late 1990s in Belgium. It stabilised in the 2000s, mostly around two forms of work: part-time and fixed-term contracts. Part-time jobs are the most widespread form of atypical work and the phenomenon mainly involves women: 44% of working women have part-time contracts, while the figure for men is 9%. A part is played in this field by the legal provisions that allow workers to voluntarily cut their working hours or take a temporary career break (*crédit-temps* in French and *tijdskrediet* in Dutch). Temporary jobs account for approximately 8% of employment and they are regulated by a number of types of contract. As in many European countries, the majority of temporary employees of this kind are women (especially foreign women), young people and over-50s.

Below is a summary of the main forms of atypical contracts currently in force.

*Temporary agency work* This is temporary work performed by a worker on behalf of an employer for a third-party user (or client). It is a distinctive form of temporary work which is atypical in terms not only of the duration of the contract but also of the “triangular” employment relationship. Initially, it was mainly used to find temporary replacements for members of staff, but it is now being increasingly utilised as a means of taking on young people for trial periods. The maximum duration of temporary agency work depends on the circumstances, such as whether it is to replace staff temporarily or work on one-off projects. Artistic work is the only kind of employment for which there is not a legally defined maximum duration. In terms of social security, temporary agency workers have the same guarantees and coverage as standard workers.

*Secondments* Generally speaking, secondments to external organisations are forbidden by Belgian legislation (Law of 24 July 1987, art. 31 et seq.). They are only permitted in temporary agency work, as described in the previous paragraph. However, exceptions to the rule are allowed in some cases, as long as the worker in question and the trade union representatives approve. Secondments must not be the company’s main form of business, only permanent staff may be seconded and the transfer must be for a limited period. Secondments only account for a small proportion of atypical work and there are sometimes compensatory benefits for the workers. They mainly take place in fields such as ICT, multimedia and advisory services, call centre work and event organisation. In terms of social security, workers on secondment have the same guarantees and coverage as standard workers. In addition, the working conditions pay and other benefits must not be worse for the secondees than for the employees of the company using their services.

*Project-based work (contracts for a clearly defined job)* These are known as contracts for a clearly defined job (*contrats de travail pour un travail nettement défini* in French, *arbeidsovereenkomst voor een duidelijk omschreven werk* in Dutch). Instead of having an established duration, they last until the completion of a specific job, such as artistic work, agricultural work or the execution of a project. The working relationship automatically comes to an end when the work is completed, without the need for further notification by the parties. With regard to employment law, these contracts generally have the same limits and conditions as fixed-term contracts. In terms of social security, workers with these contracts have the same guarantees and coverage as standard workers. They are always based on the amount of actual working time.

*Work vouchers* This scheme was officially launched to put a stop to undeclared cash-in-hand work while creating a network of support services for people. In 2004, work vouchers (*titres-services* in French, *diensten-cheques* in Dutch) were introduced as a way of paying for casual work in the domestic services sector. The system underwent rapid development. By January 2006, almost 13,000 people (equivalent to approximately 6,000 full-time workers) were working under this system. By January 2013, this figure had risen to 130,000 (equivalent to 67,000 full-time workers). 97% of them were women, and the vast majority were foreign<sup>49</sup>. The system involves four main players: a domestic worker, individuals (a family) for whom the worker works, an accredited agency that employs the worker on either a full-time or a part-time basis (for a minimum of 10 hours a week), and the federal state, which establishes the terms of the working relationship and covers more than 60% of the total costs<sup>50</sup>. There are also other players involved, because normally the same worker will perform services for a number of families each week, with changeable working hours and no pay for travel from one house to the next. Therefore, while in theory these contracts involve the same social security requirements and guarantees as a normal part-time contract, in practice the flexibility required of the workers means that it is impossible for them to gain full-time status.

*Internships and other forms of on-the-job training* Work done within a company as part of an apprenticeship scheme is regulated in Belgium by at least 18 types of contract. Some have been established by the central federal authorities, but most have been introduced by the regional and language communities responsible for work, teaching and professional training policies. Examples of contracts include the *convention d'immersion professionnelle (beroepsinlevingsovereenkomst* in Dutch), the *convention de stage des classes moyennes (stageovereenkomst middenstand)*, the *contrat d'apprentissage des classes moyennes (leerovereenkomst middenstand)*, the *contrat d'apprentissage industriel (industriële leerovereenkomst)*, the *convention d'insertion socioprofessionnelle (overeenkomst voor socioprofessionele inschakeling)* and the *contrat d'apprentissage d'une profession salariée (werknemersleerovereenkomst)*<sup>51</sup>.

While the rules and conditions vary, the agreements are always triangular in nature. A student of an accredited institute will gain knowledge or skills by working for an employer. Rather than genuine employment contracts, these arrangements provide a legal framework for work done within companies as part of the different apprenticeship schemes. Unlike employment contracts, these agreements do not cover the provision of services by a subordinate for an employer in exchange for remuneration. Instead, the purpose is to complete a training cycle so that the person in question can find (or return to) a better position in the production process and in society. In terms of employment law, it can be deemed a form of atypical work not only because of the times and durations of the contracts, but most significantly because sometimes the people concerned do proper jobs but they do not have full access to the rights that are available to normal workers in the same field. In terms of social security, things are rather complicated. Generally speaking,

<sup>49</sup> Figures from the Belgian National Social Security Office ([www.onss.fgov.be](http://www.onss.fgov.be)).

<sup>50</sup> Basically, the workers perform services in the homes of individuals (families). The latter buy vouchers, each of which is worth an hour of household work. At the end of the year, part of the outlay from voucher purchases is tax deductible. A worker's agency will receive €22.04 in total for each voucher (and therefore for every hour of work done). Part of the amount is paid by the person who receives the service (currently €9.00 for the first 400 vouchers and €10.00 for the rest, with a maximum of 1,000 vouchers per family each year) and the rest is paid by the State.

<sup>51</sup> [www.emploi.belgique.be/defaultTab.aspx?id=683#](http://www.emploi.belgique.be/defaultTab.aspx?id=683#)

until the age of 18, apprentices are only covered for paid holidays, accidents at work and occupational diseases. Once they turn 19, in theory all of the contracts have the same contributory requirements as the general system for paid workers, including pensions and unemployment benefits. However, it is a real jungle in this respect. Some contracts only provide for the basic right that is normally earned at the end of a complete study cycle: a “waiting allowance” for anyone who has still not found a job a year after they finish their studies<sup>52</sup>. Others, such as the contract for industrial apprentices, give eligibility for unemployment benefit in theory. However, in practice even in these cases apprentices are often not covered despite the fact that the necessary insurance contributions have been paid, because their pay (or rather internship allowance, a minimum amount for which is established by law and calculated in accordance with the person’s age and other factors) hardly ever reaches the level of the legally imposed minimum wage for employees, which is one of the requirements for the right to unemployment benefit in Belgium.

*(False) self-employment* These are contracts for what is essentially subordinate work, even though the contracts are for freelance activities, such as commercial agreements and those for appearance fees or authors’ rights. They are particularly common in the fields of journalism, training, multimedia, the arts and entertainment, but they are also being used more and more often by advisory companies, design firms and agencies, especially those involved in the business of European and international institutions. There is a separate statute for the “assistants” of self-employed workers. They often work for members of their own family, so their jobs are clearly at risk if splits emerge in the family. All of these contractual cases are sociologically part of the atypical work phenomenon so they must be mentioned at least, even though in legal terms they are classified as forms of self-employment rather than employment.

#### *Social protection measures and obstacles to free movement*

The Belgian welfare system is largely Bismarckian in nature. It is one of the most advanced schemes of its kind in the European Union and it is funded by some of the biggest public spending (Belgium, the Netherlands, France and the Scandinavian countries are the only EU member states where social security spending normally tops 30% of the GDP). There is heavy trade union involvement, partly because of the direct role that the unions traditionally had in the management of unemployment benefit payments (the Ghent system)<sup>53</sup>. Belgium is also one of 21 EU countries with a minimum legal salary. At €1,500 (gross) for the youngest workers, it is second only to that of Luxembourg.

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<sup>52</sup> For example, see [www.emploi.belgique.be/defaultTab.aspx?id=22774#](http://www.emploi.belgique.be/defaultTab.aspx?id=22774#).

<sup>53</sup> In 2004, the Belgian social security system came in sixth place in the international quality rankings of an International Labour Organization report. The ILO rankings were based on an economic security index that classified the working conditions of each country in accordance with seven types of security: income security, labour market security, employment security, work security, job security, skills reproduction security and representation security. Within these areas are both general indicators of wellbeing and quality of life and work (such as income level, security and inequality, job security, education, training and professional qualifications) and specific indicators that are closely tied to the social security system, such as severance pay, rules against wrongful dismissal, and protection from accidents at work and occupational diseases. ILO, *Economic Security for a Better World. Programme on Socio-economic Security*, Geneva, 2004.

Like all Bismarckian systems, it is based on a largely industrial model<sup>54</sup> in which rights are acquired while performing a (male-oriented) full-time job with an open-ended contract. This is despite the fact that the retirement age is the same for men and women (65 years old) and in general all contracts for employment (or comparable work) are subject to the *requirement to make contributions* under the general social security system for wage-earning workers, meaning that protection is provided against the main risks (disease, maternity and paternity, old age, disability, death, unemployment, accidents at work and occupational diseases), in accordance with the periods of work actually done.

Consequently, the right to *aggregate* insurance periods pursuant to European regulations is also generally safeguarded for those who have spent their careers in Belgium, but it can prove impossible for people who have spent their careers in another country such as Italy, where the distinction between employed work and self-employed work is not as clear as in Belgium (see the examples below).

On top of this, difficulties can arise as a result of incomplete and fragmented careers, leading to a *lack of the minimum requirements* for eligibility for unemployment benefits and an adequate pension. For unemployment benefits, it is necessary to have worked for a proven number of full-time days that is often difficult to reach for workers with atypical and precarious contracts<sup>55</sup>. An additional difficulty lies in the fact that only periods spent working for at least the legal minimum wage are taken into account for the purposes of unemployment benefit, and this is not always guaranteed with contracts such as those for on-the-job training.

Another aspect relating to unemployment is that Belgium has become stricter with its “activation” policies, like other EU countries such as the United Kingdom and Germany. This often leads to the loss of insurance-based unemployment benefits, which are replaced with “integration income” (*revenu d'intégration/leefloon*), a non-contributory benefit that is provided by the social services of the municipality where the recipients reside if they can prove that they have insufficient resources. In addition to the fact that the amount is lower, it is also impossible to export the benefits, so the recipients lose them if they decide to move to another country.

