



MoveS Webinar “New types of work in the light of free movement and social security coordination”

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Filip Van Overmeiren



Filip Van Overmeiren is a Professor at Ghent University and at Brussels University and Director within Deloitte Belgium. He is a lawyer and academic with more than 15 years of experience in national and international social law, with a specialization in cross-border employment and international social security law and a specific interest for international coordination of social security, free movement of workers, posted workers and the social status of individuals. He has a broad network in both academia as within national and supranational institutions. He is a regular speaker at conferences with several publications regarding international employment.



Introduction to MoveS

EU-wide network
of independent legal experts
in the fields of
free movement of workers (FMW) &
social security coordination (SSC)

Key facts about MoveS



- Funded by the European Commission (DG EMPL units D1 'FMW' and D2 'SSC')
- 32 countries covered (EU/EEA/CH)
- Implemented by Eftheia, Deloitte Advisory & Consulting, University of Ljubljana, University of Poitiers
- Four-year project (2018-2021)

Objective 1

- To provide high-quality legal expertise in the areas of FMW and SSC
 - by means of **Legal Reports**
 - by means of monthly **Flash Reports**
 - by means of **replies to ad hoc requests**

Objective 2

- To disseminate expertise and increase experts' and practitioners' knowledge
 - by organising **seminars**
 - by **sharing information**
 - by **building networks between stakeholders**

Seminars

- Ca. 10 one-day seminars a year
- Audience: Representatives of competent authorities and institutions, social partners, NGOs, judges, lawyers and academics

Cooperation and networking

- MoveS webpage (EUROPA)
<http://ec.europa.eu/social/main.jsp?langId=en&catId=1098>
- MoveS LinkedIn group:
MoveS – free movement and social security coordination
<https://www.linkedin.com/groups/4291726>



New types of work in the light of free movement and social security coordination

Our speakers today



Prof. Charlotte O'Brien

Charlotte is Professor of Law at the University of York, specialising in EU citizenship, with a focus on free movement and welfare. She has been an analytical expert with MoveS/Fressco since 2014. She was the Principal Investigator on the ESRC funded The EU Rights Project, working with and advising EU nationals and analysing the legal, administrative and practical obstacles they faced exercising their EU rights in the UK, and has recently been awarded an ESRC Governance After Brexit grant, to conduct a legal action research project on EU citizens' rights.



Mrs. Alice Welsh (PhD)

Alice is a PhD student at the University of York. Her research focuses on EU Citizenship and the rights of part-time and atypical workers in the UK to access welfare and residence rights. Alice is also a research fellow at Public Law Project working on the administrative law challenges in the new EU Settlement Scheme.



Prof. Jean-Philippe Lhernould

Jean-Philippe Lhernould is a Law professor at the University of Poitiers. He has written several books, reports and papers in the area of French and European labour and social security law. He is a board member of French and European social law journals. He works as an external expert for the European Commission (DG EMPL). He is involved in MovesS (formerly FresSco).



Dr. Nicolas Rennuy

Dr Nicolas Rennuy is a lecturer in law at the University of York and an Analytical Expert for MoveS. He specialises in EU social security law and the free movement of persons.



Anachronisms and consequent exclusions in the free movement regime

Prof Charlotte O'Brien
University of York
MoveS Analytical Expert

Atypical work and equality



- Disability and changing labour markets
- Active labour market policies – EU and national
- Disability and activation
- Care and conditionality
- Atypical work the frequent result

*"The **work-related** limitations imposed on persons with disabilities carry a significant risk of isolation and exclusion, the 'benefit trap' appearing to be one of the biggest obstacles to their labour market participation."*



- Problems with 'part of the normal labour market'
 - from Case 344/87 *Bettray* to Case C-316/13 *Fenoll*
- Problematic hours/earnings thresholds
- Requirements of stability and consistency
- Presumption of marginality
- Gaps in Directive 2004/38
 - Grounds for retaining worker status

Atypical work and welfare



EUROMOD WORKING PAPER SERIES

EM 18/18

Income protection of atypical workers in the event of unemployment in Europe

H. Xavier Jara and Alberto Tumino

October 2018

- Insecurity, variability, low pay
- Below a living wage
- Need supplementary income
- SNCBs
- Disability
- Care

 [European Journal of Futures Research](#)
December 2013, 1:18 | [Cite as](#)

Part-time work: Atypical? Precarious? Normal?

