Social security and platform work

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Towards a more transparent and inclusive path

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Public summary

Social security systems in Western Europe have been traditionally designed around the concept of the standard employment relationship, which may be defined as a "stable, open-ended and direct arrangement between a dependent, full-time employee and their unitary employer". Non-standard forms of work, in turn, have been mostly considered part of the private 'social security' sphere (i.e. the family or other private income support in case of informal work or commercial relationships), and thus left generally uncovered by public labour-related social security schemes. Among all forms of non-standard work, there is one which features diverge the most from those of the standard employment relationship (and which hence may challenge social security systems at national and EU level the most): platform work. Platform work consists in the performance, in exchange for income, of on-demand short term tasks for different persons or companies by a person selected online from a pool of workers through the intermediation of an online platform.

In recent years, many academics, social partners and public officials have wondered whether and in which way platform work's unique features may challenge social security systems. Taking into account these concerns, this thesis examines the question of what is the social security position of platform workers under the law of the EU and of selected EU countries, and how that position compares to the one of persons performing work under a standard employment relationship. At EU level, the thesis analyses the application of the EU rules for the coordination of social security, the Regulation 492/2011 and the Directive 2004/38/EC to situations of platform work. The thesis also analyses the most recent (and, arguably, most significant) effort by the EU to promote some basic minimum standards concerning the social protection of non-standard workers across the EU Member States, namely the Council Recommendation on access to social protection for workers and the self-employed.

The thesis demonstrates that platform workers often experience differences in their social security position when compared to the social security position of persons performing work in a standard employment relationship. In this regard, the thesis identifies significant challenges in determining the employment status of platform workers, as well as other aspects that are key for their social security position (such as how many hours or days of work they perform, or in which country their employer is located). The thesis also notes many instances in which platform workers may be excluded from formal, effective and/or adequate social security coverage due to the inherent features of platform work (such as its fragmented character and flexibility).

The thesis then relies on the abovementioned Council Recommendation and other instruments of EU law in order to determine the two social security principles that best address these differences and challenges on the social security position of platform workers, namely transparency (understood as both 'clarity' and 'legal certainty') and inclusion. The thesis ends by proposing several recommendations that may better ensure that these principles are respected as it regards platform work, such as the use, for social security purposes, of a broad concept of work that fully encompasses platform work, as well as the adaptation to the specific features of platform work of the requirements for entitlement to social security benefits.

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LIST OF ABBREVIATIONS

ACRE	Aide aux Chômeurs Créateurs ou Repreneurs d'Entreprise.
AKW	Algemene Kinderbijslagwet.
Anw	Algemene Nabestaandenwet.
AOV	Arbeidsongeschiktheidsverzekering.
AOW	Algemene Ouderdomswet pensioen.
ARE	Allocation d'Aide au Retour à l'Emploi.
Art.	Article/s.
ASS	Allocation de solidarité spécifique.
ATI	Allocation des Travailleurs Indépendants.
BBC	British Broadcasting Corporation.
Bbz	Besluit bijstandverlening zelfstandigen.
BpiFrance	Banque publique d'investissement.
BW	Burgerlijk Wetboek.
CAC	Central Arbitration Committee.
CIPAV	Caisse Interprofessionnelle de Prévoyance et d'Assurance Vieillesse.
CJEU	Court of Justice of the European Union.
CLEISS	Caisse nationale d'assurance vieillesse des professions libérales.
CNAVPL	Caisse nationale d'assurance vieillesse des professions libérales.
COVID-19	Corona Virus Disease 19.
CPAM	Caisses Primaires d'Assurance Maladie.
CRDS	Contribution au Remboursement de la Dette Sociale.
CSG	Contribution Sociale Généralisée.
DWP	Work and Pensions.
EC	European Commission.
ECHR	European Convention on Human Rights .
EEA	European Economic Area.
EEC	European Economic Community.
ESPN	European Social Policy Network.
EStG	Einkommensteuergesetz.
ETUC	European Trade Union Confederation.
ETUI	European Trade Union Institute.

EU	European Union.
GKV	Gesetzlichen Krankenversicherung.
HMRC	Her Majesty's Revenue & Customs.
ICT	Information and Communication Technology.
IFS	Institute For Fiscal Studies.
ILO	International Labour Organization .
IMV	Ingreso Mínimo Vital.
IOAW	Wet Inkomensvoorziening oudere en gedeeltelijk arbeidsongeschikte werknemers.
IOAZ	Wet Inkomensvoorziening voor oudere en gedeeltelijk arbeidsongeschikte zelfstandigen.
IOW	Wet Inkomensvoorziening voor oudere werklozen.
IVA	Inkomensvoorziening volledig arbeidsongeschikten.
JORF	Journal Officiel de la République Française.
JSA	Jobseeker's Allowance.
LAG	Landesarbeitsgericht.
NIC	National Insurance Contributions.
OJEU	Official Journal of the European Union.
OMC	Open Method of Coordination.
OSE	European Social Observatory.
P. / pp.	Page / pages.
Para.	Paragraph/s.
PKV	Privaten Krankenversicherung.
Q&A	Questions and Answers.
REFIT	Regulatory Fitness and Performance programme.
RETA	Régimen Especial de Trabajadores Autónomos.
RSA	Revenu de Solidarité Active.
RSI	Régime Social des Indépendants.
SEISS	Self-Employment Income Support Scheme.
SEPE	Servicio Público de Empleo Estatal.
SGB	Sozialgesetzbuch.
SSP	Statutory Sick Pay.
SVB	Sociale Verzekeringsbank.

TFEU	Treaty on the Functioning of the European Union.
TMS	Ministerio de trabajo, migraciones y seguridad social.
TONK	Tijdelijke Ondersteuning Noodzakelijke Kosten.
Tozo	Tijdelijke overbruggingsregeling zelfstandig ondernemers.
trESS	Training and Reporting on European Social Security.
TUE	Treaty on the European Union .
TW	Toeslagenwet.
UGT	Union General de Trabajadores.
UK	United Kingdom.
UKSC	United Kingdom Supreme Court.
UNEDIC	Union nationale interprofessionnelle pour l'emploi dans l'industrie et le commerce.
URSAAF	Unions de Recouvrement des Cotisations de Sécurité Sociale et d'Allocations Familiales.
VAT	Value-added tax .
WaZo	Wet Arbeid en Zorg.
WGA	Werkhervatting Gedeeltelijk Arbeidsgeschikten.
WIA	Wet werk en inkomen naar arbeidsvermogen.
Wlz	Wet Langdurige Zorg.
WW	Werkloosheidswet.
ZW	Ziektewet.

INTRODUCTION: SETTING THE RESEARCH FRAMEWORK

Chapter 1. Introduction

1.1. Introduction

Social security systems in Western Europe have been traditionally designed around the concept of the standard employment relationship,[1] which may be defined as a "stable, open-ended and direct arrangement between a dependent, full-time employee and their unitary employer".[2] Non-standard forms of work, in turn, have been mostly considered part of the private 'social security' sphere (i.e. the family or other private income support in case of informal work or commercial relationships), and thus left generally uncovered by public labour-related social security schemes. Notwithstanding the trend in many countries during the last decades towards regulating and formalising non-standard forms of work in connection with social security, still most social security systems consider the full-time, open-ended stability found in the standard employment relationship as the form of work receiving the greatest access to social insurance benefits. Thus, persons performing work as self-employed or part-time workers (or both) may not be covered by all social security schemes and, even when insured, will have a greater probability of receiving lower benefits. It is also likely that such persons contribute less to social security contributions than persons in a standard employment relationship would, and that they would have greater chances to rely on non-contributory, means-tested, social assistance schemes. In any case, determining their social security rights and obligations is much more confusing and complex than in the case of a person in a standard employment relationship, which may result in an inadequate protection, fines and financial (and emotional) distress.

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[1] Dickens, L., *Changing Contours of the Employment Relationship and New Modes of Labour Regulation. Rapporteur Paper*, Berlin: International Industrial Relations Association 13th World Congress, 2003.

[2] Walton, M. J., 'The Shifting Nature of Work and Its Implications', *Industrial Law Journal*, vol. 45 issue 2, 2016, pp. 111–121, citing Stone, K.V.W. and Arthurs, H., 'The Transformation of Employment Regimes: A Worldwide Challenge', in Stone, K.V.W. and Arthurs, H. (eds.), *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment*, New York: Russell Sage Foundation, 2013, pp. 1–20. FREEDLAND also defines it as «a long-term attachment to a single employer and accompanying wage and benefit expectations», in Freedland, M., 'Burying Caesar: What Was the Standard Employment Contract?' in Stone, K.V.W. and Arthurs, H. W. (eds.), *Rethinking workplace regulation: Beyond the standard contract of employment*, New York: Russell Sage Foundation, 2013, p. 82.

It has been pointed out already long ago that solving these issues should have been a priority for policymakers.[3] However, the need to do so is even more urgent currently, with the appearance of non-standard forms of work whose characteristics increasingly diverge from those of the standard employment relationship.[4] The clearest and most recent illustration of this trend is the advent of platform workers.

Platform workers are individuals who are connected through online platforms such as *Uber* or *Deliveroo* to other individuals to perform short-term tasks on demand in exchange for remuneration. Platform workers have become ubiquitous in the streets of most Western cities, but also in the pages of many academic journals. By taking advantage of advances on Information and Communication Technology (ICT), online platforms have been able to combine and intensify several of the characteristics present in flexible work (e.g. on-demand and short-term character, ability to perform work on distance, absence of formal subordination). However, by doing so, they may challenge social security systems.

This thesis seeks to determine what is the social security position of platform workers under the law of five Member States of the European Union and under European Union Coordination Regulations, and how that social security position compares to the one of persons in full-time, open-ended employment. In doing so, it will present some of the choices that national and European Union legislators have when facing, as far as social security is concerned, when attempting to regulate platform work. It also shows some of the main challenges that social security systems across the European Union have been facing for decades, such as how to address work producing low earnings, or how to regulate self-employed without employees (of their own). Hence, platform work, with its somewhat extreme features, media-grabbing ability and potential for allowing a prior-unknown access to work, serves as the perfect spotlight for said challenges.

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[3] See Schoukens, P., *De Sociale Zekerheid van de Zelfstandige En Het Europese Gemeenschapsrecht: De Impact van Het Vrije Verkeer van Zelfstandigen*, Leuven: Acco, 2000.

[4] See, for example, International Labour Office, *Non-standard employment around the world: Understanding challenges, shaping prospects*, Geneva: ILO, 2016.

1.2. Platform work and social security

1.2.1. *Regulating social security of platform workers by European Union Member States*

Of the selected countries for this thesis, only France has specifically regulated the social security benefits and contributions deriving from the performance of platform work. This has been done through the establishment of a set of social obligations for platforms concerning "self-employed workers who, for the purpose of their professional activity, have recourse to one or more platforms of online intermediation".[5] The concept of 'platforms of online intermediation' is, in turn, defined by Article 242 bis of the Tax Code, as "companies, no matter where they are established, who remotely link people online for the sale of goods, the provision of services or the exchange or sharing of goods or service".[6] Platforms of online intermediation "which determine the characteristics of the service provided or of the product sold, as well as its price"[7] are obliged to cover the cost of the insurance against accidents at work and of joining the training fund concerning self-employed platform workers with earnings exceeding approximately €5,400 per year.[8] Furthermore, all self-employed workers of platforms of online intermediation are entitled to the right to collective action and to join a trade union.[9]

1.2.2. *Regulating social security of platform workers by the European Union*

European Union bodies have paid particular attention to two connected issues: the challenges for social security systems presented by the platform economy, and the need to ensure adequate social protection for non-standard workers.

Concerning the challenges for social security systems presented by the platform economy, the European Parliament highlighted several of these challenges in its Resolution of 15 June 2017 on a

[5] Code du Travail, Art. L7341-1 (own translation).
[6] Code général des impôts, Art. 242 bis (own translation).
[7] Code du Travail, Art. L7342-1 (own translation).
[8] Code du Travail, Art. L7342-4, D7342-1.
[9] Code du Travail, Art. L7342-6.

European Agenda for the collaborative economy.[10] This document stressed the need to make compatible flexibility with social security for workers,[11] as well as the importance of ensuring adequate social protection for the self-employed involved in platform work.[12] Furthermore, it called on "the Member States, in collaboration with social partners and other relevant stakeholders, to assess, in a proactive way and based on the logic of anticipation, the need to modernize existing legislation, including social security systems, so as to stay abreast of technological developments while ensuring workers' protection".[13] It also asked the European Commission and the Member States "to coordinate social security systems with a view to ensuring the exportability of benefits and aggregation of periods in accordance with Union and national legislation".[14] Finally, it requested the Commission "to publish guidelines on how Union law applies to the various types of platform business models in order, where necessary, to fill regulatory gaps in the area of employment and social security".[15] This Resolution on the collaborative economy followed a 2016 Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions on a European agenda for the collaborative economy[16] and a 2017 report prepared for the European Commission on social protection of non-standard workers and the self-employed.[17] Shortly after the publication of this

[10] European Parliament, *European Parliament Resolution of 15 June 2017 on a European Agenda for the collaborative economy* (2017/2003(INI)), Brussels: European Parliament, 2017, para. 37.

[11] Ibid, para. 41.

[12] Ibid.

[13] Ibid.

[14] Ibid, para. 38.

[15] Ibid, para. 40. However, it is interesting to note that the final text of the resolution used a tone slightly less demanding to States than the one used in the text suggested by the Committee on Employment and Social Affairs, see Committee on Employment and Social Affairs, *Opinion for the Committee on the Internal Market and Consumer Protection on a European agenda for the collaborative economy*, 2017/2003(INI), Brussels: European Parliament, 2017.

[16] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on A European agenda for the collaborative economy,* Brussels: European Commission, 2016. See also European Economic and Social Committee, *Opinion on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on A European agenda for the collaborative economy*, INT/793, Brussels: EESC, 2016.

[17] Spasova, S. et al., *Access to Social Protection for People Working on Non-Standard Contracts and as Self-Employed in Europe*, Brussels: European Commission, 2017.

European Parliament Resolution, a new report on the social protection of workers in the platform economy was published under a request of the European Parliament.[18]

In parallel, European Union bodies have expressed concern about the social protection of all non-standard workers. In this regard, the European Pillar of Social Rights emphasizes the importance of ensuring decent social protection for all workers. [19] Based on this, the European Commission has performed a series of public consultations on challenges regarding access to social protection for persons in all forms of employment in the framework of the Pillar,[20] which eventually resulted in the Council Recommendation on access to social protection for workers and the self-employed.[21] One of the, arguably, most significant features of this Recommendation is that it requires Member States to ensure that all workers and the self-employed have access to social protection by extending the formal coverage concerning all social security schemes included in the scope of the Recommendation (i.e. labour-related schemes). This Recommendation is analysed in detail in this thesis.[22]

Furthermore, the Employment Committee of the European Parliament launched in 2019 an own initiative procedure under the title of 'Fair working conditions, rights and social protection for platform workers'.[23] The initiative is, nevertheless, awaiting for a committee decision since then.[24]

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[18] Forde, C. et al, *The Social Protection of Workers in the Platform Economy*, PE 614.184, Brussels: European Parliament, 2017.

[19] Commission Recommendation of 26.4.2017 on the European Pillar of Social Rights, C(2017) 2600 final; Council of the European Union, *Proposal for an interinstitutional proclamation endorsing the European Pillar of Social Rights*, 13129/17, Brussels: Council of the European Union, 2017.

[20] European Commission, *Consultation Document of 20.11.2017 on Second Phase Consultation of Social Partners under Art. 154 TFEU on a possible action addressing the challenges of access to social protection for people in all forms of employment in the framework of the European Pillar of Social Rights*, Brussels: European Commission, 2017.

[21] Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed (2019/C 387/01).

[22] See Chapter 9.

[23] Employment Committee of the European Parliament, *Fair working conditions, rights and social protection for platform workers - New forms of employment linked to digital development (2019/2186(INI)*, Brussels: European Parliament, 2019.

[24] Ibid.

Moreover, in 2020 a new report entitled 'Study to gather evidence on the working conditions of platform workers' was published by the European Commission.[25] While not the central focus of the report, the study analyses several instances in which platform workers may be compromised in their social security position under both national and European Union (EU) law. The report will be followed with a consultation to social partners in 2021 on "the possible direction of European Union action to address the working conditions in platform work".[26]

1.3. Research topic

1.3.1. *Aim of the research*

This thesis studies the social security position of persons performing platform work,[27] at both national and EU level, and how it compares to the one of persons in a standard employment relationship. The challenge of providing social security protection for persons performing work outside the standard employment relationship is not a new one. In fact, the dissertation seeks to follow in the footsteps of the theory of labour status specificity, developed by SCHOUKENS in 2000,[28] re-examining and updating its conclusions after two decades of new developments.

One of the highlights of the theory of labour status specificity (which was further developed in later works[29]) is the fact that it took into account not only the situation at national level, but also how diverse national approaches impacted on the system of coordination of social security benefits within the European Community. Time has not solved this challenge. On the contrary, it might

[25] Kilhoffer, Z. et al., *Study to gather evidence on the working conditions of platform workers, VT/2018/032*, Brussels: European Commission, 2020.

[26] European Parliament Multimedia Center, *Fair working conditions, rights and social protection for platform workers - New forms of employment linked to digital development: extracts from the debate with Nicolas SCHMIT, European Commissioner for Jobs and Social Rights*, retrieved on 15 December 2020 at https://multimedia.europarl.europa.eu/en/fair-working-conditions-social-protection-platform-workers_I199526-V_v

[27] The thesis presents the situation as of 15 December 2020.

[28] Schoukens, P., *De sociale zekerheid van de zelfstandige en het Europese Gemeenschapsrecht: de impact van het vrije verkeer van zelfstandigen*, Leuven: Acco, 2000.

[29] Schoukens, P., 'La situation des travailleurs indépendants en tenant compte de l'article 43 (ex 52) et 49 (ex 59) du traité CE', in *Sécurité sociale en Europe: Le traité CE et le Règlement 1408/71*, Vienne: Ministère Fédéral de la Sécurité Sociale et des Générations, 2001, pp. 144-174.

rather have deepened it.[30] Thus, this research will not limit itself to analysing the situation at national level, but it will also study the potential results of applying the European Union rules relevant to determine the social security position of platform workers who exercise their right to free movement across the EU Member States selected for this thesis.

Hence, this thesis will analyse the application of the EU rules for the coordination of social security (currently, Regulation 883/2004[31] and Regulation 987/2009[32] -which will be often referred in this thesis as the 'Coordination Regulations') to situations of platform work. By doing so, it is sought to provide support to the current process of re-evaluation of the mechanisms of coordination of social security benefits, adding to the debate on the new challenges brought by the latest developments on the (hampering) regulation of non-standard work.

The definition of the term 'social security' used in this thesis (see further below[33]) also includes social assistance (and thus, in some cases, it goes further than the material scope of the Coordination Regulations). This broader definition is chosen, since this thesis will also analyse (albeit to a lesser extent) other norms of EU law concerning the social security position of platform workers exercising their right to free movement. These norms are found in Article 45 TFEU, Articles 7 and 24 Directive 2004/38/EC and in Article 7(2) Regulation 492/2011.

This thesis will also analyse the most recent (and, arguably, most significant) effort by the EU to promote some basic minimum standards concerning the social protection of non-standard workers across the EU Member States, namely the Council Recommendation on access to social protection for workers and the self-employed.[34] Although it is not-binding, still, the Council Recommendation is a EU legal instrument promoting changes at national level, which will be linked to a mechanism

[30] See Case C-352/06, *Bosmann*, ECLI:EU:C:2008:290; Case C-382/13, *Franzen*, ECLI:EU:C:2015:261..

[31] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (hereinafter referred as Regulation 883/2004).

[32] Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (hereinafter referred as Regulation 987/2009).

[33] See section 1.4.2.

[34] Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed (2019/C 387/01).

for the monitoring of its implementation. However, probably due to its recent nature, there is still very little research on it.

Finally, the thesis will identify two principles that arise from some of the legal provisions studied through the thesis (i.e. transparency and inclusion), and then use them to evaluate the social security position of platform workers as reported in the previous chapters. Based on this evaluation, the thesis concludes with a brief set of recommendations on how to best approach social security protection with regard to platform work.

1.3.2. *Relevance of the research*

1.3.2.a. Societal relevance

As phrased by CHESKY, founder and CEO of *Airbnb*, we have passed from a world separating people and businesses to one where "people can also *be* business", e.g. since businesses may be created by people in 60 seconds.[35] This blurring of boundaries between self-employment, employment and non-professional activities has taken social security systems by storm, resulting in very diverse approaches towards common challenges. By analysing these different approaches, this research may serve as a roadmap for future regulation on the social security of platform workers.

Since most social security systems (as well as the system of coordination of social security benefits in the European Union) were designed with the standard employment relationship as their model, the present regulation of non-standard forms of work might be ill-adapted to the specific nature of platform work, resulting in undesired regulatory gaps.[36] This research attempts to clarify the social security situation regarding these new forms of work, something which is essential to allow policymakers to tackle the issues deriving from the surge of the platform economy in a coherent and cohesive way. Furthermore, it may allow for future analysis on whether the current social security regulation on forms of platform work , which excludes certain categories of workers from

[35] Chesky, B., 'How the Sharing Economy is Redefining the Marketplace and Our Sense of Community', *Aspen Ideas Festival*, 2014.

[36] The possible existence of gaps was highlighted by the European Parliament, *European Parliament Resolution of 15 June 2017 on a European Agenda for the collaborative economy* (2017/2003(INI)), Brussels: European Parliament, 2017.

compulsory protection, is the result of an intended policy effort, or rather an accident derived from a patchwork of regulations trying to deal with a new phenomenon.

Finally, by determining how different the coordination of social security benefits in these situations is compared to the coordination of social security benefits for persons in a regular employment relationship, it is sought to provide support to the current process of re-evaluation of the mechanisms of coordination of social security benefits.

1.3.2.b. Scientific relevance

This research stands on the shoulders of previous research on the social security of the self-employed,[37] while providing a highly needed update, taking into account recent technological developments that have changed the nature of self-employment.

In this regard, there is a gap in the literature on in-depth comparisons of the social security position of platform workers under both Member States' and EU law, a gap that this thesis seeks to fill. In this regard, the few comparative studies performed on the social position of platform work in EU countries have a predominantly sociological accent (the characteristics of platform workers rather than the content of the social security systems),[38] focus either on more general[39] or targeted

[37] Specially, this thesis is influenced by Schoukens, P., *De Sociale Zekerheid van de Zelfstandige En Het Europese Gemeenschapsrecht: De Impact van Het Vrije Verkeer van Zelfstandigen*, Leuven: Acco, 2000.

[38] Forde, C. et al, *The Social Protection of Workers in the Platform Economy*, PE 614.184, Brussels: European Parliament, 2017.

[39] See, inter alia, Behrendt, C., et al., 'Social protection systems and the future of work: Ensuring social security for digital platform workers', *International Social Security Review*, vol. 72, issue 3, 2019; Schoukens, P., 'Digitalisation and social security in the EU. The case of platform work: from work protection to income protection?', *European Journal of Social Security*, vol 22 issue 4, 2020.

aspects,[40] or do not analyse together the national and EU approaches.[41] Those studies that delved into how the situations of platform work fit into the national social security systems were mostly limited to the national level.[42] Furthermore, from the perspective that platform work is a subspecies of non-standard work, research on social security protection of non-standard workers provides useful input.[43]

1.4. Research question and delimitation of the research

In this section, the main research question is presented and, then, deconstructed, with the meaning of its different elements analysed. The exploration of the meaning of these different elements of the research question serves a double purpose: first, it clarifies the research question and, second, it delimitates its scope.

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[40] Schoukens, P., 'The EU social pillar: An answer to the challenge of the social protection of platform workers?', *European Journal of Social Security*, vol. 20 issue 3, 2018; Barrio, A., Montebovi, S. and Schoukens, P., 'Social protection of non-standard work: the case of platform work', in Devolder, B. (ed.), *The platform economy. Unravelling the legal status of online intermediaries*, Cambridge-Antwerp-Chicago: Intersentia, 2019, pp. 227–258.; Schoukens, P. and Barrio, A., 'Platform work in self-employment new challenges for social protection?', in *Revista del Ministerio de Empleo y Seguridad Social*, vol 144, 2019; Amar, N. and Viossat, L.C., *L'économie collaborative et la protection sociale, 2015-12R*, Paris: Inspection générale des affaires sociales, 2016; Chesalina, O., 'Access to social security for digital platform workers in Germany and in Russia: a comparative study', *Spanish Labour Law and Employment Relations Journal*, Vol. 7, Issue 1-2, 2018; Vukorepa, I., 'Cross-Border Platform Work: Riddles for Free Movement of Workers and Social Security Coordination', *Zbornik Pravnog Fakulteta u Zagrebu 70 Zbornik PFZ*, 2020.

[41] European Social Insurance Platform, *Are social security systems adapted to new forms of work created by digital platforms?*, Brussels: ESIP, 2019.

[42] See, inter alia, Suárez, B., 'The 'Gig' Economy and its Impact on Social Security: The Spanish example', *European Journal of Social Security*, vol. 19 issue 4, 2017; Ales, E., 'Is the Classification of Work Relationships Still a Relevant Issue for Social Security? An Italian Point of View in the Era of Platform Work', in Becker, U. and Chesalina, O. (eds.), *Social Law 4.0*, Baden-Baden: Nomos, 2021, pp. 97-116; Vonk, G., 'Extending Social Insurance Schemes to "Non-Employees": The Dutch Example', in Becker, U. and Chesalina, O. (eds.), *Social Law 4.0*, Baden-Baden: Nomos, 2021, pp. 147-170; Suárez, B., 'The Influence of the Platform Economy on the Financing of Social', in Becker, U. and Chesalina, O. (eds.), *Social Law 4.0*, Baden-Baden: Nomos, 2021. pp. 231-256.

[43] Spasova, S. et al., *Access to Social Protection for People Working on Non-Standard Contracts and as Self-Employed in Europe*, Brussels: European Commission, 2017; Eurofound, *Exploring self-employment in the European Union*, Luxembourg: Publications Office of the European Union, 2017, pp. 47-54.

1.4.1. *Research question*

The research question that is examined throughout this thesis is as follows:

> **What is the social security position of persons performing platform work under the law of five selected European countries and under European Union law, and how does it compare to the social security position of persons performing work in a standard employment relationship?**

1.4.2. *The meaning of 'social security'*

The term 'social security' is understood in this thesis as "the body of arrangements shaping the solidarity with people facing (the threat of) a lack of earnings (i.e. income from labour) or particular costs".[44] This is a broad definition, encompassing both social insurance[45] and social assistance schemes.[46] Nevertheless, it excludes private insurance schemes, as the solidarity element in them is too weak or lacking.[47]

1.4.3. *The meaning of 'social security position'*

The term 'social security position' refers to the social security benefits and contributions of platform workers and of persons in a standard employment relationship. But it also includes a normative element, namely whether that position is 'desirable', in the sense of whether it is in consonance with the social security principles identified later in the thesis (i.e. transparency and inclusion).

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[44] Pieters, D., *Social Security: An Introduction to the Basic Principles* (second edition), Alphen aan den Rijn: Kluwer International, 2006, pp. 2-3.

[45] Social insurance schemes are typically characterised by being (partially or fully) financed by social security contributions, being of compulsory participation for the members of the solidarity system and tackle specific social risks, see Ibid., pp. 5-6. For a more detailed definition of social insurance, see Pitzer, J., 'The Definition of a Social Insurance Scheme and its Classification as Defined Benefit or Defined Contribution', *International Monetary Fund Electronic Discussion Group on the Treatment of Pension Schemes*, Washington: IMF, 2003.

[46] Social assistance schemes are generally characterised by consisting on the provision of benefits to people needing them (e.g. people with income and/or property under a certain threshold) and being financed by means of government funds, see Pieters, D., Social Security: An Introduction to the Basic Principles (second edition), Alphen aan den Rijn: Kluwer International, 2006, p. 5.

[47] Ibid., p. 4.

The research question refers particularly to the social security position of platform workers and of persons in a standard employment relationship that *results from them being, respectively, platform workers and persons in a standard employment relationship*. In other words, in this thesis it is not analysed the whole social security position of an individual who happens to be a platform worker, but the social security position that derives from that individual being a platform worker, and how the features of platform work affect said social security position. Because of this, the research performed in this thesis will focus on social security schemes that replace income from work (either social insurance or social assistance schemes). Therefore, this thesis will only address social security schemes against the risks of unemployment, temporary incapacity, long-term incapacity, labour accidents and professional diseases, maternity/paternity and retirement. Excluded are schemes providing healthcare, family benefits and survivorship pensions.

1.4.4. *The meaning of 'platform work(er)'*

This thesis will only focus on platform work, as a variety of non-standard work. A preliminary analysis of different forms of non-standard work has shown that platform work was the form of work which features diverged the most from the features of the standard employment relationship.[48] In this regard, the use of ICT allows for platform work to combine and intensify several of the characteristics also present in other forms of flexible work, such as its on-demand and short-term character (allowed by the low cost of accessing the platform and remaining accessible to it), lower need of a traditional, physical workplace (as in many cases the contact between clients, workers and the platform is fully performed online) and, to a certain degree, absence of formal subordination (as the control of the performance is done primarily after the completion of the tasks, and not during it).

'Platform work' is far from being a unified concept. The phenomenon to which it refers (i.e. work performed through the intermediation of online platforms[49]) has been (partially) addressed by a

[48] Schoukens, P. and Barrio, A., 'The changing concept of work. When does typical work become atypical?', *European Labour Law Journal*, vol. 8 issue 4, 2017.

[49] Degryse, C., *Digitalisation of the economy and its impact on labour markets, WP 2016.02*, Brussels: ETUI, 2016, pp. 8-9.

wide range of terms, such as work on-demand via apps, crowd work,[50] collaborative economy,[51] sharing economy,[52] gig economy or peer-to-peer economy. The choice of terms, as well as the features highlighted in different definitions, are usually tinted by the motivations of the user.[53]

The main common element to all these definitions is that there must exist an online app and/or website that acts as intermediary between the individuals who want a service (hereafter referred as 'clients' or 'customers') and the platform workers who provide such service.[54] In other words, most work offered by online platforms may be considered platform work. The concept of platform work thus is quite dependent, at least for the moment, to what these platforms decide to offer as work, and against which conditions they decide to do so. This is in all likeness a temporal situation, which often occurs when a significantly new concept arises, and eventually a consensus among all actors on the limits of the concept of platform work will be reached.

In the meantime, it is possible to determine some common elements based on the characteristics of the most important online actors, the few legal norms yet available specifically addressing the topic and the academic discussion around it. In a few instances, some choices are made in order to ensure a feasible research topic. Thus, the definition of a platform worker used in this thesis may be briefly summarised as follows:

> **A platform worker is a person selected online from a pool of workers through the intermediation of a platform to perform personally on-demand short-term tasks for different persons or companies in exchange for income.**

[50] De Stefano, V., 'The Rise of the Just-in-Time Workforce: On-Demand Work, Crowdwork, and Labor Protection in the Gig-Economy', *Comparative Labour Law & Policy Journal*, vol. 37 issue 3, 2016, pp. 471-472.

[51] European Commission *A European agenda for the collaborative economy*, COM/2016/0356 final, Brussels: European Commission, 2016, p. 3.

[52] Richardson, L., 'Performing the sharing economy', *Geoforum*, Vol. 67, 2015, p. 121.

[53] Forde, C. et al, *The Social Protection of Workers in the Platform Economy*, PE 614.184, Brussels: European Parliament, 2017, p. 21.

[54] Ibid., p. 20.

A more detailed list of basic elements is the following:

- The contact between the customer and the worker is exclusively performed through the online platform. As a result, the platform possess and retains personal information of both parties (e.g. name, addresses, bank account, telephone number). Furthermore, the online character of platforms plays an essential role on considering platform work a new phenomenon, as it greatly facilitates access and reduces transaction costs.[55]

- The work is performed personally[56] by the worker registered in the platform, and for the costumer also registered in it.

- The work consists of specific tasks clearly delimitated by the platform. Thus, the content of the work which will be performed by the worker to the individual is generally known and restricted before it is performed (and, if it does not adjust to those expectations, the customer may complain to the platform, which will act in consequence –by, for example, deactivating the worker's account-).

- The work is temporary,[57] not open-ended.

- The work is performed in exchange of remuneration.

- The work is on demand,[58] meaning that tasks are offered when and if a person requests it, without any obligation by the platform of ensuring a minimum amount of work to be performed by the workers registered in it. Significant periods of unremunerated time, when a worker waits between tasks, may exist.