As for pensions, it should be noted that the Belgian system is based on the principle of “complete careers” (currently 45 years for men and women), so all forms of part-time and fixed-term contracts inevitably lead to incomplete pensions<sup>56</sup>. Nonetheless, unlike other EU countries such as Spain, Italy, Portugal and Slovenia, the *calculation methods for benefits* do not involve any minimum insurance periods, so even a brief and fragmented career will make a worker eligible for some benefits. The amount will be in proportion with the duration of the working period (including notional periods).

*Example 1* A 32-year-old female worker from Italy moved to Belgium in January 2012 to look for a job. In her first year and a half residing in Belgium, she had a number of stints working for different

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<sup>54</sup> For more information see: Caldarini C., *Dire, fare, tutelare. L'azione sindacale di tutela individuale in cinque Paesi europei*, Ediesse, Rome, 2010; Caldarini C., “Dal patto sociale al contratto di solidarietà tra le generazioni. Origini e funzionamento del sistema di sicurezza sociale in Belgio”, *Rivista Italiana di Politiche Pubbliche*, no. 3, 2006, p. 133-163. See also: [www.cleiss.fr/docs/regimes/regime\\_belgique.html](http://www.cleiss.fr/docs/regimes/regime_belgique.html); [www.missoc.org](http://www.missoc.org).

<sup>55</sup> Depending on the age of the applicant, either 312 days in the last 21 months, 468 days in the last 33 months or 624 days in the last 42 months ([www.rva.be](http://www.rva.be)).

<sup>56</sup> The Belgian system partially compensates for these two problems with a number of social measures (which are for assistance purposes and non-contributory) that take the income of every single person to a level that at least covers minimum living costs.

employers. Each time she had a temporary contract and the last one ended in June 2013. On 1 July 2013 she applied for unemployment benefit in Belgium, which was her country of residence and the place where she had last worked. In order to be eligible for the benefits, she needed to have worked for at least 312 days in the previous 21 months. She could have met this requirement by aggregating her periods of contributions in Belgium (310 days) with her working periods in Italy between October and December 2011, when she had a 3-month project-based contract. However, the Belgian National Employment Office rejected her application because Italian project-based contracts are deemed self-employed work in Belgium, so they are not eligible for unemployment benefits of any kind.

*Example 2* A 42-year-old Spanish waiter has worked in Spain, Italy and France, always with short-term seasonal contracts. He moved to Belgium to work as a waiter in October 2012 and the following March he lost his job. In accordance with Belgian law, to obtain unemployment benefits a worker must be able to demonstrate 468 working days in the last 33 months (the waiter can only show 412), or alternatively 624 days in the last 42 months (he can only show 580) or 5 years of work (1,560 days) in the last 10 years (he can only show 1,470). Even if he adds together all of his working periods, the waiter has no right to any unemployment benefits in Belgium.

*Example 3* In 2012, a 31-year-old Belgian researcher moved to Italy, where she worked for six months for a single client (an Italian public research body) with a project-based contract. During that time, she earned €18,000 and made the legally required social security contributions in the Italian special separate management system. In 2013, she returned to Belgium, where she had found a better job: a fixed-term contract at a university in Brussels. However, after six months her research project was cancelled and she found herself unemployed. If she had stayed in Italy, she would have been entitled to a “one-off” Italian unemployment payment with just one month of project-based contract work. Because she had moved to Belgium – where she paid insurance contributions for six months – she was neither eligible for Belgian benefits nor for Italian ones.

## DE (Germany)

### *Overview of atypical employment contracts*

Out of almost 30 million jobs, approximately 9 million are atypical. The term “atypical” in this case includes all jobs which are not covered by collective bargaining agreements, those for which workers have no protection against dismissal and those which do not give eligibility for an old-age pension. The deregulation sanctioned by the Hartz reforms in 2003-2005 has led to a huge increase in atypical work in Germany. However, not all of the changes have occurred because of former Chancellor Schröder. For at least 15 years, Germany has been one of the OECD countries with the fastest growth in low-paid work, and therefore in atypical and highly atypical working contracts. The percentage of workers with low wages has been increasing since at least 1995. There is no legal minimum wage, so the downward trend is particularly significant, especially for temporary workers, people under the age of 25 and people with fixed-term contracts, who have both low incomes and a lack of job security. According to the German Confederation of Trade Unions (DGB), since 2000 workers with low incomes have suffered the biggest losses in wages in real terms, while their working hours are longer than those of people with other categories of income. The combination of low wages and discontinuous employment naturally means that there is no guarantee of an adequate old-age pension. Poverty levels among the elderly are destined to increase, especially in the former East Germany and among immigrants. Another

factor in the deregulation of the job market is the fact that paid work by women is considered a supplementary form of income in the traditional German family model.

Looking more closely at the different forms of atypical and highly atypical contracts, below is a summary of the six main types: fixed-term work, temporary agency work, and internships (atypical contracts); mini-jobs, contract work and seasonal work (highly atypical contracts).

*Fixed-term work (Befristetes Arbeitsverhältnis)* The number of fixed-term contracts has increased in Germany in recent decades. In the 25 to 34 age group, the percentage of these contracts increased by 10.6 points in 20 years, going from 8.2% in 1991 to 18.8% in 2011 (IAQ, Institut Arbeit und Qualifikation, 2012). Among new employees, this trend is even more noticeable (Bellmann et al. 2009), especially in big companies where there is greater protection against dismissal. In 2009, the percentage of fixed-term contracts for new recruits was 59% in companies with 50-249 employees and 62% in companies with 250 or more employees (Hohendanner 2010: 3).

In terms of social security, workers with fixed-term contracts have the same requirements and rights as standard workers, but they are at much greater risk of finding themselves unemployed and there is no protection against dismissals. According to the German Confederation of Trade Unions (DGB), after one year 10-15% of employees with fixed-term contracts will be unemployed or no longer working for the same company. According to a study by the Centre for European Economic Research (*Zentrum für Europäische Wirtschaftsforschung*), the equivalent figure for workers with open-ended contracts is 5%, but after three years the risk of unemployment is just as high for both groups of workers.

*Temporary agency work (Arbeitnehmerüberlassung)* The deregulation sanctioned by the Hartz reforms has encouraged an increase in temporary agency work. In 1994, there were 6,910 temping agencies in the country. At the end of 2010, the *Bundesagentur für Arbeit* (Federal Employment Agency) counted 16,600 of them, 1,100 of which had more than 150 employees. After the 2007-2010 crisis, there was a double-digit increase in temporary work. According to the Federal Employment Agency, this type of work is behind half of the increase in employment (figures from 2010). Meanwhile, the number of workers with temporary contracts went from 170,000 in 1996 to almost 900,000 in 2011 and it topped 1 million in 2012. In terms of social security, temporary workers have the same requirements and rights as standard workers. The problem is the difference in wages and the resulting consequences on the pension front. According to research by the Friedrich Ebert Foundation, in West Germany the average starting salary for temporary workers is half of the national average pay, leaving them on the verge of poverty by European standards. Even for skilled work, the difference in monthly pay is approximately 35%. According to a study by the German Ministry of Labour in North Rhine-Westphalia, in 2006 the average monthly social security payment made by a full-time temporary worker (€1,550) was approximately 7% lower than in 1999 (€1,668) and approximately 45% lower than the average for other categories of workers. The introduction of collective contracts for temporary work in 2004 did nothing to reduce or bridge the gap between the average monthly pay of temporary workers and that of standard workers. On top of this, temporary workers have less job security<sup>57</sup> and receive less money for their unemployment benefit and old-age pensions.

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<sup>57</sup> Only around half of the periods of temporary work that ended in 2010 lasted for more than three months. Furthermore, according to the Institute for Employment Research (Institut für Arbeitsmarkt- und Berufsforschung – IAB), only 7% of previously unemployed temporary workers managed to keep hold of a job in the two years following their stint of temporary work.



*Internships (Praktika)* Internships provide professional guidance during a study or training programme, so they can serve as very useful preparation for the world of work. However, over the years companies have increasingly misused contracts of this kind to conceal their real goal of obtaining low-cost work. For example, many internships take place once a period of study or professional training is over, at a time when people would really expect to start their working careers. They no longer need professional guidance and they may well already be suitably qualified. According to the DGB, many “false” internships are used instead of giving people real jobs. A 2008 study by the Federal Ministry of Labour and Social Affairs revealed that 20% of qualified young workers (approximately 1.9 million people) have done at least one internship (1.9 internships per capita on average). Half of them received no pay and the other half did not earn enough to support themselves. No social security or pension contributions are made, it is difficult to plan for the future or consider raising a family, professional qualifications gradually lose value the longer a person remains in precarious employment and the situation can lead to health problems, such as psychological issues. In addition to the fact that young people are being treated unfairly, more false internships mean fewer standard working contracts with compulsory pension contributions. The savings made by employers are adding to the pensions deficit.

*Mini-jobs (Geringfügige Beschäftigung)* Mini-jobs are the most commonly cited example of atypical work in Germany. They are small jobs that are exempt from most contributory and tax obligations and they were included in the *Sozialgesetzbuch* (Social Security Code) for the first time in 1971. Updates to the law have been made a number of times to alter the conditions for social security, tax, pay and working hours. Until 31 December 2012, contracts for a maximum of €400 a month and no more than 15 working hours a week came under the category of mini-jobs. Since 1 January 2013, the maximum pay has been €450 a month (or €5,400 a year) and the 15-hour limit has been abolished, so it is now legal to have contracts of perhaps 30 hours a week, even though the same pay restrictions apply. The exemption from social security contributions has been made optional for everything except accidents at work. Basically, this means that employers could say that they will only give someone a job if he/she “voluntarily” opts out of the contributions, meaning that he/she will lose his/her social security rights. People with jobs of this kind are paid between €5 and €7 an hour on average, but there is no legally imposed minimum wage so at the end of the day the amount depends on the agreements made between the parties. There is also a second category called “midi-jobs” (*Gleitzonenfall*). The monthly pay can be up to €850 and the workers have the right to paid holidays, maternity leave and unemployment benefits as long as they have worked – and paid contributions – for at least 15 hours a week. Mini-jobs were originally created to provide a source of secondary income for married women – whose social security coverage was essentially provided by their husbands’ work – or to legalise little second jobs for workers who were already covered by the social security contributions of their main employment. They soon developed into a mass phenomenon and almost one out of every five jobs now falls into this category. According to the DGB’s figures, there are 7.5 million mini-jobs, more than 63% of which are held by women. Approximately 2.5 million of these workers have other sources of income, which in many cases provide them with their main form of social security coverage, but a mini-job is the only source of working income for at least 5 million people (IAQ, Institut Arbeit und Qualifikation).