Authors Authors and affiliations

Tobias Hinterseer 

'Atypical' day at the office
Tackling the problems of 'atypical' work

EU social security coordination and equality



- Limits to exportability
- Restrictions impact on certain groups the hardest
- Welfare reforms allow redefinition of benefits
- Gaps in Reg 883/2004
 - Disability benefits
 - Benefits for welfare of children

EESSI Public Directory of European
Social
Security Institutions

Limits to EU conception of disability equality



EU Agency for Fundamental Rights

- Disability as hindrance to the exercise of professional activity – Case C-354/13 FOA; Case C-395/15 *Daouidi*
- Focus on impairment, and on direct effects upon work
- But impairment in combination with PCPs can be disabling – Case C-363/12 Z
- EU FM and SSC rules can be *disabling*
- Ditto policies of activation: compare context of dismissal of the active to policies seeking to activate the 'inactive'

Equality gaps in free movement

United Nations



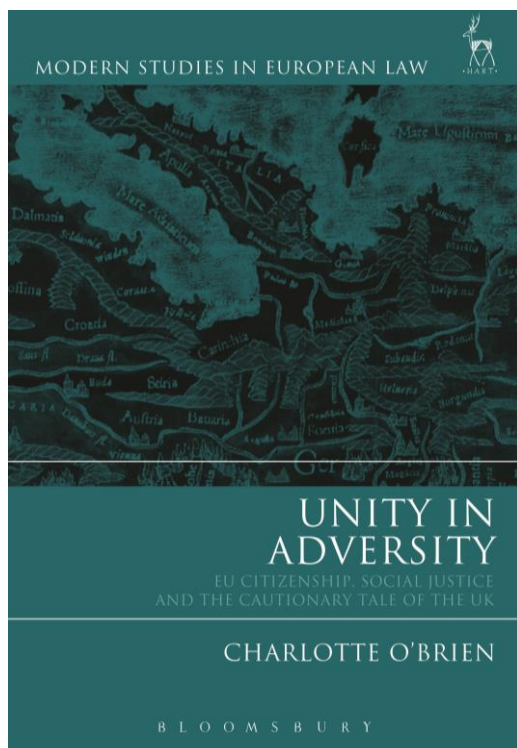
**Convention on the Rights
of Persons with Disabilities**

Freedom of movement (art. 18)

48. *The Committee is concerned at the barriers faced by persons with disabilities and persons with family members who have disabilities when moving to live or work in another European Union member State, irrespective of the length of the stay.*

- Being activated 'out' of benefits but not activated into well paid work
- Care penalty and disability employment penalty
- Gaps between benefit coverage in the home and host state
- Need to scrutinise:
 - welfare as an equalizing tool
 - the disabling effects of EU and national laws
 - the inevitable gender impacts and implications for child welfare

Indirectly discriminatory obstacles



- Changing labour markets and changing welfare systems
- Disjunctures with EU law - disproportionate impact
- Exclusions from primary right of EU citizenship
- Address status, retention and disability gaps
- General principles and the Charter
- Barriers to mobility for the purpose of cross border employment and occupation?
- Mainstreaming disability equality, gender equality and child welfare into FM & SSC



The precarity risk for the free movement of part-time and atypical workers

Mrs. Alice Welsh (PhD)
University of York

New work and growing risk



- Work has become more 'flexible' and diverse
 - **More part-time work, irregular, casual, temporary or zero hours contracts are available**
- The areas of work that are increasing are also more likely to increase precarity for workers
- Now, workers must mitigate the risk of low demand, less hours, low wages, no holiday or sick pay etc.
 - **Multiple jobs**
 - **Reliance on social security to cover gaps**
- This sits in a broader shift of risk and cost-cutting flexibility (Prassl 2018, Macdonald and Giazitzoglu 2019)