[55] For some examples on the importance of the online character (which results, among others, in the use of apps), see Valenduc, G., Vendramin, P., Work in the Digital Economy: Sorting the Old from the New, Brussels: ETUI, 2016, p. 20.

[56] De Stefano, V. and Aloisi, A., *European legal framework for "digital labour platform"*, Brussels: European Commission, 2018, p. 14.

[57] European Commission *A European agenda for the collaborative economy*, COM/2016/0356 final, Brussels: European Commission, 2016, p. 3.

[58] Kittur, A. et al., 'The Future of Crowd-Work', *Proceedings of the 2013 Conference on Computer Supported Cooperative Work*, 2013, pp.1301–1318.

- The customer pays through the platform, which then transfers part of this payment to the worker as remuneration.

- The control on the quality performance of the task is performed after its completion, primarily through feedback from the customer (e.g. ratings).

- The platform provides rules on the behaviour of both parties, monitors the compliance with such rules, and sanctions the lack of compliance with such rules by stopping temporarily or permanently an individual from accessing the platform.

While most features mentioned above are found in most widespread definitions of platform work, some of them result from a choice in focusing in some platforms (and exclude others). In this regard, by specifically mentioning the fact that platforms intermediate between individuals for the performance of short-term tasks, this definition is focusing on those platforms dedicated to the performance of services (i.e. tasks), and excluding those which primary goal is to facilitate the rent or sell of products (such as *Etsy* or *Airbnb*). Moreover, with that phrasing (i.e. *between individuals*), it also leaves outside its scope those platforms which primary purpose is to connect businesses to consumers.[59] Furthermore, by mentioning the short-term character of the tasks performed, it seeks to exclude platforms that provide temporary workers to businesses (for example, as waiters or call-center workers).[60] Finally, and perhaps self-evidently, the thesis is focused on platform work performed in exchange for income, and thus excludes non-remunerated work which is performed unconsciously (e.g. *Google ReCaptcha*[61]), or in a voluntarily or charitable way (e.g. *Couchsurfing*, *Wikipedia*).

[59] This is the case of platforms like *Booking*, in which hotels use the platform to access customers.

[60] See, for example, the case of *Temper*, a Dutch platform that arguably acts in many ways as a temporary agency for business (mostly in the catering industry).

[61] reCAPTCHA is a service provided by google to ensure that the person accessing a website is a human being (and not an algorithm), by requesting the user to do small tasks (e.g. recognise an image) that only humans are able to do. In other words, «reCAPTCHA is a free service that protects your website from spam and abuse. […] reCAPTCHA offers more than just spam protection. Every time our CAPTCHAs are solved, that human effort helps digitize text, annotate images, and build machine learning datasets», as noted in Google, What is reCaptcha, retrieved on 30 April 2018 at www.google.com/recaptcha/intro/android.html

However, even limited by such basic elements, online platforms vary greatly on some essential features of the type of work they offer. These differences may have a significant impact on the position of the worker concerning social security (partly, due to potentially different legal qualifications of the work arrangement). This is why it was decided that, for the purposes of this thesis, two different types of online platforms will be analysed:

1) platforms that offer a specific and organised service (which results in greater control of the worker by the platform), and which are referred to as 'platform as a provider of a homogenised service';

2) platforms that offer greater freedom to the worker to determine the way to perform the service and its price, and which are referred to as 'platforms as a marketplace' (a name that, however, must be taken with caution, as it does not attempt to transmit that the platform does not exerts control on the work arrangement, but only that the control is of a different, arguably weaker variety).

Platform as a provider of a homogenised service (e.g. *Deliveroo, Uber*)	**Platform as a marketplace (e.g. *Fiverr*)**
The platform offers one service (e.g. taxi service, food delivery).	The platform offers a set of services that the workers of the platform may provide (e.g. translation, logo design, gardening).
The platform establishes a set of recommendations on how the service should be provided, usually transmitted during one or more training sessions. The platform may monitor the location of the worker, and thus it has the capacity to control	The worker has freedom on how to perform such service.

aspects of the performance of the task while the task is being performed.	
The customer generally cannot resort to the same worker recurrently. As the service is homogenised, the selection of the worker by the customer is less relevant (i.e. it is assumed that all workers would perform a similar service). In the case of some platforms, the customer cannot select the worker.	The customer may resort to the same worker recurrently.
The platform sets the price of the service.	The price of the service is set by the worker.
The remuneration to the worker is generally paid by the platform on a weekly, bi-weekly or monthly basis (and thus not per task).	The remuneration to the worker is generally paid by the platform per task, after its completion.

Source: Own creation.

1.4.5. *The meaning of 'work'*

'Work' is a ubiquitous concept. And yet, most of us would be hard pressed to provide a specific definition of such a concept. According to Oxford Dictionaries, it may be defined as a "mental or physical effort done in order to achieve a purpose".[62] Nevertheless, this definition has the risk of covering almost any activity. A narrower concept may be the one provided by KELLOWAY *et al.*, who define work as "a purposeful activity directed at producing a valued good or service".[63] This definition highlights the economic value of the activity, not whether it is remunerated. Many

[62] Oxford University Press, 'work', Lexico.com, 2020.

[63] Kelloway, E.K., et al., '*Work, Employment, and the Individual*', in Kaufman, B. (ed.), Theoretical Perspectives on Work and the Employment Relationship, Champaign: Industrial Relations Research Association, 2002, p. 109.

countries seem to have been moving towards this direction, as indicated by their attempts to extend some rights traditionally restricted to paid work to certain forms of unpaid work. This is, for example, the case in Spain (where insurance against accidents at work and professional diseases is compulsory for those persons involved in voluntary work on a regular basis)[64] or in the United Kingdom (where carers are credited with social security contributions concerning old-age pensions).[65]

Nevertheless, the economic definition of work, which defines work as "an activity performed in exchange for remuneration for the purpose of earning a living",[66] is still the most accepted definition, and thus the one that will be used in the thesis.

1.4.6. *The meaning of 'standard employment relationship'*

The standard employment relationship[67] has for a long time been, and still is, the main form of work in Western countries. It may be defined as a "stable, open-ended and direct arrangement between a dependent, full-time employee and their unitary employer"[68] or "a stable, socially protected, dependent, full-time job […] the basic conditions of which (working time, pay, social transfers) are regulated to a minimum level by collective agreement or by labour and/or social security law".[69]

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[64] Ley 45/2015, de 14 de octubre, de Voluntariado, Art. 10.

[65] Pensions Act 2007, Art. 3.

[66] Brief, A.P. and Nord, W.R., 'Studying meanings of work: the case of work values', in Brief, A.P. and Nord, W.R (ed.), *Meanings of occupational work: a collection of essays*, Lexington: Lexington Books, 1990, p. 2.

[67] This term has been preferred above the one of 'standard employment contract' used by some authors, as it is considered that describes better the fact that in some legal systems this form of work went beyond the contract by the strength of conventional practice, as noted by Freedland, M., 'Burying Caesar: What Was the Standard Employment Contract?' in Stone, K.V.W. and Arthurs, H.W. (eds.), *Rethinking workplace regulation: Beyond the standard contract of employment*, New York: Russell Sage Foundation, 2013, pp. 81–94.

[68] Walton, M. J., 'The Shifting Nature of Work and Its Implications', *Industrial Law Journal*, vol. 45 issue 2, 2016, pp. 111–121, citing Stone, K.V.W. and Arthurs, H., 'The Transformation of Employment Regimes: A Worldwide Challenge', in Stone, K.V.W. and Arthurs, H. (eds.), *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment*, New York: Russell Sage Foundation, 2013, pp. 1–20. Freedland also defines it as «a long-term attachment to a single employer and accompanying wage and benefit expectations», in Freedland, M., 'Burying Caesar: What Was the Standard Employment Contract?' in Stone, K.V.W. and Arthurs, H. W. (eds.), *Rethinking workplace regulation: Beyond the standard contract of employment*, New York: Russell Sage Foundation, 2013, p. 82.

[69] Bosch, G., 'Hat das Normalarbeitsverhältniseine Zukunft?', *WSI-Mitteilungen*, vol. 90, issue 3, 1986, p. 165, as referenced by Bosch, G., 'Towards a New Standard Employment Relationship in Western Europe', *British Journal of Industrial Relations*, vol. 42 issue 4, 2004, pp. 618–619.

This form of work became the standard model for the regulation of the male labour market[70] during Fordism,[71] as the features linked to it (i.e. stable income and the full range of labour and social security protection) were a strong incentive for middle-skilled workers to seek and maintain employment,[72] while at the same time stirring workers' purchasing power (and thus provided companies with consumers).[73] Most countries provide the most comprehensive labour and social security protection to the standard employment relationship, with divergent atypical work arrangements receiving lesser protection in correlation to the magnitude of their differences with this standard.[74] Nonetheless, we may be approaching the end of the prominence of the standard employment relationship as the dominant regulatory model. In this regard, some authors have identified a process of blurring of the boundaries between commercial and employment relationships,[75] with work increasingly fragmented, networks of organizations and multi-employer relationships.[76]

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[70] As expressed by Freedland, «in its heyday, the legal standard employment contract became the template for employment relations, not solely or even primarily because mandatory legal regulation imposed it on employers, but because strong and powerful conventions supported it», in Freedland, M., 'Burying Caesar: What Was the Standard Employment Contract?' in Stone, K.V.W. and Arthurs, H. W. (eds.), *Rethinking workplace regulation: Beyond the standard contract of employment*, New York: Russell Sage Foundation, 2013, p. 83. In a similar line of thought, Catherine Stone has referred to it as «both the paradigm that informed much labor policy and practice and the ideal to which these aspired», in Stone, K.V.W., 'Green Shots in the Labour Market: Cornucopia of Social Experiments', *Comparative Labor Law & Policy Journal*, vol. 36 issue 2, 2015, p. 295.

[71] Koch, M., *'Employment Standards in Transition: From Fordism to Finance-Driven Capitalism*', in Koch, M., Fritz, M. and Hyman, R. (eds.), Non-Standard Employment in Europe: Paradigms, Prevalence and Policy Responses, London: Palgrave Macmillan, 2013, pp. 29–45; Gottfried, H, 'Insecure Employment: Diversity and Change', in Wilkinson, A., Wood, G. and Deeg, R.(eds.), *The Oxford Handresearch of Employment Relations: Comparative Employment Systems*, Oxford: Oxford University Press, 2014, pp. 541–570.

[72] Deakin, S., *Addressing Labour Market Segmentation: The Role of Labour Law*, Geneva: International Labour Office, 2013, p. 4. Furthermore, it is important to note that this was in a background of full employment and economic growth, as noted by Bosch, G., 'Towards a New Standard Employment Relationship in Western Europe', *British Journal of Industrial Relations*, vol. 42 issue 4, 2004, p. 630.

[73] Wilkinson, A., Wood, G., Deeg, R. and Boyer, R., 'Developments and Extensions of "Regulation Theory" and Employment Relations', in Wilkinson, A., Wood, G. and Deeg, R., *The Oxford Handbook of Employment Relations*, Oxford: Oxford University Press, 2014, pp. 125–126.

[74] Dickens, L., *Changing Contours of the Employment Relationship and New Modes of Labour Regulation. Rapporteur Paper*, Berlin: International Industrial Relations Association 13th World Congress, 2003.

[75] Fudge, J., 'Blurring Legal Boundaries: Regulating for Decent Work' in Fudge, J., McCrystal, S. and Sankaran, K. (eds), *Challenging the Legal Boundaries of Work Regulation*, London: Hart Publishing, 2012, pp. 10-11.

[76] See further Marchington, M et al. (eds.), *Fragmenting Work: Blurring Organizational Boundaries and Disordering Hierarchies*, Oxford: Oxford University Press, 2006.

1.4.7. *The meaning of 'selected European countries'*

The national social security systems to be studied are those of Spain, United Kingdom, France, Germany, and the Netherlands.

All countries selected are Western European countries and are (or were until recently, in the case of the United Kingdom) members of the European Union, as well as industrialised societies with Gross Domestic Products amongst the six highest in the European Union, which ensures a certain degree of comparability from a social-economic perspective.[77] Moreover, all of them share borders with at least one of the other selected countries, which facilitate the analysis of the application of European Union rules on coordination of social security benefits to cross-border situations.

At the same time, the selection allows comparisons between very different approaches towards social security and, particularly, towards the social security of platform workers.

In this regard, it includes examples of all the three main typologies of social security systems: Bismarckian (i.e. Germany, France and -partly- the Netherlands), Beveridgean (i.e. the United Kingdom and -again, partly- the Netherlands) and Southern European (i.e. Spain).

Moreover, the countries selected also have very diverse approaches towards the regulation of self-employed activities concerning social security. There are significant differences with regard to the degree of coverage by compulsory social security schemes for the self-employed, from those providing compulsory protection against most risks (i.e. France and the United Kingdom) to those in which insurance against the great majority of risks may only be accessed on a voluntary basis (i.e. Germany). It also encompasses social security systems with occupation-based schemes for the self-employed (i.e. France and Germany) and those providing the same protection for all the self-employed no matter the occupation (i.e. Spain, the United Kingdom and the Netherlands). And it includes countries with and without sub-varieties of self-employment (i.e. Spain, France and the United Kingdom versus Germany and the Netherlands).

[77] Eurostat, Gross domestic product, current prices, 2017.

Furthermore, it covers countries that exempt employees (i.e. the United Kingdom and Germany) or self-employed (i.e. the United Kingdom, France and Spain) with earnings under a certain threshold from coverage of certain social security schemes, and those which do not do so (i.e. the Netherlands).

It also includes one country (i.e. France) with specific social security provisions on platform work.

Finally, a word must be said on the choice of including the United Kingdom in a thesis which compares it with other EU Member States and analyse EU law. The reasons why it was decided to maintain the United Kingdom as one of the selected countries for this study once the path towards Brexit was taken were the same reasons why it was included in the first place: The United Kingdom is an important example of the Beveridge model of social security, and has acted as a significant influence in the design of many of the social security systems who have been also selected for study. It has a thriving platform economy, a strong national debate on the subject, and has been the stage where some seminal judicial decisions on the legal status of platform workers were taken (including the fundamental *Uber v Aslam and others*). More importantly, the configuration of its system contains lessons on both the challenges that platform work may pose to social security systems, and how these challenges may be faced.

1.5. Research methodology

This thesis attempts, first, to determine what is the social security position of persons performing platform work under the law of five Member States of the European Union. For this purpose, sometimes it is sufficient to analyse the norms and judicial decisions specifically addressing the social security rights and obligations of platform workers. Unfortunately, due to the novelty of platform work, more often such clear-cut answers were lacking, and thus in most cases it was necessary to analyse how the general social security legislation or those norms specifically targeting non-standard work might be applied to the particular nature of platform work. This exercise has been performed through the interpretation of legal texts based on legal doctrine, jurisprudence and other legal sources which may inform such interpretation. Hence, the use of sources besides jurisprudence was of particular relevance for this research, due to the eminently recent nature of the

platform economy, which implies a lack of relevant case law, as observed above. The sources used in the research were identified through a combination of desk research and the consultation of national experts.

Then, an internal comparison[78] (i.e. a comparison within the same legal system) between the social security position of platform workers and the one of persons in a standard employment relationship is performed concerning each of the five selected countries.

The thesis also includes an interpretation of the European Union rules on coordination of social security, Directive 2004/38/EC, Regulation 492/2011 and the Council Recommendation on access to social protection for workers and the self-employed in order to assess how they might be implemented to the specific situation of platform work. Here, as it was the case with the analysis of national legislation, the thesis relies not only on the text of these legal instruments, but also on the relevant jurisprudence, doctrine and other sources (including preparatory works).

The thesis concludes by proposing an evaluative framework and showing how to apply it in order to analyse the social security position of platform workers under national and EU legislation. The evaluative framework derives primarily from the analysis of the Council Recommendation on access to social protection for workers and the self-employed and of the Coordination Regulations performed in the previous sections of the thesis.

1.6. Structure

The first chapter of this thesis has introduced the topic and its conceptual framework, as well as the methodology used. This chapter has sought to introduce, narrow and clarify the scope of the research, something particularly important when dealing with a concept with such a degree of terminological uncertainty as it is the case with regard to platform work.

[78] For more information on the importance of internal comparison see, inter alia, Pieters, D., 'Reflections on the methodology of Social Security law comparison', *Anuario coruñés de Derecho Comparado del Trabajo*, vol. 2, 2010, pp. 103-127.

Chapters 2 until 6, which compose the Part 1 of this thesis, focus on determining the social security position of platform workers in five Member States of the European Union, and to compare them with the social security position of a person in a standard employment relationship.

In order to do so, each chapter is structured in a similar way, and which may be presented using the metaphor of a train.[79] In this regard, each chapter begins by studying the basic elements of the national social security system, such as its legal framework and the different employment statuses around which it revolves. This basic analysis is like the train tracks, the foundation which support the system, but also what marks its direction. Once this analysis of the basic elements of the system has been carried out, the different social security schemes are studied. These are the wagons of the train, the compartments of the system, which structure and shape it. After presenting the social security schemes, the thesis goes on to an analysis of how the situation of both persons in a standard employment relationship and platform workers fit into them. Following the same metaphor, the standard employees and the platform workers are the passengers of the train, the users of the social security system, who experience, enjoy (or suffer) it.

Part 1 of the thesis concludes with a comparison of the social security position of platform workers across the selected countries.

Part 2 of the thesis consists of Chapters 7, 8 and 9, in which the social security position of platform workers under EU law is analysed.

Chapters 7 and 8 examine the social security position of platform workers in situations where they move across EU Member States (such as four of the countries studied in this thesis), and thus it studies the application of the EU norms that may have an impact on said position, namely the Coordination Regulations, the Regulation 492/2011 and the Directive 2004/38/EC.

[79] This train metaphor has the additional benefit of being reminiscent of the 'TraIn approach', which is proposed later in this thesis. Nevertheless, both concepts should not be confused. In this context, 'train' refers to "a series of connected railway carriages or wagons moved by a locomotive or by integral motors" (see Lexico, Oxford: Oxford University Press, 2019, retrieved on 15 December 2020 at https://www.lexico.com/), while the word 'TraIn' used in the context of the 'TraIn approach' is an acronym of the words 'transparency' and inclusion' (see section 10.2.1).

The structure of these two chapters is similar to the one of the chapters of Part 1. Hence, they start by covering the basic elements of these legal instruments, and then examine those of their provisions that are relevant for determining the social security position of platform workers, with a particular focus, in the case of the Coordination Regulations, on the rules for the determination of the legislation applicable. Both chapters end by highlighting those aspects of the relevant provisions which might be difficult to apply to situations of platform work, arguably because its features deviate from the ones of the form of work on which the design of these instruments was based, namely the standard employment relationship.

Chapter 9, in turn, focuses on the 2019 Council Recommendation on access to social protection for workers and the self-employed, and how it may be applied to situations of platform work. Again, the chapter begins with an overview of the Council Recommendation's basic elements, and continues by presenting its different provisions and analysing how they may be applied to situations of platform work. However, given the fact that this is a fairly new instrument with almost no guidance (yet) on how it might be interpreted, when there are different possible interpretative paths, each path is explored, and the potential consequences of that interpretation for the meaning of the Recommendation as it regards platform work are studied.

Part 2 also ends with a conclusion presenting those common aspects across the three EU legal instruments which may be difficult to apply to situations of platform work.

Hence, chapters 2 to 9 compose what is the descriptive part of the thesis. Nevertheless, and as mentioned above,[80] the term 'social security position' in this thesis has two sides, a descriptive one and a normative one. Chapter 10 focuses on that normative side of the research question, namely whether the social security position of platform workers as determined in chapters 2 to 9 is a *good* or a *desirable* position when evaluated based on a set of principles, namely the principle of transparency and the principle of inclusion.

The structure of this last chapter is different from the one of the other chapters. It starts by exploring the content of these principles and justifying their choice as the normative framework for the thesis.

[80] See section 1.4.3 on the meaning of 'social security position'.

It then uses the two principles to evaluate the social security position of platform workers under both national and EU law that was identified in chapters 2 to 9. Finally, they are used to provide a few recommendations on what changes on the social security provisions affecting platform work may be done as to better achieve the principles of transparency and inclusion in the social security position of platform workers. The use of the principles of transparency and inclusion as a framework to both analyse the social security position of platform workers and to make recommendations that may improve that position is what is referred in this thesis as the ‘TraIn approach’.

PART 1: DESCRIPTION OF THE SOCIAL SECURITY POSITION OF PLATFORM WORKERS UNDER NATIONAL LAW

Chapter 2. Platform work and social security in Spain

2.1. An introduction to the Spanish social security system

The aim of this section is to present the bases on which the social security system of Spain is established. These are the nature and type of social security system (section 2.1.1), the legal (section 2.1.2) and institutional framework (section 2.1.3), the different legal statutes available for the performance of work (section 2.1.4) and the system of financing the social security system, including an explanation of the different security contributions (section 2.1.5). These elements set the background of the social security system.

2.1.1. *Nature of the Spanish social security system*

It has been argued that the Spanish social security system tends more towards the Bismarckian model of social security than towards the Beveridgean one.[81] This may be supported by the relative correlation between benefits and contributions, all within a system of social security which is mostly based on the protection of employees. However, features such as its strong labour market regulation and the importance of the family composition in many social security benefits may reflect elements of a different model. This is what some authors refer to as the Southern European model.[82]

2.1.2. *Legal framework and structure*

The Spanish social security system, as far as contributory social security schemes is concerned, is divided in the General Regime and the Especial Regimes. The General Regime regulates the social security rights and obligations of persons performing work under a contract of employment, while the Especial Regimes determine the social security rights and obligations of self-employed persons, seafarers, public servants and students. The Special Regime for the self-employed, in turn, includes certain provisions referring specifically to agricultural workers.

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[81] Conde-Ruiz, J.I. and Profeta, P., *What Social Security: Bismarckian or Beveridgean?,* UPF Economics and Business Working Paper No. 633, Barcelona: Universitat Pompeu Fabra, 2003, pp. 9-10.

[82] Karamessini, M., 'The Southern European social model: Changes and continuities in recent decades', *Discussion Paper Series*, Geneva: International Institute for Labour Studies, 2007, pp. 2-6.

The legal basis for the Spanish social security system is laid down in Article 41 of the Spanish Constitution. The regulation of most social security schemes, however, is developed by the General Social Security Law.

2.1.3. *Institutional framework*

The basic regulation of the social security system and its economic regime belongs to the competence of the central State.[83] Thus, the collection of social security contributions is performed by the general social security treasury (*Tesorería General de la Seguridad Social*). The managing of most social security benefits, which includes recognising entitlement and performing payments (as well as monitoring against fraud), is distributed between three main public bodies.

The National Social Security Institute (*Instituto Nacional de Seguridad Social*) manages all contributory social security benefits concerning the risks of retirement, long-term incapacity, temporary incapacity, survivorship, maternity and paternity, with the exception of those benefits linked to the specific regime of seafarers (which is managed by the marine social institute *Instituto Social de la Marina*-).

The Public National Employment Service (*Servicio Público de Empleo Estatal*), in turn, is in charge of managing all aspects related to contributory unemployment benefit.

The Institute of Old Persons and Social Services (*Instituto de Mayores y Servicios Sociales*) is responsible for managing non-contributory benefits linked to retirement and long-term incapacity, as well as the subsidy of minimum resources and the transport subsidy.

Finally, regions have exclusive competence on social assistance,[84] referring to those social protection programs outside the scope of the social security system as understood under Spanish law. However, this definition of social assistance is significantly narrow.[85] Thus most non-contributory schemes referred to in this thesis are managed by the central State, except when

[83] Constitución Española, Art. 149(1)(17).

[84] Constitución Española, Art. 148(1)(20).

[85] See Tribunal Constitucional, Sentencia 239/2002, de 11 de diciembre, ECLI:ES:TC:2002:239.

specifically referred to, as it is the case, for example, concerning the regional benefit for labour market integration (*renta de inserción autonómica*).

2.1.4. *Modalities of work in the Spanish social security system*

In Spain, and as it regards social security law, a person may perform work (outside the public sector, which is outside the scope of this thesis) as an employed person (*trabajador por cuenta ajena*) and a self-employed worker (*trabajador por cuenta propia* or *autónomo*).[86] A person may also perform work on a non-professional basis (if he[87] performs work on a non-regular basis outside an employment relationship).

The concept of 'employee' for labour and social security purposes is defined in detail under Spanish legislation,[88] followed by a list of activities which are not considered to amount to an employment relationship.[89] Thus, an employee is[90] the person who performs work for others in exchange for income under the direction of another person.[91] The Supreme Court has interpreted this as meaning that an employment relationship requires dependency (indicated by, inter alia, the fact that the work is performed personally and at times and locations established by the employer) and that work is performed for others' behalf (indicated by, inter alia, the fact that it is the employer who owns the result of the work, who fixes prices and salaries, and who selects clients).[92]

[86] Real Decreto Legislativo 8/2015, de 30 de octubre, por el que se aprueba el texto refundido de la Ley General de la Seguridad Social, Art. 7.

[87] In this thesis, the pronoun 'he' is used as a neutral pronoun, hence referring to all genders.

[88] Real Decreto Legislativo 2/2015, de 23 de octubre, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores, Art. 1(1).

[89] Ibid, Art. 1(3).

[90] Ibid, Art. 8(1).

[91] Ibid, Art. 1(1) (own translation).

[92] See, inter alia, Tribunal Supremo. Sala de lo Social, Sentencia núm. 902/2017, para. 3; Barrio, A., 'Contradictory decisions on the employment status of platform workers in Spain', *Dispatches Comparative Labor Law & Policy Journal*, Dispatch No. 20 – Spain, 2020.

Self-employed persons, in turn, are defined as those persons who carry out, on a regular basis, personal, direct, on their own account and outside the sphere of management and organization of another person, an economic or professional activity for profit, whether or not employing persons.[93]

Moreover, there is a subcategory of self-employment: the economically dependent self-employed worker (*trabajador autónomo económicamente dependiente*). This legal status grants some extra labour and social security rights.[94]

This status is defined as a self-employed person who carries out an economic or professional activity for profit and on a regular, personal, direct and predominant basis for a natural or legal person, called a client, who is financially dependent on him for at least 75% of his income.[95] Economically dependent self-employed workers must sign a contract with their main client and register it in the National Registry of Professional Associations of Self-Employed Workers (*Registro Nacional de Asociaciones Profesionales de Trabajadores Autónomos*). However, it is important to note that this legal form is rarely used.[96]

As noted above,[97] in order to be considered a self-employed worker, one of the criteria to be fulfilled is that the activity performed is done so on a regular basis. The term 'regular basis' is not defined under statutory law, although the Supreme Court has developed a set of criteria through its case-law: if an economic activity is not performed continuously, exclusively and through a physical establishment open to the public,[98] then it would be assumed that it is not self-employment if it

[93] Ley 20/2007, de 11 de julio, del Estatuto del Trabajo Autónomo, Art. 1(1)

[94] The primary difference, for social security purposes, is that economically dependent self-employed may resort to a social court instead of a civil court.

[95] Ley 20/2007, de 11 de julio, del Estatuto del Trabajo Autónomo, Art. 11.

[96] There were only 10,250 economically dependent self-employed workers registered in September 2016. See Europa Press, 'Sólo 10.250 autónomos están inscritos en el SEPE como económicamente dependientes', in *Europa Press*, 20 September 2016, retrieved on 15 December 2020 at https://www.europapress.es/economia/laboral-00346/noticia-solo-10250-autonomos-estan-inscritos-sepe-economicamente-dependientes-upta-20160920121206.html. The fact that this form of work is only used marginally has not changed significantly since then, in spite of the online platforms' interest in it, see Suárez, B., 'The Influence of the Platform Economy on the Financing of Social', in Becker, U. and Chesalina, O. (eds.), *Social Law 4.0*, Baden-Baden: Nomos, 2021, pp. 233.

[97] See the mention of 'on a regular basis' in the definition of Self-employed persons.

[98] The assumption of being a self-employed worker if the person performs his activity through an establishment open to the public is established in Real Decreto 2530/1970, de 20 de agosto, por el que se regula el régimen especial de la Seguridad Social de los trabajadores por cuenta propia o autónomos, Art. 2.

produces annual earnings below the minim wage per year[99] (which is €13,300 in 2021[100]). The interpretation of the notion 'regular basis' has progressively broadened.[101] In this regard, it is no longer required to consider an activity as 'regular' only because it is the main occupation. In turn, an activity which only occupies a few hours a week might be considered as a regular activity (and, therefore, self-employment). [102] Moreover, there has been some discussion on how the concept of 'establishment open to the public' may be transferred to platform work.

If a person performs an activity outside an employment relationship on a non-regular basis, then such activity would not be considered as self-employment nor employment, and thus it would not be subjected to the provisions on social security related to the performance of work. It must be stressed that this may only be the case for those activities performed outside an employment relationship, as all activities performed as an employee produce the obligation to be insured by all labour-related social security schemes, no matter the salary. In this regard, while the law foresees the possibility of excluding from the field of application of certain social security schemes those persons who perform work which may not be considered their main source of income,[103] this has not been reflected yet into specific norms with real applicability.[104]

[99] Tribunal Supremo, Sala de lo Social, Rec. 406/1997, de 29 October 1997; Tribunal Supremo, Sala de lo Social, Rec. 5006/2005, de 20 March 2007. As noted in Iberley, *Requisito de habitualidad de la actividad económica que se exige al trabajador autónomo para la inclusión en el RETA*, retrieved on 15 December 2020 at www.iberley.es/temas/habitualidad-actividad-economica-autonomos-14121.

[100] Real Decreto 231/2020, de 4 de febrero, por el que se fija el salario mínimo interprofesional para 2020; Real Decreto-ley 38/2020, de 29 de diciembre, por el que se adoptan medidas de adaptación a la situación de Estado tercero del Reino Unido de Gran Bretaña e Irlanda del Norte tras la finalización del periodo transitorio previsto en el Acuerdo sobre la retirada del Reino Unido de Gran Bretaña e Irlanda del Norte de la Unión Europea y de la Comunidad Europea de la Energía Atómica, de 31 de enero de 2020, Disposición adicional sexta. Prórroga de la vigencia del Real Decreto 231/2020, de 4 de febrero, por el que se fija el salario mínimo interprofesional para 2020.

[101] Todolí, A., *El Trabajo en la era de la Economía Colaborativa*, Valencia: Tirant lo Blanch, 2017, p. 100.

[102] Ibid.

[103] Real Decreto Legislativo 8/2015, de 30 de octubre, por el que se aprueba el texto refundido de la Ley General de la Seguridad Social, Art. 7(5).

[104] Such an exclusion has been only foreseen concerning two occupations of residual importance: horse breeders working for a particular company and persons 'repairing and mending sacks'.

2.1.5. *Financing and contributions*

The Spanish social security system is financed by a combination of social security contributions and general taxation.

There are several important differences between the social security contributions of employees and the self-employed. The most significant is the total contribution rate,[105] which is higher in the case of employees, although it also corresponds to a more comprehensive range of social security schemes available for them. Moreover, the employees' contributions generally depend on the salary while, in the case of the self-employed, the self-employed themselves determine the contributory basis (with a minimum and a maximum amount -these minimum and maximum amounts change in the case of self-employed persons aged 47 years or older-[106]).

The social security contributions resulting from an employment relationship varies between 38.2% and 43.85% of the contribution basis (depending on the economic sector[107]). As it was just mentioned, the contribution basis generally is the employee's salary, although with two caveats. First, in the case of occupations considered as belonging to a superior professional group (e.g. managerial staff, engineers), the minimum contributory basis exceeds the minimum monthly salary (and reaching up to around €1,200). And, second, the maximum contributory basis is roughly €3,800 per month.

The social security contribution rates of the self-employed, in turn, amount to about 30,2% of the contribution basis. As noted above, the basis for contribution is determined by the self-employed person, but there is a minimum basis of about €950 per month, as well as a maximum of around €4,100 per month. This means that, in theory, a self-employed person must pay at least about €300 per month in social security contributions, irrespective the amount of time dedicated to the

[105] For the specific social security contributions rates, see Orden TMS/83/2019, de 31 de enero, por la que se desarrollan las normas legales de cotización a la Seguridad Social, desempleo, protección por cese de actividad, Fondo de Garantía Salarial y formación profesional para el ejercicio 2019.

[106] Ibid., Art. 15.