*Contract work (Werkverträge)* With contract work, one party accepts a fee to do a job or perform a service on behalf of another party, working mainly on their own without any degree of

subordination. It is a form of self-employed work, so there should be no need to include it here. However, contract work is often used as a means of getting around the rules of employment law and collective agreements so as to cut costs and limit protection from dismissal. In such cases, it is false self-employment, at least three types of which exist. The first is when companies give contract work to workers who are self-employed but nonetheless subordinate to the companies and made to follow their orders. This allows the companies to avoid taking on permanent staff. In the second case, the jobs are given to other companies, which do not carry out the work directly. Instead, they illegally supply temporary workers. The third case is when contract work is given to foreign companies, which take advantage of the right to free movement of services in Europe and use their own resources. If there is a minimum wage for the sector which is not paid, it is a violation of the European secondment regulations for workers. If there is no minimum wage for the sector in question, wage dumping is not illegal under EU law. Numerous case studies and trade surveys have shown that inappropriate use of contract work has increased. The most extreme forms can be found in the meat industry (in which the supply chain is divided into separate activities) and in construction (in which a long subcontracting chain allows minimum wage checks to be avoided). Assembly work is also outsourced in the automotive industry (for example, see Rieble 2012; Koch/Wohlhüter 2012). Unfortunately, the amount of spurious contract work cannot be quantified because it is impossible to make a clear distinction between real and false contract jobs, but a number of indicators show that it is a growing trend. In the automotive industry, the percentage of external suppliers and service providers is expected to go from 62% in 2002 to 77% in 2015 (Bromberg 2007: 2). Research by the IAB (Institute for Employment Research) into the use of self-employed workers by companies revealed an increase from 350,000 in 2002 to more than 600,000 in 2010. In the same period, the percentage of companies that use contract work increased from 4% to over 7%. European E101 forms are the only source of information in these cases. They confirm that self-employed workers contribute to the social security schemes in their home countries, so they do not need to make contributions in their host countries. It is not possible to know whether the secondments really happen or how many workers are seconded without these forms. Despite the crisis, in 2009 the use of the forms was more and more widespread. 221,220 were issued for seconded workers in Germany. Just over half were in industrial fields and approximately half of these were in construction. According to the figures, the majority of contract workers (165,400) came from countries with much lower wages in Central and Eastern Europe (European Commission 2011).

*Seasonal work (Saisonarbeit)* Seasonal work in fields such as forestry, agriculture, catering, the meat industry and home help provides people from the EU and other countries with the opportunity to work in an EU country like Germany. It may be for a brief period and can involve jobs for the duration of the harvest, assisting ill people or work in slaughterhouses. The workers are partially protected by Europe-wide minimum legal conditions, but it is not easy to provide them with protection and they do not tend to be aware of their right to it. Often, they do not speak the local language, they quickly return to their home countries in the event of illness, they are not organised, they are not members of unions, they do not know how the legal and administrative control mechanisms work, and they are afraid that they will not be paid if they do the wrong thing. They constitute a proletariat that even the unions struggle to represent and protect.

*Social protection measures and obstacles to free movement*

Germany is one of the founding fathers of welfare and under Bismarck it was the first country to introduce compulsory social insurance, meaning that the State replaced the countless mutual aid funds (mainly with the goal of preventing the growth of trade unions and socialism). Its welfare system largely developed around employment. Generally speaking, people must have an ongoing, regular professional career in order to be eligible for rights. Access is based on insurance rules, with proportionality between wages, contributions and benefits.

Trade union membership is rather low (approximately 20% of employees) and it has been falling for a number of years. Nonetheless, Germany has a large population and more than 30 million workers, so there are almost 9 million members of trade unions in the country (including pensioners and unemployed people). This makes it one of the countries with the highest numbers of union members in Europe, along with the United Kingdom and Italy. Although it is not as high as in Nordic countries, welfare spending is quite high (almost 30% of the GDP), but the system mostly protects people in standard employment.

There is a strong split in the job market and the welfare system, with high income and protection for some categories of workers, and little or no protection for others, such as small-scale (or false) self-employed workers<sup>58</sup>, interns and above all people with mini-jobs. The latter are subject to a special tax and social security regime, under which employers are charged a flat rate of 30% and the workers have no social security coverage. Some people already have health coverage because they are dependants or their mini-jobs are just a way of supplementing another income from a job in which the legally required contributions are made, but all other people with mini-jobs have to pay for their own health insurance (at approximately €150 a month) and they are not eligible for unemployment benefit or maternity leave. They can only claim a small benefit in the event of disability and when they retire they will only be able to have a basic state pension, not a contributory one (unless they choose to make a voluntary contribution of 4.5% of their pay, which can be added to the pension fund).

In terms of coordination of social security systems and free movement, the *lack of compulsory insurance* clearly means that *aggregation* with (insured) working periods in other states is not possible. Even for those with compulsory contributions, it can be difficult to satisfy *the minimum insurance requirements* for unemployment if their careers have been fragmented, because no rights are available to those who work for less than 15 hours a week.

## ES (Spain)

### *Overview of atypical employment contracts*

In the early 1980s, there was growing unemployment because of a fall in demand, partly due to the opening of the internal market after the long period under the dictatorship and ahead of Spain joining the EEC after years of waiting (in January 1986). In response, the first socialist government under Felipe Gonzalez introduced a number of forms of fixed-term contracts. This resulted in the creation of a two-track job market, in which the majority of people had open-ended contracts and

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<sup>58</sup> The trade unions believe that self-employed workers need just as much protection as employed workers. However, the German social security system is not designed for workers of this kind. Currently, approximately a quarter of self-employed workers have pension plans with special regimes. They include farmers, midwives, sailors and registered professionals. There are also special regimes for other groups, such as social insurance for artists, but most self-employed workers are not covered by compulsory insurance. Since 2009, everyone who lives in Germany has been required to take out health insurance, but many self-employed workers struggle to pay the amount due, which is approximately €650 for those with income of over €1900.

a minority – who nonetheless constituted a significant percentage of the total – had fixed-term contracts. The latter group was mainly made up of young people, women, immigrants and workers with few qualifications in general. The economic structure was based on intensive use of the workforce in sectors with low productivity (especially in the tertiary sector) and seasonal work (such as agriculture and the associated industries, tourism, catering and construction), which encouraged the use of these contracts. Subsequently, they also began to be used by industrial companies and even by the public authorities.

The low level of pay (compared to the EU average) meant that employers were able to cover the costs of contributions (in an industrial environment that largely catered to the internal market). In some cases, they even (fraudulently) managed to reduce the costs of workers by getting the public system to pay some of them. For example, they would get the welfare system to cover holiday pay by ending contracts at the beginning of holidays and starting a new contract at the end of the break, so that unemployment benefit would act as holiday pay. The use of fixed-term contracts reached a peak in 2005, when they were held by 6% of women and 32% of men. In recent years, these percentages have fallen simply because this group of workers has been the worst affected by the unemployment in the country. At the same time, in business sectors there has been growing demand for measures to cut social costs. In broad terms, there have been calls to reduce income-based contributions, but there have also been requests for the introduction of new forms of contracts which are not only fixed-term but also involve lower social security contributions. There are often references to “mini-jobs” in the proposals<sup>59</sup>.

Nevertheless, truly discriminatory measures have never been taken on the welfare front. Indeed, the benefits available – especially to the unemployed – have always acted as an important safety net for workers with a string of fixed-term posts, at times with periods out of work in between. As a result, even today Spain is not only the EU country with the highest unemployment rate but also the one that spends the greatest proportion of its GDP on unemployment benefit. All the same, as outlined below, there are three forms of atypical contracts in a grey area where the protection is not quite as strong.

*Apprenticeships (contratos para la formación)* These are training schemes for workers aged between 16 and 25 who do not already have a professional or academic qualification (Law 3/2012 has temporarily raised the upper age limit to 30 and it will apply until the official unemployment rate drops below 15%). There is compulsory insurance with a single contribution ([www.seg-social.es](http://www.seg-social.es)). For insurance against unemployment (*desempleo*), the minimum contribution is the same as the minimum for accidents at work and occupational diseases, which was €753 in 2013. Therefore, these contracts give workers limited economic rights, both in terms of national benefits and if the abovementioned contributions are aggregated in accordance with European regulations.

*Scholarship holders and researchers (becarios y investigadores)* This is a group of qualified workers who had no rights to benefits until recently. Following a general strike on 29 September 2010, the Spanish government agreed to have talks with workers’ representatives about possible changes to the job market and pensions reforms. One of the few positive measures was recognition for

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<sup>59</sup> When the European Central Bank (ECB) bought Italian and Spanish sovereign debt in the secondary markets, its president at the time, Jean-Claude Trichet, sent a letter to Zapatero. One of his conditions was that mini-jobs should be introduced in Spain. The Spanish Confederation of Employers’ Organisations (CEOE) defended this request, but the Spanish trade unions strongly opposed it.

these workers by the welfare system. Following the Royal Decree (*Real Decreto*) 1493 of 2011, scholarship holders and researchers had the right to make contributions. The same contributions system was applied as for the above-mentioned training contracts, with the exclusion of the contributions (and therefore the benefits) for unemployment, wage guarantee funds and professional training. Less than two weeks later, with the *Real Decreto* 1707/2011 the government excluded from the right to contributions all university students who were taking part in external training programmes. There had been 41,135 registrations for the Spanish social security system by people in this category in one month alone, but following this measure the number immediately fell to 20,000. The Comisiones Obreras trade union made a legal appeal against the second *Real Decreto* and on 21 May 2013 the Supreme Court (*Tribunal Supremo*) restored the scholarship holders and researchers' right to contributions, as ratified by the previous law (ruling no. 130,514).

*Economically dependent self-employed workers (TAED - trabajadores autónomos económicamente dependientes)* Spanish self-employed workers have to make a monthly contribution of 29.80% to the social security system, which is based on a minimum contribution of €858.60 and a maximum of €3,425.70 (these are the figures for 2013). They can choose the amount themselves, regardless of their actual net income or turnover. Many of these figures only work for a single client, so Law 20/2007 (the self-employed workers' statute) introduced the concept of an economically dependent self-employed worker (*trabajador autónomo económicamente dependiente*). These workers make the relevant contributions to the social security (*Seguridad Social*) system and they are eligible for benefits in circumstances such as unemployment and ill health, in the cases covered by the law. Before the introduction of this concept, there were numerous blatant examples of false self-employed workers with roles equivalent to those of employees. They had to go to work every day and they had set working hours and (in some cases) paid holidays<sup>60</sup>.