The important of Worker Status



- EU citizens residing and working in a host member state may also face these risks
 - **The prohibition of discrimination should help EU citizens to mitigate the precarity in the same way as nationals from that member state.**
- EU Citizenship does not give sufficient protection to non-economically active citizens
- Work is often the best route for EU citizens to acquire these rights.
 - **Worker status as one category under Article 7 of Directive 2004/38 is required to have a right to reside which grants equal treatment (Art 24)**

CJEU approach to “worker”



C-66-85 *Laurie-Blum*

‘a person who performs services under the direction of another person in return for remuneration.’

C-53/81 *Levin*:

‘Part-time employment... constitutes for a large number of persons an effective means of improving their living conditions, the effectiveness of Community law would be impaired... if the enjoyment of rights conferred by the principle of freedom of movement for workers were reserved solely to persons engaged in full time employment’

‘to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary’.

CJEU approach to “worker” (2)



- This approach is broad and, as cases have shown, can encompass a large variety of work:
 - Case C-171/88 *Rinner-Kuhn* - 10 hours a week
 - Case 14/09 *Genc* - 5 hrs a week. Consideration of aspects characterising an employment relationship
 - Case C-1/97 *Birden* – long hours and low pay
 - Case C-139/85 *Kempf* – income can be below minimum subsistence levels
 - Case C-357/89 *Raulin* – Short-term, on-call contract
- The difficulty is in how Member States interpret and apply this definition.

The UK's approach:



FINANCIAL TIMES

Opinion **UK immigration**

Free movement within Europe needs to be less free

David Cameron NOVEMBER 26, 2013



Press release

Minimum earnings threshold for EEA migrants introduced

Published 21 February 2014

From: [Department for Work and Pensions](#)

*'...So in order to help ensure benefits only go to those who are genuinely working a minimum earnings threshold will be introduced as part of the government's long-term plan **to cap welfare and reduce immigration...**'*



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The UK: Minimum Earnings Threshold (MET)



- (1) a threshold of (£166 pw);
- (2) genuine and effective test
 - **In theory, a two tier test complies with EU law.**

Problems with the MET (1)



Part (1) the threshold:

**The current threshold is £166 pw (2019/20) = Just over 20 hours
(minimum wage: £8.21)**

Average earnings over 3 months

Best case scenario;

- May not be earning minimum wage
- May be under 25

Does not seem comply with EU case law on worker status

Problems with the MET (2)



- Part (2) the genuine and effective test
- advice for decision makers
 - **presumption that part-time work is likely to must be marginal and ancillary:**
'work that is part time or low paid is not necessarily always marginal and ancillary '
 - **persistently implying the importance of earnings and hours again**
 - **Failing to include holiday/sickness pay as 'aspects characterising an employment relationship' (Case 14/09 Genc)**
 - **'...person's primary motivation in taking up employment' should be considered**
 - Despite C-53/81 *Levin* clearly stating that motivation is '...of no account'

Problems with the MET (3)



- No recognition of capacity to work
 - **Recognised for UK citizens if you are a lone parent, have a disability or are a carer**

- **Time spent on caring responsibilities not considered 'work'**
 - Although carers allowance restricts earnings and requires 35 hours a week of care responsibilities

Impact of a negative MET decision



- No worker status = no access to many benefits
- Beyond the refusal of benefits
 - Permanent residence
 - Break in continuity of residence
 - 5 years continuous lawful residence required
 - Post-work rights
 - Retaining worker status - requires worker status first
 - Derivative rights (Case 310/08 *Ibrahim* and Case 480/08 *Teixeira*)

Is the MET determinative?



Casework examples of decisions on workers status:

'your income... does not meet the minimum earnings threshold. You are not entitled to Housing Benefit'

'I am satisfied that you care for your mother who is blind for 35 hours a week and receive carers allowance of £62.10. I am therefore of the view that the housekeeping (work) which you provide **could only be** marginal and ancillary to the support you give to your mother as a carer..'