[107] This percentage includes contributions for all contingencies -including those that are not included in the material scope of this thesis, such as survivorship, as such contribution is paid together with the contribution for long-term incapacity. See Ley 42/2006, de 28 de diciembre, de Presupuestos Generales del Estado para el año 2007, disposición adicional cuarta.

self-employed activity or the income derived from it. Nevertheless, persons who start as a self-employed (and who have not been self-employed in the last two years) are allowed to pay during the first 12 months a fixed monthly contribution of €60, if they opt for the minimum contributory base; or a reduction of 80% of their social security contribution, if they do not do so. Reductions in contributions of 50% apply to the next six months, and of 30% to the six months after.[108] A further 30% reduction applies for another 12 months to young workers.[109]

2.2. Social security benefits in Spain

The previous section has provided an overview of the constitutive elements of the Spanish social security system. The current section presents and analyse the different social security schemes (both social insurance and social assistance schemes) which form the social security system of Spain. Understanding the different social security schemes is fundamental for analysing how they may apply to the specific situation of platform work.

2.2.1. *Unemployment*

There are six unemployment benefit schemes:

- The contributory unemployment benefit scheme (*prestación por desempleo*)[110] is a benefit aimed towards those who were employees for at least 360 days in the six years prior to claiming the benefit.[111] The duration of the benefit varies between four months and two years, depending on the claimant's contributions. Its amount during the first six months of benefit is approximately 75% of the claimant's average salary[112] during the previous 180

[108] Ley 20/2007, de 11 de julio, del Estatuto del trabajo autónomo, Art. 31(1).

[109] Ibid, Art. 31(2).

[110] Real Decreto Legislativo 8/2015, de 30 de octubre, por el que se aprueba el texto refundido de la Ley General de la Seguridad Social, Art. 266-273.

[111] Ibid., Art. 266.

[112] The benefit is calculated applying the abovementioned percentages to the regulatory basis (*base reguladora*). The regulatory basis for the contributory unemployment benefit will be the average amount on which contributions are calculated (contribution basis) during the last 180 days. For employees, the contribution basis is an amount similar to the salary, although with a minimum and a maximum amount.

days,[113] and 50% of that same average salary afterwards. Nevertheless, there is a minimum monthly amount.

It should be noted that those employees who have experienced a temporary redundancy (i.e. a suspension of their employment contract)[114] as a result of the COVID-19 pandemic are automatically entitled to the contributory unemployment benefit without having to fulfil the minimum periods of contribution normally required.[115] Furthermore, the period of contributory unemployment benefit they receive is not taken into account for the duration of the contributory unemployment benefit.[116]

- The unemployment allowance scheme (*subsidio por desempleo*)[117] is a means-tested benefit available to those persons with income of less than 75% of the minimum wage and who are included in at least one of the following situations:

    a) having exhausted the contributory unemployment benefit and having family charges;[118]

    b) having exhausted the contributory unemployment benefit and being 45 years or older at the date of exhaustion;

[113] Real Decreto Legislativo 8/2015, de 30 de octubre, por el que se aprueba el texto refundido de la Ley General de la Seguridad Social, Art. 270.

[114] Employers are not allowed to dismiss employees as a result of the COVID-19 pandemic, and all temporary contracts must be renewed while the measures concerning the COVID-19 (which have been renewed periodically) are applicable. See Decreto-ley 9/2020, de 27 de marzo, por el que se adoptan medidas complementarias, en el ámbito laboral los efectos causados por el COVID-19; Real Decreto-ley 18/2020, de 12 de mayo, de medidas sociales en defensa del empleo.

[115] Real Decreto-ley 30/2020, de 29 de septiembre, de medidas sociales en defensa del empleo.

[116] Ibid.

[117] Real Decreto Legislativo 8/2015, de 30 de octubre, por el que se aprueba el texto refundido de la Ley General de la Seguridad Social, Art. 274-280.

[118] For the purposes of this scheme, family charges mean having a dependent spouse, children under twenty-six years of age or disabled adults, or foster children, when the income of the entire family unit thus constituted, including the applicant, divided by the number of its members, does not exceed 75% of the minimum inter-professional wage. See Real Decreto Legislativo 8/2015, de 30 de octubre, por el que se aprueba el texto refundido de la Ley General de la Seguridad Social, Art. 275.

c) being legally unemployed and not being entitled to the contributory unemployment benefit for not reaching the contribution period of 360 days, provided that the person has contributed for at least three months if he has family charges, or six months if he has no family charges;

d) being 52 years or older and having fulfilled all criteria to become entitled to the old-age retirement pension except the age;

e) being an emigrant returned from countries outside the European Economic Area, having worked abroad for at least 12 months in the last six years in those countries and not having the right to the contributory unemployment benefit;

f) having been released from prison and not having the right to the contributory unemployment benefit; a permanent incapacity withdrawn due to the improvement of an ailment;

g) having exhausted the contributory unemployment benefit and being long-term unemployed.

The benefit amounts to about €450 per month. Its minimum duration is three months, and the maximum duration is 24 months, depending on the periods of insurance accumulated, and on whether or not the claimant has family responsibilities and whether or not he is older than 45 years.

- The active income for labour market integration scheme ('*renta activa de inserción*')[119] is a means-tested benefit design specifically for persons belonging to certain vulnerable groups. The active income for labour market integration is available to those persons who are not entitled to other unemployment benefits or allowances, have income of less than 75% of the minimum wage (and are in a household which members do not have, on average, income

[119] Real Decreto 1369/2006, de 24 de noviembre, por el que se regula el programa de renta activa de inserción para desempleados con especiales necesidades económicas y dificultad para encontrar empleo.

exceeding 75% of the minimum wage), are 64 years or younger, and are included in one of the following situations:

a) being 45 years of age or older, having extinguished an unemployment benefit or allowance and being registered or in the employment office as a job seeker for 12 or more months without interruption;

b) having a recognised degree of incapacity equal to or greater than 33%, having extinguished an unemployment benefit or allowance and being registered in the employment office as a job seeker for 12 or more months without interruption;

c) having worked abroad for at least 6 months since the last departure from Spain and have returned within the 12 months prior to the application;

d) being accredited by the competent administration as a victim of gender or domestic violence.

The benefit amounts to about €450 per month, for a maximum duration of 11 months. A person may claim this benefit again after a year of finishing claiming it for the last time.

- The extraordinary unemployment allowance (*subsidio extraordinario por desempleo*)[120] is a means-tested benefit for those who have reached the maximum duration of at least one of the previous benefits. It amounts to 70% of the minimum wage, and has a maximum duration of three months (and it can only be claimed once).

- The special unemployment allowance scheme (*subsidio especial por desempleo*)[121] is a scheme available to those persons whom entitlement to any of the unemployment benefits or allowances abovementioned ended between the 14th March 2020 and the 30th June 2020 and who do not receive any of the other benefits or allowances mentioned in this section.

[120] Real Decreto Legislativo 8/2015, de 30 de octubre, por el que se aprueba el texto refundido de la Ley General de la Seguridad Social, disposición adicional vigésima séptima.

[121] Real Decreto-ley 32/2020, de 3 de noviembre, por el que se aprueban medidas sociales complementarias para la protección por desempleo y de apoyo al sector cultural, Art. 1.

- The regional income for labour market integration (*renta de inserción autonómica*) is a means-tested benefit for those persons who are no longer entitled to any of the previous schemes, and which is provided by the regional governments. Its amount and duration varies between regions. However, on average, it may amount to about €400 per month for a maximum duration of approximately a year.

- Finally, the benefit against the risk of the involuntary end of the activity scheme (*protección por cese de actividad*)[122] is a scheme specific for the self-employed, and to which they are obliged to belong since January 2019.[123] In order to become entitled to it, the claimant must have contributed to it for at least 12 months uninterruptedly and immediately prior to the end of activity. It has a duration of between four and 24 months, depending on the number of months contributed (being 48 the maximum number of months contributed taken into account). An activity is considered to have ended for the purposes of this scheme if any of the following situations occur:[124]

    a) losses arising from the development of the activity in a full year exceeding 10% of the income obtained in the same period, excluding the first year of the self-employed activity;

    b) judicial or administrative executions aimed at the collection of debts recognized by the executive bodies, amounting to at least 30% of the income of the immediately preceding financial year;

    c) the judicial declaration of bankruptcy that prevents the continuation of the activity;

[122] Real Decreto Legislativo 8/2015, de 30 de octubre, por el que se aprueba el texto refundido de la Ley General de la Seguridad Social, Art. 327-350.

[123] Real Decreto Ley 28/2018, de 28 de diciembre, para la revalorización de las pensiones públicas y otras medidas urgentes en materia social, laboral y de empleo.

[124] For the sake of simplicity, only those situations that are more closely related to this thesis' topic have been included. The other situations accepted as justifying the end of activity for this scheme's purposes are loss of the administrative licence, gender-based violence which is a determining factor in the temporary or permanent cessation of the self-employed worker's activity and divorce or marital separation in cases in which the self-employed worker was performing family assistance functions in the spouse's business. See further Real Decreto Legislativo 8/2015, de 30 de octubre, por el que se aprueba el texto refundido de la Ley General de la Seguridad Social, Art. 331.

d) force majeure resulting in the temporary or definitive cessation of the economic or professional activity.

The benefit amounts to 70% of the average contribution basis of the last 12 months (as it has been noted above, in Spain the self-employed may decide their basis for contribution, although within a minimum and a maximum amount). However, a maximum benefit exist, amounting to approximately €980 for those self-employed without dependent children, €1,130 for those with one dependent child and €1,270 for those with more than one dependent child. A minimum benefit also exists, but only for those self-employed persons who have not opted to pay the lower contribution allowed during the first year of the self-employed person's activity. That minimum benefit amounts to about €450 or €600 (depending on whether the beneficiary has dependent children or not).

In the context of the COVID-19 pandemic, the requirements to access the benefit for end of activity has been reduced. Hence, those self-employed persons who are insured against the risk of end of activity and who have experienced a reduction on their turnover of at least 75% compared with the turnover from the last semester are entitled to the benefit for the end of activity (without requiring the usual minimum amount of contributions).[125]

2.2.2. *Sick pay*

Protection against the risk of temporary incapacity to work due to sickness may be granted in two ways:

- Through the temporary incapacity scheme (*incapacidad temporal*),[126] a benefit which is available to employees who have been insured for at least six months in the last five years,

[125] Real Decreto-ley 8/2020, de 17 de marzo Se abrirá en una ventana nueva, de medidas urgentes extraordinarias para hacer frente al impacto económico y social del COVID-19; Real Decreto-ley 14/2020, de 14 de abril Se abrirá en una ventana nueva. , por el que se extiende el plazo para la presentación e ingreso de determinadas declaraciones y autoliquidaciones tributarias; Real Decreto-ley 15/2020, de 21 de abril Se abrirá en una ventana nueva. , de medidas urgentes complementarias para apoyar la economía y el empleo; Real Decreto-ley 30/2020, de 29 de septiembre, de medidas sociales en defensa del empleo.

[126] Real Decreto Legislativo 8/2015, de 30 de octubre, por el que se aprueba el texto refundido de la Ley General de la Seguridad Social, Art. 169-176.

and which amounts to approximately 60% the employee's basis for contribution (which is typically similar to the person's salary) in the previous month for the first three weeks, and 75% of it afterwards. The maximum duration of the benefit is 18 months, after which the person may resort to the long-term incapacity benefit.

- Through a private insurance fund (*Mutua*) for those persons in self-employment. Joining such a private insurance is compulsory, and grants the same benefits (and under the same requirements) as in the case of employees.

2.2.3. *Long-term incapacity*

There are two schemes providing a pension for those persons who are long-term incapacitated:

- The contributory long-term incapacity pension scheme (*pensión de incapacidad permanente*),[127] which covers both self-employed and employees, although self-employed persons are only protected against the risk of total or absolute[128] incapacity (and thus not against partial incapacity -except in those cases due to labour accidents or professional diseases).[129] In this regard, there are four degrees of long-term incapacity, namely partial incapacity (i.e. at least a 66% capacity reduction for the usual occupation), total incapacity (i.e. incapacity to perform all or the main activities of the usual occupation, but the individual may perform other occupations), absolute incapacity (i.e. incapacity to perform any occupation) and great invalidity (i.e. incapacity to perform any occupation and the need of support for daily activities).[130] In order to be entitled to this benefit, the claimant needs to have performed insured work in the relevant legal status for at least 25% of the time since his 20th birthday (and with a threshold of a minimum total insured time of five years). Furthermore, part of those periods of work (20%) needs to have been performed within the

[127] Real Decreto Legislativo 8/2015, de 30 de octubre, por el que se aprueba el texto refundido de la Ley General de la Seguridad Social, Art. 193-200.

[128] As it is noted just below, the terms 'total' and 'absolute' incapacity refer to different degrees of incapacity.

[129] Decreto 2530/1970, de 20 de agosto, por el que se regula el Régimen Especial de la Seguridad Social de los trabajadores por cuenta propia o autónomos, Art. 36-41.

[130] See Orden de 15 de abril de 1969 por la que se establecen normas para la aplicación y desarrollo de las prestaciones por invalidez en el Régimen General de la Seguridad Social, Art. 12.

10 years before becoming incapacitated. The benefit varies but amounts to approximately, half or the totality of the average monthly salary prior to becoming incapacitated (depending on whether the incapacity is total or absolute). Increased level of benefit is possible for persons above the age of 55 and for women who have had children, as well as in the case that the incapacity results from an accident at work or professional disease. In case of partial long-term incapacity, the benefit consists of a one-time lump-sum amounting to approximately 24 times the claimant's basis for contribution (which, in the case of employees is typically similar to the person's salary and, in the case of the self-employed, it is generally determined by them -see further section 2.1.55-).[131]

- The non-contributory invalidity pension (*pensión no contributiva de invalidez*),[132] which is available to all persons legally residing in Spain and with income under a certain threshold. In this regard, one-person households must have an income of less than about €5,500 per year in order to be entitled to this pension. This threshold increases by approximately €5,000 or €10,000 per extra member of the family unit (depending on whether that member is a parent/offspring or a close relative/partner). The amount of the benefit for one individual varies between about €100 and €400 per month, depending on the number of beneficiaries of the non-contributory invalidity pension belonging to the same household, the personal income and of the number of members of the household.

2.2.4. *Labour accidents and professional diseases*

Protection against the risk of labour accidents and professional diseases (*accidentes de trabajo y enfermedades profesionales*) is embedded into the temporary (i.e. sick pay) and long-term

[131] For the exact method for calculation of the regulatory basis for this benefit, see Real Decreto Legislativo 8/2015, de 30 de octubre, por el que se aprueba el texto refundido de la Ley General de la Seguridad Social, Art. 197.

[132] Real Decreto 357/1991, de 15 de marzo, por el que se desarrolla en materia de pensiones no contributivas la Ley 26/1990, de 20 de diciembre, por la que se establecen en la Seguridad Social prestaciones no contributivas; Orden PRE/3113/2009, de 13 de noviembre, por la que se dictan normas de aplicación y desarrollo del Real Decreto 357/1991, de 15 de marzo, por el que se desarrolla, en materia de pensiones no contributivas, la Ley 26/1990, de 20 de diciembre, por la que se establecen en la Seguridad Social prestaciones no contributivas, sobre rentas o ingresos computables y su imputación.

incapacity schemes. Therefore, employees are insured through the statutory schemes, while self-employed persons must be insured[133] through the private institutions called *Mutuas*.

Temporary or long-term incapacity resulting from a labour accident or professional disease receives extra protection. In the case of temporary incapacity, this reflects in the possibility of receiving the full benefit (75% of the claimant's salary) the day after the incapacity occurs. Furthermore, there is no requirement of periods of contribution. In the case of long-term incapacity, there are no required periods of contributions as well. Moreover, normally the benefit is increased by 30% to 50% if the accident was caused by a lack of the required safety measures. However, as this increase is imposed upon the employer, this does not apply to the situation of self-employed workers (including economically dependent self-employed workers).[134] Furthermore, and as noted above, self-employed persons may be entitled to partial long-term incapacity if it results from a labour accident or professional disease (while, if it does not, they are only entitled to total or absolute long-term incapacity).

2.2.5. *Maternity and paternity*

There are two benefits available to future parents performing work, either as an employee or a self-employed:

- The birth and childcare benefit (*prestacion por nacimiento y cuidado de menor*)[135] is a benefit available to men and women, whether employees or self-employed persons,[136] who are insured at the moment of birth[137] and fulfil the minimum contribution period. The

[133] See Real Decreto-ley 28/2018, de 28 de diciembre, para la revalorización de las pensiones públicas y otras medidas urgentes en materia social, laboral y de empleo.

[134] Ministerio de Empleo y Seguridad Social, 'Incapacidad permanente', Regímenes Especiales, retrieved on 15 December 2020 at http://www.mites.gob.es/es/Guia/texto/guia_14/contenidos/guia_14_29_7.htm

[135] Real Decreto Legislativo 8/2015, de 30 de octubre, por el que se aprueba el texto refundido de la Ley General de la Seguridad Social, Art. 177-180; Real Decreto Legislativo 2/2015, de 23 de octubre, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores, Art. 48.

[136] Real Decreto Legislativo 8/2015, de 30 de octubre, por el que se aprueba el texto refundido de la Ley General de la Seguridad Social, Art. 318.

[137] Similar provisions exist in the case of adoption, guardianship for the purposes of adoption or foster care, see further Real Decreto Legislativo 8/2015, de 30 de octubre, por el que se aprueba el texto refundido de la Ley General de la

contribution period varies between three months and a year, depending on the age of the claimant and the period of time taken into account[138] (persons under 21 years of age are not required to fulfil any contribution period). The benefit amounts to the basis for contribution[139] (which, in the case of employees is typically similar to the person's salary and, in the case of the self-employed, it is generally determined by them -see further section 2.1.5-).[140] The benefit duration of the benefit varies slightly between the one for the mother and the one for the father:

a) For the biological mother, the benefit lasts 16 weeks (of which six weeks are mandatory).[141] The mother may opt to transfer two of the 10 voluntary weeks to the other parent.[142] It is possible to receive the benefit on a part-time basis.

b) For the parent other than the biological mother, the benefit lasts 12 weeks (of which four are mandatory). [143]

Moreover, each parent is entitled to one extra week for each additional child, as well as one other extra week due to the incapacity of the child.[144]

- The non-contributory special maternity allowance (*subsidio especial por maternidad*) is available to mothers, either employees or self-employed, and has the same requirements for its entitlement as in the case of the birth and childcare benefit, except that a minimum contribution period is not required. The benefit amounts monthly to about €550 or

Seguridad Social, Art. 177-180; Real Decreto Legislativo 2/2015, de 23 de octubre, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores, Art. 48.

[138] The claimant may choose whether the periods of work performed in the last seven years or the claimant's whole work history should be taken into account.

[139] The basis for contribution taken into account is of the one of the month prior to the birth in the case of employees, and of the six months prior to the birth in the case of self-employed persons.

[140] For the exact method for the calculation of the regulatory basis for this benefit, see Real Decreto Legislativo 8/2015, de 30 de octubre, por el que se aprueba el texto refundido de la Ley General de la Seguridad Social.

[141] Real Decreto Legislativo 2/2015, de 23 de octubre, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores, Art. 48.

[142] Ibid.

[143] Ibid.

[144] Ibid.

approximately the basis for contribution as it was calculated in the case of the birth and childcare benefit, whichever is lower. It has a duration of 42 calendar days after giving birth, plus 14 additional calendar days in cases of birth in a large or single-parent family, multiple births or incapacitated mother or child.[145]

Besides maternity benefits, there are two benefits focused on the protection of the mother and the child when the professional activity may endanger them: Benefit due to risk during pregnancy and breastfeeding. Both benefits do not require a minimum period of contribution.

2.2.6. *Retirement*

2.2.6.a. First pillar pensions

Two schemes providing income replacement in the case of retirement exist:

- Contributory old-age pension scheme (*pensión contributiva de jubilación*), which is available to both employees and the self-employed. In order to be eligible, a person must fulfil a minimum contribution period of 15 years, of which at least two years must be within the preceding 15 years (which includes periods of pregnancy).[146] Furthermore, it is necessary to have reached at least the age of 65 years and 10 months.[147]

  The basis for calculating the benefit is 85.7% of the average basis for contribution (based on the basis for contribution over the last 21 years).[148] The amount of the benefit is, for the first 15 years of contributions, 50% the basis for calculation. Each additional month of contributions accumulated above those 15 years means a small increase (of about 0.20%) in

[145] These causes for extension in the duration cannot be accumulated.

[146] It is assumed that the worker rises 112 full days of contribution for each pregnancy, and 14 days for each child after the second within a multiple birth.

[147] Or 65 years, if the person has at least 37 years of accumulated insurance periods. Furthermore, the age requirements for those without long careers will raise until 2027, when only people who have had accumulated periods of insurance of at least 38 years and a half will be entitled to retire at the age of 65, will those who do not will have to retire at the age of 67, see Real Decreto Legislativo 2/2015, de 23 de octubre, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores, Art. 204-225.

[148] Ibid., Art. 209-210.

the pension's amount.[149] Therefore, a pension amounting to the full basis for calculation will be reached in the case of a person with about 37 years of paid contributions. Moreover, certain increases apply if the recipient retires after the legal retirement age. The pension benefit is suspended during reincorporation to work (except in cases of compatibility) and sanctions.

While self-employed people are eligible to the contributory old-age pension in the same conditions as employees, there are a few caveats.[150] In this regard, self-employed persons are not eligible for partial contributory old-age pension and early pension. Furthermore, self-employed people cannot provide extra contributions in order to fill contribution gaps.

- Non-contributory old-age pension (*pensión no contributiva de jubilación*),[151] a means-tested benefit with the same conditions and amounts as in the case of non-contributory invalidity pension. Thus, the pension is available to all persons legally residing in Spain and who have income of less than about €5,500 per year, for family units of one member (this amount is higher in the case of family units with more members, particularly when those members are parents, offspring or a partner). The pension amounts to up to €400 per month, if the claimant has income of less than about €1,600 per year (otherwise, the benefit would be reduced in relation to the earnings up to a minimum amount of €100 per month).

It must be noted that, in Spain, the use of pension funds other than the public pension system managed by the State is relatively marginal.[152]

[149] Nevertheless, the criteria for calculation will progressively vary until 2027, when the amount of the benefit will be calculated as follows: for the first 15 years of contributions, 50% of the basis for calculation; from the 16th year, for each additional month of contribution, it is the addition of a 0.19% for each additional month of contribution between 1 and 248 months, and, from the 248th month onwards, addition of a 0.18% per additional month. The total percentage to be applied to the basis for calculation in order to determine the amount of the benefit cannot exceed 100%.

[150] See Decreto 2530/1970, de 20 de agosto, por el que se regula el Régimen Especial de la Seguridad Social de los trabajadores por cuenta propia o autónomos, Art. 42-45.

[151] Real Decreto 357/1991, de 15 de marzo, por el que se desarrolla en materia de pensiones no contributivas.

[152] In June 2020, there were approximately €110,000,000,000 in private pension funds in Spain. See further Asociación de Instituciones de Inversión Colectiva y Fondos de Pensiones, *Patrimonio de los fondos de pensiones al 30/09/2020*, retrieved on 15 December 2020 at www.inverco.es//documentos/pension_trimestral/2009_Septiembre%202020/2009Tfp_0101-PatrimEuros.pdf

2.2.7. *Minimum income*

The Minimum Vital Income (*Ingreso Mínimo Vital -IMV-*)[153] is a (means-tested) minimum income scheme for households at risk of poverty and social exclusion. It is a new scheme, created in May 2020. While the reason behind it is to combat structural poverty in Spain, its creation was accelerated in order to also address the situations of vulnerability caused by COVID-19.[154] The benefit lasts as long as the access requirements are met. It guarantees an income of €470 per month for a one-person household, an amount that is increased by about €140 per additional household member up to a maximum of approximately €1,000 per month. The final benefit is calculated as the difference between the household's income and the income guaranteed by the MVI. It is paid in 12 instalments, and it is compatible with other benefits.

Recipients need to be between 23 and 65 years old, have been resident in Spain for one year, live independently for between one and three years, be in demand for employment and have assets of less than three times the annual amount of the benefit (for one person this will be €16,000 and for a cohabitation unit of 4 it will be €43,000).

2.3. The social security position of persons in a standard employment relationship

In the previous section, the different schemes available in Spain in relation to all the contingencies studied in this thesis have been analysed. In this section the social security position of a person in a standard employment relationship is studied.[155] This is done in three steps: Firstly, it is considered whether a person in a standard employment relationship is covered by these schemes (i.e. formal access). Secondly, it is determined whether a standard worker can meet the necessary requirements

[153] Real Decreto-ley 20/2020, de 29 de mayo, por el que se establece el ingreso mínimo vital.

[154] Revista de la Seguridad Social, *El Consejo de Ministros aprueba la creación de un Ingreso Mínimo Vital*, 29/05/2020, retrieved on 15 December 2020 at www.revista.seg-social.es/2020/05/29/el-consejo-de-ministros-aprueba-la-creacion-de-un-ingreso-minimo-vital/#:~:text=La%20prestaci%C3%B3n%20se%20percibir%C3%A1%20mensualmente,retroactivos%20al%201%20de%20junio.

[155] See the definition of a standard employment relationship used in this thesis in section 1.4.6.

to become entitled to the benefits contained in these schemes (i.e. effective access).[156] Thirdly, the content of the benefits for a person in a standard employment relationship (i.e. their duration and amount) is analysed.

Hence, a person performing work in a standard employment relationship is formally covered by all social security schemes available in Spain, both social insurance schemes and social assistance schemes.[157] In that regard, standard employees are included in social insurance schemes addressing all the contingencies covered in this thesis: unemployment (through the contributory-based scheme -*prestación por desempleo*- and, if the person exceeds its maximum duration, the means-tested extraordinary unemployment allowance -*subsidio extraordinario por desempleo*-[158]), sick pay (through the temporary incapacity scheme -*incapacidad temporal*-), long-term incapacity (through the contributory long-term incapacity pension -*pensión de incapacidad permanente*-), labour accidents and professional diseases (*accidentes de trabajo y enfermedades profesionales*), maternity or paternity (through the birth and childcare benefit -*prestacion por nacimiento y cuidado de menor*-) and retirement (through the contributory old-age pension scheme -*pensión contributiva de jubilación*-).

The requirements to become entitled to these schemes' benefits would be generally fulfilled by a person who works full-time in an open-ended relationship earning the minimum wage. The benefits of the social insurance schemes vary (depending on the scheme) between approximately 75% and 100% of the basis for contribution (which, in turn, is very similar to the employee's salary). Hence, they may ensure the conservation of a similar standard of living of the claimant while they last. In that regard, the duration may vary (depending on the contributions paid and the benefit) in between

[156] That is, although a person may be formally covered by a social security scheme, if that person is not able to meet the requirements to obtain the benefits contained in that programme, he does not actually have access to the benefits despite being part of it.

[157] As it is analysed just below, persons in a standard employment relationship in Spain would typically fulfill the requirements to become entitled to benefits of the social insurance schemes. As a result, the social assistance schemes are not addressed as it regards these persons (they are addressed, however, as it regards the situation of platform workers).

[158] Other schemes available are the special unemployment benefit (*subsidio especial por desempleo*), a temporary benefit created in the context of COVID-19, and the regional income for labour market integration (*renta de inserción autonómica*).

four months and two years (with the exception of long-term full incapacity and retirement pensions, which duration is generally indefinite).

2.4. Platform work and social security in Spain

In this section, the specific social security position of platform workers in Spain is studied.

In order to do so, it is first analysed what is the general legal status of platform workers in this country (section 2.4.1), as this status is (as it has been shown in the previous analysis of the different social security schemes available) fundamental in many occasions for determining their social security position.

Since 2018, there have been numerous rulings on the employment status of platform workers working through (what is referred in this thesis as) platforms that provide a homogenised service, such as *Deliveroo*. Hence, these rulings and, particularly, the different trends and their evolution, are analysed below, with the aim of providing some light on the legal status of platform workers in the country. Nevertheless, it is also acknowledged that these decisions do not represent the entire range of situations included in this thesis under the term 'platform work'.

Then, the social security position of platform workers in an employment relationship (section 2.4.2.) and self-employed platform workers (section 2.4.3) is examined. It is in these two sections where the analysis of the different social security schemes available in this country comes to fruition, as it is applied to the specific situation of platform workers. When doing so, the differences between the social security position of persons in a standard employment and the one of platform workers are highlighted.

2.4.1. *The legal status of platform workers*

There are no norms under Spanish law specifically addressing platform work.[159] Instead, platform workers are treated as any other workers as far as social security is concerned. This means that the

[159] Please note that, since the finalisation of the writing of this thesis, but prior to its defense, an Act establishing a presumption of employment concerning delivery riders of online platforms was enacted (entering into force on the 12

legal status (or legal statuses) under which a person has performed insured work and the time during which he has done so determine in great part his social security rights and obligations. Therefore, assessing the legal status under which a person performs platform work is key with regard to the social security position of platform workers.

The question of the legal status of workers of online platforms that offer a homogenised service (e.g. *Uber*, *Deliveroo*) was initially addressed in late 2017 and early 2018 by the labour inspectorate in the regions of Valencia and Madrid. In these regions, the inspectorate classified persons performing work for the delivery platform *Deliveroo* as employees (*trabajador por cuenta ajena*), and thus requiring the payment of sanctions and unpaid social security contributions.[160] This was done so in spite of the offer of *Deliveroo* to reclassify its workers as economically dependent self-employed (*trabajadores autónomos ecónomicamente dependientes*) few months prior to the decision of the labour inspectorate.[161] Then, a social court of first instance in Barcelona decided that riders of the delivery platform *Take Eat Easy* had been wrongly classified as self-employed (*trabajador autónomo*), since they were deemed to be employees.[162] Shortly after, a social court of first instance in Valencia decided in a similar case with the same outcome, this time concerning the riders of *Deliveroo*.[163] This decision then became final, as *Deliveroo* withdrew its appeal. Nevertheless, since then a string of decisions by courts of first instance started, with an almost equal

August 2021), see Real Decreto-ley 9/2021, de 11 de mayo, por el que se modifica el texto refundido de la Ley del Estatuto de los Trabajadores, aprobado por el Real Decreto Legislativo 2/2015, de 23 de octubre, para garantizar los derechos laborales de las personas dedicadas al reparto en el ámbito de plataformas digitales; Resolución de 10 de junio de 2021, del Congreso de los Diputados, por la que se ordena la publicación del Acuerdo de convalidación del Real Decreto-ley 9/2021, de 11 de mayo, por el que se modifica el texto refundido de la Ley del Estatuto de los Trabajadores, aprobado por el Real Decreto Legislativo 2/2015, de 23 de octubre, para garantizar los derechos laborales de las personas dedicadas al reparto en el ámbito de plataformas digitales.

[160] Acta de liquidación de cuotas a la seguridad social, desempleo, fondo de garantía salarial y formación professional por falta de afiliación o alta, dirigida a Roofoods Spain, SL., por el periodo 05/2016 al 09/2017, comuniacada el 11 Diciembre 2017.

[161] Paniagua, E., 'Deliveroo anuncia cambios en los contratos de sus repartidores', *El Mundo*, 19 June 2017, retrieved on 15 December 2020 at https://www.elmundo.es/economia/empresas/2017/06/19/5947bd4bca4741fe1f8b45e6.html; Europa Press, 'Más del 70% de los 'riders' de Deliveroo apoyan el nuevo modelo de colaboración ofrecido por la empresa', in *Europa Press*, 4 September 2017, retrieved on 15 December 2020 at www.europapress.es/economia/noticia-mas-70-riders-Deliveroo-apoyan-nuevo-modelo-colaboracion-ofrecido-empresa-20170904122127.html

[162] Juzgado de lo Social de Barcelona No. 11, sentencia de 29 de mayo de 2018.

[163] Juzgado de lo Social de Valencia No. 6, sentencia de 1 junio de 2018.

number of decisions considering platform workers of delivery platforms as employees (nine decisions[164]) as those considering them self-employed (six decisions[165]). The same division existed with the first two decisions taken in appeal cases by regional courts (one considering platform workers as employees[166] and one considering them as self-employed[167]). Nevertheless, then the regional court of Madrid[168] concluded (in a decision taken by all the 21 court's members) that platform workers were employees, and all decisions taken after it had concluded that platform workers of delivery platforms are employees.[169] This included a recent decision by the Supreme Court, in which it was concluded that a platform worker of the delivery platform *Glovo* was an employee.[170] In the cases that have considered platform workers as employees, some of the key elements in which the decisions have been based were that the platform was the main mean of production, that the platform workers did not have in practice real freedom to establish their own schedule, and that the platform exercise all power the commercial decisions, including setting the remuneration.[171]

In summary, the initial situation of significant legal uncertainty due to contradictory judicial status of platform workers performing work for platforms providing a homogenised service[172] (such as *Deliveroo*) might have come to a (tentative) end with the recent trend of decisions and, specially,

[164] Juzgado de lo Social de Madrid No 33, sentencia de 11 de febrero de 2019; Juzgado de lo Social de Gijón No. 1, sentencia del 20 de febrero de 2019; Juzgado de lo Social No. 1 de Madrid, sentencias del 3 y 4 de abril de 2019; Juzgado de lo Social No. 6 de Valencia, sentencia del 10 de junio de 2019; Juzgado de lo Social No. 31 de Barcelona, sentencia del 11 de junio de 2019; Juzgado de lo Social No. 19 de Madrid, sentencia del 22 de julio de 2019; Juzgado de lo Social No. 3 de Barcelona, sentencia del 18 de noviembre de 2019.