#### *Social protection measures and examples of obstacles to free movement*

As in Greece, Italy and Portugal, spending on the Spanish welfare system is rather low. It is mainly focused on unemployment benefits and it is supplemented by the traditional central role of the family, which can offer welfare, income and services. Another notable feature of the Spanish system is that the rate of union membership is one of the lowest in Europe. The legal minimum for a monthly salary is approximately €750 (gross).

Generally speaking, all of the types of contracts for employed work require *contributions* to be made, so it is possible to *aggregate* them and *export* benefits in accordance with the European regulations.

Difficulties applying the European coordination rules emerge when it comes to meeting the *minimum requirements*, due to some of the *benefit calculation mechanisms* for old-age pensions. This is an issue with both standard and atypical working contracts and it has caused the pension calculation system established by Spanish law to be examined by the European Court of Justice on two occasions, in 2011 and in 2013.

<sup>60</sup> According to the Spanish trade unions, every year there are still more than 3,000 reports of breaches of the rules. The majority of them concern false self-employed work, and this is only the tip of a much larger iceberg.

The first case (C-385/11, Isabel Elbal Moreno vs. Seguridad Social, judgement of 22/11/2012) involved a woman who was refused an old-age pension because she did not meet the requirement of having made contributions for at least 15 years. She had worked part-time for 18 years, doing four hours a week, which is 10% of the statutory working week in Spain. The court ruled that the system discriminated against part-time workers, because basing the calculation for the contributions made on the hours actually worked means that they are unable to reach the minimum amount of contributions required in order to be eligible for an old-age pension. The court even noted that there was a form of discrimination on grounds of sex, because 73% of part-time workers are women.

The other judgement was in the case of Ms. Salgado González, who paid contributions to the special scheme for self-employed persons in Spain for a total of 10 years and then in Portugal for a period of five years. Under the Spanish regulations, pensions are calculated on the basis of the contributions paid in the 15 years prior to an application. A fixed divisor is then applied for the contributions, but neither the duration of the period nor the divisor can be adapted to take account of the fact that the workers concerned have exercised their right to freedom of movement in another member state.

Using this system, the Spanish social security body deemed it necessary to calculate the amount for Ms. Salgado González's pension by only adding together the contributions made in Spain between 1991 and 2005 and dividing the total by 210, which would normally correspond to the amount of contributions made in 15 years. It completed the calculation period with five years at a notional value, which for a self-employed person is zero. As the court noted, by doing so it created discrimination between people that have worked in more than one country and those who have worked for the same amount of time in just one country.

## FR (France)

### *Overview of atypical employment contracts*

In France atypical work has been growing since the 1980s. Since then, the number of fixed-term workers has increased six-fold, while the number of contracts through third parties and apprentices is four times bigger. Considering all fixed-term contracts, the "precariousness rate" of the employed was 5.3% in 1982, 7.6% in 1990, 11.8% in 2000 and it exceeded 12% in 2011 (INSEE data). Part-time jobs have also almost tripled from 1980 to today. This percentage is approximately 7% among men and 30% among women. It should be taken into account that precarious employment tends to decrease in periods of economic crisis, since fixed-term, part-time, temporary, intermittent and occasional jobs are the first to be deleted, then developing again when unemployment becomes structural.

Undoubtedly, in some cases part-time work can be a voluntary choice. However, manpower statistics show that 27 to 29% of part-time workers do not choose such work intentionally; they just cannot find better jobs. Precarious jobs are more common among women and young people in France too. At least one third of the so-called working poor are actually part-time female workers. In the 15 to 29 age range, one employed person out of three has a precarious contract (fixed-term, internship, apprenticeship, temporary), a much higher percentage than the previous generations.

Atypical contracts in France can be grouped in two main categories: contracts with atypical terms and non-permanent employment relationship (fixed-term, temporary, funded contracts and various forms of internship) and contracts with atypical working hours and wages (some are part-time contracts). Globally, at least 6 million people are involved in atypical work, of whom at least 4 million working part-time. Please note, however, that these contracts are subject to compulsory insurance, so workers are entitled, at least in principle, to general protection by the social security system. Additionally, fixed-term workers are usually entitled to a one-off precariousness benefit (*prime de précarité*), equal to 10% of the total gross pay received by the worker during his/her contract. This benefit is not applicable to students' contracts, seasonal workers, contracts dealing with unemployment measures, dismissal for serious misconduct and generally when workers obtain a permanent job upon termination of a fixed-term one.

Here is a summary of the main forms of atypical contracts existing in France at the moment<sup>61</sup>.

*Fixed-term contracts (à durée déterminée)* Fixed-term contracts (the so-called CDD) are only permitted in France to perform specific, temporary tasks and in cases strictly provided for by the law. Regardless of the reason why fixed-term work is resorted to, this must be laid down in a written contract, the object of which may not be performance of a company's ordinary job. If these legal requirements are not fulfilled, the CDD turns into a permanent job (CDI) automatically.

*Project-based contract (à objet défini)* Law 596/2008, known in France as labour modernization Act, introduced a new kind of fixed-term contract. Its duration is not determined by a period of time but by the conclusion of a specified 'project'. This contract can only be stipulated if provided for by a trade association agreement, or by a specific agreement between trade union and the company and can only be used for professional tasks (engineers and managers, as defined by collective contracts). Its term should be at least 18 months and no longer than 36 months and it can be terminated with 2-months notice<sup>62</sup>.

*Apprenticeship (apprentissage)* Apprenticeship contracts are not real work contracts, but offer supplementary training and specialization to young people who have already completed their studies and are not of compulsory school age. These contracts are usually intended for 16 to 25-year-olds, with some exceptions provided for by the law. In addition to the *contrat d'apprentissage* narrowly defined, there are some other apprenticeship contracts<sup>63</sup>, such as the so-called *contrat d'apprentissage aménagé*, with no age limits and designed for people with diagnosed and recognized disabilities, the *contrat de professionnalisation*, open to the unemployed over 25 and other unemployed beneficiaries of social benefits, the so called *PACTE* which allows for the recruitment of non-graduated and non-qualified young people, or the so-called *contrat de professionnalisation*, *l'Emploi d'avenir*, etcetera.

*Intermittent work (travail intermittent)* Exclusively allowed for some trade categories in certain businesses, usually with regular activities, such as tourism, show business, school, etc.), intermittent work alternates between working to non-working periods, in the context of a permanent job. A number of compulsory workers' protection clauses are provided, such as taking

<sup>61</sup> For further atypical employment relationships see: <http://travail-emploi.gouv.fr> (for instance: *contrat unique d'insertion*, *contrat vendanges*, *cumul d'emplois*, *travail à temps partagé*, *travail saisonnier*, *activités d'adultes relais*, *emplois d'avenir*).

<sup>62</sup> Notice may be shorter than 2 months in some cases as provided for by the law.

<sup>63</sup> <http://travail-emploi.gouv.fr>

into account non-working periods for the length of service or in the event of dismissal. Workers with intermittent contracts have the same rights as the other workers.

*Common use contracts (contrat d'usage)* The so-called *contrats d'usage* are temporary contracts which represent an exception to general legislation; they are permitted in some sectors where work is typically seasonal or fluctuating. Here the use of non-permanent jobs is common, such as in forestry, ship repair services, transportation, restaurants, show business, education, surveys, etc. Unlike a regular fixed-term contract, the *contrat d'usage* can be renewed many times with no limits; there are no time limits between two consecutive renewals; it does not entitle workers to any precariousness benefit and does not necessarily imply a termination date.

*Occasional work (travail occasionnel)* Occasional work is only allowed to carry out a task at a private person's house - not in a company - and is different from the so-called social and personal services. Recruitment, working and wage conditions are the same as those usually applied to paid employment and those recruiting occasional workers have the same obligations as an employer. The most common case is that of an individual who intends to have some construction or maintenance work done in his/her house and recruits a worker rather than a self-employed or building firm, thus paying for social contributions and no VAT. The occasional worker and his employer are both subject to labour law and the worker is entitled to the same social protection as any paid employee.

*Temporary work (travail temporaire)* A temporary work contract in France is only permitted to perform a pre-set assignment (*mission*) and in cases provided for by law. Its object cannot be a company's ordinary job. Workers with temporary contracts have the same rights as the other workers and such a contract signed outside its legal framework turns into a permanent job automatically.

*Agency work (intérimaire)* Legalized in 1972, agency work is theoretically intended to exceptionally replace workers in a company. This contract has recorded such a significant increase that it has become a common category in the French labour market. As in the other main kinds of atypical work, the agency worker has the same rights as other workers in terms of social security; income uncertainty is partially balanced by the so-called one-off precariousness benefit (*prime de précarité*), equal to 10% of the total gross pay received by the worker during his/her contract.

#### *Social protection measures and obstacles to free movement*

The French social protection system is among the oldest in Europe – its origins can be traced back to the medieval guilds, the confraternities and mutual aid associations that appeared spontaneously in the 18th century). Today it is a mix of initially different legal systems which were then assimilated around a general occupational pattern for some aspects, and universal for others. In terms of the allocation of resources, France comes immediately after the Scandinavian countries, along with Belgium and the Netherlands, and has historically been one of the countries allocating more resources to the social protection system (over 30% of GDP in 2011), mainly through social contributions. Unlike these countries, however, unionization in France is among the lowest in the world (approximately 8% of the employed), anyway compensated by high firm representation. Its welfare system is usually defined as *mere occupational*, but with remarkable



*state-centric* features unlike Belgium and Germany<sup>64</sup>. Additionally, France is one of the 21 EU countries where the minimum legal wage is effective and its amount, Euro 1,430 gross, is the fifth highest, after Luxembourg, Belgium, the Netherlands and Ireland.

All employment contracts (or similar) are basically subject to *contributions* p to the social security payable by employers and the insured covering the main risks such as sickness, maternity and paternity, old-age, invalidity, death, unemployment, occupational incidents and occupational diseases. Obviously, this depends on the periods actually worked and with all the disadvantages connected to career fragmentation and to the wage differences (not considering the abuse of atypical contracts). The right to an *aggregation* of insurance periods, according to European rules, is therefore generally safeguarded.

The *minimum requirements* to be entitled to unemployment benefits are less strict than those in most EU countries<sup>65</sup>, thus in relative terms they facilitate the right for workers with short and fragmented careers. A similar consideration can be made for pensions. In the French social security system the full-rate pension depends more on the person's age than on their completed career. Unlike countries such as Spain, Italy and Slovenia, the benefit calculation system does not depend on a minimum insurance period, so even a short and fragmented career entitles people to a benefit, with an amount proportional to the working period (including figurative periods).