'Due to the short term temporary nature of your last job it has been determined that this employment was not genuine and effective'

Conclusions



- The UK is not the only member state to do this – but it is the highest threshold.
- While decisions can be challenged:
 - Requires access to support and expertise
 - Delay in the correct decision
- As the scope of work which qualifies for worker status under EU law is allowed to decrease, the variety and availability of precarious work increases.

Conclusions



- There is a risk that the test will become:
 - **Are EU citizens economically active *enough* for welfare and residence rights in a host member state?**
- Without further guidance or intervention many EU citizens in part-time and atypical work may struggle to access rights



Telework versus free movement of workers (FMW) and social security coordination (SSC)

Prof Jean-Philippe Lhernould,
Université de Poitiers

I – Telework and SSC



- Telework is a form of organising and/or performing work, using information technology, in the context of an employment contract/ relationship, where work, which could also be performed at the employer’s premises, is carried out away from those premises on a regular basis (European framework agreement on telework, 2002)
- Cross-border telework? In border areas or not !
 - A way to address the “commuting issue”
 - Work life balance
 - Work quality
 - Rationalisation of the use of working area

Challenges



Determination of the legislation applicable (= country of insurance)

- Story: An important telecommunication company has its headquarters in Luxembourg (LU), where several hundred people are employed. In accordance with the European social partners' Framework Agreement on tele-work of 16 July 2002 and the collective agreement signed in LU, the employer plans to allow the employees who reside more than 20 minutes away from the company and who have certain functions to telework 3 days a week. 75 employees whose residence is in France are interested.
- The company head hesitates to sign the agreement, wondering where the contributions of these employees would have to be paid...

Other challenge: competent country for UBs

Challenges



- Shall a teleworker be considered as working in one single Member State?
 - If so, which one?
 - Alternative solution: place of residence?
- Shall a teleworker be considered as performing his/her activities in two Member States?
- Could the teleworker be seen as a posted worker if some circumstances are met?

Challenges | looking ahead



New rules of conflict of law?

- Reconsider the notion, included in Regulation (EC) No. 593/2008 (Rome I), according to which the place where the activity is performed is the place from which the employee habitually carries out his or her work in performance of the contract?
- Refer to the notion of the closest link of the activity to a Member State in order to determine the applicable legislation?



II – Telework and FMW | selected issues



For the purpose of the right to stay rules (including the family members' right to stay), can a teleworker be classified as a migrant worker?

- Laura, an EU citizen from Italy, does virtually full-time telework from Austria where she resides. Her employer is established in Germany. Her registered partner, Mauricio, is from Argentina
 - Does Mauricio have the right to stay in Austria by virtue of FMW rules (45 TFEU / Dir. 2004/38)
 - Is Laura a migrant worker in Germany (where employer is established)?
- Sonia, a Romanian citizen, has concluded a part-time job with a Romanian on-line newspaper. She resides in Paris where it is agreed between parties that she does telework for the equivalent of one day per week. She draws little income from this activity and may need social assistance. She has no other job.
 - Is Sonia a worker under Article 45 TFEU?

- Can a teleworker who performs only a minor part of his activity from home (which is not the country of origin) be considered as a migrant worker in the country of residence?
- Or is he/she a migrant worker in the country of main performance of activity? Or country where company is established?
 - Lola, a Spanish citizen, works four days a week in Brussels (BE) where the company's office is located, and one day from home in Lille (FR). His son (who is also Spanish) is a university student in Lille.
- Can the son claim in FR a student grant on the grounds of his status as family member of a migrant worker in FR?
- Should such a grant rather be rather claimed in BE where Lola would be a migrant (frontier) worker?
- In other words, is Lola a migrant worker in FR, in BE or in both?



