PART 3

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

Stefano Giubboni

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[29]) 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"[30]. 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." [31]

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

[29] 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.
[30] European Court of Justice, 03 July 1986, Case 66/85, Lawrie-Blum.
[31] 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[32]. 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)[33], 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[34].

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"[35].

[32] Cf. P. Tosi, F. Lunardon, *Introduzione al diritto del lavoro. 2. L'ordinamento europeo*, Laterza, Roma-Bari, 2005, p. 93 ff.
[33] Cf. N. Countouris, *The Changing Law of the Employment Relationship*, Ashgate, Aldershot, 2007, p. 57 ff.
[34] Cf. more recently European Court of Justice, 7 September 2004, Case C-456/02, *Trojani.*
[35] 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[36]. 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"

[36] 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[37]. 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 […]".

[37] 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"[38] 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 nation 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.

[38] 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[39].

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[40]. 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

[39] 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 R*ivista del diritto della sicurezza sociale*, 2010, p. 193 ff.

[40] 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[41], the European Court of Justice reversed previous decisions[42] 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[43] 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" [44]. 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

[41] *Supra*, note 2.
[42] 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.
[43] The benefits in question were those for disabled young people in the Netherlands mentioned in the previous footnote.
[44] 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[45].

[45] 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