## IT (Italy)

### *Overview of atypical employment contracts*

In the last 20 years, there has been a huge increase in the number of types of contracts in the Italian system. This has led to a sharp drop in the indicators of employment protection used by the OECD for international comparisons<sup>66</sup>. Numerous legislative measures have been taken in the field, the most significant of which are the Treu Law (1997), the Biagi Law (2003) and the Fornero Law (2012). The multitude of overlapping regulations has produced a bewildering array of *atypical* and *highly atypical* contracts. Estimates of the number of contracts of this kind depend on the classification criteria applied: there are 19 according to the Confindustria employers' federation, 26 according to the Employment Consultants' Study Centre, and 46 according to the CGIL trade union's job market department (including 26 types of subordinate positions, four types of contract positions, five types of self-employed positions and 11 types of "special" positions). Against such a disjointed backdrop, the one thing that all of them have in common is that they tend to be more flexible, less protected, less expensive and reasonably versatile. They make things on the job market particularly tough for young people, who find themselves in a state of *flex-insecurity* (Berton et al. 2009) that is more arduous than that of many of their European contemporaries because of the poor social protection standards. The situation is splintered and there is no clear functional specialisation in the system, so "it is possible for companies to engage in a kind of *contract shopping* as they seek out the most advantageous model and the best options for (foreseeable) strategic use, with a series of contractual types used to avoid the restrictions imposed by the law" (Carinci 2012: 531).

<sup>64</sup> Caldarini C., *Dire, fare, tutelare. L'azione sindacale di tutela individuale in cinque Paesi europei*, Ediesse, Roma, 2010. Bonoli G., "Classifying Welfare State: A Two-Dimension Approach", *Journal of Social Policy*, n° 3, 1997, pages 351-372.

<sup>65</sup> 122 days over the last 28 months or, for workers of fifty or over fifty, over the last 36 months.

<sup>66</sup> [www.oecd.org/employment/emp/oecdindicatorsofemploymentprotection.htm](http://www.oecd.org/employment/emp/oecdindicatorsofemploymentprotection.htm).

For the sake of brevity, in this report we will only examine four types of contract in detail: staff leasing, intermittent work, contract work, and ancillary casual work.

*Staff leasing* This is a type of triangular working relationship that was introduced in Italy in 2003 (with the Biagi law) to replace the temporary working relationship that was introduced in 1997 (with the Treu law). Workers are employed by an accredited staff leasing agency and they are sent to work for third parties known as “users”. Consequently, this type of work involves two contracts: a commercial agreement between the user and the agency, and an employment contract between the agency and the worker. Although the workers are employed by the leasing agency, they work under the management and supervision of the user. Therefore, they have to comply with the orders given by the user as they do their work, as if they were its own employees. They have the right to the same pay and the same benefits as the employees of the user (in terms of aspects such as information, health and safety, strikes and meetings). Workers essentially have open-ended contracts with the agencies, so they are subject to the general regulations for open-ended employment. When their services are not being used, the workers remain at the disposal of the agency, so they have the right to a “waiting” allowance. The amount is established by the relevant collective bargaining agreement and it must be at least €350 a month. The regular contribution rate applies. Fixed-term staff leasing is only allowed in certain cases (such as the need for temporary, one-off additions to the workforce or replacements for workers on sick leave)<sup>67</sup> and the rules for fixed-term contracts apply, with some exceptions<sup>68</sup>.

In terms of social security, leasing staff have to make the same contributions and they have the right to the same benefits as standard employees, including unemployment benefit<sup>69</sup>. On top of this, there is a special one-off unemployment payment of €700 from the Bilateral National Temporary Work Body (run by trade unions and associations of temporary work agencies) for anyone who has worked for at least six of the previous 12 months. The waiting allowance is also taken into account for pension purposes<sup>70</sup>. However, no unemployment benefits are available during periods of inactivity for the workers if they continue to be employed by the agency, even if they do not receive a waiting allowance.

*Apprenticeships* Apprenticeship contracts provide young people aged between 15 and 29 with an opportunity to combine work and training as they make the transition from school to the workplace. At any time, the agreements can be converted into open-ended employment contracts. The law provides for three types of apprenticeships: apprenticeships for professional diplomas and qualifications, apprenticeships for qualified professionals or trade contracts, and higher education and research apprenticeships. Finally, in a measure that reflects recent trends elsewhere in Europe, adults that have been made redundant can be given apprenticeship contracts regardless of their age. In terms of social security, apprentices have the right to family allowance, medical care and insurance coverage for accidents at work, occupational diseases, disability and old age. They do not have the right to receive temporary redundancy pay, unemployment benefit following redundancy or sick pay. Until 2012, apprentices had no right to

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<sup>67</sup> It is not necessary to specify the reasons for an initial working contract of no more than 12 months or for contracts for certain categories of disadvantaged workers specified by the law.

<sup>68</sup> The provisions for re-employment, the right to precedence, transfers following takeovers and overall duration do not apply.

<sup>69</sup> The exceptions are unemployment benefit, temporary redundancy pay and special unemployment rights for construction workers. Leased staff are not eligible for them even if they work in an industrial or building firm because their official employers are the staff leasing agencies.

<sup>70</sup> For further details, see [www.inps.it](http://www.inps.it).

any unemployment benefits whatsoever. Since 2013, they have had the same rights as normal employed workers in the event of unemployment.

*Intermittent work (or on-call jobs)* With these subordinate employment contracts, workers are at the disposal of their employers for intermittent work, as defined by national or local collective bargaining agreements. The employers are only obliged to pay a “waiting” allowance (20% of the wages) if the workers “choose” to guarantee their availability on call. The workers have the right to the same payment, social security and assistance conditions (in proportion to their hours of work) as someone of the same level with a normal employment contract. The benefits for sickness, injury, maternity and parental leave are also reduced in proportion with the working hours. Meanwhile, intermittent workers can claim the full amounts for family allowance and unemployment benefits for periods when they do not work. Unemployment benefits are only available if the workers are not contractually obliged to be on call, meaning that they do not receive a waiting allowance.

*Contract work* This label is used to describe a range of working relationships that lie somewhere between employment and self-employment, such as contracts for ongoing coordinated services (Co.co.co.) and project-based contracts (Co.pro.). The former are for set periods specified when the contracts are signed, while the latter are for the completion of a project. In both cases, the following can be said about the workers: 1) they are not subordinates because the client (company) does not have management and hierarchic powers over them, so they can organise their work relatively independently; 2) they are not entrepreneurs, because they do the work themselves; 3) they are not self-employed workers because they do not have a direct relationship with the market, they have an exclusive contractual relationship with a single client, and they are economically dependent. In terms of social security, contract workers have to make payments to a system that is managed separately from that for employed workers. It provides insurance for accidents at work, occupational diseases, old age, disability and survivors. Subject to compliance with certain conditions, the workers are eligible for some benefits, such as those for sickness, maternity, parental leave and family allowance. In addition, for some years now Co.pro. workers have been able to claim one-off severance pay. It is not of an entirely contributory nature and there are some very strict requirements for entitlement<sup>71</sup>.

*Ancillary casual work (with vouchers)* This is a special system for “ancillary” casual work whose nature means that standard employment contracts cannot be used. Payment is made with vouchers with a nominal value of €10 per hour of work. The final, net value for the workers is €7.50 (except for in the agricultural sector, where the conditions of the relevant contract are applied). Voucher-based work is officially covered for the purposes of pensions and insurance (for accidents at work and occupational diseases), but the workers have no right to income support (such as benefits for unemployment, maternity, sickness or family allowance).

#### *Social protection measures and obstacles to free movement*

Traditionally, one of the gaps in the Italian welfare system has been the lack of income support to act as a “social safety net” for those who lose their jobs.

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<sup>71</sup> In the year prior to the application, it is necessary to have worked for just one client, with a taxable income of less than €20,000, two months of unemployment and three months of contributions. In addition, it is necessary to have made one month of contributions in the year of the application (conditions in 2013).

According to the latest Eurostat figures (correct as of 31 December 2011), out of the 28 EU member states, Italy is in joint 23<sup>rd</sup> place (with Estonia) for spending on unemployment support, 26<sup>th</sup> place for spending on sickness and disability support and last place (28<sup>th</sup>) for spending on families, children, social housing and measures to fight exclusion. Nonetheless, overall Italian spending on social security is in line with the EU average both as a proportion of the GDP and in terms of per capita spending at purchasing power parity. This is entirely down to spending on old age and dependant's pensions, which has traditionally been the highest in Europe, largely due to the fact that Italy has the oldest population, and consequently now also the highest retirement age among all of the EU countries. According to a number of estimates, unemployment benefits in Italy cover less than 30% of unemployed people, compared to 36% in the United Kingdom, 50% in France, 70% in Germany, Spain and Scandinavia, and 80% in Belgium. There is also insufficient spending on activation policies and employment services (Source: OECD, [www.oecd.org](http://www.oecd.org)).

The foundations for unemployment protection mainly lie in the Constitution of 1948. The model is based on the principle of employment/work, with a degree of proportionality binding work, wages, contributions and benefits. However, the actual protection system in Italy is the product of a mass of measures that has created a mixed output. Over the years, it has been altered by numerous measures, which have mostly been shaped by emergencies and the negotiating power of different production categories who have demanded and obtained recognition on each occasion. Consequently, the protection system is incoherent and fragmented. It is correlated to the nature of the recipient's work contract, the size of the company, the production sector, the age of the recipient and the job market in the local area. The size, funds, coverage and access to the benefits vary significantly with the employment boundaries, which are based on the capabilities and the negotiating power that each production category has used over the decades to put pressure on the public authorities, who in turn are interested in gaining and stabilising approval.

With regard to the different forms of atypical work, in general all of the contracts involve *compulsory contributions*, as mentioned above. The problems mainly emerge when people try to *aggregate* the contributions that they have made to the "separate management system" (for contract work), in order to claim either unemployment benefit or a pension. The difficulties with unemployment benefit lie in the lack of compatibility between the Italian separate management system and the social security systems of other member states (see article 61 of EU regulation 883/2004)<sup>72</sup>. As for pensions, in principle the payments to the separate management system can count towards the right to a pension in other member states, but this must be "in accordance with the limits set by the system of the country where the contributions are used"<sup>73</sup>, as established by the Administrative Commission for the Coordination of Social Security Systems. For example, under Italian legislation it is not always possible to add the contributions for a period of work abroad before 1 January 1996 to contributions to the separate management system, which began operating on that date as a result of Italian law 335/1995. Workers with other pension contributions in Italy need to use the national aggregation scheme in order to make use of all of their past contributions. It should be said that the same applies for people in the same situation

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<sup>72</sup> The article states that "periods of employment or self-employment completed under the legislation of another Member State shall not be taken into account unless such periods would have been considered to be periods of insurance had they been completed in accordance with the applicable legislation".