[165] Juzgado de lo Social No. 24 de Barcelona, sentencias del 21 y 29 de mayo de 2019; Juzgado de lo Social No. 39 de Madrid, sentencias del 11 de enero de 2019; Juzgado de lo Social No. 4 de Oviedo, sentencias del 25 de febrero de 2019; Juzgado de lo Social No. 1 de Salamanca, sentencias del 1 de junio de 2019. Juzgado de lo Social No. 2 de Vigo, sentencia del 12 noviembre de 2019.

[166] Tribunal Superior de Justicia de Asturias, Sala de lo Social, sentencia de 25 de julio de 2019.

[167] Tribunal Superior de Justicia de Madrid, Sala de lo Social, sentencia de 19 de septiembre de 2019.

[168] Tribunal Superior de Justicia de Madrid, Sala de lo Social, sentencia de 17 de enero de 2020.

[169] Suárez, B., 'The Influence of the Platform Economy on the Financing of Social', in Becker, U. and Chesalina, O. (eds.), *Social Law 4.0*, Baden-Baden: Nomos, 2021, p. 237.

[170] Tribunal Supremo, Sala de lo Social, sentencia de 25 de septiembre de 2020.

[171] Ibid.; See further Todolí, A., 'Dispatch No. 30 - Spain - "Notes on the Spanish Supreme Court Ruling that Considers Riders to be Employees"', in *Dispatches Comparative Labour Law and Policy Journal*, retrieved on 15 December 2020 at www.cllpj.law.illinois.edu/dispatches

[172] See, on the definition of this term for the purposes of this thesis, section 1.4.4.

the Supreme Court decision. This is, at least, from a theoretical point of view. In practice, most platforms providing an homogenised service still consider their platform workers (at least those who are the object of a definitive ruling) as self-employed workers.[173] Moreover, it should not be rejected as a possibility that online platforms will change their terms of service and way of operating in a way that allows them to argue that previous judicial decisions are no longer applicable to the reality of the relationship between the platform and the platform worker under the new terms. Furthermore, no judicial decisions have been taken yet on the employment status of platform workers of platforms acting as a marketplace.[174] As a result, platform workers are still experiencing plenty of uncertainty on their legal status, which translates into uncertainty on their social security position, as one is in a considerable part linked to the other.

Taking into account this uncertainty, the social security position of platform workers in an employment relationship, as well as the position of those who are self-employed, is studied below.

2.4.2. *The social security position of platform workers in an employment relationship*

The position of platform workers classified as employees as it regards their formal coverage by social insurance and social assistance schemes is identical to the one of persons in a standard employment relationship (analysed above). Hence, these platform workers are included in social insurance schemes addressing all the contingencies covered in this thesis: unemployment (through the contributory-based scheme -*prestación por desempleo*- and, if the person exceeds its maximum duration, the means-tested extraordinary unemployment allowance -*subsidio extraordinario por desempleo*-[175]), sick pay (through the temporary incapacity scheme -*incapacidad temporal*-), long-term incapacity (through the contributory long-term incapacity pension -*pensión de incapacidad permanente*-), labour accidents and professional diseases (*accidentes de trabajo y enfermedades profesionales*), maternity or paternity (through the birth and childcare benefit -*prestacion por*

[173] Suárez, B., 'The Influence of the Platform Economy on the Financing of Social', in Becker, U. and Chesalina, O. (eds.), *Social Law 4.0*, Baden-Baden: Nomos, 2021, p. 235.

[174] See, on the definition of this term for the purposes of this thesis, section 1.4.4.

[175] Other schemes available are the special unemployment benefit (*subsidio especial por desempleo*), a temporary benefit created in the context of COVID-19, and the regional income for labour market integration (*renta de inserción autonómica*).

nacimiento y cuidado de menor-) and retirement (through the contributory old-age pension scheme -*pensión contributiva de jubilación*-).

To qualify for benefits under contributory programmes, contributions must have been paid for a period of between three months and one year, except in the case of long-term incapacity pensions (where longer periods are required) and retirement pension (entitlement to which requires 15 years of contributions, and 35 years for the full pension). One thing to note is that these periods of contributions need to be fulfilled within a relatively long period of time, which may allow platform workers to access the benefits of these schemes in spite of periods of inactivity or fractionated work. Nevertheless, in the case of the contributory unemployment benefit, the fact that a contribution is requested for one year in the last six years may pose a certain barrier for those entering or re-entering the labour market. As mentioned when studying the social security position of standard workers, the contributory benefits vary (depending on the scheme) between approximately 75% and 100% of the employee's salary. The fact that benefits are based on the employee's salary can obviously be detrimental to those platform workers with low earnings. Nevertheless, certain schemes (such as the contributory unemployment scheme) have set minimum amounts for their benefits. Moreover, while the duration of these benefits can vary from four months to two years, this variation depends largely on the contributions paid (as well as the type of benefit). Therefore, those platform workers who have contributed for short or fragmented periods may find themselves with short-term benefits.

Furthermore, for those cases where the platform worker cannot meet the requirements of the contributory schemes, there is a wide array of social assistance programmes based on the income of the worker and/or his family unit. Entitlement to those generally requires having earnings of less than approximately €700 per individual per month. The benefits linked to these programmes are approximately €500 per month (and may be less for part-time employees). It should be noted, however, that this 'social assistance net' is quite complex, composed of a great number of different social assistance schemes targeting specific contingencies (i.e. unemployment -concerning which there are currently six different social assistance schemes-, long-term incapacity, maternity and old-age pensions), plus a newly created minimum income scheme.

Overall, while platform workers in Spain are formally covered under all social security schemes and might, in some occasions, become entitled to the benefits contained in even the contributory schemes, the benefits that they would receive from these schemes might be low.

2.4.3. *The social security position of self-employed platform workers*

The classification of platform workers providing a homogenised service as employees is not a *fait accompli*. In this regard, the companies which own these platforms are persistent in claiming that the persons performing work through their platforms are genuine self-employed workers.

Self-employed platform workers are obliged to join the social insurance schemes concerning sick pay (through the temporary incapacity scheme -*incapacidad temporal*-, contributory long-term incapacity pension (*pensión de incapacidad permanente*), maternity and paternity pay (through the birth and childcare benefit -*prestacion por nacimiento y cuidado de menor*-), insurance against accidents at work and professional diseases (*accidentes de trabajo y enfermedades profesionales*, and for which they may opt out) and old-age pension (through the contributory old-age pension scheme -*pensión contributiva de jubilación*-). Thus, they are not covered for (regular) unemployment benefit. However, they are obliged to join the contributory scheme for income compensation in case of the end of their economic activity (*prestación por cese de actividad*).

Next to this, as in the case of employees, they may be entitled to means-tested schemes, namely non-contributory unemployment benefit (*prestación por desempleo de nivel asistencial*), non-contributory incapacity pension (*incapacidad permanente no contributiva*) and non-contributory old-age pension (*pension de jubilación en su modalid no contributiva*), as well as the minim income scheme (*Ingreso Minimo Vital*).

In order to access the contributory social security programmes, platform workers must contribute a minimum of €300 per month. It is worth noting that, however, during the first year this contribution is only €60 per month, which in practice constitutes a subsidy that facilitates the exercise of self-employment, which is especially relevant in the case of platform workers due to the low income that characterizes this activity.

The requirements to qualify for benefits are generally the same as for employees. Therefore they have to pay contributions that vary from 3 months to 1 year except in the case of long term incapacity where the periods are longer and retirement pensions where as we said before a period of 15 years of contributions and 35 years for full pension is acquired. It should be noted that the requirements for access to the benefit for cessation of activity are relatively demanding. Once again, as in the case of employees, the relatively long period of time in which these contribution periods must be fulfilled must be highlighted. As in the case of employees, the benefits of these contributory programmes are also based on the contribution base, which is key because the contribution base of the self-employed is decided by them and there is a risk that if a very low contribution base is chosen the resulting benefits may be very low. This is particularly relevant in the case of those self-employed workers who have chosen to pay a reduced contribution of €60 during the first year of activity, given that in this case the contribution base considered will be the minimum.

As noted above concerning the situation of platform workers in an employment relationship, there is a wide (and complex) array of social assistance schemes based on the income of the worker and/or his family unit, including a newly created minimum income scheme.

It should be noted that, however, the abovementioned protection refers to those platform workers who perform their activity with enough regularity to be considered as self-employed persons (and who, obviously, do not perform platform work in an employee capacity). There is thus the risk that a person who performs platform work and does not fulfil these criteria (which, in broad terms, consists on having annual income over the annual minimum wage[176]) would not have the legal status of either employee or self-employed, thus performing the activity in what may be referred as a non-professional capacity, in which case he would be excluded from all the social insurance schemes as well as the social assistance scheme concerning maternity.

[176] See, for a more detailed explanation on the requirements to be considered self-employed, section 2.1.4.

2.5. Concluding remarks

In Spain, platform workers generally receive a similar social security protection (at least concerning formal and effective access), no matter whether they are self-employed or employed. This is with the exception of unemployment benefits, concerning which self-employed platform workers have to meet much more demanding requirements and are not entitled to several of the welfare benefits for unemployment available to employees.

However, there may be important differences in the amount of the benefits depending on the employment status. In this regard, self-employed platform workers may decide their own contribution base, with a minimum, and have a significant reduction on their contribution during their first year of activity. This may result in an initial misconception for the self-employed platform worker on the real cost of performing platform work, as well as typically lower contributory benefits than persons in a standard employment relationship (as contributory benefits are typically related to the basis of contribution).

Both employed and self-employed platform workers may have difficulties accessing permanent incapacity benefits due to the relatively high requirements of this contingency. Furthermore, due to the fragmentation and lower salaries that characterises platform work, platform workers may typically receive contributory benefits that are of a lower amount and a shorter duration than persons in a standard employment relationship.

Nevertheless, perhaps the most controversial issue regarding the platform economy in Spain has been the discussion on the occupational classification of platform workers who provide a homogeneous service. Many judgements have been issued on that, and while the current trend points clearly towards considering such kind of platform workers as employees, many online platforms still treat their platform workers as self-employed persons. This has generated (and still generates) much confusion and lack of legal certainty for these workers.

However, there are some reasons for optimism, as there have been three new measures that can have a very significant effect on improving the social position of platform workers, namely the raising

of the minimum wage, the creation of the minimum living income and the strong scrutiny performed by the Labour Inspectorate on the occupational classification of self-employed platform workers.

Moreover, as a result of the COVID-19 pandemic, it seems that some of the gaps in the protection of vulnerable workers such as platform workers have come into the spotlight, with the Spanish government eliminating (in the case of employees) or reducing (in the case of self-employed persons) the requirements to access unemployment benefits.

Chapter 3. Platform work and social security in the United Kingdom

3.1. An introduction to the British social security system

As in the previous chapter on Spain, this section presents the basic elements of the social security system of the United Kingdom. These include the type of social security system (section 3.1.1), its legal (section 3.1.2) and institutional (section 3.1.3) framework, what legal forms of work exist (section 3.1.4), and how the social security contributions are structured (section 3.1.5). These elements play a fundamental role in understanding the sections which follow this one, and which enter into greater detail into the different social security schemes and how they affect the social security position of platform workers.

The fact that the UK is now no longer part of the European Union cannot be ignored. As mentioned in the first chapter of this thesis,[177] the reasons why it was decided to maintain the United Kingdom as one of the selected countries for this study in spite of Brexit were the same reasons why it was included in the first place: The United Kingdom is an important example of the Beveridge model of social security, and one of the first EU countries where platform work gained prominence. In any case, it is a country that will continue to be an interlocutor and a model for many EU Member States in the future. The challenges it faces as it regards platform work are similar to those faced by other Member States, and the solutions to them that it attempts (or will attempt in the future) are not too different to those considered across the EU.

3.1.1. *Nature of the British social security system*

Since the inception of the Beveridge Report on 1942,[178] and the subsequent reforms that it inspired, the British social security system has been characterised for providing an encompassing social security protection for all persons legally residing in the United Kingdom, with social security benefits of a fixed amount and duration.

[177] See section 1.4.7 on the selection of countries.

[178] Beveridge, W., *Social Insurance and Allied Services*, London: British Library, 1942.

The comprehensive character of the British social security system does not mean, however, that all residents are covered by all social security schemes. In particular, some schemes addressing the risks of unemployment, retirement and temporary and long-term incapacity only protect persons paying social security contributions (and, in some cases, only those in an employment relationship). Next to these insurance-based schemes, social assistance schemes exist. These are means-tested and (in the case of unemployment benefits) linked to demanding obligations to reintegrate into the labour market.

3.1.2. *Legal framework and structure*

The main source of legislation concerning social security is the Social Security Contributions and Benefits Act 1992, created in 1992 but amended multiple times since then. It provides the general legal framework concerning the contributory obligations of both employees and the self-employed, as well as the schemes relating to temporary and long-term incapacity, maternity and paternity, survivorship, retirement, children support, housing and labour accidents and professional diseases. Several of these schemes are regulated in greater detail by Regulations. The scheme 'Universal Credit' (a non-contributory scheme which provides protection in case of low income) is regulated by the Welfare Reform Act 2012 and the Universal Credit Regulations 2013.

3.1.3. *Institutional framework*

In the United Kingdom, most social security benefits are managed at a central level by the Department for Work and Pensions (hereinafter DWP),[179] while social security contributions are collected by Her Majesty's (HM) Revenue and Customs (the latter being also responsible of the tax credits, child benefit and in-work benefits, as well as to solve disputes relating to Statutory Sick Pay and Statutory Maternity Pay[180]). The DWP is supported by 15 agencies and public bodies, including the Jobcentre Plus (responsible for all employment and work related schemes managed by the DWP), the Pensions Service (which manages retirement pensions), the Social Fund Applications

[179] See further Government of the UK, *Department for Work & Pensions*, retrieved on 15 December 2020 at www.gov.uk/government/organisations/department-for-work-pensions

[180] Hardy, S., 'The United Kingdom', in Van Eeckhoutte, W. (ed.), *IEL Social Security Law*, Alphen aan den Rijn: Wolters Kluwer, 2019, p. 228.

(which asses applications to the Social Fund) and the Pension Protection Ombudsman (which address complains concerning the retirement pension), as well as several advisory bodies such as the Industrial Injuries Advisory Council and the Social Security Advisory Committee.[181]

Apart from this, some social assistance schemes (particularly those related to housing, family benefits and social care[182]) are provided by local entities.[183]

3.1.4. *Modalities of work in the British social security system*

In the United Kingdom, a person may perform work as an employee or a self-employed. Nevertheless, these categories are differently regulated under employment law and social security law (specifically, under the Social Security Contributions and Benefits Act 1992). The eligibility for social security contributory schemes (i.e. *New Style Jobseeker's Allowance*, *Employment and Support Allowance* and *New State Pension*) depend on a person's status under social security law. However, regarding a limited number of contributory benefits (i.e. *Statutory Sick Pay* and *Statutory Maternity Pay and Statutory Paternity Pay*), eligibility depends on a person's status under employment law. In contrast, the legal status under either employment law or social security law is of no great significance for drawing entitlement to social assistance benefits (i.e. *Universal Credit* and *Maternity Allowance*).

Under employment law, a person may perform work under a contract of employment[184] (also referred as 'contract of service') or under a contract to perform services (also called 'contract for services'). The second category is the one commonly referred as self-employment.

[181] For a comprehensive list of the different bodies supporting the Department for Work and Pensions, as well as links to their respective websites, see Government of the UK, *Departments, agencies and public bodies*, retrieved on 15 December 2020 at www.gov.uk/government/organisations

[182] See Government of the UK, *Local councils and services*, retrieved on 15 December 2020 at www.gov.uk/browse/housing-local-services/local-councils

[183] Hardy, S., 'The United Kingdom', in Van Eeckhoutte, W. (ed.), *IEL Social Security Law*, Alphen aan den Rijn: Wolters Kluwer, 2019, p. 228.

[184] See Employment Rights Act 1996, section 230; United Kingdom Supreme Court, Autoclenz Limited v Belcher and others, UKSC 41, 2011.

Moreover, a person may perform work under a contract for services as a so-called limb 'b' worker or as a person performing work under a contract for services as a non-worker (the latter being referred here for clarity as 'independent contractor', even if from a technical legal perspective both categories are independent contractors). A limb 'b' worker is a person that performs work personally under a contract for services without being in business of their own account[185] (e.g. they may not possess specialist skills, they do not provide their own materials or tools and they do not undertake economic risk[186]). As it will be analysed further below, limb 'b' workers have a right to opt into *occupational pensions* (or, even, may be automatically enrolled in certain circumstances), while independent contractors cannot.[187] Their other rights as it regards social security are the same as independent contractors.

1) Under the Social Security Contributions and Benefits Act 1992, in turn, there are two legal statuses: 'employed earner', referring to "a person who is gainfully employed in Great Britain […] under a contract of service";[188]

2) and 'self-employed earner', meaning "a person who is gainfully employed in Great Britain otherwise than in employed earner's employment".[189] So, in contrast to employment law, the Social Security Contributions and Benefits Act 1992 does not differentiate between self-employed persons who perform work personally and those who do not.

In light of the above, it should be noted that the same arrangement to perform work might be classified as work under a contract of employment for employment law, and work under a contract for services for social security law (or vice versa). In this regard, while there are many similarities among the criteria used in both legal areas, there are differences in its interpretation.[190] For example,

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[185] Employment Rights Act 1996, section 230(3)(b). The term 'limb 'b' worker' is used to differentiate this category of those workers who perform work under a contract of employment, mentioned in section 230(3)(a).

[186] Employment Appeal Tribunal, Byrne Brothers (Formwork) Ltd v Baird and Others, IRLR 96, 2002, para. 18.

[187] As they are considered 'eligible job holders' for purposes of the Pensions Act 2008, as noted by Broadcasting, Entertainment, Communications and Theatre Union, *Response to the Work and Pensions Select Committee inquiry into the "gig economy" January 2017*, London: BECTU, 2017, p. 2.

[188] Social Security Contributions and Benefits Act 1992, section 2(1)(a).

[189] Ibid., section 2(1)(b).

[190] This is the case, for example, concerning the criteria 'mutuality of obligations' which, for social security law purposes only means the existence of a remuneration in exchange of the worker providing his own work, while

tax authorities (which interpret Social Security Contributions and Benefits Act 1992 concerning the obligation to pay social security contributions) have established a lower threshold for agency workers or construction workers to be classified as 'employed earners'[191] than the one established for employment law purposes.[192] In contrast, 'limb 'b' workers' might be considered self-employed earners for tax purposes in certain cases.[193]

An activity may be considered as self-employment by HM Revenue & Customs (and, thus, professional) if it is performed repeatedly with the purpose of making profit.[194] This implies that even if an activity does not produce profit, it might be considered as a situation of self-employment. In any case, the obligation to report earnings from a self-employment activity to the Tax Office only starts when such activities are performed more often than accidentally. This is translated in a minimum floor of annual earnings of at least £1,000.

Furthermore, all persons with earnings under a certain threshold, are exempted from the payment of social security contributions irrespective of whether they performed the work as an employee or as a self-employed. In this regard, if a person has earnings from his activity as a self-employed of less than the small profits threshold (£6,475 a year in 2020), he would be excluded from coverage unless he voluntarily pays Class 2 National Insurance Contributions (£3.05 a week).

3.1.5. *Financing and contributions*

The British social security system is financed by a combination of National Insurance contributions and general taxation.[195]

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employment law requires also that the worker is required to accept work. See further HM Revenue & Customs, '*Guide to determining status: mutuality of obligation'*, HMRC internal manual: Employment Status Manual, 20 April 2017, retrieved on 15 December 2020 at www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm0543

[191] See Social Security Contributions and Benefits Act 1992, section 2(1)(a).

[192] Burchell, B., Deakin, S. and Honey, S., *The Employment Status of Individuals in Non-standard Employment*, London: Department of Trade and Industry, 1999, p. 9.

[193] Office of Tax Simplification, *Employment Status Report*, London: OTS, 2015, pp. 32, 151.

[194] For a list of indicators of self-employment for tax purposes, see HM Revenue & Customs, *HMRC Internal manual, Business Income Manual*, 2017, retrieved on 15 December 2020 at www.gov.uk/hmrc-internal-manuals/business-income-manual/bim20205

[195] Ibid. pp. 46-48.

The amount of national insurance contributions depends on the employment status and the level of earnings. There are four classes: Class 1, Class 2, Class 3 and Class 4.

The classification of a person under social security law is the most relevant for social insurance purposes on most occasions, as it determines the (type and level) of National Insurance contributions that are required to be paid (whether Class 1, or Class 2 and 4). This, in turn, determines whether a person may rise entitlement for most social insurance schemes. However, in some cases (particularly when the responsibility to cover the payment of benefits falls at the employer) the classification under employment law is decisive for benefit eligibility.

Class 1 National Insurance contributions are paid by employed earners and their employers, but only if the employed earner has earnings as a result of that employment relationship above the primary threshold limit (established for the 2020-2021 tax year at £183 per week).[196] If the employed earner has weekly earnings between £120 and £183, both the employer and the employee are exempted from paying contributions, but the employee accumulates periods of insurance as if they were being paid (while, if the earnings are below £120, periods of insurance are not accumulated).[197] Employed earner's contribution is 12% of the earnings between the primary threshold (£183 per week) and the upper secondary threshold (£962 per week), and 2% of the earnings over that limit.[198] The employer's contribution is 13.8% of the earnings above the secondary threshold (£169 per week).[199]

[196] HM Revenue & Customs, 'Annex A: rates and allowances', in *Budget 2020: Overview of Tax Legislation and Rates*, London: HM Revenue & Customs, 2020, p. 30.
[197] Ibid.
[198] Ibid.
[199] Ibid., p. 31.

As an exception, there is an exemption from the payment of the employed earner's National Insurance contributions (although not the employer's), as well as of the self-employed person's Class 2 contributions if the person is over the State Pension age[200].[201]

Self-employed are required to pay Class 2 and Class 4 National Insurance contributions through self-assessment. Class 2 contributions are £3.05 a week, although those self-employed with profits from their activity as self-employed of less than the small profits threshold (£6,515 a year for 2021) are exempted from its payment[202] (nevertheless, this results in a lack of coverage, so self-employed may opt to pay voluntary Class 2 contributions[203]). Class 4 contributions amount to 9% on profits between £9,501 and £50,000, and 2% on profits over £50,000[204].[205] Currently, self-employed persons accumulate National Insurance periods through the payment of Class 2 National Insurance contributions, whereas Class 4 contributions do not count for this purpose.

Persons who were exempted from the payment of Class 1 National Insurance contributions (and, in the case of the self-employed, who did not opt to pay voluntary Class 2 contributions) may opt to pay Class 3 voluntary National Insurance contributions. These contributions amount to £15.30 per week,[206] and serve to accumulated periods of insurance for eligibility to Basic State Pension and

[200] The State Pension age is currently 66 years for men and women, and is planned to increase to 68 by 2028, see Government of the UK, *State Pension age timetables*, retrieved on 15 December 2020 at www.gov.uk/government/uploads/system/uploads/attachment_data/file/310231/spa-timetable.pdf

[201] Government of the UK, *National Insurance and tax after State Pension age*, retrieved on 15 December 2020 at www.gov.uk/tax-national-insurance-after-state-pension-age/stopping-paying-national-insurance#:~:text=You%20stop%20paying%20Class%201,if%20you're%20still%20working.

[202] HM Revenue & Customs, 'Annex A: rates and allowances', in *Budget 2021: Overview of Tax Legislation and Rates*, London: HM Revenue & Customs, 2021.

[203] Low Income Tax Reform Group, *What National Insurance do I pay if I am self-employed?*, retrieved on 30 December 2020 at www.litrg.org.uk/tax-guides/self-employment/what-national-insurance-do-i-pay-if-i-am-self-employed#toc-why-might-i-choose-to-pay-class-2-nic-even-though-i-could-be-exempt-because-i-am-entitled-to-pay-reduced-rate-contributions-

[204] HM Revenue & Customs, 'Annex A: rates and allowances', in *Budget 2020: Overview of Tax Legislation and Rates*, London: HM Revenue & Customs, 2020, p. 32.

[205] It is important to note that, contrary to in the case of employees, National Insurance contributions of self-employed people are calculated on the basis of annual profits.

[206] HM Revenue & Customs, 'Annex A: rates and allowances', in *Budget 2020: Overview of Tax Legislation and Rates*, London: HM Revenue & Customs, 2020, p. 32.

New State Pension,[207] therefore not granting access to *Additional State Pension*, contributory unemployment benefit scheme *(New Style Jobseeker's Allowance)*, contribution-based *New Style Employment and Support Allowance* and *Maternity Allowance*.[208]

Furthermore, individuals may be eligible for National Insurance credits under certain circumstances, which would count for the accumulation of insurance periods. Thus, individuals would get Class 1 National Insurance credits while receiving *New Style Jobseeker's Allowance*, *Employment Support Allowance*, *Maternity Allowance*, *Carer's Allowance*, *Working Tax Credit* with a disability premium or on a government-approved training course.[209] Moreover, they would get Class 3 National Insurance credit if they are receiving universal credit or working tax credit without a disability premium.[210]

Compared to employees, the self-employed pay significantly lower National Insurance contributions. In this regard, the Institute for Fiscal Studies notes that HM Revenue & Customs has stated that "the effective NICs subsidy to the self-employed relative to the employed exceeds the value of their reduced benefit entitlement by £5.1 billion, or £1,240 per self-employed person, in 2016–17".[211] This issue was initially addressed in the Spring Budget 2017,[212] which included a plan to raise the National Insurance contributions of self-employed to 10% from April 2018, and to 11% from April 2019. However, after receiving much criticism, it was announced that such a plan would not be implemented.[213] No new steps have been taken since then to raise the self-employed National Insurance contributions.

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[207] These contributions also serve to accumulate survivorship benefit, although this benefit is outside the scope of this research and thus it will not be examined.

[208] Government of the UK, '*National Insurance'*, in National Insurance, retrieved on 15 December 2020 at www.gov.uk/national-insurance

[209] Government of the UK, *National insurance credits*, retrieved on 15 December 2020 at www.gov.uk/national-insurance-credits/eligibility

[210] Ibid.

[211] Alan, S., Miller, H. and Pope, T., 'Tax, legal form and the gig economy', in *The IFS Green Budget: February 2017*, London: Institute for Fiscal Studies. 2017.

[212] HM Treasury, *Spring Budget 2017*, London: House of Commons, 2017, p. 2.

[213] BBC News, U-turn over Budget plan to increase National Insurance, 15 March 2017, retrieved on 15 December 2020 at www.bbc.com/news/uk-politics-39278968 ; Stewart, H. and Walker, P., 'Philip Hammond defends scrapping

Finally, it should be noted that, if a person performs work both as an employee and as a self-employed, the employee's National Insurance contribution is reduced to 2% on earnings over £157 a week if he is already paying contributions through another occupation[214] (however, the employer's contributions for that employee remain the same[215]). Moreover, when a person has paid National Insurance contributions as both employee and self-employed, the amounts paid as an employee will be taken into account when calculating his Class 2 and Class 4 contributions if he exceeds the annual maximum of total earnings fixed by law.[216]

3.2. Social security benefits in the United Kingdom

This section addresses the diverse social security schemes (both social insurance and social assistance schemes) that make up the social security system of the United Kingdom.

3.2.1. *Unemployment*

Employees may be entitled to the contributory unemployment benefit (*New Style Jobseeker's Allowance*) and to the means-tested benefit *Universal Credit*, while self-employed workers (both limb b workers and independent contractors) may only be entitled to *Universal Credit*.

- The contributory unemployment benefit scheme *(New Style Jobseeker's Allowance)*[217] is an unemployment benefit for which accumulated insurance periods are required. In this regard,

National Insurance rise for the self-employed', in *The Guardian*, 15 March 2017, retrieved on 15 December 2020 at www.theguardian.com/politics/2017/mar/15/philip-hammond-ditches-national-insurance-rise-for-self-employed

[214] Another exemption is that the employers' are exempted from the payment of their share of National Insurance contributions for employees under the age of 21 earning less than £866 a week (£3,750 a month), see Government of the UK, 'National Insurance rates and categories', in Payroll, retrieved on 15 December 2020 at www.gov.uk/national-insurance-rates-letters/contribution-rates

[215] Government of the UK, '*National Insurance rates and categories*', in Payroll, retrieved on 15 December 2020 at www.gov.uk/national-insurance-rates-letters/contribution-rates

[216] HM Revenue and Customs, *Help and guidance for Class 2 National Insurance: paying Class 2 in self-employment*, London: HMRC, 2016; HM Revenue and Customs, *Q & A Talking Points. Collecting Class 2 National Insurance via Self- Assessment. 15 June 2016*, London: HMRC, 2016.

[217] The contribution-based Jobseekers' Allowance scheme has been replaced by the New Style Jobseekers' Allowance for all persons who were in its personal scope except those persons entitled to the severe disability premium (and who may still apply to the old scheme). Due to its currently marginal use, the old scheme will not be analysed in detail in

claimants must have paid contributions as employees (i.e. Class 1 National Insurance contributions) in respect of one of the last two tax years previous to the claim of at least £3,120, as well as having paid at least a total of £6,000 in those last two years (counting -in both cases- National Insurance credits[218]).[219] It has a maximum duration of six months (182 days). The benefit is linked to an obligation to seek employment (a failure to comply with this obligation is sanctioned with up to 13 weeks of no allowance).[220] The benefit amounts up to £58.90 per week if the claimant is under the age of 25, and up to £74.35 per week if he is 25 or over.[221] There is a waiting period of 7 days.[222] While savings do not affect the *New Style Jobseeker's Allowance*, earnings from work or pensions may reduce the benefit.[223] Moreover, the benefit is compatible with income from work, up to an amount of (on average) 16 working hours per week.[224]

- A means-tested unemployment allowance scheme is part of the *Universal Credit* scheme. In this regard, *Universal Credit* has gradually replaced the *income-related Jobseeker's Allowance*,[225] *Income Support, Income-related Employment and Support Allowance, Child Tax Credit, Working Tax Credit, Housing Benefit* and certain *Social Fund* payments.[226] The *Universal Credit* does not require a qualifying period, but it is means-tested. A person may apply to *Universal Credit* as a self-employed if self-employment is his main and regular occupation and if he expects to make a profit[227] (or, in other words, if he is in gainful self-employment[228]). Persons who are considered to not be in gainful self-employment may

this thesis. See Government of the UK, *Jobseeker's Allowance (JSA)*, retrieved on 15 December 2020 at www.gov.uk/jobseekers-allowance/eligibility

[218] Jobseekers Act 1995, section 1(2).

[219] Jobseekers Act 1995, section 2(1)(a).

[220] Jobseekers Act 1995, sections 19A, 19B; The Jobseeker's Allowance Regulations 2013, regulations 20, 21.

[221] Government of the UK, *Benefit and Pension Rates 2020/2021*, London: Government of the UK, 2020, p. 9.

[222] Jobseeker's Allowance Regulations 2013 (waiting days), regulation 36(2).

[223] Jobseekers Act 1995, section 2.

[224] The Jobseeker's Allowance Regulations 2013, regulation 42(1).

[225] Please note that only *income-based Jobseeker's Allowance*, and not *contribution-based Jobseeker's Allowance*, has been replaced by Universal Credit by the time this thesis was concluded.

[226] Welfare Reform Act 2012, section 33(1).

[227] The Universal Credit Regulations 2013, regulation 64.

[228] Ibid.

also apply to Universal Credit, but they are expected to seek and remain available for employment (unless they are included in one of the categories mentioned below).