Non-standard work and social security coordination

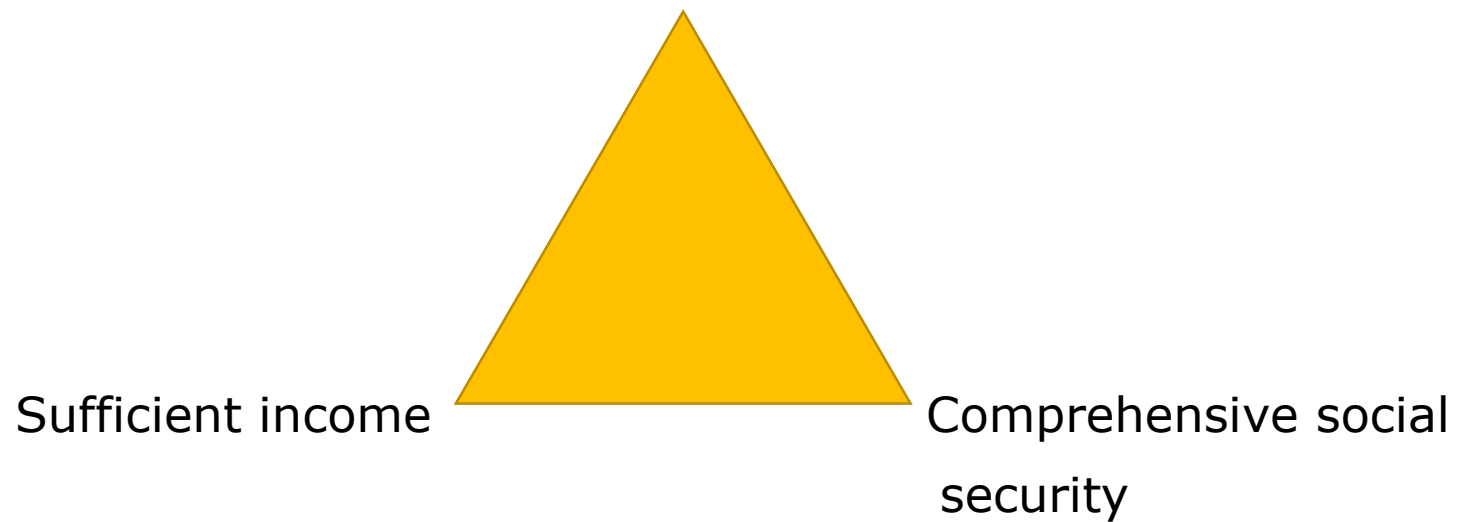
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Standard work

- Full-time
- Open-ended
- Employment contract

Standard work



Work in social security law



Assumption in national law:

- Standard work

Assumption in EU law:

- Standard work

Reality:

- Non-standard forms of employment
- New forms of self-employment

Non-standard work in social security law



- Treated as standard work: comprehensive social security coverage
- Treated as self-employed work
- Treated as standard work or self-employed work, but with exclusion from certain/most branches
- Category other than employed or self-employed work
- Treated as inactivity (ignored)

Which social security law applies? Which Member State is competent?

Does Reg. 883/2004 apply?



- Art. 2(1) Reg. 883/2004: 'This Regulation shall apply to nationals of a Member State [...] who are or have been subject to the legislation of one or more Member States [...]'
- Is a person 'subject to Estonian legislation'?
 - Yes, if he/she is 'covered, even if only in respect of a single risk, compulsorily or on an optional basis' under Estonian law
 - C-85/96 *Martínez Sala*; see also Case 39/76 *Mouthaan*
 - E.g. insured on basis of residence -> Reg. 883/2004 applies

Which law applies?



- Only one law (art. 11(1) Reg. 883/2004)

Person ...	Applicable law
... performs employed/self-employed work in one MS	MS of work (art. 11(3)(a) Reg. 883/2004; <i>lex loci laboris</i>)
... performs employed/self-employed work in more than one MS	MS of residence or ... (art. 13 Reg. 883/2004; simultaneous activities)
... does not work (enough)	MS of residence (art. 11(3)(e) Reg. 883/2004; <i>lex loci domicilii</i>)

Which law applies?



- E.g. works in Austria, lives in Hungary

Person ...	Applicable law
... performs employed/self-employed work in one MS	MS of work (<i>lex loci laboris</i>)
... does not work (enough)	MS of residence (<i>lex loci domicilii</i>)

- Is non-standard work in Austria work?
 - Income threshold: € 438/month
 - ...