<sup>73</sup> Administrative Commission for the Coordination of Social Security Systems, Decision no. H6 of 16 December 2010.

who have only worked in Italy: they too must turn to the national aggregation scheme in order to use all of their past contributions.

The circumstances in Italy highlight a problem that also applies in all of the other countries, albeit on a smaller scale: rather than cancelling each other out, the problems that workers with atypical contracts have accessing social protection often compound each other. Once again, an example is provided by the field of contract work, and in particular by Co.pro. workers. In order to qualify for their one-off severance pay (note that this is something completely different from unemployment benefit, to which they have no right), they have to meet *minimum requirements* that are so strict that in practice hardly anybody is eligible.

*Example* Let us consider the case of a worker with 17 years of insurance contributions in Sweden prior to 1993, six of which were actually spent working. He can only lay claim to three years of contributions to the separate management system in Italy, between 1997 and 2001. In Italy, he does not have the right to a disability allowance, but he should be eligible for an old-age pension using the national and international aggregation system. There may be grounds for a refusal because the worker is not registered for two or more compulsory forms of pensions in Italy, as provided for by article 1, section 2 of Italian Legislative Decree no. 42 of 2 February 2006. Nonetheless, it should be noted that he would definitely be registered for two different forms of pensions if he had worked in Italy before 1993. Therefore, this requirement could be satisfied by the principle of equal treatment of benefits (art. 5 of EC Regulation 883/2004). Failure to respect this principle would result in unequal treatment of a worker who had exercised his right to free movement.

Having the right to a foreign pension does not prevent a person from using the national aggregation system to combine periods of contributions. Established rulings by the European Court of Justice also safeguard the more favourable rules from internal legislation when applying EU provisions. Finally, it is worth noting that subparagraph 3(a) of article 53 of Regulation no. 883/2004 also only allows restrictions to be imposed by national legislation if external clauses apply (*“the competent institution shall take into account the benefits or incomes acquired in another Member State only where the legislation it applies provides for benefits or income acquired abroad to be taken into account”*).

## SE (Sweden)

### *Overview of atypical employment contracts*

The job market in Sweden stands out for the generally high protection rate of standard job contracts, even more than the other Northern countries<sup>74</sup>. However, the same rate is unusually low, both in relation to the European average and that of other Northern countries, as far as fixed-term contracts are concerned, currently involving approximately 15% of overall employment. The centre-right wing government, which has been in power since 2005, is insisting on the concept of *flexicurity*, based on lower taxes on salaries and changes to the social insurance systems in the event of illness and unemployment. The activation policies for the unemployed have been improved, new incentives have been introduced for employers recruiting barely

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<sup>74</sup> [http://resourcecentre.etuc.org/linked\\_files/documents/Sweden\\_Fiche.pdf](http://resourcecentre.etuc.org/linked_files/documents/Sweden_Fiche.pdf)

employable people and the use of fixed-term contracts, in their different forms, has been streamlined.

The Swedish trade unions are concerned about the weakening of the so-called LAS (*Employment Protection Act*), law protecting the general employment of the social security system and of labour market rules, even though the increase in atypical work is not prioritized as compared to other issues.

*Temporary work (allmän visstidsanställning)* As compared to other forms of atypical work, fixed-term contracts for temporary substitutions and for seasonal jobs are relatively well-regulated in Sweden, since they are governed by LAS and by the collective bargaining contracts which set their terms and give automatic rights to a permanent contract if the employment relationship is longer than 2 years over a 5-year period. Fixed-term contracts, on the other hand, with fewer rights than a typical contract, are those without a definite term, particularly hourly-based and on-call contracts. These are the most popular contracts with less social protection.

Frequently used in the service-producing and trade sectors, the *on-call contracts (behovsanställningar)* and the *hourly-based contracts (timanställningar)* are not covered by collective bargaining contracts; they do not comply with a work scheme, or allow one to plan one's week, often not even one's day and virtually never lead to a permanent job. The on-call contract is particularly disadvantaged in terms of social protection since it does not entitle workers to sick or paid leave. On-call contracts in Sweden are often offered by text messages and require full availability from workers. This kind of contract is mainly to be found among women and young people. 53% of workers with such contracts is aged between 16 and 24 (data from 2011). Fixed-term contracts include trial period contracts (*provanställning*), which automatically turn into a permanent job after 6 months, but the employer has the right to interrupt the trial period at any time.

*Temporary agency work (anställningar i bemanningsföretag)* Temporary agency work was not allowed in Sweden before 1993. This kind of contract is regulated by LAS and by collective bargaining. The Swedish trade unions have always opposed these contracts, since they tend to decrease the overall level of salaries in companies. In order to keep this problem under control, LO signed a collective contract with the agency work employers' organization so that at least those sectors covered by LO (mainly industry, trade and services) can ensure the same salary and working conditions for agency work employees as the other employees in the company. In 2010, 60,000 workers had a temporary contract, equal to approximately 1.5 % of employed people.

*Involuntary part-time (deltidsanställningar)* Involuntary part-time is very common, particularly among women and in the service-producing sector (elderly care, cleaning, etc.). This contract has the same rights and rules as typical contracts but barely meets all the minimum requirements to be entitled to unemployment benefit, particularly when working hours are below 50% and in any case has proportionally limited benefits in the event of maternity/paternity or retirement.

*Social protection measures and obstacles to free movement*

The Swedish social model is often used as a reference in international comparisons. It is essentially based on four pillars: strong trade unions (unionization at approximately 70% and coverage of collective bargaining agreements higher than 90%), flexible work legislation, active policies for the job market and family, welfare for all. In the background, high taxes and an effective public communication system. Sweden allocates approximately 30% of its GDP to social security. Its scheme covers all risks, partly dependant on living in Sweden and partly according to the work situation and is mainly funded by taxes and contributions. The compulsory scheme includes a basic insurance for sickness and maternity, old-age pension, invalidity and survivors, family allowances, occupational accidents and occupational diseases.

Social protection for maternity and paternity leave is quite progressive, as long as the working period before birth reaches 240 days<sup>75</sup>.

The old age pension system covers all individuals residing or having worked in Sweden and is divided into four kinds of pension: a basic pension (*inkomstpension*), based on an allocation system funded by social contributions, a government supplementary pension (*premiepension*), based on an individual capitalization system, a guaranteed pension (*garantipension*), financed through general taxation (a genuine safety net for those people who have not paid enough contributions to be entitled to pension) and finally the so called *tjänstepension*, a job-related supplementary pension, depending on the company or the industry<sup>76</sup>.

On average, 80% of the workers are covered by voluntary unemployment insurance. This is managed through an insurance fund system historically associated with the trade unions, even if formally independent. As for involuntary unemployment, atypical workers too are also generally entitled to benefits provided by social security. In addition, the State encourages all citizens to pay into one of the 29 voluntary funds managed by the trade unions, which pay a more generous benefit and are proportional to the last wage. A state fund called *Alfa-kassa* provides for payment of a basic benefit to workers who do not have any voluntary insurance. A set of restrictive measures introduced by the centre-right coalition has resulted in a reduction in trade union funds and union members. Despite providing for a voluntary private fund, now cheaper than in the past, the Swedish insurance system is still characterized by reasonable costs for the individual and by generous unemployment benefits, but at the sole condition of having paid for minimum insurance periods over a certain timespan, which can be difficult for occasional and irregular workers. From the social security viewpoint, it is not the atypical character of the contract that makes it most disadvantageous, but rather the fragmentation and the precariousness of the work career.

The unemployment insurance system consists of two parts: basic coverage depending on the work done and another one based on income. The first one is for all those workers who have not subscribed to any optional unemployment insurance or have not been members for a minimum period of 12 months; the other one is for *A-kassa* members who meet the requirement of a minimum 12-month membership, including 80 hours' work a month over a 6-month period. The income-based unemployment benefit is calculated according to the average salary of the last 12 months. In the first 200 days it amounts to 80% of the salary average of the last 12

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<sup>75</sup> Otherwise, only a basic allowance is granted (*Grundersättning*), equal to 180kr per day for no longer than 90 days.

<sup>76</sup> In most cases atypical contracts are not covered by collective bargaining contracts, so they are not entitled to a professional pension paid by the employer (*tjänstepension*).

months. Subsequently, it decreases to 70% of the average salary. The unemployment benefit cannot exceed 300 days (450 in the event of a child aged under 18).

In addition, in 2007 the government introduced an unemployment benefit with a maximum daily ceiling of 680kr. As a matter of fact, this made it impossible to receive benefit equal to 80% of the salary, as it was before. To overcome this problem, many union funds introduced a supplementary insurance which allows workers to obtain 80% of the actual salary.

All employment relationships in Sweden are *subject to contributions* and allow for *aggregation* of the working periods pursuant to EU rules. The social protection measures concerning atypical work contracts are basically the same as those relating to typical employment.

As for pension, a *minimum contribution period* is not required to be entitled to pension. Each contribution paid and residing year are taken into account for the calculation. As for contributory pensions, all taxable incomes automatically generate pension contributions. The problem lies with occasional workers with an income lower than 42.30% of the basic income; i.e. 18,824 kr in 2013, equal to approximately 2,000 Euro, since this income does not need to be declared so no contribution is generated. The mixed Swedish system is based on the *benefit calculation* principle which mainly protects "residents" but may be particularly unfavourable if not all contributions have been paid in Sweden, especially when someone's career is fragmented.

As for unemployment, most of the problems affect workers with very short-term contracts (hourly-based, etc.) rarely resulting in permanent jobs and which make it very difficult to meet the *minimum requirements* and be entitled to unemployment benefit (particularly with a working time of below 17 hours a week) or even to a maternity or paternity allowance.

*Example 1* It is the specific case of a 65-year-old waiter who spent lots of short periods working in Italy and Sweden. From the age of 25, he worked in Italy with training and internship contracts through which no contributions were made. At the age of 35 he moved to Sweden, where he still lives. For his first 10 years living in Sweden he studied and did labour market integration courses, without any income. In the following 20 years he worked occasionally for an hourly rate as a waiter in restaurants and pizzerias. During eight of his years residing in Sweden he returned to Italy for three months in the summer (24 months in total) to do seasonal work for an hourly rate. In Italy, he only has 48 weeks of contributions, so he does not meet the minimum requirement of 52 weeks and he therefore does not have the right to receive a pension. In all of his time in Sweden, he only had annual income of more than 42.30% of the basic income rate (meaning that he paid contributions that are valid for a pension) in 12 years (the years when he did not do seasonal work in Italy). This means that in Sweden he will receive a very low pension which would be supplemented by the full "guaranteed pension" (*garantipension*) if he had resided in Sweden for 40 years. Instead, only 28 years of residence will be taken into consideration (30 years less the two years in total which he spent in Italy). He will therefore receive 28/40 of the guaranteed pension (the full amount would be 7,046 Swedish kronor for married people and couples with children or 7,899 Swedish kronor for other people). The person in question will not meet the requirements for an Italian pension and he will have a very low Swedish pension. If he had resided in Sweden all of the time, and he had paid his contributions here and not in Italy, even with short atypical contracts, nowadays his pension would be considerably larger.