Claimants of *Universal Credit* are subjected to the same sanctions as those for *New Style Jobseeker's Allowance*, which means that voluntarily losing employment or losing employment as a result of a misdemeanour may result in stopping receipt of the benefit for a certain period. Claimants who work as self-employed[229] are not expected to seek or remain available for other work, or to prepare or plan to look for other work in any way.[230]

The monthly *Universal Credit* allowance varies depending on the claimant's earnings. In this regard, individuals receive £342.72 if they are aged under 25 and £409.89 if they are 25 or over; members of a couple receive £488.59 if both its members are under 25 years of age, and £594.04 if any of them is aged 25 or over.[231] Extra monthly amounts are added depending on both family circumstances (i.e. whether the claimant has one or more children, whether any of them suffers a disability and whether the claimant needs to resort to childcare costs), whether he suffers a disability and whether he cares for a incapacitated person. That amount is reduced by 63p for every £1 that the claimant earns.

However, for persons having worked a year or more as a self-employed before claiming *Universal Credit*, the Department of Work and Pensions set a certain 'minimum income floor', which is the amount that it is considered to be earned in order to calculate their *Universal Credit* benefits. The minimum income floor is the result of multiplying the minimum wage (of the relevant age group[232]) by the number of hours the person is expected to work, which in turn is multiplied by 52 and divided by 12 in order to get the monthly

[229] As it is noted below, after a year in Universal Credit, it is assumed that a claimant in self-employment is earning the minimum income floor (even if that is not the case).

[230] The Universal Credit Regulations 2013, regulation 89.

[231] The Welfare Benefits Up-rating Order 2015, schedule 5.

[232] Minimum wage in the UK varies depending on the age of the worker. Currently, the national minimum wage amount to £7.50 for workers aged 25 years and over, £7.05 for workers aged 21 to 24 years, £5.60 for workers aged between 18 and 20 years, £4.05 for workers under the age of 18, and £3.50 for apprentices. See Government of the UK, *National Minimum Wage and National Living Wage rates*, retrieved on 15 December 2020 at www.gov.uk/national-minimum-wage-rates

amount.[233] A self-employed person is expected to work 35 hours if he is included in the 'all work-related requirements work', and 16 hours if he is exempted from actively seeking and remain available for employment, but still is required to prepare or plan to look for work (see above). In any case, a person obtaining any income from self-employment and claiming *Universal Credit* is expected to report such income to the Department of Work and Pensions.[234]

- Moreover, a new *Self-Employed Income Support Scheme* has been created to address the loss of income experienced by self-employed persons since the beginning of the COVID-19 pandemic. This scheme is available for persons who have performed activities as self-employed workers in the previous two years, who expect significant loses on their business' profits and who have profits of less than £50,000. The scheme consists of four grants (one each three months, and which need to be applied for independently). The grant consists on a 70% of the self-employed person's average earnings for the last 3 tax years, with a limit of approximately £7,500.[235] This programme has been extended with new regulations until April 2021.

- While it is not *per se* an unemployment benefit scheme, the *Job Support Scheme* has been established in the UK to address the impacts of the COVID-19 pandemic. Through this scheme, businesses facing reduced demand (and which, as a result, reduce their employees working time at least 20%) will receive grants covering 67% of their employees' salaries.[236] This scheme was designed to replace the initial Coronavirus Job Retention Scheme.[237]

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[233] The Universal Credit Regulations 2013, regulation 62.

[234] Department for Work and Pensions, *Guidance: Universal Credit and self-employment. Updated 11 April 2016*, London: DWP, 2016.

[235] See, for information on the fourth grants, *Low Incomes Tax Reform Group, Coronavirus: Self-Employment Income Support Scheme (SEISS)*, retrieved on 15 December 2020 at www.litrg.org.uk/tax-guides/coronavirus-guidance/coronavirus-self-employment-income-support-scheme-seiss

[236] Thomson Reuters Practical Law, *COVID-19: Job Support Scheme*, retrieved on 15 December 2020 at https://uk.practicallaw.thomsonreuters.com/w-027-6594?contextData=(sc.Default)&transitionType=Default&firstPage=true

[237] Ibid.

3.2.2. *Sick pay*

Temporary incapacity schemes existing in the United Kingdom are:

- *Statutory Sick Pay*, a contribution-based scheme to which only employees can be eligible. Thus, those classified as 'employees' for employment law purposes,[238] may be eligible for *Statutory Sick Pay* if they earn at least £120 (before tax) a week, are not on maternity leave, had been unable to work due to sickness for 4 days (but including non-working days) and informed their employer before the established deadline (or, if a deadline is missing, within 7 days). The benefit starts being paid on the fourth day of continuous sickness, amounts to £95.85 per week and has a maximum duration of 28 weeks.

- In some cases, employers agree to provide a sick pay benefit that offers a greater amount and/or a longer duration than *Statutory Sick Pay.* This is referred as *Contractual Sick Pay*,[239] and its content vary on the individual contract (and thus in some cases might amount to the employee's full salary for a certain period of time, followed by a smaller amount for another period of time).

- *Universal Credit*, the abovementioned means-tested scheme, covers both temporary and long-term incapacity and is independent of labour status.

3.2.3. *Long-term incapacity*

There are two existing schemes against the risk of long-term incapacity:

- The (contribution-based) *New Style Employment and Support Allowance*,[240] a scheme available to those persons who have paid contributions as an employee or as a

[238] This condition is unclear from Social Security Contributions and Benefits Act 1992, section 151. Nevertheless, it seems to be stated in Government of the UK, *Statutory Sick Pay (SSP)*, retrieved on 15 December 2020 at www.gov.uk/statutory-sick-pay/eligibility; furthermore, it is not noted as one of the benefits for which Class 1 National Insurance contributions produces entitlement, see Government of the UK, *National insurance contributions*, retrieved on 15 December 2020 at www.gov.uk/national-insurance/what-national-insurance-is-for

[239] Citizens Advice, *Check if you're entitled to sick pay*, retrieved on 15 December 2020 at www.citizensadvice.org.uk/work/rights-at-work/sick-pay/check-if-youre-entitled-to-sick-pay/

[240] Replacing from 2014 the former system of Incapacity Benefit.

self-employed. In order to be entitled to benefits under this scheme, a person must have paid, in respect of one of the last three complete tax years before the beginning of the relevant benefit year, Class 1 or Class 2 contributions amounting to at least that tax year's lower earnings limit multiplied by 25[241] (e.g., concerning 2021, this amount is £3,000).

During the first 13 weeks of receiving the *New Style Employment and Support Allowance* (the so-called 'assessment period'), the benefit may amount up to £58.90 if the claimant is aged under 25, and up to £74.35 if he is aged 25 or over. From week 14 onwards, if the claim is accepted, the recipient would obtain up to £74.35 a week if he is included in the work-related activity group,[242] and up to £113.55 a week (plus enhanced disability premium of £17.10 a week, or of severe disability premium of £66.95 per week) if he is placed in the support-related group. The inclusion in one group or another depends on the degree of incapacity determined during the assessment (with persons in the work-related group being expected to attend advisory meetings aimed to support a job transition).

Recipients may obtain the benefit for a maximum duration of 365 days in a row (with the possibility of re-applying 12 weeks after the end of the benefit), while there is no time limit for those recipients in the support-related group. Nevertheless, there is a waiting period of seven days.[243] The benefit is not compatible with receiving *New Style Jobseeker's Allowance*, *Statutory Sick Pay* or *Maternity Pay*.

- The *Universal Credit*, the already mentioned means-tested scheme that exists concerning the abovementioned contingencies, is available to those individuals who are not entitled to *New Style Employment and Support Allowance*. The benefit consists of the same amount as in the case of *Universal Credit* for jobseekers (i.e. between approximately £342.72 and £594 per month for claimants without any other income, depending on the age of the individual and whether he lives alone or with a partner).

[241] Welfare Reform Act 2007, schedule 1, section 1.

[242] Being in a work-related groups means that the person may be able to go back to work eventually.

[243] Employment and Support Allowance Regulations 2013 (waiting days), regulation 85(1).

3.2.4. *Labour accidents and professional diseases*

There is only one scheme currently existing in the United Kingdom concerning the risk of accidents at work and professional diseases. This is the *Industrial Injuries Disablement Benefit*, a scheme only available to persons who become ill or get an accident as a result of performing work as employees (under employment law).[244] The benefit consists of a fixed weekly sum (which is added to the benefit of temporary or long-term incapacity), and which depends on the degree of incapacity resulting from the accident or professional disease, varying between £36.04 for a 20% incapacity to £182 for an incapacity of 100%.

3.2.5. *Maternity and paternity*

In the United Kingdom, there are two social security schemes available for a person giving birth: Statutory Maternity Pay, for those persons with employee status and with income above the Lower Earnings Limit (£120 for 2021-2022); and Maternity Allowance, a means-tested benefit for those who are not entitled to Statutory Maternity Pay. Fathers, in turn, may only be entitled to Statutory Paternity Pay (and only if they fulfil the same criteria on employment status and income as in the case of Statutory Maternity Pay).

- *Statutory Maternity Pay*[245] provides pay while the recipient is on Statutory Maternity Leave. In order to receive such benefit, the claimant must (besides being an employee, as in the case of leave) have worked as an employee for the current employer continuously for at least 26 weeks up to the 15th week before the expected week of childbirth and have earned on average at least £120 a week[246] over 8 weeks. The benefit lasts up to 39 weeks (tax and National Insurance will be deducted). During the first six weeks, the benefit amounts to 90% of the recipient's average weekly earnings (before tax) and, for the next 33 weeks, to £151.20[247] or 90% of her average weekly earnings (whichever is lower). Therefore, if a

[244] Social Security Contributions and Benefits Act 1992

[245] The Statutory Maternity Pay (General) Regulations 1986.

[246] It must be remembered that £120 a week is the minimum threshold for the payment of National Insurance contributions for employees.

[247] Keen, R., Apostolova, V., *2017 Benefits Uprating, Briefing Paper Number CBP 7818, 05 December 2016*, London: House of Commons, 2016, p. 11.

person claims the total duration of Statutory Maternity Leave (52 weeks), the last 13 weeks of leave would be without Statutory Maternity Pay. Furthermore, it is important to note that it is the employer who has to pay *Statutory Maternity Pay*.

- Persons who are not entitled to *Statutory Maternity Pay* but, instead, may resort to *Maternity Allowance*. This scheme provides a benefit for two different lengths depending on the employment status and accumulated National Insurance periods of the claimant.

  Thus, a claimant may receive *Maternity Allowance* for up to 39 weeks if he is currently employed (for example, as a 'limb 'b' worker or self-employed and paying Class 2 NIC), or recently ceased being so; has been so for at least 26 weeks in the 66 weeks before the pregnancy due date (even if is with different employers or with periods of unemployment); has earnings of at least £30 a week for at least 13 weeks (not necessarily consecutive); and, in case he is a self-employed, has paid Class 2 National Insurance for at least 13 of the 66 weeks before the pregnancy due date (nevertheless, if not enough Class 2 National Insurance to get the full rate (mentioned below) have been paid but, nevertheless, the other requirement shave been fulfilled, the benefit amounts to £27 a week for up to 39 weeks.

  If the claimant does not fulfil said requirements, she nevertheless may receive Maternity Allowance for up to 14 weeks if her spouse or civil partner pays Class 2 National Insurance contributions and, while she herself is not employed or self-employed, she provides unpaid work for the business of the self-employed spouse or civil partner. In either case, the benefit amounts to £148.69 a week or 90% of the recipient's average weekly earnings (whichever is lower).

Finally, *Statutory Paternity* leave and pay is a benefit for the same amount and with the same requirements as *Statutory Maternity pay*, although for a maximum duration of two weeks.[248] Nevertheless, and as mentioned above, part of the duration of Statutory Maternity leave and pay

[248] Government of the UK, *Statutory Paternity Pay and Leave: employer guide*, retrieved on 15 December 2020 7 at www.gov.uk/employers-paternity-pay-leave

may be shared with the father. Furthermore, similar to *Statutory Maternity Pay*, the benefit is paid by the employer.[249]

Both Statutory (Maternity/Paternity) Pay and Maternity Allowance require that the individual was, immediately before receiving the relevant benefit, in remunerated employment or self-employment. In the case of employment, this means that the individual performed work for at least 16 hours weekly; while, in the case of self-employment, this only requires that the person performed work in exchange or in expectation of payment. [250]

3.2.6. *Retirement*

3.2.6.a. First pillar pensions

A person starts to be eligible for a *New State Pension*[251] if he has gathered at least 10 qualifying years of Class 1, 2 or 3 National Insurance contributions. The full amount of the benefit is £175.20 per week, which is obtained if the claimant has paid 35 years of National Insurance contributions. If that requirement is not met, the benefit would be the higher of the two following amounts: either the result of multiplying the number of qualifying years by £4.45[252]; or the amount as it would be calculated for the replaced State Pension for the qualifying years before April 2016, plus the result of multiplying by £4.45 the number of qualifying years reached since 1 April 2016. The benefit is increased yearly by the higher of two factors (average wages or Consumer Price Index).

The *Basic State Pension* is a scheme still existing for those who reached the State Pension age before April 2016. In order to be eligible for the full benefit, claimants must have paid 30 years of National Insurance Class 1, Class 2 or Class 3 (voluntary contributions). The full benefit amounts

[249] Social Security Contributions and Benefits Act 1992, section 171ZD(1).

[250] HM Revenue & Customs, 'Eligibility: remunerative work (determining): Childbirth and adoption (Info) (TCM0124060)', in *HMRC internal manual: Tax Credits Manual*, 2017.

[251] For persons retiring since April 2016, the New State Pension replaced the State Pension (which includes both the Basic State Pension and the Additional State Pension). Thus, in this research, most attention will be focused on the New State Pension. Nevertheless, the replaced State Pension still has an impact, and for this reason will be covered further below.

[252] This amount is the result of dividing the weekly amount for a full pension by the number of years necessary to achieved.

to £134.25 per week. This scheme might be complemented with the Additional State Pension if the claimant was employed and receiving earnings between certain brackets.

3.2.6.b. Second and third pillar pensions

The first pillar pension sketched above is universal in nature, meaning that it covers both employees and self-employed. In contrast, self-employed are not automatically enrolled in second pillar pension schemes, whereas employees are. In this regard, employees or limb 'b' workers aged 22 or over and with an annual salary of over £10,000 are automatically included in a workplace pension scheme[253] (for which contributions are deducted from their salary), although they may opt-out. This rule is making automatic enrolment in a workplace pension a social norm among employees. Nevertheless, the Government is struggling to find a similar measure to promote the use of second tier pensions among self-employed,[254] which has been considered one of the reasons for the sharp difference between employees' and self-employed pensions.[255]

3.2.7. *Minimum Income*

The UK does not have a minimum income scheme strictly speaking.[256] Nevertheless, it might be argued that the broad arrange of means-tested social assistance schemes that have been included in the Universal Credit scheme (and which have been analysed above) may serve in practice a similar purpose (namely, to ensure that individuals with income under a certain threshold receive a minimum income). However, in the case of the *Universal Credit*, entitlement is typically related to fulfil certain requirements related to specific contingencies, such as unemployment. In this regard, *Universal Credit* has gradually replaced *income-based Jobseeker's Allowance*, *Income Support*,

[253] Pensions Act 2008, section 3.

[254]Department for Work and Pensions, *The future world of work and rights of workers inquiry*. Written evidence, London: Business, Energy and Industrial Strategy Committee, 2017, pp. 11-12.

[255] House of Commons Work and Pensions Committee, *Self-employment and the gig economy Thirteenth Report of Session 2016–17*, London: House of Commons, 2017, pp. 17-18.

[256] See Bradshaw, J., *Report on the minimum income system in the United Kingdom for the Spanish Government*, Madrid: Government of Spain, 2018.

Income-related Employment and Support Allowance, *Child Tax Credit*, *Working Tax Credit*, *Housing Benefit* and certain *Social Fund payments*.[257]

3.3. The social security position of persons in a standard employment relationship

This section relies on the analysis performed above in order to determine what are the potential social security entitlements of a person in a standard employment relationship. The section pays special attention to formal access, effective access and the specific content (i.e. duration and amount) of the benefits to which such an individual may be entitled in the United Kingdom.

A person performing work in a standard employment relationship is formally covered by all social security schemes available in the United Kingdom, both social insurance schemes and social assistance schemes.[258] In that regard, standard employees are included in the social insurance schemes addressing all the contingencies covered in this thesis: unemployment (through the contributory-based scheme *New Style Job Seekers Allowance*), sick pay (through the *Statutory Sick Pay* scheme or, if agreed with the employer in the employment contract, *Contractual Sick Pay*), long-term incapacity (through the *New Style Employment and Support Allowance* scheme), labour accidents and professional diseases (through *Industrial Injuries Disablement Benefit*), maternity or paternity (through the *Statutory Maternity* -or *Paternity- Pay* scheme) and retirement (through the *New State Pension*).

The requirements to become entitled to these schemes' benefits are relatively accessible, and would be in any case fulfilled by a person who works full-time in an open ended relationship earning the minimum wage.[259]

The benefits may have a typical duration of between approximately 6 and 9 months (except in the case, of course, of long-term incapacity and old-age pension). Nevertheless, the amount of the

[257] Welfare Reform Act 2012, section 33(1).

[258] As it is analysed just below, persons in a standard employment relationship in the UK would typically fulfill the requirements to become entitled to benefits of the social insurance schemes. As a result, the social assistance schemes are not addressed as it regards these persons (they are addressed, however, as it regards the situation of platform workers).

[259] See, for the rules on calculating the National Insurance contributions, section 3.1.5.

benefits is low, typically not reaching the amount of the adult minimum wage (except in the case of the first six weeks of the *Statutory Maternity Pay* and, depending on the conditions established in contract of employment, the *Contractual Sick Pay*).

3.4. Platform work and social security in the United Kingdom

In this section, the specific social security position of platform workers in the United Kingdom is studied.

In order to do so, it is first analysed (section 3.4.1) what is the general legal status of platform workers in this country, as this status is (as it has been shown in the previous analysis of the different social security schemes available) fundamental in many occasions for determining their social security position. Given the fact that there has been some uncertainty on that legal status, some emphasis is placed on the different judicial decisions that have studied such legal status. These decisions, however, only concern what it has been referred in Chapter 1 of this thesis[260] as platforms which provide a homogenised service (and which generally include, for example, platforms for the delivery of food), and they mainly relate to the platform workers' labour rights. Still, it is believed that such decisions provide a necessary light on the legal status of platform workers in the country. Nevertheless, it is also acknowledged that these decisions do not represent the entire range of situations that are included in this thesis under the term 'platform work'.

Once it has been discussed the legal status of platform workers, it is then analysed the social security position of those platform workers classified in each of those (potential) legal statuses, namely platform workers in an employment relationship (section 3.4.2.) and self-employed platform workers (section 3.4.3). It is in these two sections where the analysis of the different social security schemes available in this country comes to fruition, as it is applied to the specific situation of platform workers. When doing so, the differences between the social security position of persons in a standard employment and the one of platform workers are highlighted.

[260] See section 1.4.4.

3.4.1. *The legal status of platform workers*

No social security legislation addressing specifically platform work has been enacted as of now. As a result, the regulation of platform work as it concerns social security is very much contingent on their classification as either employees or self-employed. In this regard, in the UK the discussion on the employment status of workers in the platform economy has mostly taken place in the field of employment law (and not that much in the field of social security, at least not openly) for the moment. In this regard, several cases concerning the employment status of platform workers have been brought before the Employment Tribunals, with the case of *Aslam and Farrar v Uber*[261] getting the greatest exposure, also far beyond the British jurisdiction. In this case, the Employment Tribunal ruled in favour of the claimants, stating that their employment status was one of limb 'b' workers. Its decision was based on what may be broadly summarised as the control of the essential elements of the service that *Uber* has (and drivers have not), such as setting the fare, selecting the drivers, providing instructions on how to perform the tasks (including recommended routes) and monitoring their performance (through ratings). The decision was maintained on appeal.[262] In the meanwhile, a string of similar decisions reclassifying self-employed as limb 'b' workers were also taken by Employment Tribunals concerning the delivery companies *Citysprint*,[263] *Excel Group*,[264] and *Addison Lee*.[265] The single ruling on the employment status of platform workers in which they were not considered as limb 'b' workers to date in the United Kingdom concerned *Deliveroo* riders, and was made by the *Central Arbitration Committee* (*CAC*) on 14 November 2017.[266] This case dealt with the question of whether riders were to be classified as limb 'b' workers, in order for *Deliveroo* riders to be able to join a Trade Union, a right which is granted to limb 'b' workers but not independent contractors. *Deliveroo*, in turn, claimed that riders were instead independent

[261] Aslam, Farrar and Others v Uber BV and Others, Employment Tribunal, Case No. 2202551/2015 and Others, 28 October 2016.

[262] Uber BV and Others (appellants) v Aslam and Others (respondents), Employment Appeal Tribunal, Appeal No. UKEAT/0056/17/DA, 10 November 2017; Uber BV and Others (appellants) v Aslam and Others (respondents), Court of Appeal (Civil Division), [2018] EWCA Civ 2748, 19 December 2018; Uber BV and Others (appellants) v Aslam and Others (respondents), Supreme Court, [2021] UKSC 5, 19 February 2021.

[263] Dewhurst v Citysprint UK Ltd, case No. 2202512/2016.

[264] Boxer v Excel Group Services Ltd (in liquidation), case No. 3200365/2016.

[265] Gascoigne v Addison Lee Ltd; case No. 2200436/2016.

[266] Central Arbitration Committee, Independent Workers' Union of Great Britain (IWGB) and RooFoods Limited T/A Deliveroo, Case No. TUR1/985(2016).

contractors and, thus, unable to join a Trade Union. The *CAC* ruled in favour of *Deliveroo*, confirming that riders were independent contractors.

The abovementioned cases, however, concerned the labour rights of platform workers. Less clarification has been provided, in turn, concerning their professional qualification for tax purposes (which, in the case of the United Kingdom, includes social security contributions). In this regard, the *Office for Tax Simplification* has only noted that the fact that platform workers have been classified as limb 'b' workers does not automatically mean that they are considered as employees for tax purposes.[267] Furthermore, it is not clear whether workers themselves may wish to be charged as such. In this regard, *Uber* presents as one of the arguments justifying its appeal the fact that many drivers consider themselves as self-employed for tax purposes.[268] However, even if its platform workers would be indeed classified as self-employed earners for tax purposes, *Uber* still would have an obligation to report payments made to self-employed workers if it is considered an employment intermediary.[269]

In summary, while it seems that platform workers in the United Kingdom are considered as self-employed persons, there is still a significant degree of uncertainty concerning in which category (for labour law and some social security aspects) of self-employed persons they must be included (either in the one of limb 'b' workers or the one of independent contractors). Furthermore, there are still many questions open on how HM Revenue & Customs, in charge of collecting social security contributions, approaches situations of platform work. As a result, there is still significant uncertainty on the specific social security position of platform workers in the United Kingdom. Still, below it will be attempted to provide some light in that position.

[267] Office for Tax Simplification, *The 'Gig' economy – what does it mean for tax?*, London: OTS, 2017, p. 4.

[268] Employment Appeal Tribunal, Uber B.V., Uber London Ltd, Uber Britannia Ltd v Yaseen Aslam and James Farrar, Notice of Appeal, para. 23(6).

[269] The Income Tax (Pay As You Earn)(Amendment No. 2) Regulations 2015; Her Majesty Revenue and Customs, Guidance: *What this means for an intermediary*, retrieved on 12 September 2017 retrieved on 15 December 2020 at www.gov.uk/government/publications/employment-intermediaries-reporting-requirements/what-this-means-for-an-intermediary

3.4.2. *The social security position of self-employed platform workers*

Platform workers in the United Kingdom classified as self-employed persons (as it is typically the case, as it has been just mentioned), are only included in the social insurance schemes concerning contributory long-term incapacity (*New Style Employment and Support Allowance*) and retirement (*New State Pension*). In turn, they may only access protection regarding unemployment,[270] sick pay and maternity through social assistance (specifically, through *Universal Credit* concerning the first two contingencies, and *Maternity Allowance* concerning the last one). This lack of formal coverage by many of the contributory-based schemes is arguably the main difference between the position of platform workers and the one of persons in a standard employment relationship.

The requirements for access to contributory programmes in which platform workers are included (i.e. long-term incapacity and pensions), are not very demanding and are allowed to be met over a relatively long period of time. In terms of access to Social Assistance programmes the key requirement is to have an income below about £16,000 per year. This amount is slightly higher than the annual minimum wage. It follows that the amount required is low in order to have greater social coverage.

Perhaps the most striking aspect of the UK system is the low level of both contributory and Social Assistance benefits, which range from £230 to £700 per individual depending on the type of benefit and family structure. While a person in a standard employment relationship and an platform worker may receive very similar benefits, it should be noted that Standard workers supplement the state pension with a second level occupational pension (of which they must be a mandatory part), while self-employed workers generally do not make use of occupational or private pensions.

A last difference between the social security situation of self-employed platform workers and those in a standard employment relationship is the contribution level which, in the case of the self-employed, is on average much lower. However, it should be borne in mind that those employees on low incomes are exempt from payment.

[270] Except in the case of reduction of income as a result of the COVID-19 pandemic, for which (as noted above) three grants have been established since the beginning of the pandemic to compensate for the loss of income.

3.5. Concluding remarks

The strict and demanding demarcation of the legal status of employees has resulted in practically all platform workers being considered as self-employed workers (either as limb 'b' workers or independent contractors). Even so, a considerable legal battle have been happening in front of the courts concerning which of those two variants of self-employment is the one appropriate for platform workers. This situation may generate confusion and uncertainty among platform workers

In any case, as self-employed workers, platform workers are excluded from many of the contributory social security schemes (i.e. concerning unemployment, sick pay and labour accidents and professional diseases), and thus may have to resort to social assistance. Those schemes by which they are covered (as well as the social assistance scheme) provide quite low benefits.

Furthermore, as a result of the COVID-19 pandemic, it seems that some of the gaps in the protection of vulnerable workers such as platform workers have come into the spotlight, with the United Kingdom a specific scheme (with the *Self-Employed Income Support Scheme*) creating to cover situations of loss of income due to the impact that the pandemic has had on the business of self-employed persons.

Chapter 4. Platform work and social security in France

4.1. An introduction to the French social security system

This section explores the basic elements that will help ground the analysis of the French social security system and how it may be applied to situations of platform work. The section starts by analysing what kind of social security system the French one is (section 4.1.1), and continues by considering its legal (section 4.1.2) and institutional framework (section 4.1.3). Then, it examines the different legal statutes available for the performance of work (section 4.1.4). Finally, it offers an overview of the financing of the system and the contributory obligations of each professional category (section 4.1.5).

4.1.1. *Nature of the French social security system*

France may be considered to follow the Bismarckian model of social security, as far as it provides a set of social security benefits for those who has paid contributions linked to the performance of work, and these schemes mainly seek to replace lost income. However, at the same time, the system presents a set of other social security schemes aiming to combat poverty. As a result, it has been sustained that the French model of social security, as it was designed after the Second World War, sought to occupy a middle ground between the Beveridgean and Bismarckian models, a sort of compromise.[271]

4.1.2. *Legal framework and structure*

The most essential elements of the French social security system are regulated by the Constitution of 1958, in its Articles 34, 39 and 47. Nevertheless, it is the Social Security Code (*Code de la sécurité sociale*) that establishes the main legal framework concerning all contributory-based social security schemes. This is with the exemption of those schemes related to unemployment, and which general conditions regulated in the Title II of the Labour Code (*Code du travail*). Social Assistance

[271] Palier, B. and Bonoli, G., 'Entre Bismarck et Beveridge « Crises » de la sécunté sociale etpolitique(s)', *Revue française de science politique*, vol. 45, issue 4, 1995, pp. 672-674.

schemes, in turn, are regulated by the Code of Social Action and Families (*Code de l'action sociale et des familles*).

4.1.3. *Institutional framework*

In France, the institutional framework of the social security system is in the midst of a reform seeking greater simplification. Up until 2018, most benefit schemes for the self-employed were included in a separate social regime for the self-employed (*régime social des indépendants*), whereas the benefit schemes for employees were included in the general regime (*régime général*). Nevertheless, since January 2018, the social regime for the self-employed was eliminated, and the schemes that integrate it have been progressively transferred to the general regime, a transition that was finalised in January 2020.

From that date, all schemes concerning temporary incapacity, maternity and paternity are managed by the *Caisse primaire d'assurance maladie*, basic retirement pension are administered by the *Caisse d'Assurance Retraite et de la Santé au Travail*, and complementary retirement pension and long-term incapacity are managed by the *Conseil de la protection sociale des travailleurs indépendants* (except in the case of a limited list of liberal professions, in which case these schemes are still managed by the *Caisse nationale d'assurance vieillesse des professions liberals*). The change, however, only affects the managing institution, while differences regarding benefits between employees and the self-employed (and between the different types of self-employed) remain.

4.1.4. *Modalities of work*

In France, a person may perform work for the purposes of social security under two main professional status: Employee and self-employed person.

Concerning the employee status, while French legislation does not establish a clear set of criteria to determine such status, these have been developed through case law. The main criterion is the existence of a subordination link, characterised by the performance of work under the authority of an employer, who has the power of providing orders and directions, of controlling the performance

and of sanctioning the faults committed by the employee.[272] The fact that work is performed as part of a service organised by the company, a circumstance which was for some time considered sufficient to classify a work arrangement as an employment relationship,[273] is currently considered only an indication of the existence of an employment relationship (and only if it is combined with the fact that the employer determines unilaterally the way in which work must be executed).[274]

Moreover, Article L311-3 of *Code de la Sécurité Sociale* present a list of professional categories which, despite the fact of generally fulfilling the criteria for being considered self-employment, are covered by the regulation on social security for employees. These categories (which are referred in this thesis as 'employee-like' categories) include, among others,[275] self-employed members of a cooperative of activity and employment (*entrepreneur salarié d'une coopérative d'activité et d'emploi*) and landlords of furnished lodgings with earnings under a certain threshold. Self-employed members of a cooperative of activity and employment[276] are persons performing a professional activity and which sign a contract with a cooperative under which they commit themselves to produce earnings above a certain threshold and to pay a certain amount to the cooperative in exchange of remuneration (which may be fixed or variable) and access to a set of services (e.g. accounting).[277]

[272] Cour de Cassation, Chambre sociale, du 1 décembre 2005, 05-43.031.

[273] Cour de Cassation, Assemblée plénière, du 18 juin 1976, 74-11.210.

[274] Cour de Cassation, Chambre sociale, du 1 décembre 2005, 05-43.031.

[275] Other situations assimilated to employees are those in which there is a relationship of subordination, such as home workers with economic dependency to the provider of orders or door-to-door salesmen, those of members of certain occupations (e.g. referees, newspaper sellers, entertainment industry workers and freelance journalists) and those of managers of companies without a majority share, see Code de la sécurité sociale, Partie Législative, Livre 3, Titre 1, Art. L311-3.

[276] A cooperative d'activité et d'emploi takes the legal form of a Société Coopérative Ouvrière de Production, a company in which the majority of the shares are owned by the workers, and which must be registered in the list of cooperatives, published annually by the Government. It may take one of the legal forms available for companies with more than one owner (i.e. a Company by Simplified Shares, a Limited Liability Company or a Public Limited Company). See Allard, F., et al., 'L'accompagnement entrepreneurial par les Coopératives d'Activité et d'Emploi : des singularités à questionner', *Management International*, vol 17, issue 3, 2013.

[277] Code du Travail, Art. L7331-2, R7331-1 – R7331-10.

The self-employed status is defined by opposition to the employee status. In this regard, a person who performs a professional activity outside the circumstances considered to amount to an employment relationship is deemed to be a self-employed.

Furthermore, there are several situations where it is presumed that an employment contract does not exist.[278] This is the case when a person is inscribed in the registry of trade or craftsmanship, or in one of the social security funds for the self-employed, as well as the directors of companies which are inscribed in the registry of trade. Nevertheless, this presumption is broken in case the criteria for the existence of an employment contract are present.[279]

Those performing an activity as a self-employed person may be regular self-employed or micro (solo) self-employed (*auto-entrepreneurs*), depending on whether or not they overpass a certain amount of profit. This amount is less than €170,000 if the activity is trade or craftsmanship, or €70,000, if it consists on the provision of services (including accommodation, but excluding those related with liberal professions with a specific retirement fund -such as legal or healthcare professionals-[280]).[281]

Moreover, those performing an activity as self-employed may do so within one of the following professional categories:

- Craftsman is a category somewhat restrictive under French law, defined by legislation[282] as those persons or companies who do not employ more than 10 employees and that perform as a self-employed an activity (of production, transformation, reparation or provision of

[278] Code du travail, Art. L8221-6.

[279] Ibid.