Which law applies?



- Art. 1(a) Reg. 883/2004:
 - “activity as an employed person’ means any activity or equivalent situation treated as such for the purposes of the social security legislation of the Member State in which such activity or equivalent situation exists’
- Austria determines whether non-standard work in Austria is work
 - Is it treated as work for the purposes of Austrian social security legislation?
 - Yes: it is work -> *lex loci laboris* -> Austrian legislation
 - No: it is not work -> *lex loci domicilii* -> Hungarian legislation

Which law applies?



- Does the law of the MS of work apply continuously under the *lex loci laboris*?
 - *C-2/89 Kits van Heijningen*
 - Lives in Belgium and works two hours a day on Mondays and Saturdays in the Netherlands
 - Covered by Dutch legislation all of the time

Benefits in State other than the competent State?

Non-standard work in social security law



- Treated as standard work: comprehensive social security coverage
- Treated as self-employed work
- Treated as standard work or self-employed work, but with exclusion from certain branches
- Category other than employed or self-employed work
- Treated as inactivity (ignored)

- Incomplete social protection in MS of work (Austria)
 - sickness benefits
 - ~~maternity and equivalent paternity benefits~~
 - ~~invalidity benefits~~
 - ~~old-age benefits~~
 - benefits in respect of accidents at work and occupational diseases
 - ~~unemployment benefits~~
 - ~~pre-retirement benefits~~
 - ~~family benefits~~
 - Austria is competent
 - Its legislation applies
- Full social protection in MS of residence (Hungary)
 - sickness benefits
 - maternity and equivalent paternity benefits
 - invalidity benefits
 - old-age benefits
 - benefits in respect of accidents at work and occupational diseases
 - unemployment benefits
 - pre-retirement benefits
 - family benefits
 - Hungary is *not* competent
 - Its legislation does *not* apply
 - Can atypical worker claim Hungarian benefits?

Incomplete/low social protection



- Art. 11(1) Reg. 883/2004:
 - 'Persons to whom this Regulation applies shall be subject to the legislation of a single Member State only.'
 - One MS is competent, and its legislation is applicable
 - All other MS are not competent, and their legislation is not applicable?

There is a right under national law



- Entitlement to benefit based solely on the national law of non-competent MS
 - E.g. residence-based benefits in the MS of residence
 - If EU law did not exist, the person would be entitled to the benefit
- ECJ: migrants are entitled to all benefits available solely under the laws any other Member State
 - C-352/06 *Bosmann*; Joined Cases C-611/10 and C-612/10 *Hudziński and Wawrzyniak*; exception in C-394/13 *B?*

There is a right under national law



- Why would Hungary grant benefits to residents who work abroad?
 - Avoiding gaps in social protection
 - Refusing social security benefits might shift people to social assistance
 - Claimants often are connected to its society / labour market
 - E.g. frontier workers who only leave Hungary for a couple of days a month, children growing up in Hungary, taxpayers, ...
 - Labour market policy
 - Better employed abroad than unemployed in Hungary
 - Risk of litigation
 - Not always clear whether Member State can refuse

There is no right under national law



- No entitlement to benefit based solely on the national law of non-competent MS
- Sometimes still a duty to grant benefit
- When?
 - Cases in which a duty was found
 - C-287/05 *Hendrix*
 - Joined Cases C-611/10 and C-612/10 *Hudziński and Wawrzyniak*
 - Case C-382/13 *Franzen* (?)
 - Joined cases C-95/18 and C-96/18 *van den Berg (Franzen II)* (?)
 - Cases in which no duty was found
 - C-208/07 *von Chamier-Glischinski*
 - Joined cases C-95/18 and C-96/18 *van den Berg*

There is no right under national law – *Hudziński and Wawrzyniak*



- Joined Cases C-611/10 and C-612/10 *Hudziński and Wawrzyniak*
 - Mr Wawrzyniak: posted from Poland to Germany
 - German provision: 'Child allowance shall not be paid for a child who is in receipt of [...] child benefits granted outside Germany and comparable to child allowance'
 - Mr Wawrzyniak's wife received Polish child benefits, therefore no right under German law
 - Still a right under EU law?