*Example 1* A 65-year-old waiter spent lots of short periods working in Italy and Sweden. From the age of 25, he worked in Italy with training and internship contracts through which no



contributions were made. At the age of 35 he moved to Sweden, where he still lives now. For his first 10 years living in Sweden he studied and did labour market integration courses, without any income. In the following 20 years he worked occasionally for an hourly rate as a waiter in restaurants and pizzerias. During eight of his years residing in Sweden he returned to Italy for three months in the summer (24 months in total) to do seasonal work for an hourly rate.

In Italy, he only has 48 weeks of contributions, so he does not meet the minimum requirement of 52 weeks and he therefore does not have the right to receive a pension. In all of his time in Sweden, he only had annual income of more than 42.30% of the basic income rate (meaning that he paid contributions that are valid for a pension) in 12 years (the years when he did not do seasonal work in Italy). This means that in Sweden he will receive a very low pension which would be supplemented by the full “guaranteed pension” (*garantipension*) if he had resided in Sweden for 40 years. Instead, only 28 years of residence will be taken into consideration (30 years less the two years in total which he spent in Italy). He will therefore receive 28/40 of the guaranteed pension (the full amount would be 7,046 Swedish kronor for married people and couples with children or 7,899 Swedish kronor for other people). The person in question will not meet the requirements for an Italian pension and he will have a very low Swedish pension. If he had resided in Sweden all of the time, even with nothing but atypical contracts, his pension would be considerably larger.

*Example 2* An Italian musician worked in Italy and in England, always with short seasonal contracts. In January 2013 he moved to Sweden where he worked as a musician for a short time and then lost his job in February 2013. When he applied to the Swedish social fund for unemployment benefit this was refused since he had only worked in Sweden for 2 months before being unemployed and in England, where he last worked 24 months before moving to Sweden, he could not prove he had worked 12 months with a minimum of 80 hours over a 6-month period, nor that he had worked 480 hours over 6 months with a minimum of 50 hours a month. Therefore, even if we add all working periods to work out the benefit according to the international convention, Sweden will grant him no income-based unemployment-, but only a maximum basic benefit amounting to 320 kr a day (depending on the hours worked) for a maximum of 300 days.

## SI (Slovenia)

### *Overview of atypical employment contracts*

In Slovenia, atypical work needs to be considered in a framework of a deep social transformation and of developing international relationships, where special attention is drawn to cross-border work.

Slovenian economic stability and its labour market were profoundly impacted upon by events such as the dissolution of the Federation, independence, the resulting worsening relations with Serbia and the conflict extending to Croatia and Bosnia-Herzegovina. Slovenia accounted for only 8% of the Yugoslavian population, yet it was the most prosperous of all Yugoslavian Republics and contributed to approximately 20% of GDP and 30% of Federal exports. Immediately after independence, Slovenia went through a tough recession: GDP dropped, unemployment and inflation rates rocketed and financial institutions suffered a deep crisis. This stage was overcome by a deep economic review, mainly consisting in joining the EU, curbing public expenditure, privatization, strengthening trade with Western countries, particularly Germany, Italy and Austria

and promoting tourism. Slovenia, however, still needs to deal with a high public and private sector debt as well as a bank system that is just about collapsing.

Today Slovenia has 2 million inhabitants, with 900,000 of them economically active (i.e. employed or looking for a job). 90% of the employed have a full time job and 83% have a permanent job (data from SURS, *Statistični Urad Republike Slovenije*, 2012). Standard jobs are therefore the prevailing form of contract. However, for some years now, a steady increase in precarious and atypical work has been noted. Women usually have more precarious jobs than men; young workers are more often in a precarious situation than older workers and cross-border workers are more likely to have temporary, atypical employment relationships than standard workers.

As a whole, a *fixed-term* job provides for the same conditions and rights as permanent jobs, except for the end-of-service conditions, where no notice is required. It is often used to find temporary replacements for members of staff, to cope with a temporarily increased workload or similar situations. Generally, the employee cannot renew more subsequent contracts with the same employer over a two-year period. Before the 2013 reform, this kind of contract did not entitle workers to severance pay.

In this context, *cross-border work* is a further form of atypicalness. This form of contract is growing in Slovenia, according to two opposing migration flows: one outbound, towards Austria and Italy, the other inbound, from Croatia and Hungary. Despite some undisputed disadvantages, such as uncertainty and discontinuity in terms of income and social benefits, in Slovenia many workers "voluntarily" choose cross-border and atypical jobs, as a permanent choice; hence the contradictory case of fixed-term workers, whose contract is renewed up to ten years in some cases.

Other forms of atypical work developing in Slovenia are tele-working (or working from home), temporary agency work, occasional work, seasonal work and various forms of internship or apprenticeship.

*Tele-working* According to SURS, tele-working involved over 46,000 workers in 2012, usually supported by communication technologies. In general, this work is considered positively by the government and employers, as it allows them to increase productivity and employment. In terms of flexibility, it offers some advantages, but more disadvantages when it comes to working conditions, control of health and safety, career development, access to training, as well as social isolation problems, blurred distinction between work and private life and lack of trade union participation and representation. As for the social protection and labour law, tele workers are entitled to the same collective rights as people working on the premises. Different conditions are often achieved through an additional agreement between the employer and the employee, usually more favorable for the employer than for the workers.

*Temporary agency work* This includes work contracts between an agency providing work, a work supplier (worker) and a user (client). It is a fast-growing phenomenon. According to SURS, the hours worked through agencies were just over 17,000 in 2009, well above 138,000 in 2010 (+700%) and already 138,000 in the first 6 months of 2011. According to the Slovenian trade union, these figures show how agency work is clearly turning into a crisis negotiation pattern. Still according to SURS, there over 160 temporary job agencies in Slovenia, with over 6,500 registered workers (data 2012). According to the trade union, at least as many workers work irregularly, beyond any control, and the number of violations is increasing due to few, inefficient labour

inspections. The 2013 reform will establish a 25% limit for employees hired through agencies in a company.

*Seasonal work* Lacking a clear legislative definition, it is a fixed-term job, often used in the building sector, agriculture, forestry and tourism. It is basically covered by the usual social security system, but is often characterized by fragmented working periods as well as irregular contributions or wages, with non-clearly defined working hours.

*Part-time occasional work (malo delo)* In Slovenia, part-time occasional work, less than 60 hours a month for a gross income of up to Euro 6,300 per year, is exempt from compulsory insurance contributions, thus does not entitle workers to social security benefits. Mainly designed for some categories excluded from the labour market (the unemployed, pensioners, students, other inactive people), these contracts are often used in order not to pay contributions and illegally used for jobs which should be standard. In 2011 a labour market reform, to extend mini-job contracts based on the German model, was defeated by a referendum, with 80% of votes.

*Internship and apprenticeship* There are several contracts regulating students' jobs and, more generally, young people in training. Students' temporary work is not subject to contributions or taxes if performed within the limits set by law. It does not entitle people to social security benefits and is often used for workers who are not studying. Apprenticeships apply to young people who have completed basic training, aged 15 or more, attending a vocational school whilst doing an apprenticeship in a company. They have limited obligations and social security benefits (1 year apprenticeship equal to 6 months of social security benefits). Apprentices are insured for occupational accidents and occupational diseases and before 2011 they used to be entitled to unemployment benefit. Post-diploma organized training in the workplace, for maximum one year, grants trainees the same social rights as regular permanent employment. These contracts imply a minimum legal wage (784 Euro a month in 2013- gross), but real pay does not exceed 70% of the average salary.

#### *Social protection measures and obstacles to free movement*

In the shift from the Communist sphere of influence to the European Union, Slovenia has a quite low unionization rate (approximately 26% according to OECD), but is protected by collective bargaining (96% according to Eurofound). Another feature of the Slovenian system is moderate social protection expenditure (25% of GDP according to Eurostat), but still the highest of all former Communist countries. This figure is expected to decrease due to heavy adjustments to public expenditure decided in recent years. 2013 saw a pension reform being enacted, progressively increasing the pensionable age, taking men and women to the same level. At the same time, the budget law led to some social benefit restraints in terms of unemployment, sickness, old-age and family allowances.

As a whole, as briefly reported, most contracts are subject to the *requirement to make contributions* in Slovenia, thus entitling workers to an *aggregation* of periods according to the EU coordination rules. Additionally, Law 80/2010, enacted in 2011, has reformed the unemployment insurance system, making it compulsory for both employees in the public and private sector and for the self-employed and apprentices. Since it is a form of contribution with a minimum requirement of 9 months insurance coverage over the last 24 months, unemployment benefit can be exported based on coordination rules. Slovenian citizens working abroad who are not covered by compulsory insurance might subscribe to a voluntary unemployment insurance. Under

economic and financial crisis pressure, those few contracts not offering standard guarantees - basically occasional work and different forms of internship and apprenticeship - are used increasingly by the labour market, thus lessening workers' benefits.

## UK (United Kingdom)

### *Overview of atypical employment contracts*

There are three main forms of employment contract in UK: Contracts of service, Contracts for services and Agency worker contracts.

The majority of UK workers continue to work on typical standard contracts (contracts of service), that is full-time permanent contracts. At February 2013, 21.65m people (73 per cent of those in employment) were employed in this way. Of those working full-time 18m were working as full-time employees (in other words were working under contracts of employment which gave them access to the full range of statutory employment rights). The remaining 3m (in legal terms defined as 'workers') had employment contracts defined as 'contracts for services' and therefore were treated as self-employed for some social welfare protection. Those who are 'workers' as opposed to 'employees' are more likely to work longer working weeks, with 34.5 per cent of men and 15.7 per cent of women in that category working more than 45 hours.

It is important to note that the mere fact that a contract is not 'typical' does not mean per se that workers engaged under such contracts are necessarily disadvantaged in terms of the social protection norms available to them. In principal the obligation of 'no less favorable treatment' applies in the case of part-time workers, fixed-term contract employees, agency workers (after 12 weeks' employment with the same employer).

The typical standard contract is normally defined as a *contract of service* whereby the employee agrees to work, under the direction of the employer, in return for pay. A person who is employed under a contract of employment will have access to the full range of employment and social security rights, although these may be dependent on length of service<sup>77</sup>.