[280] Deprost, P., Imbaud, D., Laffon, P., *Évaluation du régime d'auto-entrepreneur*, Annex II, Paris: Gouvernement de la République Francaise, 2013, p. 2.

[281] Code général des impôts, Art. 50-0, as modified by Loi n° 2017-1837 du 30 décembre 2017 de finances pour 2018, Art. 22.

[282] Loi n° 96-603 du 5 juillet 1996 relative au développement et à la promotion du commerce et de l'artisanat, Art. 19.

service) included in the list approved by the Conseil d'Etat.[283] Those fitting this definition are obliged to register in the regional Register of Crafts.

- Traders are those persons performing one or more of the activities of the list established at Articles L110-1 and L110-2 of the Code de Commerce, which includes selling movable and immovable goods, as well as renting movable goods.

- Liberal professionals, as defined by Article 29 of *Loi n° 2012-387 du 22 mars 2012 relative à la simplification du droit et à l'allégement des démarches administratives*, are those that perform, as self-employed and on a regular basis, professional activities which are mainly of a technical or intellectual nature, or belonging to the care sector, based on certain qualifications and a deontological ethic. It is, arguably, the broadest description of the three professional groups. Furthermore, Article L-622-5 of the Code de la Sécurité Sociale, after providing a short list of liberal professions, states that all persons, other than lawyers, performing a professional activity as non-wage earners and not being included in the regime of craftsmen or traders are considered as liberal professionals.

4.1.5. *Financing and contributions*

Employees' total contributions (i.e. combination of employee and employer's contributions) amount to 7% of their salary (or 13%, if the employee's monthly salary is €3,848.55 or more) for the financing of healthcare, sick pay, maternity pay, incapacity pension and survivorship pension (*assurance maladie, maternité, invalidité et décès*), 4.05% of their salary concerning unemployment benefit (*assurance chômage*),[284] 15.45% of their salary concerning retirement pension (*assurance vieillesse*),[285] 7.75% of their salary concerning complementary old-age pension (*retraite*

[283] See Chambre de Métiers et de l'Artisanat, *Liste des activités relevant de l'artisanat*, retrieved on 15 December 2020 at www.cfe-metiers.com/HTM/activites.aspx

[284] Up to the maximum threshold, which has been set to about €3,428 per month for 2021, see Arrêté du 22 décembre 2020 portant fixation du plafond de la sécurité sociale pour 2021.

[285] Ibid.

complémentaire)[286], 9.2% for the Social General Contribution (*contribution sociale généralisée*)[287] and 0.5% for the reimbursement of the social debt (*contribution pour le remboursement de la dette sociale*) as well as a percentage of their salary (and which depends on the occupation) concerning accidents at work and professional diseases.[288]

Nevertheless, a person earning less than 1.6 times the minimum salary would be eligible to a reduction of the employer's share of the social security contributions which, with some caveats, may cover the totality of the employer's social security contributions.[289]

As it concern self-employed persons' contributions, all self-employed people are liable to pay, as a percentage of their income from self-employment, 3% to 6.50% for maternity (depending on income) and 8% for the tax to finance the social security *CSG-CRDS* (*Contribution Sociale Généralisée –CSG-* and *Contribution au Remboursement de la Dette Sociale –CRDS-*).

Traders and craftsmen are liable to pay as a percentage of their income from self-employment, 0.70% for sick pay (up to a maximum of €196,140), 1.30% for invalidity and survivorship (up to a maximum of €39,228), 17.75% for basic pension (up to a maximum of €39,228, then 0.60% on income over that amount) and 7%-8% (for income below and above €37,546, respectively, up to a maximum limit of €156,912).[290] The amount of income, nonetheless, is a fixed amount (between €10,592 and €15691, depending on contingency and year) for the first two years of professional activity.[291]

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[286] This rate applies to monthly income up to the monthly maximum threshold. A higher rate is applied to income above this threshold.

[287] The *contribution sociale généralisée* contributes to the financing of the social security system as a whole.

[288] Loi n° 2017-1837 du 30 décembre 2017 de finances pour 2018. Other contributions applied to an employee's salary, but outside the scope of this research, are those concerning family benefits (allocations familiales), professional training (formation professionnelle) and social housing (fonds national d'aide au logement).

[289] The formula to determine the exact amount of the reduction of the employer's contributions, for a company employing more than 20 employees, is (0,2854 / 0,6) x (1,6 x annual minimum wage / gross annual salary - 1), see URSAAF, *La réduction générale*, retrieved on 16 Jully 2018 at www.urssaf.fr/portail/home/employeur/beneficier-dune-exoneration/exonerations-generales/la-reduction-generale.html

[290] Régime Social des Indépendants, *Travailleurs indépendants : artisans et commerçants. Le guide de votre retraite*. Édition 2017, Paris: RSI, 2017, p. 23.

[291] Ibid.

Liberal professionals are liable to pay, as a percentage of their income from self-employment, 10.10% for income up to €38,616, and 1.87% for income between €38,616 and €193,080 annually. Furthermore, they are liable to pay for the complementary pension at CIPAV (depending on income) and €76, €228 or €380 (to be decided by the self-employed person) for the invalidity and survivorship fund at CIPAV.[292]

Nevertheless, auto entrepreneurs are liable to pay contributions to 22.2% (if they are considered traders or liberal professionals), 22.3% (if craftsmen) or 12.8% (if they are exclusively dedicated to the selling of products).

Overall, the contributions of self-employed people amount, on average, to 47% of their net professional earnings while, in the case of employees, the contributions amount to 74%.[293]

Self-employed people are obliged to contribute to the relevant social insurance funds depending on their income, with a minimum contribution. The minimum contribution amounts annually to €1,042 for craftsmen and traders (and which includes contributions from training, sick pay,[294] invalidity pension and survivorship pension, as well as three trimesters of basic old-age pension), and €478 for liberal professionals (and which concern only training and three trimesters of basic *CNAVPL* pension).[295]

However, and unlike regular self-employed,[296] auto-entrepreneurs do not have an obligation to pay a minimum contribution if they do not have income from their entrepreneurial activity[297] (but, instead, they only pay a percentage of their income) and, thus, if their income is under €3,806.80

[292] Régime Social des Indépendants, *Objectif Entreprise 2017*, Paris: RSI, 2017, p. 26.

[293] Ibid, p. 27.

[294] Except in the case of liberal professionals of certain occupations, see below.

[295] Sécurité Sociale des Indépendants, *Cotisations minimales*, retrieved on 15 July 2021 at https://www.secu-independants.fr/cotisations/calcul-cotisations/cotisations-minimales/

[296] See Code de la Sécurité Sociale, Art. L133-6-8.

[297] Code général des impôts, Art. 50-0 and 102 ter.

per year, they are not entitled to sick pay.[298] Nevertheless, since 2017,[299] they may voluntarily opt to pay the minimum contribution in order to ensure accumulation of insurance periods.

Currently, unemployed persons seeking employment[300] and persons under the age of 26 (among others[301]) initiating an entrepreneurial activity and with annual earnings from such activity of less than €30,852 may take advantage of the Support to Creators or Buyers of a Company (*Aide aux Chômeurs Créateurs ou Repreneurs d'Entreprise –ACRE-*). This support programme consists on an exemption from the payment of all social security contributions (with some exceptions[302]) during the first 12 months of activity (except those contributions concerning the General Social Contribution, the reimbursement of the Social Debt, professional training and the compulsory complementary pension –the latter only in the case of traders and craftsmen-).[303] The exemption progressively decreases when income is above €30,852, with no exemption if the person's income exceeds €41,136.[304] In the case of auto-entrepreneurs, the exemption applies in a gradually decreasing manner during the first three years, with reductions on the social security contribution rates[305] of 75%, 25% and 10% (concerning the first, second and third year).[306]

4.2. Social security benefits in France

The current section explores the various social security schemes (both social insurance and social assistance schemes) that constitute the social security system of France.

[298] Furthermore, this, of course, also impacts those benefits linked to the amount paid through contributions, such as invalidity pension.

[299] Loi n° 2015-1702 du 21 décembre 2015 de financement de la sécurité sociale pour 2016.

[300] This applied to either persons receiving the

[301] Code du travail, Art. L5141-1.

[302] Those persons taking advantage of ACRE still have to pay contributions concerning the General Social Contribution, the reimbursement of the Social Debt, professional training and the compulsory complementary pension –the latter only in the case of traders and craftsmen-).

[303] Code de la sécurité sociale, Art. L131-6-4, D131-6-1.

[304] Code de la sécurité sociale, Art. L131-6-4, D131-6-1.

[305] These rates vary depending on the occupation, as noted in Code de la sécurité sociale, Art. D131-5-1.

[306] Code de la sécurité sociale, Art. L131-6-4, D131-6-3.

4.2.1. *Unemployment*

There are three unemployment schemes:

- The Support for Return to Employment (*Allocation d'Aide au Retour à l'Emploi –ARE-*) is a contributory-based scheme that is only available for those persons who have been in an employment relationship prior to the claim. It is available for those persons who lost their employment for no cause of their own,[307] who are actively looking for employment and have accumulated insurance periods of at least 910 hours within the last 24 months (36 months for persons of 53 years of age or older).[308] The daily amount of the benefit is the sum of a fixed amount (€12) and a variable amount dependant on previous wage (40.4% of the daily reference wage[309]), and with a minimum amount of €29.[310] Nevertheless, the fixed amount and the minimum amount are proportionally reduced if the person performs work for less than the legal full-time duration (1,607 hours per year[311]),[312] although the resulting amount may not be lower than 75% of the daily reference wage.[313] Concerning the duration of the benefit, this is equivalent to the days of employment which produced the claim, with a minimum duration of 122 days and a maximum duration of 730 days.[314]

  Nevertheless, a number of measures have been taken due to the COVID-19 pandemic,[315] and which take effect for the period between 31 May 2020 to 31 January 2021. In this regard,

[307] Nevertheless, a claim may be also performed if the dismissal is due to an agreement between the employer and the employee or, in case of public servants, due to a sanction, see Code du travail, Art. L5421-1 - L5421-4.

[308] Code du travail, L5421-1 - L5421-4; Arrêté du 25 juin 2014 portant agrément de la convention du 14 mai 2014 relative à l'indemnisation du chômage et les textes qui lui sont associés, JORF n°0146 du 26 juin 2014; UNEDIC, Circulaire N° 2014-19 du 2 Juillet 2014, Paris: UNEDIC, 2014.

[309] The daily reference wage (salaire journalier de référence) is calculated by dividing the sum of the gross salary in the year prior to the claim between the result of multiplying the number of days of employment during that year by 1.4, see Arrêté du 25 juin 2014 portant agrément de la convention du 14 mai 2014 relative à l'indemnisation du chômage et les textes qui lui sont associés, JORF n°0146 du 26 juin 2014.

[310] Règlement général annexé à la convention du 14 mai 2014, Art. 14.

[311] Code du travail, Art. L3121-27.

[312] Règlement général annexé à la convention du 14 avril 2017 relative à l'assurance chômage, Art. 15.

[313] Ibid., Art. 16.

[314] Ibid., Art. 9.

[315] Décret n° 2020-425 du 14 avril 2020 portant mesures d'urgence en matière de revenus de remplacement mentionnés à l'article L. 5421-2 du code du travail.

the period of reference within which claimants need to have fulfilled the abovementioned periods of contributions is extended to 31 or 43 months (depending on the claimant's age -see above-). The number of hours required to become entitled to the benefit are reduced to 610. Furthermore, those persons who would lose entitlement to the benefit during that period continue receiving entitlement until the end of that period.

Perceiving *ARE* is compatible with earnings from work or self-employment, although the restrictions are significant. In this case, if a recipient of *ARE* performs work, it would be deducted to his *ARE* benefit the amount equivalent to 70% of his gross salary or gross income from the self-employment activity, and the resulting amount (i.e. the sum of *ARE* benefit and his salary or income) cannot overpass the daily reference wage used to calculate *ARE*.[316]

- The Specific Solidarity Allowance (*Allocation de solidarité spécifique –ASS-*) is a benefit available for those persons with at least five years as an employee during the previous 10 years prior to the end of the contract of employment, and which are not (or no longer) entitled to the Support for Return to Employment benefit.

- The Self-Employed Allowance (*Allocation des Travailleurs Indépendants -ATI-*)[317] is a benefit available to a person who stops being self-employed after having being self-employed for two years uninterruptedly. The benefit amounts to approximately €800 per month, and it has a maximum duration of six months.

- The Active Solidarity Income Support (*Revenu de Solidarité Active –RSA-*) is a means-tested scheme for persons with income under a certain amount. It is however covered in this thesis as a minimum income benefit, and thus it is analysed further below.[318]

- Moreover, an already existing program for situations of a significant reduction of the economic activity due to exceptional circumstances (such as economic crisis or natural

[316] Ibid, Art. 31.

[317] Code du travail, Art. L5424-24 - Art. L5424-28.

[318] See section 4.2.7.

disasters) was adapted to address the impact of the COVID-19 pandemic. The scheme, called partial unemployment scheme (*chômage partiel*), is directed to situations of mandatory closure of the company due to COVID-19 restrictions, a decline of the activity or the impossibility to perform the work telematically. Through it the employee receives from his employer a compensation of approximately 70% of his salary (instead of his salary), and the employer, in turn, is reimbursed 85% of the cost of said compensation.[319]

Finally, certain forms of self-employed workers may opt to join a voluntary unemployment insurance, such as the *Garantie sociale des chefs et dirigeants d'entreprise*, or those provided by *l'Association pour la protection des patrons indépendants* or *April assurances*. Contributions to these insurances may produce tax deductions through the *Madellin* contract.

4.2.2. *Sick pay*

There are two schemes concerning temporary incapacity:

- The daily allowance (*indemnités journalières*) is a scheme available to employees who have been insured for at least 150 hours during the three months prior to the sick leave, or 90 days prior to the sick leave, or who had contributed at least about €10,300 per year (i.e. 1,015 times the hourly minimum wage in the six months prior the period of sickness). Its maximum duration is six months,[320] although the recipient may be entitled to a longer benefit if he fulfils the double of the previous requirements.[321] The benefit amounts to half the basic daily salary[322] during the last three months.[323] Nevertheless, the salary taken into account is limited to 1.8 times the hourly minimum wage of the month prior to starting receiving sick pay. Moreover, there is a maximum daily amount of sick pay (about €45 for a person without

[319] Décret n° 2020-325 du 25 mars 2020 relatif à l'activité partielle; Ministère de l'économie des finances et de la relance, Dispositif de chômage partiel, retrieved on 15 December 2020 at https://www.legifrance.gouv.fr/loda/id/JORFTEXT000041755956/2021-01-10/

[320] Code de la sécurité sociale, Art. R313-3.

[321] Ibid.

[322] The basic daily salary is calculated (in case it is paid on a monthly basis) by dividing the salary of the three months prior to fallen sick by 91.25

[323] Code de la sécurité sociale, Art. R323-1 – 323-12.

children under his charge).[324] There is a waiting period of three days.[325] In order to continue receiving the benefit after six months, the claimant must have contributed continuously during the year prior to fallen ill, and to have worked at least 600 hours during that period; or, alternatively, to have contributed at least 2,035 times the daily minimum wage during the year prior to fallen ill.

- The complementary daily allowance (*indemnité complémentaire*) is available for those employees who are entitled to the *regular* daily allowance, who are not homeworkers and who have been working continuously for their employer for at least one year prior to falling sick would be also entitled to a complementary sick pay. This benefit, paid by the employer, would complement from the eight day of sickness the abovementioned sick pay in order for it to amount to 90% of the gross regular salary of the employee during the first 30 days of incapacity to work, and of 66.66% of the salary afterwards. The maximum duration of the benefit would depend on the length of time the employee has been working for the employer, with a minimum of 60 days and a maximum (concerning those employees who have worked for their employer during at least 31 years) of 180 days.

- The daily allowance for self-employed craftsmen and traders (*indemnités journalières des artisans, industriels et commerçants*) [326] is a scheme available for self-employed workers in those professional categories. It is thus not available to self-employed liberal professionals. In order to be entitled to this benefit, self-employed craftsmen and traders need to have been insured for at least a year prior to their claim. The benefit consists of a daily cash benefit of 1/730 of their average annual salary of the last three years (with a minimum of €5.54 and a maximum of €56.35 per day).[327] The maximum duration of the benefit is of 360 days (for a full-time professional activity) within a period of three years, when the disease is not considered of long duration (i.e. it is considered that the person will be able to return to work

[324] Ibid, Art. R323-9.

[325] Ibid, Art. R323-1.

[326] See Code de la sécurité sociale, Art. D613-14 - D613-28.

[327] Code de la sécurité sociale, Art. D613-21.

in less than six months); and of three years if the disease is considered of long-duration.[328] There is a waiting period of seven days (three days in case of hospitalisation).[329]

While self-employed liberal professionals are not covered by this scheme,[330] they may opt for voluntary insurance.[331] Also, micro self-employed craftsmen or traders with annual earnings below €4,047 are not liable to pay contributions for this contingency, in which case they are neither entitled to receive such benefit (nevertheless, they may opt to pay the minimum contribution, explained above, in which case they would be eligible for this scheme).

- Self-employed workers may subscribe a private insurance providing extra insurance in case of sickness.

4.2.3. *Long-term incapacity*

There are currently four schemes for long-term incapacity:

- The employee's pension due to long-term incapacity is available to those persons who, as a result of an accident or disease, have become unable to earn a salary above 33% of their previous salary, and who have been insured continuously as employees for at least 12 months prior to the cause of incapacity, and who, during that period, had a salary of at least €20,604 (i.e. 2,030 times the daily minimum wage) or have performed work during at least 600 hours. The amount of the pension would depend on the degree of incapacity, and it is calculated using an average of the best 10 years of contributions of the employee (with a maximum of €3,428 per month). Persons who are nonetheless still able to perform remunerated work would be entitled to a pension of 30% their average annual salary, with a minimum monthly amount of €292.80 and a maximum amount of €1028.40. And persons

[328] Code de la sécurité sociale, Art. D613-20.

[329] Code de la sécurité sociale, Art. D613-19.

[330] While this depends on the occupation, as some occupations (such as those in the healthcare sector -with the professional funds CARF, CARCDSF and CARPIMKO-) do have some form of sick pay, but many others (including the fund in which are included liberal professionals who does not fit in the other professional funds) do not.

[331] Régime Social des Indépendants, *Le guide de votre assurance maladie-maternité Édition 2017*, Paris: RSI, 2017, p. 15.

who are not able perform remunerated work would be entitled to a pension of 50% their average annual salary, with a minimum monthly amount of €292.80 and a maximum amount of €1,714. Persons who are not only not able to perform remunerated work, but also need continuous assistance, would also be entitled to a supplement, as well as a higher minimum (€1,418.09) and maximum amount (€2,839.29).

- The pension for craftsmen and traders due to long-term incapacity[332] is available to self-employed from those professional categories who have been insured against this contingency when the risk materialised, and who had at least a year of accumulated periods of contributions. The benefit amounts to 30% of the annual average earnings (i.e. an average of the contributory base of the recipient's 10 best years of earnings) in case of partial incapacity, and of 50% in case of total and definitive incapacity. Furthermore, the amount cannot be lower than €459.51 and €647.39 per month, respectively. If the recipient is also entitled to sick pay, the long-term incapacity pension is provided after the end of it.

- The pension for liberal professionals due to long-term incapacity, instead, is available to those self-employed who fulfil the same requirements than in the case of the pension for craftsmen and traders. The amount of the benefit depends on the professional group and whether the incapacity is partial or full.[333]

- The Allowance for Incapacitated Adults (*Allocation aux Adultes Handicapés*) is available to all persons with a long-term incapacity of over 50%, no matter their employment status, and with income under a certain threshold (€10,843, for a person living alone).[334]

[332] Previssima, *Quelle pension d'invalidité pour les travailleurs indépendants* ?, retrieved on 15 December 2020 at www.previssima.fr/question-pratique/invalidite-quelle-prevoyance-pour-les-artisans-commercants.html#linvalidite-totale-et-definitive

[333] See Previssima, *Je suis profession libérale : ai-je droit à une pension d'invalidité?*, retrieved on 15 December 2020 at www.previssima.fr/question-pratique/invalidite-quelle-prevoyance-pour-les-professions-liberales.html

[334] Code de la sécurité sociale, Art. L821-1 - L821-8.

4.2.4. *Labour accidents and professional diseases*

Employees are compulsorily covered by insurance against labour accidents and professional diseases.[335] If the accident produces a temporary inability to work, the person is entitled to sick pay amounting daily to 60% of 79% of the gross daily wage during the first 28 days, and of 80% of 79% of the gross daily wage during the rest of period.[336] If the incapacity is permanent, the person is entitled to a compensation in one payment, if the accident or disease produces a disability with a degree below 10%; or a pension, if the incapacity degree is 10% or more.[337]

While self-employed people are not compulsorily insured against this risk, they may join the scheme voluntarily.[338] In this regard, they may do so through a health insurance (specifically, through the *Caisses Primaires d'Assurance Maladie –CPAM-*), which grant the same compensation for long-term incapacity as in the case of employees but, nevertheless, does not produce entitlement to sick pay in case of temporary inability to work.[339]

However, since January 2018,[340] platforms which determine the characteristics of the service provided or of the product sold, as well as determine its price, are obliged to cover the cost of the insurance against accidents at work for self-employed workers who opt to take such insurance.[341] This voluntary insurance will be the one regulated by the social security code,[342] unless the company has established through collective agreement the coverage by a different insurance which provides at least an equivalent protection.[343]

[335] Code de la sécurité sociale, Partie legislative, Livre 4.

[336] Code de la sécurité sociale, Partie réglementaire, Livre 4, Titre 3, Chapitre 3.

[337] Code de la sécurité sociale, Partie legislative, Livre 4, Titre 3, Chapitre 4.

[338] Code de la sécurité sociale, Art. L743-1.

[339] Code de la sécurité sociale, Art. R743-3.

[340] Décret n° 2017-774 du 4 mai 2017 relatif à la responsabilité sociale des plateformes de mise en relation par voie électronique.

[341] Code du Travail, Art. L7342-2.

[342] Code de la Sécurité Sociale, Art. L743-1, L743-2.

[343] Code du Travail, Art. L7342-2.

Nevertheless, this only applies to workers with earnings from the work performed through the platform of over 13% the annual social security ceiling[344] (i.e. €3,428 for 2021,[345] resulting thus in a threshold of €445). However, some platforms have decided to provide accidents at work insurance without extra cost for all persons performing work through their platforms, no matter the amount of income. This is the case concerning *Deliveroo*[346] and *Uber*,[347] both of which provide this service with the insurance company 'AXA'.

4.2.5. *Maternity and paternity*

There are three schemes concerning maternity insurance:

- The Daily Maternity Allowance (*indemnité journalière maternité*) is a benefit available to employees who fulfil the same criteria as in the case of sick pay. The amount of the benefit is the result of dividing 79% of the sum of the employee's salary in the three months prior to the claim (with a maximum monthly salary of €3,428) by 91.25, and with a maximum amount of €89.03 per day. The total duration of the benefit is of 16 weeks (six before and 10 after birth), although this duration increase in the case of multiple or recent births.[348]

- The Maternity Rest Benefit scheme (*Allocation de repos maternel*) is a scheme which covers all self-employed persons.[349] In this regard, self-employed artisans, merchants and liberal professionals who are insured at the moment of the claim are entitled to €56.35 per day of maternity leave, with a maximum number of maternity leave days of 112 (and a minimum

[344] Code du Travail, Art. L7342-2, D7342-1.

[345] Arrêté du 22 décembre 2020 portant fixation du plafond de la sécurité sociale pour 2021.

[346] This is performed through a partnership with the insurance company AXA, providing as lump sum payment (between €300 and €1000, depending on the duration of the cease of activity due to the accident) and covering the cost of medical treatment, see AXA, *Ton assurance santé Deliveroo by AXA*, retrieved on 15 December 2020 at https://axalive.fr/article/axa-deliveroo-protection-sociale

[347] Uber espace presse, *Uber et AXA France lancent une protection sociale à destination des chauffeurs indépendants*, retrieved on 15 December 2020 at www.uber.com/fr/newsroom/uber-et-axa-france-lancent-une-protection-sociale-destination-des-chauffeurs-independants/

[348] Service Public, Congé de maternité d'un salarié du secteur privé, retrieved on 15 December 2020 at www.service-public.fr/particuliers/vosdroits/F2265

[349] Code de la Sécurité Sociale, Art. L613-1.

of eight months).[350] Nevertheless, since 2017, those with earnings below €3,982.80 receive a benefit 10% lower.[351]

- The daily allowance due to interruption of business (*Indemnité journalière d'interruption d'activité*) is a benefit available for persons who are entitled to Maternity Rest benefit. It amounts to a lump sum payment of €3,428 (€590.74 if the claimant's annual earnings are below €3,983) paid in two instalments, half at the time of the birth and the other half seven months after it.[352]

There are, in turn, two schemes concerning paternity insurance:

- Employees who fulfil the same requirements as in the case of sick pay would be entitled to paternity pay. The amount of the benefit is the result of dividing 79% of the sum of the employee's salary in the three months prior to the claim (with a maximum monthly salary of €3,428) by 91.25. The maximum duration of the benefit is 11 days (although this duration is increased in the case of multiple births).[353]

- Self-employed artisans, merchants and liberal professionals who are insured at the moment of the claim are entitled to €591.14 for a period of 11 days of not performing a professional activity starting within the four months following birth, or €967.32 for a period of 18 days, if there are multiple births (€59.11 and €96.73, respectively, in the case of a self-employed person with annual earnings below €3,982.80).[354]

[350] L'assurance Maladie, *Les prestations maternité des travailleuses indépendantes et des conjointes collaboratrices*, retrieved on 15 December 2020 at https://www.ameli.fr/assure/remboursements/indemnites-journalieres/prestations-maternite-independantes-conjointes-collaboratric.

[351] Ibid.

[352] Régime Social des Indépendants, *Allocations de maternité*, retrieved on 15 December 2020 at https://www.secu-independants.fr/baremes/baremes-2019/baremesprestations-maladie-maternite/

[353] Service Public, Congé de paternité et d'accueil de l'enfant d'un salarié du secteur privé, retrieved on 3 July 2018 at www.service-public.fr/particuliers/vosdroits/F3156

[354] Ibid.

4.2.6. *Retirement*

4.2.6.a. First pillar pensions

Employees and self-employed are covered, with generally the same conditions, by the basic old-age pension and a complementary pension.[355] Liberal professionals, in turn, may be entitled to a basic pension and a complementary pension from the *Caisse nationale d'assurance vieillesse des professions libérales* (*CNAVPL*).[356]

In all cases, the legal age of retirement[357] is 62 for those persons born after 1955, and 60 for persons born before 1955. Nevertheless, only those who have accumulated periods of contribution for a certain duration (from 150 trimesters require for those born before 1943 to 172 trimesters for those born on or after 1973) are entitled to the full pension at that age. Persons who do not fulfil these conditions may qualify for the full pension when reaching approximately 67 years of age.[358]

In the case of employees, traders and craftsmen, the amount of the *Basic Pension* benefit[359] is calculated by multiplying their average annual income (*revenu annuel moyen artisan ou commerçant*)[360] by the retirement rate (in the case of those entitled to full pension, this rate is 50%) which, in turn, is multiplied by the result of dividing the number of trimesters of insurance since 1972 by the number of trimesters which are required to obtain a full pension (e.g. 172 for those born on or after 1973). The number of trimesters of insurance does not represent the period of time during which contributions are paid but, instead, it is based on the amount of contribution paid based on

[355] Régime Social des Indépendants, Travailleurs indépendants: artisans et commerçants. Le guide de votre retraite. Édition 2017, Paris: RSI, 2017.

[356] Régime Social des Indépendants, Objectif Entreprise 2017, Paris : RSI, 2017, p. 36. For an overview of the retirement schemes available in France, please see Agirc-Arrco, *La retraite en France*, retrieved on 15 December 2020 at www.agirc-arrco.fr/fileadmin/agircarrco/documents/plaquettes/retraite_en_france.pdf

[357] It is not, however, compulsory to retire at this age, and those persons who continue working after having fulfilled the required age and minimum contribution periods are entitled to a raise in their pension.

[358] See Cleiss, *Le régime français de protection sociale des travailleurs indépendants*, retrieved on 15 December 2020 at www.cleiss.fr/docs/regimes/regime_france_independants.html#vieillesse

[359] Code de la sécurité sociale, Art. L634-2 - L634-6-1.

[360] This amount is the result of an average of basis for contribution during the years of professional activity, and limited by the annual social security ceiling (plafond annnuel de la Sécurité Sociale), see Ibid.

the amount of contribution basis. [361] Nevertheless, this amount may be increased in the case of having had more than three children or being incapacitated. Moreover, there is a minimum amount for those who have reached the age for a full pension, which is means-tested and based on residence.[362]

A specificity in the case of employees is that the claimant may opt to be covered by specific provisions designed for part-time workers, the so-called progressive old-age pension (*retraite progressive*).

In the case of liberal professionals, the basic pension[363] is calculated on the basis of a system of points accumulated throughout their professional career, the annual value of the point which is fixed by decree and the rate of payment of the pension which will be 100% if they have contributed for the required time, with the possibility of decreasing or increasing the percentage if the period of contribution is insufficient or has exceeded it. The formula to calculate its value is "Basic pension = number of accumulated points x annual value in points x pension rate". The calculation of points varies depending on whether it is before or after 1 January 2004.

The points are also used to calculate the *Complementary Pension* for craftsmen and traders. Depending on the contributions paid, a number of points are obtained, the value of which depends on the date of acquisition. This pension is reduced if the basic pension was obtained at a reduced rate.[364]

Concerning the case of liberal professions, the points are determined by the amount paid as contribution per year. The amount of the benefit is, as it was the case with previous benefits, the result of multiplying the number of points by a certain number, which varies each year.[365]

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[361] Régime Social des Indépendants, *Travailleurs indépendants : artisans et commerçants. Le guide de votre retraite*. Édition 2017, Paris: RSI, 2017, pp. 15-18.

[362] Ibid, p. 19.

[363] Code de la sécurité sociale, Art. L643-1 – L643-6; See also CNAVPL, *Guide de l'assurance viellese des professions libérales, Edition 2020*, Paris : CNAVPL, 2020.

[364] Cleiss, *Le régime français de protection sociale des travailleurs indépendants*, retrieved on 15 December 2020 at www.cleiss.fr/docs/regimes/regime_france_independants.html#vieillesse

[365] CNAVPL, *Guide de l'assurance viellese des professions libérales, Edition 2020*, Paris : CNAVPL, 2020.

Finally, those persons aged 65 years or over and residing in France, not receiving any old-age benefits and with annual earnings of less than €10,838.40 (€16,826.64 if applying as a couple) may be entitled to the Solidarity Allowance for the Aged (*Allocation de solidarité aux personnes âgées*).[366]

4.2.6.b. Second and third pillar pensions

The use of second and third pillar pensions is not widespread in France. This is so despite the fact that certain fiscal advantages are linked to the use of these funds.

In the case of second pillar pensions, employees may join a group insurance (*assurance de group*) or a pension fund created by the employer, or a sectoral insurance (when such insurance exists). Self-employed, in turn, may also join a second pillar pension through a complementary free pension for the self-employed (*pension libre complémentaire pour indépendants*).

In the case of third pillar pensions, the saving pension funds ensure a 25 to 30% tax deduction on savings up to €1230. Both employees and the self-employed may join such schemes.

4.2.7. *Minimum income*

The Active Solidarity Income Support (*Revenu de Solidarité Active –RSA-*) is a means-tested minimum income scheme available to all persons, no matter their professional status, with income under a certain threshold. While the benefit does not require periods of employment for persons aged 25 or older, or for those aged 18 years or older and with dependent children,[367] it does require them for those aged between 18 and 25 without dependent children. In this regard, the latter must have performed work as an employee for at least the double of the number of hours of what is considered under the Labour Code to amount to the annual working time of a full-time occupation[368] (i.e. 3,214 hours of employment within the three years prior to claim the benefit)[369] or having been

[366] Code de la sécurité sociale, Art. L815-1 - L815-6, R815-1 - R815-2-1, L815-9, D815-1, D815-2, L815-10 - L815-12.
[367] Code de l'action sociale et des familles, Art. L262-4.
[368] As established under the provisions regulating working time is considered as extra time, see Code du travail, Art. L3121-41.
[369] Code de l'action sociale et des familles, Art. D262-25-1.

registered as a self-employed person and reported earnings of at least €23,456 within the previous two years prior to claim the benefit.[370]

The scheme does require to those recipients with earnings under a certain threshold (i.e. €500 of average per month within the latest trimester)[371] to actively seek employment or self-employment.[372]

RSA is compatible with earnings from work or self-employment, although earnings from professional activities are deducted from the amount of the benefit. The benefit ensures a minimum income,[373] which varies depending on the composition of such household,[374] and that for a person living alone and without children under his charge amounts to €564.78.[375]

4.3. The social security position of persons in a standard employment relationship

In the previous section, the different schemes available in France in relation to all the contingencies studied in this thesis have been analysed. In this section we will move on to study the social security position of a person in a standard employment relationship. This will be done in three steps: Firstly, it will be considered whether a person in a standard employment relationship is covered by these schemes (i.e. 'formal access'). Secondly, it will be determined whether a standard worker can meet the necessary requirements to become entitled to the benefits contained in these programmes (i.e. effective access).[376] Thirdly, it will be analysed what is the content of the benefits that a person in a standard employment relationship is entitled to (i.e. their duration and amount).