There is no right under national law – *Hudziński and Wawrzyniak*



- German provision is not compatible with EU law
 - No German child benefit (rather than reduced child benefit) is substantial disadvantage for migrant workers
 - Mr Wawrzyniak contributed to funding of child benefit through income tax
 - No costs/complications for Mr Wawrzyniak's employer
 - Therefore, Germany should reduce the amount of its child benefit by the amount of the Polish child benefit
- Grand Chamber: no right to benefit under national law of non-competent MS, still a right under EU law

There is no right under national law – *Franzen, Giesen and van den Berg*

- Dutch nationals residing in the Netherlands, in minor employment in Germany
 - Case C-382/13 *Franzen*
 - Joined cases C-95/18 and C-96/18 *van den Berg (Franzen II)*



There is no right under national law – **Franzen, Giesen and van den Berg**



- Ms Franzen
 - 20h/week hairdresser, very low earnings
 - Germany: only insured against accidents at work
- Dutch law on family benefits
 - All residents are insured
 - Exception: if insured abroad on basis of Reg. 883/2004, residents are not insured in the Netherlands
- Dutch family benefits?
 - No right only based on national law (*Bosmann*)
 - Still a right based on EU law?
 - Non-competent MS can, but is not obliged to, award benefits

There is no right under national law – **Franzen, Giesen and van den Berg**



- Art. 16(1) Reg. 883/2004:
 - 'Two or more Member States, the competent authorities of these Member States or the bodies designated by these authorities may by common agreement provide for exceptions to Articles 11 to 15 in the interest of certain persons or categories of persons.'
 - Strongly recommended by ECJ when the competent MS gives no right, whereas such a right would be available in the State of residence had the person remained without employment

There is no right under national law – *Franzen, Giesen and **van den Berg***

- Mr van den Berg
 - Brief periods of work in Germany over 5 years
- Dutch law on old-age pensions:
 - All residents are insured
 - Each year of work abroad: minus 2% of full pension
- Calculation of Mr van den Berg's Dutch old-age pension?
 - Minus 10% because he worked in Germany over 5 years
 - Non-competent MS can, but is not obliged to, award benefits



There is no right under national law – *Franzen, Giesen and van den Berg*



- Mr Giesen's wife
 - 2/3 days/month: on-call sales assistant
 - Until 1/1/1989, she was insured on the basis of Dutch law only
- Dutch law on old-age pensions:
 - Idem
 - Insured persons can 'buy' insurance periods retroactively by paying contributions
- Calculation of Mr Giesen's Dutch old-age pension?
 - Minus 16% because his wife worked in Germany
 - The Netherlands may not make old-age pension insurance conditional upon contributions

Incomplete/low social protection



- Can atypical worker claim the benefits of the non-competent State?
 - There is a right based on national law only
 - Non-competent State must always award benefit
 - There is no right based on national law only
 - Non-competent State can always award benefit
 - Non-competent State must sometimes award benefit
 - Non-competent State is sometimes not obliged to award benefit

(N. Rennuy, 'The emergence of a parallel system of social security coordination', *Common Market Law Review* 2013, 1221)

Incomplete/low social protection



- *Why* would Hungary grant benefits to residents/workers who work abroad?
- *How* would Hungary grant benefits to residents/workers who work abroad?
 - 'A person who resides or works in Hungary and who is not insured for [old-age, disability, ...] in any Member State, shall be insured against [old-age, disability, ...] under Hungarian law.'
 - Hardship clause: 'Administrators can lift exclusion from insurance [or benefits] if it would lead to [significant, gross, ...] unfairness'
 - Agreements based on art. 16 Reg. 883/2004
 - On a case-by-case basis without any legislation

Non-standard work in EU social security law



Problems

- Assumption in national law: standard work
- Assumption in EU law: standard work

Solutions

- In national law
- In EU law

**Thank you for your
attention!**



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