A 'worker' is someone whose work is regulated under a *contract for services*. Here the law tests whether the individual has a degree of control over her/his work, can for example determine how it is done and when, utilises their own equipment and takes responsibility for the payment of taxes and National Insurance. While this definition includes genuinely self-employed workers, the UK courts have often extended it to include workers who might otherwise be seen as being directly employed<sup>78</sup>. Those defined as 'workers' have limited employment and social security rights. They have for example, no right to protection against unfair dismissal (no matter how long the period of employment) and limited rights to welfare protection. 'Workers' are entitled only to rights under National Minimum Wage legislation<sup>79</sup>, the regulations governing the protection of part-

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<sup>77</sup> For example, for rights to protection against unfair dismissal an employee must have worked for at least two years for the same employer and this is also the case with regard to collective dismissals.

<sup>78</sup> See: *Carmichael and another v National Power plc.* [2000] IRLR 43.

<sup>79</sup> National Minimum Wage Regulations 1999

time workers<sup>80</sup> and by the working time regulations<sup>81</sup>. They are not however covered by the fixed-term workers regulations<sup>82</sup>, which give the right to 'no less favorable treatment' only to employees.

Over the last decade, the use of *temporary agency work* has increased markedly. Estimates by the European Confederation of Private Employment Agencies for the UK suggested that in 2005 there were some 6,000 officially designated employment agencies operating through 14,400 branches and sourcing 1.2 million workers a day (5% of the national workforce). These temporary agency workers made up 86% of all workers on a temporary contract. Agency work is regulated by the Agency Workers Regulations 2010<sup>83</sup> which give workers hired through agencies the right to equal access to workplace facilities and after a period of 12 weeks' work give a right to equal treatment with regard to pay and other basic working conditions.

Broughton, in her Eurofound study, defines very atypical contracts as those 'based on the principle of 'absolute' divergence from the standard employment relationship' and as encompassing three main categories of workers: Workers with no employment contract; Workers who report working a very small number of hours (less than 10 hours a week); Workers who hold a temporary employment contract of six months or less. To these three categories can be added apprentices, unpaid family members and those in freelance or false self-employment.

*Workers on Zero hours contract* These are contracts where employees work only when requested by the employer and where there is no contractual obligation to offer a specific amount of work. There is little data as to the number of workers on zero hours' contracts. Broughton suggested that around five per cent of workplaces employed at least some workers on zero hours' contracts (2010).

*Workers on a very small number of hours* - Hakim (2004)<sup>84</sup> calculated that for the UK this around eight per cent of the UK workforce worked fewer than ten hours a week. Recent ONS data shows that 470,000 people had usual working hours of less than six hours a week between December 2012 and February 2013. Women are much more likely to have contracts with very short working hours and of the 470,000 identified in that category 161,000 were male (34 per cent) and 309,000 (66 per cent) were female. Of those working fewer than six hours a week, 304,000 (65 per cent) were categorised as employees working under contracts of employment, while 148,000 (32 per cent) were classified as 'self-employed'. Thus while just 14 per cent of the UK workforce is classified as self-employed, a higher proportion of the self-employed work a very small numbers of hours.

*Temporary contracts of six months or less* There is little data on the length of fixed-term contracts. Broughton suggested that most fixed-term contracts in the UK will be of less than 12 months induration.

*Apprentices on government or employer training schemes* 151,000 mainly young people were on government supported training and employment programs in February 2013. This number has

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<sup>80</sup> The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000

<sup>81</sup> Working Time Regulations 1998

<sup>82</sup> The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002

<sup>83</sup> <http://www.legislation.gov.uk/uk/si/2010/93/contents/made>

<sup>84</sup> Hakim, C. (2004) Key Issues in Women's Work: Female Diversity and the Polarisation of Women's Employment (Contemporary Issues in Public Policy).

grown significantly, with a 30.5 per cent increase registered between February 2012 and February 2013.

*Freelance or false self-employment* This is where the worker declares or is declared to be self-employed and therefore excluded from certain National Insurance and taxation regimes but where consequently she/he is also excluded from a range of welfare protection. There are no accurate figures as to how many workers fall under this category but from the 4.204m persons who were declared as being self-employed in February 2013, three million are working full-time. Males are more likely to be declared as self-employed than females, with 70 per cent of all self-employed workers in that category.

*Unpaid family members* In February 2013 just over 100,000 people were identified as unpaid family members, a figure which rose by 5.7 per cent over the previous year. In this category they are unlikely to have access to social security rights available to employees or even to workers.

#### *Social protection measures and obstacles to freedom of movement*

Employment in the UK is characterized by a relatively low level of social protection. In addition social protection is based on the model of the full-time, permanent worker, and there are no measures which specifically seek to address the position of those with atypical contracts.

In contrast to many other EU countries, UK workers are largely unprotected at work. For example, they have no entitlement to claim that they have been unfairly dismissed until they have worked for the same employer for more than two years. UK social security protection has been under increased attack over the last two to three decades. There has been a move away from benefit levels which are linked to earnings and thus are aimed at providing a substitute income to those who cannot for whatever reason work. Instead, much social security protection is based on flat-rate payments. These inevitably are low, as they are established at a level that will not encourage people to stay on benefits and it is thus the lowest levels of pay that are used as a basis to determine the level of benefit provision. Within this overall panorama is the continued fall in trade union representation in the UK. Just 6.4m workers were members of trade unions in 2011, compared to more than 13m in 1979. Trade union density fell to 26 per cent.

Social protection for those who are out of work is provided under the Job Seekers' Allowance (JSA). The *eligibility conditions* for JSA require that an individual has actually paid Class 1 contributions<sup>85</sup> in respect of one of the last two tax years and must have had relevant earnings for the base year on which the contributions have been paid or treated as paid.<sup>86</sup> JSA is paid for a maximum of six months, after which individuals who are still out of work can claim income-based Jobseeker's. Those whose gross earnings are less than the 'lower earnings limit', currently £109 (€124.26)<sup>87</sup> a week do not pay National Insurance contributions but also have no entitlement to contribution-based JSA. Only 60 per cent of those who are unemployed have been in a position to claim the allowance. The type of contract which individuals have is the main reason for this gap in provision between those out of work and those entitled to JSA.

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<sup>85</sup> Class 1 contributions are the standard contributions paid by those in work.

<sup>86</sup> A person must actually have paid contributions with an earnings factor of 26 times the lower earnings limit in one of the last two contribution years (this means that they must have earned at least £2,834 (€3,230) a year. They must also have worked a minimum of 26 weeks during one of the last two complete tax years and they must have paid or been credited<sup>86</sup> with contributions based on having earned at least £5,450 (€6,213) a year in both of the last two years before the claim is made.

<sup>87</sup> Calculation on basis of £=€1.14

Atypical contracts make it also more difficult for workers to become eligible for the State Pension which is based on the contributions made throughout working life from the age of 16 to reaching the state pension age. The following table shows how contract type impacts on entitlement to both the JSA and the State Pension.

#### Forms of atypical work and their consequences on social protection entitlement

	Consequences on JSA	Consequences on State Pension entitlement
<b>Agency workers</b>	Their likely irregular periods of work may also mean that they do not have a salary level which is sufficiently high to pay NI contributions, thus excluding them from JSA. They are also more likely to be defined as 'self-employed' and thus are ineligible for JSA.	They are likely to meet current the requirements for State Pension but only if they have the NI contributions over 30 years (35 years in 2016).
<b>Fixed-term workers</b>	Most fixed-term contracts are of less than 12 months, and working on such short contracts is likely to put the worker in a position of ineligibility for JSA.	Breaks in employment affect the number of years of contributions.
<b>Part-time workers</b>	Workers on these contracts are more likely to be excluded from entitlement to JSA on the basis of their earnings being below the threshold for National Insurance contributions.	Part-time workers are predominantly female and are more likely than male workers to have significant breaks in employment; consequently they may not have the 30 years of qualifying contributions.
<b>Freelance and falsely self-employed</b>	Those workers who are required to declare themselves as self-employed have no entitlement to JSA under the eligibility conditions.	They have entitlement to the basic State Pension but not to the additional state pension (S2P).
<b>Apprentices</b>	The national minimum wage for apprentices is below the LEL and therefore is outside the National Insurance contribution requirement. There is thus no entitlement to JSA.	Apprentices are not likely to have sufficient earnings to pay National Insurance contributions.

INCA-CGIL in the UK acknowledges that there are enormous problems over the exchange of information within Member States and that it is those workers with the most vulnerable employment contracts that are most affected by the rules for benefit entitlement which vary dependent on the country. The main area of difficulty is with the JSA for those coming from Italy or going to Italy. People with atypical contracts rarely satisfy the contribution conditions to be able to apply for Jobseeker Allowance. Furthermore if Italian workers in the UK are working in poorly paid jobs with uncertain conditions and cannot find anything better, they tend to leave their jobs and return to Italy. If this occurs then, even if they satisfy the contributions conditions, they

will not have entitlement neither in the UK if they stay and look for another job nor in Italy, if they go back, because they left their job voluntarily.

*Example 1 (worker choosing to leave work)* Stefano (not his real name) is 24 year old of Italian origin who has been working in the UK, earning. He had been earning around £1,700 a month (€1,938) before tax and National insurance deductions. Stefano had worked for at least two years in the UK and had paid his contributions. However, Stefano made the mistake of resigning from his job without a reason acceptable to the DWP. As a result it was decided that he was not entitled to JSA as by leaving his job he had deprived himself of the right to claim the benefit. In the case of *St Prix v. Secretary of State for Work and Pensions [2011] EWCA Civ 806*, the Court of Appeal held that a pregnant woman who voluntarily left employment on account of her pregnancy did not retain the status of worker; leaving work meant that she was no longer a worker.

*Example 2 (part-time contracts)* In the case of *SS v. Slough Borough Council [2011] UKUT 128 (AAC)* the claimant was a Dutch national and EU citizen. She worked part-time, working 13 hours a week for £5 an hour, thus earning just £65 a week. She also received child benefit of £28.40 a week and child tax credit of £72.38 a week. Having lived with friends for some time she and her children eventually moved into rented accommodation at a monthly rent of £895 and she claimed housing benefit, a social security provision which UK citizens in her position would have been entitled to. The local authority argued that the part-time work she did was insufficient 'effective and genuine' to qualify as work under EU law but the tribunal allowed her claim on the basis that she was a worker, even though she required public funds to survive economically.

*Example 3 (self-employed contracts)* In the case of *Tilianu v. Secretary of State for Work and Pensions [2010] EWCA Civ 1397*, the Court of Appeal concluded that a self-employed person could not retain the status of a self-employed person when "unemployed", so as to be able to claim income JSA, implying that the self-employed can never be "unemployed" in the same sense as a worker.

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