[370] Ibid., Art. D262-25-2.

[371] DARES, 'L'accompagnement des bénéficiaires du revenu de solidarité active (RSA)', *DARES Analyses*, issue 8, 2013, p. 2.

[372] Code de l'action sociale et des familles, Art. L262-28, D262-65.

[373] Ibid., Art. L262-2.

[374] Ibid., Art. L262-9.

[375] Décret n° 2018-324 du 3 mai 2018 portant revalorisation du montant forfaitaire du revenu de solidarité active, Art. 1.

[376] That is, although a person may be formally covered by a programme, if that person is not able to meet the requirements to obtain the benefits contained in that programme, he does not actually have access to the benefits despite being part of it.

Persons in a standard employment relationship are covered by the health insurance (*assurance maladie*), which includes sick pay, maternity/paternity benefit, accidents at work and professional diseases benefit and incapacity pension. They are also covered by basic and complementary old-age pension (*pension de retraite*), and may also be covered for occupational pension schemes. Furthermore, they are covered by the contributory unemployment benefit (*allocation d'aide au retour à l'emploi*).

The conditions for entitlement to these schemes' benefits are reasonably accessible, and would be in any case fulfilled by a person who works full-time in an open ended relationship. The benefits of the social insurance schemes vary (depending on the scheme) between approximately 50% and 100% of the employee's salary. The duration may vary (depending on the contributions paid and the benefit) on between four months and two years (with the exception of long-term full incapacity and retirement pensions, which duration is generally indefinite).

4.4. Platform work and social security in France

In this section, the specific social security position of platform workers in France is studied.

In order to do so, it is first analysed (section 4.4.1) what is generally the legal status of platform workers in this country, as this status is (as it has been shown in the previous analysis of the different social security schemes available) fundamental in many occasions for determining their social security position. Given the fact that there has been some uncertainty on that legal status, some emphasis is placed on the different judicial decisions that have studied such legal status. These decisions, however, only concern what it has been referred in chapter 1 of this thesis[377] as platforms which provide a homogenised service (and which generally include, for example, platforms for the delivery of food), and they mainly relate to the platform workers' labour rights. Still, it is believed that such decisions provide a necessary light on the legal status of platform workers in the country. Nevertheless, it is also acknowledged that these decisions do not represent the entire range of situations that are included in this thesis under the term 'platform work'.

[377] See section 1.4.4.

Once it has been discussed the legal status of platform workers, it is then analysed the social security position of those platform workers classified in each of those (potential) legal statuses, namely platform workers in an employment relationship (section 4.4.2.) and self-employed platform workers (section 4.4.3). It is in these two sections where the analysis of the different social security schemes available in this country comes to fruition, as it is applied to the specific situation of platform workers. When doing so, the differences between the social security position of persons in a standard employment and the one of platform workers are highlighted.

4.4.1. *The legal status of platform workers*

In France, the consideration of the status of platform worker has evolved significantly since when the question was first presented in front of the Courts, In this regard, in one of the first cases concerning the platform economy, a Paris Labour Court (*conseil de prud'hommes*) declared itself incompetent to decide on a claim concerning the employment status reclassification by a *Deliveroo* rider, redirecting the case to the Civil Court of Paris (*tribunal de commerce*). This decision was ratified by the Court of Appeal of Paris (*Cours d'Appel*).[378] Nevertheless, since then the tide seems to have been changing, particularly after the Court of Cassation decided that riders of the (now defunct) platform *Take Away* were employees.[379] After that, several other cases concerning the same platform have been ruled considering its platform workers as employees.[380] However, there are still many online platforms that treat their platform workers as self-employed persons.

Because of this, in the following section it is studied the social security position of platform workers in an employment relationship and the one of self-employed platform workers.

Besides the legal classification determined by the Courts based on the general criteria differentiating an employment relationship from self-employment (and which have been studied above[381]), the

[378] Cours d'Appel de Paris, pôle 6 - ch. 2, 9 nov. 2017, n° 16/12875.

[379] Cour de cassation, Arrêt n°1737 du 28 novembre 2018 (17-20.079)

[380] See, inter alia, Leclerc, A. and Bissuel, B., 'D'ex-livreurs de la plate-forme Take Eat Easy obtiennent des indemnités aux prud'hommes', in *Le Monde*, 28 juin 2019, retrieved on 15 December 2020. www.lemonde.fr/economie/article/2019/06/28/d-ex-livreurs-de-la-plate-forme-take-eat-easy-obtiennent-des-indemnites-aux-prud-hommes_5482546_3234.html

[381] See section 4.1.4.

French legal system is special in that it has also provided some specific legal definitions of the concepts of 'platforms of online intermediation' and of 'digital online platforms', having created specific obligations for those companies included in those concepts.

In this regard, a person performing work as a self-employed for platforms of online intermediation (*plateformes de mise en relation par voie électronique*), defined as "companies, wherever they are established, who link people remotely and online for the sale of goods, the provision of a service or the exchange or sharing of a good or service"[382], when the platform "determines the characteristics of the service provided or of the product sold, as well as determine its price"[383], will be covered by sick pay insurance on the expense of the platform (see, for further information, the section on sick pay benefit).[384]

In turn, operators of digital online platforms (*operateur de plataforme en ligne*) as "any natural or legal person offering, on a professional basis and either in a remunerated or unremunerated way, an online service based on (...) bringing together several parties for the purpose of selling property, providing a service or exchanging or sharing a content, property or a service"[385] will be obliged, since the 1 January 2019, to report certain information on the work performed through them.[386]

Finally, it should be noted that there have been two (unsuccessful) attempts[387] to legislate so that platform workers of online platforms which provide some form of social protection to platform workers (such as insurance through private schemes concerning sick pay) would be automatically considered as self-employed persons and could not be reclassified as employees by the judiciary in case their situation was, in practice, the one of an employment relationship. In both cases, the Constitutional Court considered such provisions unconstitutional (in the case of the first law,

[382] Code général des impôts, Art. 242 bis (own translation).

[383] Code du travail, Art. L7342-1 (own translation).

[384] Ibid.

[385] Code de la consommation, Art. L111-7 (own translation). It is also important to note that the consumer code also establishes certain obligations to platforms offering online services based on classifying through an algorythm services or goods offered by a thrid party.

[386] Loi n° 2016-1918 du 29 décembre 2016 de finances rectificative pour 2016, Art. 24.

[387] Loi n° 2018-771 du 5 septembre 2018 pour la liberté de choisir son avenir professionnel; Loi n° 2019-1428 du 24 décembre 2019 d'orientation des mobilités.

because of not having followed the correct legislative procedure[388] and, in the case of the second one, because it considered it is up to the judge, in conformity with the Labour Code, to reclassify a situation as an employment relationship).

In summary, while there seems to be a trend of decisions considering platform workers performing work for platforms providing an homogenised service[389] (such as *Deliveroo*) as employees, there are still many platforms that treat their platform workers as employees. Furthermore, there seems to be a political will of restricting the judiciary's capacity of assessing the legal status of platform workers, even if attempts to do so have been stopped by the Constitutional Court. Both phenomenon arguably result in ambiguity and unpredictability as it regards the legal status of platform workers and, as a result, they may experience legal uncertainty. Taking into account this uncertainty, below it will be studied the social security position of platform workers in an employment relationship, as well as the position of those who are self-employed persons.

4.4.2. *The social security position of platform workers in an employment relationship*

As it was noted above, the state of the case law in France on the legal classification of platform workers indicate that, at least in some cases, platform workers in France are employees. Because of this, this segment will focus on the social security position of platform workers who are employees.

Platform workers classified as employees (*salariés*) are covered by the health insurance (*assurance maladie*), which includes sick pay, maternity/paternity benefit, accidents at work and professional diseases benefit and incapacity pension. They are also covered by basic and complementary old-age insurance (*pension de retraite*), and may also be covered by occupational pension schemes. Furthermore, they are covered by the contributory unemployment benefit (*allocation d'aide au retour à l'emploi*).

The periods of contributions required to become entitled to the benefits contained in these social insurance schemes are fairly short ranging between 20 days and four months (with the exception of the complementary sick pay -*indemnité complementaire*-, which requires a year of work with the

[388] Décision n° 2018-769 DC du 4 septembre 2018.

[389] See, on the definition of this term for the purposes of this thesis, section 1.4.4.

same employer, as well as long-term incapacity and old-age pension -which requirements are not significantly demanding either-), and are usually allowed to be fulfilled in a relatively broad period of time. In this regard, a person must have been insured for at least 150 hours in the three months prior to the period of sickness[390] in order to access sick pay and maternity/paternity pay, and at least 88 days in the 28 months to access contributory unemployment benefits (*allocation d'aide au retour à l'emploi*).

As it was described when studying the social security position of standard workers, the amount of the contributory benefits range (depending on the scheme) between approximately 50% and 100% of the employee's salary. The fact that benefits are dependent on the employee's salary can obviously be detrimental to those platform workers with low earnings. Moreover, while the duration of these benefits vary from four months to two years (with the exception of the paternity benefit, which lasts 11 days, and, of course, the long-term incapacity and old-age pension), this variation relies heavily on the contributions paid (as well as on the type of benefit). Therefore, those platform workers who have contributed for short or fragmented periods may find themselves with relatively short benefits.

Overall, although platform workers in France are officially protected under all social security schemes and might, in certain instances, become entitled to the benefits found in even the contributory schemes, the benefits that they will obtain from these schemes might be limited.

4.4.3. *The social security position of self-employed platform workers*

Platform workers classified as self-employed craftsmen (*artisans*)[391] or traders (*commerçants*)[392] are compulsorily covered for unemployment benefit (through the Self-employed Allowance -*Allocation des Travailleurs Indépendants*-ATI-), maternity benefit, sick pay and long-term incapacity pension through the health insurance, as well as for basic and complementary

[390] See further, on sick pay in France, section 4.2.2.

[391] 'Craftsmen' is defined by Art. 19 of Loi n° 96-603 du 5 juillet 1996 as those persons or companies who do not employ more than 10 employees and that perform as a self-employed an activity (of production, transformation, reparation or provision of service) included in the list approved by the Conseil d'Etat.

[392] 'Traders' are those persons performing one or more of the activities of the list established at Art. L110-1 and L110-2 of the Code de Commerce, which includes selling movable and immovable goods, as well as renting movable goods.

pension (*pension de retraite*). They may opt to be voluntarily insured against accidents at work and professional diseases through the health insurance as well.

Platform workers classified as self-employed liberal professionals (*professionnels libéraux*) are covered by the same schemes than craftsmen and traders concerning unemployment, as well as maternity and paternity. Moreover, they are covered by similar schemes in the case of long-term incapacity and retirement. Liberal professionals, however, cannot join the statutory scheme providing sick pay[393] (although, they may opt to join a voluntary private insurance).

In the case of platform workers of platforms that provide an homogenised service (i.e. platforms that determine the characteristics of the service provided or of the product sold, as well as determine its price), no matter whether they are classified as traders, craftsmen or liberal professionals, the platform is obliged to cover the cost of the insurance against accidents at work and professional diseases.[394] However, this only applies to workers with annual earnings from the work performed through the platform of over of €444.[395]

It should be noted that self-employed platform workers in France may avoid paying the minimum social security contributions that self-employed persons are obliged to pay (and which amounts to approximately €1,042 for craftsmen and traders and €478 for liberal professionals)[396] if they opt to be micro self-employed (*auto-entrepreneurs*), in which case they may only pay social security contributions as a percentage of their income. Nevertheless, if they opt to do so, they would not be entitled to sick pay if their income is under €3,982.80 per year.

Moreover, persons who are unemployed or under the age of 26 (among others[397]) and who start a platform work activity may be exempted from all take social security contributions during the first year of activity if their income is of less than €30,852 (through the *Aide aux Chômeurs Créateurs*

[393] While this depends on the occupation, as some occupations (such as those in the healthcare sector -with the professional funds CARF, CARCDSF and CARPIMKO-) do have some form of sick pay, but many others (including the fund in which are included those liberal professionals who does not fit in the other professional funds) do not.

[394] Code du Travail, Art. L7342-2.

[395] Code du Travail, Art. L7342-2, D7342-1. See also section 4.2.4.

[396] Sécurité Sociale des Indépendants, *Cotisations minimales*, retrieved on 15 July 2021 at https://www.secu-independants.fr/cotisations/calcul-cotisations/cotisations-minimales/

[397] Code du travail, Art. L5141-1.

ou Repreneurs d'Entreprise –ACRE-). If, however, they decide to be micro self-employed, then a decreasing reduction on social security contributions of 75%, 25% and 10% applies during the first three years of activity.

The requirements to qualify for benefits vary between one and two years (except in the case of maternity and paternity benefit for self-employed persons, which requires approximately two months of contributions, and old-age pension, which is generally provided to persons of 67 years of age at the latest). The requirements for effectively accessing social insurance benefits are thus typically more demanding than in the case of both persons in a standard employment relationship and platform workers who are employees.

Furthermore, self-employed platform workers often receive lower and shorter benefits than in the case of both persons in a standard employment relationship and platform workers classified as employees. In this regard, self-employed platform workers persons may receive a lower sick pay benefit than employees due to the form of calculation (which takes into account the annual earnings of three years and has a daily cap)[398] and the duration of their maternity benefit is shorter (44 days for the self-employed,[399] against the 16 weeks which may be awarded to the employee[400]).

Finally, all persons, no matter their employment status, may qualify for the means-tested benefit Active Solidarity Income Support (*Revenu de Solidarité Active –RSA-*), which amount is established depending on the earnings per household and the composition of such household (with a minimum amount of €545.48[401]), and which is compatible with starting an enterprise. Furthermore, all persons aged 65 years or over and residing in France, not receiving any old-age benefits and with annual earnings of less than €9,609.60 (€14,918.90 if applying as a couple) may be entitled to the Solidarity Allowance for the Aged (*l'allocation de solidarité aux personnes âgées*).[402]

[398] Code de la sécurité sociale, Art. D613-21. It should be note that, however, self-employed platform worker may opt to contract a private insurance concerning sick pay.

[399] Code de la sécurité sociale, Art. D613-4-2.

[400] Code de la sécurité sociale, Art. L331-3.

[401] Service Public, *Revenu de solidarité active (RSA*), retrieved on 15 December 2020 at www.service-public.fr/particuliers/vosdroits/N19775; Code de l'action sociale et des familles, Art. R 262-18 – R262-25.

[402] CNAVPL, *Guide de l'assurance vieillesse des professions liberals. Edition 2016*, Paris: CNAVPL, 2016, pp. 31-32.

Overall, self-employed platform workers in France are formally covered concerning all contingencies (except if they are included in the occupational category of liberal professionals, in which case they are not covered by the sick pay scheme). Nevertheless, the requirements to become entitled to the benefits provided by these schemes are typically more demanding than in the case of employees, the amount of the benefits is generally smaller, and their duration is occasionally shorter. These limitations in the social security system for the self-employed may be in part balanced by the minimum income scheme by the existence of the means-tested scheme Active Solidarity Income Support (*Revenu de Solidarité Active*), although the amount of the benefit it provides may be (depending on the personal circumstances of the claimant) quite small.

4.5. Concluding remarks

France is one of the first European countries which has established certain specific obligations for online platforms concerning social security which, furthermore, includes detailed definitions of the concept of online platforms. That has not stopped a lively legal debate on the employment status of platform workers, still on going, and which may generate confusion and legal uncertainty among them. Furthermore, the French social security system for self-employed persons, based on their occupational classification (as either traders, craftsmen or liberal professionals -and which a significant number of varieties concerning the latter), is quite complex, which may generate a feeling of being lost in the system.

Self-employed platform workers are formally covered concerning several contingencies (i.e. unemployment, sick pay -for traders and craftsmen-, long-term incapacity, maternity and paternity benefits and retirement pension). Nevertheless, there are some important differences in the requirements to access such benefits depending on the platform worker's professional status. Furthermore, the amount of most contributory social security benefits is related to the platform worker's earnings, which may result in low benefits. France does provide a series of social assistance schemes, including a minimum income scheme, which may serve as a resort to those self-employed platform workers which are excluded from formal coverage of certain schemes due to being self-employed, as well as to those platform workers receiving low benefits.

Moreover, as a result of the COVID-19 pandemic, it seems that some of the gaps in the protection of vulnerable workers such as platform workers have come into the spotlight, with France reducing the requirements for accessing contributory unemployment benefits.

Chapter 5. Platform work and social security in Germany

5.1. An introduction to the German social security system

The pillars on which the German social security system is based are studied in this section. Therefore, it is analysed the nature and type of social security system that the German system is (in section 5.1.1), its legal (section 5.1.2) and institutional framework (section 5.1.3), the different legal statutes available for the performance of work (section 5.1.4) and the system of financing social security system, including an explanation of the different security contributions (section 5.1.5).

5.1.1. *Nature of the German social security system*

Germany is arguably (and for obvious historical reasons) one of the prime examples of the Bismarckian model of social security. In this regard, public insurance schemes against risks linked to labour primarily cover persons performing work under a contract of employment. Most self-employed workers, in turn, are not covered by many of these schemes. This approach was slightly softened with the Hartz reforms, which established a form of minimum income benefit which serves to grant coverage for those non-employee persons who become unemployed.

5.1.2. *Legal framework and structure*

Public social security schemes are regulated by the Social Code (*Sozialgesetzbuch –SGB-*), which is divided in 12 books. Furthermore, there is a set of both employment and social security norms that develops parts of this legal framework, such as the Maternity Protection Act (*Mutterschutzgesetz*), the Federal Parental Allowance and Parental Leave Act (*Bundeselterngeld- und Elternzeitgesetz*) and the Ordinance on Occupational Diseases (*Berufskrankheiten-Verordnung*), among others.

5.1.3. *Institutional framework*

Most social security schemes linked to labour are implemented by the Federal Ministry of Labour and Social Affairs, with the exception of certain benefits linked to maternity and paternity, managed by the Federal Employment Agency and a set of regional agencies.

Disputes concerning social security legislation are dealt with by the Social Courts (*Sozialgerichtsbarkeit*), divided in three levels: Social Courts of first instance (*Sozialgerichte*), regional social courts (*Landessozialgerichte*) and the Federal Social Court (*Bundessozialgericht*).

5.1.4. *Modalities of work in the German social security system*

A person performing work in Germany may do so as an employee or a self-employed worker. If the person does so as an employee, he may be a 'regular' employee, a person performing work under a mini-job employment contract (for workers with earnings from work under approximately €450 per month) or a home worker.

A person is generally considered an employee by the social insurance administration if he fulfils at least three of the following criteria: does not employ others, has one employer only, performs the same type of work repeatedly, is not personally or economically independent, or performs work similar to the work he used to perform before within the same company. [403] In turn, carrying the entrepreneurial risk (whether voluntarily or involuntarily) is a key aspect for considering that a person is not in an employment relationship.[404] In any case, the concept of 'employee' is generally understood as to be interpreted holistically, so no one feature leads obligatorily to employee status classification but, instead, the whole relationship must be analysed as a whole. [405] This definition of

[403] Eichhorst, W., et al., *Social protection rights of economically dependent self-employed workers*, Brussels: European Parliament, 2013., p. 38.

[404] Chesalina, O., 'Access to social security for digital platform workers in Germany and in Russia: a comparative study', *Spanish Labour Law and Employment Relations Journal*, vol. 7 issue 1-2, 2018., p. 5.

[405] Eichhorst, W., et al., *Social protection rights of economically dependent self-employed workers*, Brussels: European Parliament, 2013, p. 38.

'employee' for social security purposes is generally broader than for labour law or collective bargaining purposes.[406]

A person may be in a employment relationship under a mini-job contract. In order to perform work under a mini-job employment contract, a person must have income from work under €450 per month. Moreover, those employees in one or more employment relationships, no matter the salary, with a total combined duration of at maximum 70 days of work per year[407] (or three months, if the person works at least five days a week),[408] and which does not amount to a professional activity,[409] are exempted from both compulsory contributory unemployment insurance and statutory pension insurance.

Home workers (*Heimarbeiter*) are persons who work commercially in their own workplace and by their own account, have economic ties to a particular client and do not have employees (except if the employees are members of their own family). Their social security position is generally the same as the one of employees and, thus, unless otherwise express in the analysis of the different social security schemes available in Germany, home workers are treated as employees concerning these schemes.

If, in turn, a person performs work as a self-employed, he may be a 'regular' self-employed, an employee-like self-employed or a home trader.

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[406] Pedersini, R., *Economically dependent workers', employment law and industrial relations*, Dublin: Eurofound, 2002, p. 6.

[407] Sozialgesetzbuch, Viertes Buch, §8(1)2.

[408] Sozialgesetzbuch, Viertes Buch, §115. Since January 2019, the total combined duration cannot exceed a maximum of 50 days of work per year (or two months, if the person works at least five days a week), see Sozialgesetzbuch, Viertes Buch, §8(1)2. Also, if the person performs more than short-term mini-job, each of them for at least five days a week, the combined duration of these mini-jobs may be a maximum of 90 days if each job does not last longer than 1 month (ibid.).

[409] It is only necessary to check whether such an activity is a professional activity if it produces earnings over €450 per month. A set of criteria helps determining what amounts to a 'professional activity', being at the core of them whether employment is of primary importance to ensure livelihood, as well as whether it is performed as a secondary activity. See Minijob Zentrale, *Berufsmäßige Beschäftigung bei kurzfristigen Minijobs*, retrieved on 15 December 2020 at www.minijob-zentrale.de/DE/01_minijobs/02_gewerblich/01_grundlagen/02_kurzfristige_gewerbliche_minijobs/03_berufsmaessige_beschaeftigung/node.html

'Regular' self-employed persons in Germany may be classified as self-employed traders (G*ewerbetreibender*) or free-professionals (*Freiberufler*).

A trader is a person who performs any permitted commercial activity for profit and on a permanent basis as a self-employed, with the exception of agricultural and fishery, liberal professions and the mere management and use of own assets.[410] A trader must be registered in the chamber of trade (*Handwerkskammer*). For some occupations, a trader must have obtained a licence.[411]

A free-professional is a person performing an occupation among those mentioned in Article 18 of the Income Tax Act,[412] which includes self-employed doctors, lawyers, scientists, teachers, dentists, engineers and journalists, among others. They must register in the relevant Tax Office, instead of in the Chamber of Commerce. In the same line, they are not subjected to trade tax, but only to income tax.[413]

Employee-like self-employed (*arbeitnehmerähnliche Personen*) are those individuals who perform work personally and solely outside an employment relationship. They are obligatorily insured concerning the State Pension insurance. This group include self-employed persons who are economically dependent on one client[414] as well as persons performing as a solo self-employed certain occupations (which includes teachers, lecturers, midwifes, artist, home traders, craftsmen[415] and carers).[416]

Home traders (*Hausgewerbetreibende*) are self-employed persons who work commercially in their own workplace and by their own account for clients.[417] Unlike other self-employed persons, they

[410] BVerwG, NVwZ 1995, 473, 474.

[411] See further Gesetz zur Ordnung des Handwerks (Handwerksordnung), Anlage A-B, retrieved on 15 December 2020 at www.gesetze-im-internet.de/hwo/BJNR014110953.html#BJNR014110953BJNG000301308

[412] Einkommensteuergesetz (EStG), Art. 18, retrieved on 20 November 2017 at www.gesetze-im-internet.de/estg/__18.html

[413] See, inter alia, BVerfG, Urteil vom 15.01.2008, Az. 1 BvL 2/04.

[414] See Tarifvertragsgesetz, Art. 12a; Bundesarbeitsgericht Urt. v. 15.11.2005, Az.: 9 AZR 626/04.

[415] More specifically, the concept 'craftsmen' (Handwerker) is understood in the Sozialgesetzbuch as tradesmen who are registered personally in the register of skilled qualified craftsmen (*Handwerksrolle*), fulfilling the criteria to register as such.

[416] Sozialgesetzbuch, (SGB VI) - Gesetzliche Rentenversicherung, Art. 2.

[417] Sozialgesetzbuch (SGB IV) - Gemeinsame Vorschriften für die Sozialversicherung, Art. 12.

have economic ties to a particular client but, unlike employees, they are not in a situation of personal subordination.[418]

As noted above,[419] persons performing an activity for less than 70 days a year and doing so in a non-professional capacity are exempted from both compulsory contributory unemployment insurance and statutory pension insurance. Hence, the fact that an activity is performed in a professional capacity is relevant in this case for German law. A set of criteria are used to determine what amounts to a 'professional activity', being at the core of them whether employment is of primary importance to ensure livelihood, as well as whether it is performed as a secondary activity.[420] Concerning situations of self-employment, while it seems that all persons performing work outside an employment relationship must do so as self-employed, such activities that are not an "independent, sustainable activity, which is undertaken with the intention of making a profit and which presents itself as participating in the general economic activity" might be exempted from being considered as self-employed activities.[421]

5.1.5. *Financing and contributions*

While, generally, self-employed people are excluded from many of the social insurance schemes linked to labour contingencies, there are some schemes that allow self-employed to join voluntarily. However, this also implies that they are generally liable for the whole contribution rate (which, in the case of employees, is divided between the employer and the employee).[422]

[418] Heimarbeitsgesetz, Art. 2.

[419] When referring to the regulation of a mini-job contract.

[420] See Minijob Zentrale, *Berufsmäßige Beschäftigung bei kurzfristigen Minijobs*, retrieved on 15 December 2020 at www.minijob-zentrale.de/DE/01_minijobs/02_gewerblich/01_grundlagen/02_kurzfristige_gewerbliche_minijobs/03_berufsmaessige_beschaeftigung/node.html

[421] See Einkommensteuergesetz, § 15.

[422] This is not the case, however, concerning artists and publishers, as it is explored further below.

Furthermore, self-employed persons who opt to contribute to unemployment insurance within the cases allowed (see below) must fulfil a monthly contribution of 3% of the monthly reference value.[423]

If the self-employed person opts to join the statutory health insurance, the extra cost represents 0.06% of the professional earnings of self-employed people (with an annual minimum of €25). The total contribution rate for health insurance (including the extra cost for sick pay) is 14.6% of the professional earnings of the self-employed person, with a minimum monthly contribution of €325.76 and a maximum of €635.10. Nevertheless, those recipients of a start-up grant (see above) or with especially low earnings may request to lower the minimum monthly contribution to €217.18.[424]

Self-employed persons who opt to join insurance against labour accidents and professional diseases are liable to pay contributions amounting to 1.18% of their professional earnings. In comparison, for employees this is the only insurance contribution which is not equally shared with the employer but which, instead, is fully financed by employer's contributions.

Furthermore, the abovementioned employee-like self-employed are obliged to join the same statutory insurance schemes as employees concerning some contingencies. Thus, craftsmen, caregivers and freelance teachers, as well as self-employed economically dependent on one client, are compulsory included in the statutory old-age and invalidity pension scheme.[425] As a result, they are liable for the payment of 18.6% of the gross salary concerning statutory old-age and incapacity pension insurance. Nevertheless, this rate may be reduced by half during the first three years of

[423] IHK Rhein-Neckar, *Freiwillige Arbeitslosenversicherung für Selbstständige*, retrieved on 15 December 2020 at www.rhein-neckar.ihk24.de/gruendung/existenzgruendung/Basisinformationen/Versicherungen/Arbeitslosenversicherung/939358

[424] These figures are calculated based on the minimum (€2,231.25), extra minimum (€1,487.50) and maximum (€4,350.00) monthly base for 2017, and without taking into account the additional contribution (Zusatzbeitrag) of 1.1%. See Krankenkassen, Krankenkassenbeitrag: Selbstständige, retrieved on 02 November 2017 at www.krankenkassen.de/gesetzliche-krankenkassen/krankenkasse-beitrag/selbststaendige/

[425] Deutsche Rentenversicherung, Selbständig – *wie die Rentenversicherung Sie schützt*, 12th edition, 2017, retrieved 15 December 2020 at https://www.deutsche-rentenversicherung.de/SharedDocs/Downloads/DE/Broschueren/national/selbstaendig_wie_rv_schuetzt_aktuell.pdf?__blob=publicationFile&v=8

activity as a self-employed[426] and, furthermore, it may be raised or reduced if the self-employed person is able to prove fluctuating earnings.[427] Artists and publishers are also compulsorily included in the statutory old-age and invalidity pension insurance but, unlike the other employee-like categories, they do so as part of the Artists Social Fund (*Künstler Sozialkasse*), which cover the employer's social insurance contribution.[428]

Moreover, home traders (*Hausgewerbetreibende*) which, as it was mentioned already, is a variety of self-employment, are also obliged to be insured in the statutory old-age and invalidity pension scheme (*Gesetzliche Rentenversicherung*).[429]

5.2. Social security benefits in Germany

This section analyses the social security schemes (both social insurance and social assistance schemes) that compose the social security system of Germany.

5.2.1. *Unemployment*

There are two social security schemes against the risk of unemployment:

- Unemployment benefit I (*Arbeitslosengeld I*) is a scheme only available to employees. Nevertheless, those persons who were previously employees but are no longer so, but perform at least 15 hours a week[430] as self-employed, may remain insured in the unemployment insurance scheme voluntarily.[431] In order to become entitled to the benefit, the claimant must have accumulated periods of insurance of at least 12 months during the

[426] Deutsche Rentenversicherung, *Versicherungspflicht auf Antrag*, retrieved on 15 December 2020 https://www.deutsche-rentenversicherung.de/SharedDocs/Formulare/DE/_pdf/V0025.html

[427] Bäcker, G., *ESPN Thematic Report on Access to social protection of people working as self-employed or on non-standard contracts – Germany*, Brussels: European Commission, 2017, p. 12.

[428] See further Bundesministerium für Arbeit und Soziales, Künstlersozialversicherung, Bonn: BMAS, 2016.

[429] SGB VI - Gesetzliche Rentenversicherung, Art. 2(6).

[430] Bäcker, G., *ESPN Thematic Report on Access to social protection of people working as self-employed or on non-standard contracts – Germany*, Brussels: European Commission, 2017, p. 14.

[431] Conen, W., Schippers, J., Schulze Buschoff, K., *Self-employed without personnel: Between freedom and insecurity*, Dusseldurf: Hans-Böckler-Stiftung, 2016, p. 12.

30 months prior to becoming unemployed.[432] The benefit then amounts to 60% of the net salary (or 67%, if the claimant has dependent children), with a certain maximum monthly amount (i.e. approximately €6,000).

Moreover, and although not strictly an unemployment benefit scheme, the start-up grant (*Gründungszuschuss*) may serve a similar purpose.[433] In this regard, persons receiving contributory-based unemployment benefit (*Arbeitslosengeld I*) and entitled to do so for at least 150 more days may apply for a start-up grant in order to start a professional activity as self-employed as their main occupation (with secondary occupations amounting to less than 15 hours per week). If their application is approved (based on their skills and the viability of the business plan), they would be entitled to €300 per month plus their regular unemployment benefit for a period of six months, after which they may continue receiving €300 for another nine months (based on a study of the performance during the previous months). Persons entitled to unemployment allowance (*Arbeitslosengeld II*) may be entitled to some form of start-up allowance (*Einstiegsgeld*), but its amount and duration are at the discretion of the employment office's agent.

Furthermore, in the context of the COVID-19 pandemic, the government has extended the unemployment benefit I (*Arbeitslosengeld I*) by three months for those whose entitlement would expire between 1 May and 31 December 2020.[434]

- Unemployment allowance (*Arbeitslosengeld II*),[435] in turn, is available to those persons who are not entitled to the previous benefit and who do not receive income from assets, as well as to persons who have earnings from work of less than the subsistence level (i.e. €1,178 per month).[436] The monthly benefit amounts to €432 (for single beneficiaries the benefit is

[432] Bundesagentur für arbeit, *Anspruch, Höhe, Dauer – Arbeitslosengeld*, retrieved on 15 December 2020 at www.arbeitsagentur.de/arbeitslos-arbeit-finden/anspruch-hoehe-dauer-arbeitslosengeld

[433] See Sozialgesetzbuch (SGB) Drittes Buch Arbeitsförderung, Art. 93-94, as approved by i, Art. 1.

[434] Die Bundesregierung, *Maßnahmen der Bundesregierung zur Eindämmung der COVID-19-Pandemie und zur Bewältigung ihrer Folgen*, retrieved on 15 December 2020 at www.bundesregierung.de/resource/blob/975226/1747726/0bbb9147be95465e9e845e9418634b93/2020-04-27-zwbilanz-corona-data.pdf?download=1

[435] Sozialgesetzbuch (SGB II) - Grundsicherung für Arbeitsuchende, Art. 20.

[436] Zivilprozessordnung, Art. 850c.

slightly reduced for beneficiaries living with a partner), and it has a duration of 12 months, after which an extension may be requested.[437] Beneficiaries of this benefit, however, must accept any offers for a suitable job.

5.2.2. *Sick pay*

There is only one existing public scheme against the risk of temporary incapacity (*Krankengeldbezug*). It is part of the statutory health insurance (*Gesetzlichen Krankenversicherung –GKV-*).[438] Employees must compulsory join it, while the self-employed may opt between joining it (by submitting an optional declaration *–Wahlerklärung-*) and joining instead a private health insurance (*Privaten Krankenversicherung –PKV-*).[439] The statutory scheme against temporary incapacity amounts to approximately 70% of the salary prior to the incapacity.[440] The benefit is provided from the 7th week of incapacity to work,[441] and may last for a maximum duration of 78 weeks in a three-year period.[442] Employees, nevertheless, are entitled to receive their remuneration during the first six weeks of temporary incapacity, paid by their employer.

Concerning private insurances, both the price and benefits vary among different insurances. Unlike in the case of the statutory health insurance, prices depend on age, health condition and desired benefits. As a result, private health insurances may be more cost-effective for those self-employed with low risks (i.e. young and healthy).

5.2.3. *Long-term incapacity*

Long-term incapacity pension is covered under German law under the term 'reduced earning capacity pension' (*Rente wegen verminderter Erwerbsfähigkeit*), which is granted for those insured

[437] Bundesagentur fur Arbeit, *Unemployment Benefit II and Social Benefit - for the basic security of your livelihood*, retrieved on 15 December 2020 at https://www.arbeitsagentur.de/en/unemployment-benefitii

[438] See Sozialgesetzbuch (SGB V) Fünftes Buch - Gesetzliche Krankenversicherung, Art. 44(2)1.

[439] Krankenkassen, Gesetzliche Krankenkasse: Sinnvoll für Selbstständige?, retrieved on 02 November 2017 at www.krankenkassen.de/meine-krankenkasse/freiwillig-versichert/vorteile/

[440] Ibid, Art. 47.

[441] Sozialgesetzbuch (SGB V) Fünftes Buch - Gesetzliche Krankenversicherung, Art. 46.

[442] Ibid, Art. 48.

in the Statutory Pension Insurance (*Gesetzliche Rentenversicherung* -see below-).[443] In order to access this pension, a person must have accumulated periods of contribution for at least five years, of which three must be during the last five years prior to the event causing the invalidity.[444]

The method for calculating the benefit is the same as in the case of old-age pensions within the Statutory Pension Insurance. In this regard, the applicant's earned income during the entire insurance life is decisive. Thus, the basis for contribution is converted into points of remuneration,[445] which are in turn multiplied by the current pension value.[446] The result is then multiplied by the access factor[447]. The method of calculation also takes into account whether the reduction of earning capacity is partial or total (a reduction is partial if the person is unable to work for at least six hours a day, while it is total if he is unable to work for at least 3 hours per day).

5.2.4. *Labour accidents and professional diseases*

The statutory insurance against professional accidents (*Unfallversicherung*)[448] is a scheme to which employees must join, while the self-employed may do so voluntarily.[449] The only exception concerns the case of home traders (*hausgewerbetreibende*), who are compulsorily insured through this scheme.[450]

The benefit amounts to 100% of the net wage if the person is unable to work temporarily due to a labour accident or professional disease.[451] Furthermore, insured persons who suffer a reduction of

[443] Sozialgesetzbuch (SGB VI) - Gesetzliche Rentenversicherung, Art. 43.

[444] Ibid.

[445] A person reaching the average earnings (Durchschnittsentgelt) in a year (a value fixed annually by the Government) receives 1.0 points; if his earnings double the average earnings, he would receive 2.0 points and, if they are half the average earnings, he would receive 0.5 points that year. For the year 2018, the average earnings are €37,873 for West Germany, and €33,672 for East Germany.

[446] The current pension value (Aktueller Rentenwert) varies each year, depending on average salaries. For 2018, the current pension value amounted to €32.03 for West Germany and €30.69 for East Germany.

[447] The access factor depends on the degree of incapacity, and may vary also based on the age of the insured at the beginning of retirement (the basic factor being deduced on 0.003 by each month that is missing to reach the age of 63). The basic access factor is 1.0 in case of total reduction of earning capacity, and 0.5 in case of partial reduction.

[448] Siebtes Buch Sozialgesetzbuch - Gesetzliche Unfallversicherung, Art. 2.

[449] Ibid, Art. 3-4.

[450] Ibid, Art. 2.

[451] Ibid, Art. 44.

earning capacity due to a labour accident or professional disease may experience a reduction in the accumulated periods of insurance required.

5.2.5. *Maternity and paternity*

There are three schemes available in case of pregnancy:

- Maternity benefit (*Mutterschaftsgeld*) is a benefit available to those employees and self-employed persons who are covered for sick pay under the statutory health insurance and who become pregnant.[452] Homeworkers also receive the same protection as employees concerning maternity allowance and leave.[453] The benefit consists of the average net earnings from work during the last three months (if the net daily wage is over €13, the insurance institution must pay the difference), for a period of between eight and 12 weeks (depending on the type of birth –e.g. premature or multiple-) after it.[454] The recipient is forbidden to perform work in the six weeks before childbirth and during the eight to 12 weeks after it.[455]

- Maternity benefit provided by the Federal Insurance Office (*Bundesversicherungsamt*).[456] Persons who are not obliged to join a statutory health insurance fund (for example, because they are covered by a private health insurance or are co-insured as a family member in statutory health insurance) are nevertheless entitled to maternity benefit of a maximum of €210 for the entire period. While homeworkers are entitled to this benefit (as included within the scope of the Maternity Protection Act), self-employed people are not entitled.[457]

- Parental allowance (*Elterngeld*), is a benefit available to all parents with annual combined income under €500,000 (if in a couple) for up to the first 14 months of life of the child. The

[452] Sozialgesetzbuch (SGB V) - Gesetzliche Krankenversicherung, Art. 24i(1).

[453] Gesetz zum Schutze der erwerbstätigen Mutter, Art. 1.

[454] Ibid.

[455] Ibid, Art. 3, 4, 6

[456] Ibid, Art. 13(2).

[457] See also Bundesversicherungsamt, 'Wichtige Informationen', in *Mutterschaftsgeld*, retrieved on 15 December 2020 at www.bundesversicherungsamt.de/mutterschaftsgeld/wichtige-informationen.html

benefit requires parents to work a maximum of 30 hours per week. It amounts depends on the claimant's earnings from work, with a minimum of €300 per month and a maximum of €1,800 per month. Persons with monthly earnings of over approximately €1,250 would receive a benefit equivalent to 65% that amount, with persons with lower earnings receiving a benefit amounting to a higher percentage up to 100% of their earnings for monthly earnings of €1,000 or less.

5.2.6. *Retirement*

The system of pension insurance in Germany is composed, in its first pillar, of a statutory pension insurance (for employees and certain categories of self-employed people) and a voluntary pension insurance. The statutory pension insurance (*Gesetzliche Rentenversicherung*) is a scheme that, in principle, is only available to employees. However, there are many exemptions to this rule. Thus, craftsmen, artists, publicists, caregivers (*pflegepersonen*) and freelance teachers, as well as self-employed economically dependent on one client, are also compulsorily included in the statutory old-age (and invalidity) pension scheme.[458] In the case of economically dependent self-employed, they may be exempted from being included in the Statutory Pension Insurance during the first three years of business activity (a similar exemption exist for employee-like self-employed in general who are near the retirement age).[459] Artists and publishers are also compulsory included in the statutory old-age and invalidity pension insurance but, unlike the other employee-like categories, they do so as part of the Artists Social Fund (*Künstler Sozialkasse*), which cover the employer's social insurance contribution.[460] Furthermore, all self-employed may opt to be included in the Statutory Pension Insurance within the first five years of starting their activity as self-employed, after which they would be subjected to the same rights and obligations as those compulsorily

[458] Sozialgesetzbuch (SGB) Sechstes Buch (VI) - Gesetzliche Rentenversicherung, Art. 2.

[459] Bäcker, G., *ESPN Thematic Report on Access to social protection of people working as self-employed or on non-standard contracts – Germany*, Brussels: European Commission, 2017, p. 13.

[460] See further Bundesministerium für Arbeit und Soziales, Künstlersozialversicherung, Bonn: BMAS, 2016.

included in the scheme.[461] The benefit is calculated using the same method as in the case of long-term incapacity pension (see above[462]).

Second-pillar pension schemes are exclusively designed for employees and, even among them, they are usually voluntarily and mostly cover those with standard full-time employment within large companies and with relatively high earnings.[463]

Third-pillar pension insurance may complement an existing pension, or act as a unique insurance. The former is the one of promoted private pensions (*Riester-Rente*), available for those who are covered by the statutory pension insurance. These promoted private pension schemes are supported with tax reliefs and subsidies.[464] The latter are so-called 'basic pensions', which are complementary pension insurances used particularly among high-income self-employed.[465]

5.2.7. *Minimum income*

The minimum income scheme in Germany is composed primarily[466] by two schemes, namely the unemployment allowance (*Arbeitslosengeld II*), which has been already studied above[467] and the Current Assistance for Living Expenses Outside the Institutions scheme (*Hilfe zum Lebensunterhalt*), regulated under Book XII of the Social Code. The Current Assistance for Living Expenses Outside the Institutions scheme is a means-tested scheme for people in need who do not have access to the main social security benefits. To calculated, the income and assets of the claimant's household are taken into account. It covers the entire population legally resident in Germany. The benefit includes food, clothing, personal hygiene items, energy and household items, as well as a small amount of income.

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[461] Bäcker, G., *ESPN Thematic Report on Access to social protection of people working as self-employed or on non-standard contracts – Germany*, Brussels: European Commission, 2017, p. 13.

[462] See section 5.2.3.

[463] Ibid.

[464] Ibid.

[465] Ibid, p. 14.

[466] For further analysis of the different minimum income schemes in Germany, see European Policy Network, *ESPN Thematic Report on minimum income schemes Germany*, Brussels: European Commission, 2016.

[467] Section 5.2.1.

5.3. The social security position of persons in a standard employment relationship

In the previous section, the different schemes available in Germany in relation to all the contingencies studied in this thesis have been analysed. In this section we will move on to study the social security position of a person in a standard employment relationship.[468] This will be done in three steps: Firstly, it will be considered whether a person in a standard employment relationship is covered by these schemes (i.e. 'formal access'). Secondly, it will be determined whether a standard worker can meet the necessary requirements to become entitled to the benefits contained in these programmes (i.e. effective access).[469] Thirdly, it will be analysed what is the content of the benefits that a person in a standard employment relationship is entitled to (i.e. their duration and amount).

In this regard, persons in a standard employment relationship are eligible for old-age and incapacity pensions under the state pension insurance (*Rentenversicherung*), unemployment benefit under the contributory unemployment benefit insurance (*Arbeitslosengeld I*), maternity/paternity and temporary incapacity benefit under the statutory health insurance (*Krankenversicherung*) and insurance against labour accidents and professional diseases (*Unfallversicherung*), as well as by occupational pension schemes.

A person in a standard employment relationship would in all probability have effective access to the benefits of all the social insurance schemes.

For these persons, unemployment benefit amounts to about 60% of their previous earnings, while temporary incapacity consists of 70% (or their full previous salary, if they would become incapacitated due to a labour accident, and in the case of maternity benefit). Moreover, a person who is in a standard employment relationship during his whole career, and earns an average annual income of about €38,000, would be entitled to a statutory old-age and long-term incapacity pension of approximately €1,500 per month.

[468] See the definition of a standard employment relationship used in this thesis in section 1.4.6.

[469] That is, although a person may be formally covered by a programme, if that person is not able to meet the requirements to obtain the benefits contained in that programme, he does not actually have access to the benefits despite being part of it.

5.4. Platform work and social security in Germany

5.4.1. *The legal status of platform workers*

In Germany, the debate on the employment status of platform work has not ended up in the courts as much as in the case of other countries. Initially, the Regional Court of Munich rejected the claim of the plaintiff (a platform worker performing work through the platform) that he was an employee.[470] Nevertheless, the Federal Labour Court, in appeal, ruled on favour of the plaintiff, thus stating that he was indeed an employee.[471] It is however unclear yet what the consequences of such decision may be. Nevertheless, the decision provides an argument to assume that, at least in some instances, platform workers in Germany may be considered as employees. As a result, their social security position as such is analysed below. In turn, given the fact that the use of the legal status of self-employment is a common practice among online platforms in Germany, the social security position of self-employed platform workers is also studied.

5.4.2. *The social security position of platform workers in an employment relationship*

Platform workers classified as employees are covered by the state pension insurance (*Rentenversicherung*) (which includes both old-age and incapacity pension[472]), contributory unemployment insurance (*Arbeitslosengeld I*), statutory health insurance (*Krankenversicherung*) (which includes maternity/paternity and sick pay) and accident insurance (*Unfallversicherung*). They may also be covered by occupational pension schemes.

Platform workers performing work through a mini-job contract are excluded from coverage by the contributory unemployment insurance (*Arbeitslosengeld I*) if their income is less than 450 per month.[473] If, in turn, they are in one or more employment relationships with a total combined

[470] Landesarbeitsgericht (LAG) München vom 4. Dezember 2019, 8 Sa 146/19.

[471] Bundesarbeitsgericht, Urteil vom 1. Dezember 2020, 9 AZR 102/20.

[472] Disability pension is covered under German law as reduced earning capacity pension (Rente wegen verminderter Erwerbsfähigkeit), see Sozialgesetzbuch, Sechstes Buch, §43.

[473] Palier, B. and Thelen, K., '*Dualization and Institutional Complementarities: Industrial Relations, Labor Market and Welfare State Changes in France and Germany*' in Emmenneger, P., Häusermann , S., Palier, B., Seeleib-Kaiser, M. (eds.), The Age of Dualization: The Changing Face of Inequality in Deindustrializing Societies, 2012, p. 210.

duration of at maximum 70 days of work per year[474] (or three months, if the person works at least five days a week),[475] and which does not amount to a professional activity,[476] they are excluded from coverage by both compulsory contributory unemployment insurance and statutory pension insurance.

Limitations on access may exist in practice for platform workers, due to the fragmented and flexible nature of this form of work. In this regard, a person must have been insured for at least four weeks uninterrupted in order to be entitled to sick pay and maternity/paternity pay;[477] for at least 360 days in the two years prior to becoming unemployed to be entitled to contributory unemployment benefits (*Arbeitslosengeld I*);[478] and for at least five years, of which three must be during the last five years prior to the event causing the invalidity, to be entitled to incapacity benefits linked to the statutory pension insurance.[479]

In any case, platform workers in an employment relationship with income under a certain threshold are entitled to the means-tested unemployment benefit (*Arbeitslosengeld II*).[480] This benefit consists on a fixed monthly amount of €409 and it applies to all persons of working age who are able to work and who cannot sufficiently secure their livelihood from their own resources.[481] The impact

[474] Sozialgesetzbuch, Viertes Buch, §8(1)2.

[475] Sozialgesetzbuch, Viertes Buch, §115. Since January 2019, the total combined duration cannot exceed a maximum of 50 days of work per year (or two months, if the person works at least five days a week), see Sozialgesetzbuch, Viertes Buch, §8(1)2. Also, if the person performs more than short-term mini-job, each of them for at least five days a week, the combined duration of these mini-jobs may be a maximum of 90 days if each job does not last longer than 1 month (ibid.).

[476] It is only necessary to check whether such an activity is a professional activity if it produces earnings over €450 per month. A set of criteria helps determining what amounts to a 'professional activity', being at the core of them whether employment is of primary importance to ensure livelihood, as well as whether it is performed as a secondary activity. See Minijob Zentrale, *Berufsmäßige Beschäftigung bei kurzfristigen Minijobs*, retrieved on 15 December 2020 at www.minijob-zentrale.de/DE/01_minijobs/02_gewerblich/01_grundlagen/02_kurzfristige_gewerbliche_minijobs/03_berufsmaessige_beschaeftigung/node.html

[477] Sozialgesetzbuch, Fünftes Buch, §24i.

[478] Sozialgesetzbuch, Drittes Buch, §142.

[479] Sozialgesetzbuch, Sechstes Buch, §43.

[480] Sozialgesetzbuch, Zweites Buch, §20.

[481] See Sozialgesetzbuch, Zweites Buch, §9.

of the means-tested unemployment benefit is considerable, with 70% of all unemployed being entitled to it.[482]

5.4.3. *The social security position of self-employed platform workers*

Platform workers who are classified as self-employed traders (G*ewerbetreibender*) or free-professionals (*Freiberufler*) are not compulsory covered by any of the social insurance schemes except healthcare insurance. Even in this case, they may opt between joining the statutory health insurance (*Gesetzlichen Krankenversicherung –GKV-*)[483] and joining instead a private health insurance (*privaten Krankenversicherung –PKV-*). They may also voluntarily join the professional accidents insurance (*Unfallversicherung*)[484] and, within the first five years of starting their activity as self-employed, the state pension insurance (*Rentenversicherung*) (which includes both old-age and incapacity pension).[485] Furthermore, those who have been compulsorily insured for the contributory unemployment insurance scheme at some point and are self-employed for at least 15 hours a week[486] have the possibility of remaining insured in the contributory unemployment insurance scheme voluntarily. Also, persons receiving contributory unemployment benefit (*Arbeitslosengeld I*) may receive a start-up grant (*Gründungszuschuss*)[487] of €300 per month for a total period of 15 months in order to start a professional activity as self-employed as their main occupation. If their application is approved (based on their skills and the viability of the business plan), those entitled to tax-financed unemployment benefit (*Arbeitslosengeld II*) may be entitled to some form of start-up allowance (*Einstiegsgeld*).[488]

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[482] Bäcker, G., *ESPN Thematic Report on Access to social protection of people working as self-employed or on non-standard contracts – Germany*, Brussels: European Commission, 2017, p. 14.

[483] See Sozialgesetzbuch, Fünftes Buch, §44(2)1. Furthermore, persons who are not part of the compulsory health insurance may join the voluntary health insurance (Freiwillige Versicherung), see Sozialgesetzbuch, Fünftes Buch, §9.

[484] Sozialgesetzbuch, Siebtes Buch, §§2-4.

[485] After joining the statutory pension insurance, nevertheless, they would be subjected to the same rights and obligations than those compulsory included in the scheme, see Bäcker, G., *ESPN Thematic Report on Access to social protection of people working as self-employed or on non-standard contracts – Germany*, Brussels: European Commission, 2017, p. 13.

[486] Ibid. p. 14.

[487] See Sozialgesetzbuch, Drittes Buch, §§93-94.

[488] Nevertheless, its amount and duration are at the discretion of the employment office's agent.

If, in turn, self-employed platform workers are considered employee-like persons,[489] then they are eligible for Statutory Pension Insurance (*Gesetzliche Rentenversicherung*). However, this means that they must cover the contribution of both the employer and the employee's contributions fully themselves. In the case that they are employee-like self-employed as artists or publishers, then they are compulsorily included in the statutory old-age and invalidity pension insurance (*Rentenversicherung*) as well but, unlike the employee-like categories mentioned above, they do so as part of the Artists Social Fund (*Künstler Sozialkasse*), which cover the employer's social insurance contribution.[490]

Finally, and as mentioned in the case of platform workers who are employees, self-employed platform workers may be entitled to tax-based unemployment benefit (*Arbeitslosengeld II*).[491]

5.5. Concluding remarks

The German social security system is based on the idea that self-employed workers are typically not covered by statutory social security schemes, with the result that all social insurance schemes (except those related to health insurance) exclude them from their scope. Notwithstanding, the social security system has progressively allowed certain categories of the self-employed (such as employee-like self-employed) to join social insurance schemes for employees. However, whether platform workers might be included in those statuses is still unclear. Furthermore, self-employed platform workers who have been employees at some point in their careers may opt to continue their

It is also of note that German social security legislation exempts from joining compulsory contributory unemployment insurance (and, in certain cases, statutory pension insurance) those individuals who perform work in an employment relationship with earnings or duration under a certain threshold (the so-called mini-jobs). This threshold might in practice exclude from these

[489] As noted above (see 5.1.4), this category includes self-employed persons who are economically dependent on one client, as well as persons performing as a solo self-employed certain occupations (which includes teachers, lecturers, midwifes, artist, home traders, craftsmen and carers).

[490] Bundesministerium für Arbeit und Soziales, Künstlersozialversicherung, Bonn: BMAS, 2016.

[491] Sozialgesetzbuch, Zweites Buch, §20.

schemes many platform workers who are classified as employees. It is nevertheless not clear whether mini-jobs are a significant part of platform work.

Chapter 6. Platform work and social security in The Netherlands

6.1. An introduction to the Dutch social security system

This section lays out the foundations on which the Dutch social security system is grounded. First the sort of social security system that exists in the Netherlands is discussed (section 6.1.1). This is followed by a brief presentation of its legal (section 6.1.2) and institutional framework (section 6.1.3). Then, the various professional statutes that exist are explored (section 6.1.4). Finally, the section presents the financing of the social security system, including an explanation of the different social security contributions (section 6.1.5).

6.1.1. *Nature of the Dutch social security system*

The Dutch social security system, similarly to the French system, is a hybrid system combining Beveridgean and Bismarckian elements.[492] In this regard, prior to World War II, social security in the Netherlands followed the Bismarckian model. Nevertheless, during the war, the Dutch Government exiled in London, influenced by the Beveridgean approach to social security, decided to complement the Bismarckian model with resident-based benefit schemes at a minimum flat-rate level.[493] Further reforms in the late 80s and 90s of the 20th century brought the introduction of active labour market policies and more restricted (and lower) benefits.[494]

The current social security system is composed of a set of universal schemes, available to all persons legally residing in the Netherlands, as well as a set of schemes only available to employees. The first group encompasses child benefits, survivorship benefit, basic state old-age pension, long-term care and healthcare.[495] Protection against the risks of temporary and long-term incapacity,

[492] Van Oorschot, W., 'The Dutch welfare state: recent trends and challenges in historical perspective', *European Journal of Social Security*, vol. 8 issue 1, 2006, pp. 57-58; Westerveld, M., 'The Netherlands: solo self-employment and labour on demand', in Westerveld, M. and Olivier, M. (eds.), *Social Security Outside the Realm of the Employment Contract*, Cheltenham: Edward Elgar Publishing, 2019, pp. 224-226.

[493] Pennings, F., 'The Netherlands', in Van Eeckhoutte, W. (ed.), *IEL Social Security Law*, Alphen aan den Rijn: Kluwers, 2017, p. 23.

[494] Cox, R. H., 'From Safety Net To Trampoline: Labor Market Activation in the Netherlands and Denmark', *Governance: An International Journal of Policy and Administration*, vol. 11 issue 4, 1998, pp. 405-409.

[495] Due to the limits on the material scope of this thesis (see section 1.4.2), child benefits (AKW), survivorship benefit (Anw), long-term care (Wlz) and healthcare (Zvw) will not be analysed.

irrespective of whether it stems from labour accidents or occupational diseases or other causes, as well as unemployment, is generally only provided to persons who are in an employment relationship (or a situation assimilated to it), unless they were previously insured as employees and decided to remain insured after losing their employee status. Occupational pension schemes are also only accessible to employees. Maternity/paternity benefits, in turn, may be provided to both employees and the self-employed.

6.1.2. *Legal framework and structure*

Social security schemes in the Netherlands are regulated by a set of provisions. In this regard, the unemployment benefit is regulated by the Unemployment Benefits Act.[496] Temporary incapacity is regulated by the Civil Code[497] and the Sickness Benefits Act.[498] Long-term incapacity (including both partial and full (permanent) incapacity is governed by the Work and Income According to Labour Capacity Act,[499] which encompasses the Income Provisions for the Fully Incapacitated[500] and the Return to Work for Partially or Temporarily Incapacitated Persons Scheme.[501] The maternity benefit is established by the Work and Care Act.[502] The residence-based basic old-age pension is regulated by the General Old Age Pensions Act.[503] Furthermore, the Supplementary Benefits Act[504] supplements low income up to the level of the minimum wage in certain situations. The Participation Act,[505] in turn, supports the reintegration into the labour market of persons who experience some form of limitation to work, as well as provides social assistance for all adult residents (who are not eligible to other benefits and with a household income under a certain threshold) at the level of approximately 70% to 90% of the minimum wage. Moreover, a specific social assistance scheme available to self-employed persons is regulated by the Self-Employed

[496] Werkloosheidswet van 6 november 1986.
[497] Burgerlijk Wetboek Boek 7.
[498] Ziektewet van 5 juni 1913.
[499] Wet werk en inkomen naar arbeidsvermogen van 10 november 2005.
[500] Inkomensvoorziening volledig arbeidsongeschikten, see further below.
[501] Werkhervatting Gedeeltelijk Arbeidsgeschikten, see further below.
[502] Wet Arbeid en Zorg van 16 november 2001.
[503] Algemene Ouderdomswet van 31 mei 1956.
[504] Toeslagenwet van 6 november 1986.
[505] Participatiewet 9 October 2003.

Assistance Decree.[506] There are also a set of schemes targeting specific groups (see section 6.2), regulated by legal instruments such as the Act on Income for Older and Partially Incapacitated Employees,[507] the Act on Income for Older and Partially Incapacitated Former Self-Employed Persons[508] and the Act on Income for Older Unemployed Persons.[509]

6.1.3. *Institutional framework*

State pension is financed by general budget and a percentage of individuals' income (the latter being fixed and collected by the Tax Office). The funds allocated for the State Pension are administered by the Social Insurance Bank (*Sociale Verzekeringsbank –SVB-*), an entity created by the State but with independent legal personality.[510]

Sickness benefits (as far as not directly paid by the employer -see section -), incapacity benefits and unemployment benefits are financed by social security contributions, which are collected by the Tax Office. The Ministry of Social Affairs and Employment has tasked the administration of these benefits to the Employee Insurance Agency (*Uitvoeringsinstituut Werknemersverzekeringen – UWV-),* an autonomous administrative body that is also in charge of providing labour market and data services.[511]

6.1.4. *Modalities of work in the Dutch social security system*

In the Netherlands, a person may perform work as an employee or a self-employed person.

The concept of 'employee' (*werknemer*) is defined by the Sickness Benefits Act (ZW),[512] the Work and Income according to Labor Capacity Act (WIA)[513] and the Unemployment Benefits Act

[506] Besluit bijstandverlening zelfstandigen van 10 oktober 2003.
[507] Wet Inkomensvoorziening oudere en gedeeltelijk arbeidsongeschikte werknemers (IOAW) van 6 november 1986.
[508] Wet inkomensvoorziening voor oudere en gedeeltelijk arbeidsongeschikte zelfstandigen (IOAZ) van 11 juni 1987.
[509] Wet Inkomensvoorziening voor oudere werklozen (IOW) van 19 juni 2008.
[510] Wet structuur uitvoeringsorganisatie werk en inkomen, Art. 3.
[511] UWV, *About UWV*, retrieved on 25 July 2021 at https://www.uwv.nl/overuwv/english/about-us-executive-board-organization/detail/about-us
[512] Ziektewet, Art. 3.
[513] Wet werk en inkomen naar arbeidsvermogen, Art. 8(1).

(WW)[514] as a person performing work under a contract of employment. This, in turn, is defined by the Dutch Civil Code (*Burgerlijk Wetboek*) as an agreement under which a person commits himself to work for another person for a certain period of time in exchange of remuneration.[515] Thus, subordination and remuneration are the two main elements of the concept deriving from this definition. A third element is the fact that work must be performed personally by the employee, who may only be replaced with the consent of the employer.[516]

Moreover, there are a set of situations that the law specifically qualifies as employment (these situations, following the same terminology used in the previous chapter on Germany, will be generally referred as 'employee-like' situations). In this regard, a person who performs work under an agreement to accept work is considered to be in an employment relationship unless he is deemed a self-employed under tax law. Also, a set of situations that qualify as an employment relationship are listed, including among others labour intermediaries (under certain conditions), commercial agents, homeworkers and artists[517] (as well as others who are excluded from being considered an employment relationship, such as persons who perform work at a person's household for less than four days a week[518]). Furthermore, persons who perform work personally in exchange for remuneration may be deemed as employees through legislation.[519] This is done through a Decree,[520] which states that a person is considered an employee if he fulfils a set of criteria, including that the work relationship lasts longer than 30 consecutive days and that the person earns at least 40% of the minimum wage.

Concerning self-employment, while there is not a statutory definition of this legal status for social security purposes, it may be defined as the opposite of the concept of employment relationship (which, in turn, encompasses the situation of a person who performs work outside such a legal

[514] Werkloosheidswet, Art. 3.

[515] Burgerlijk Wetboek, boek 7, Art. 610.

[516] Burgerlijk Wetboek, boek 7, Art. 659.

[517] Werkloosheidswet, Art. 4-5; Ziektewet, Art. 4-5; Wet werk en inkomen naar arbeidsvermogen, Art. 4-5.

[518] Werkloosheidswet, Art. 6.c; Ziektewet, Art. 6.c; Wet werk en inkomen naar arbeidsvermogen, Art. 6.c.

[519] Werkloosheidswet, Art. 5.d; Ziektewet, Art. 5.d.; Wet werk en inkomen naar arbeidsvermogen, Art. 5.d.

[520] Besluit van 24 december 1986: aanwijzing gevallen waarin arbeidsverhouding als dienstbetrekking wordt beschouwd (Rariteitenbesluit).

form). Moreover, the concept of self-employed is defined by tax legislation as a person who runs a company and is directly linked to the commitments made by this company.[521]

As an employee, the individual may be employed by a company, an employment agency or a cooperative. As a self-employed person, he may be a regular self-employed or an employee-like self-employed. If he is a regular self-employed, he may be under an agreement for a specific work (*Overeenkomst tot aanneming van werk*)[522] or under an agreement for professional services (*Overeenkomst van opdracht*).[523]

6.1.5. *Financing and contributions*

Nominally, the financing of social security schemes depends on whether insurance in each scheme is based on residency or employment status. Thus, individuals are liable to contribute for general insurance schemes, while employers are liable to pay contributions[524] for the employee insurance schemes. In this regard, employees and the self-employed are liable to pay 17.90% of their earnings for basic old-age pension (AOW). In turn, employers are liable to pay 4.13% of the employee's salary concerning unemployment benefit, 7.93% concerning incapacity pension, and 6.90% concerning sick pay. Those self-employed persons who opt to continue being insured at the employee's schemes after stopping being part of an employment relationship would assume the contributions for all contingencies.

[521] Wet inkomstenbelasting 2001, Art. 3.4.

[522] Burgerlijk Wetboek, boek 7, Art. 750.

[523] Burgerlijk Wetboek, boek 7, Art. 400.

[524] From 1 January 2006 pursuant to the Social Insurance (Funding) Act (Wet financiering sociale verzekeringen) all disputes on contributions are submitted to separate fiscal proceedings. Moreover, an appeal may be brought before the Dutch Supreme Court (*Hoge Raad*) in cases where the concepts of 'employee', 'employer' and 'employment' in employee insurances are at issue. See Van den Berg, L., *Tussen feit en fictie. Rechtspersoonlijkheid en de verzekerings- en premieplicht voor de werknemersverzekeringen*, Den Haag: Boom Juridische uitgevers, 2010, English Summary, p. 422.

6.2. Social security benefits

This section presents the different social security schemes (both social insurance and social assistance schemes) which form the social security system of the Netherlands.

When analysing the Dutch social security system, it is important to note the different general insurance schemes, to which any person legally residing in the Netherlands may become eligible, and the employee insurance schemes, for which an employee status is required.

General insurance schemes exist concerning the risks old-age (*Algemene Ouderdomswet pensioen –AOW-*), long-term healthcare (*Wet Langdurige Zorg -Wlz-*), family responsibilities (*Algemene Kinderbijslagwet –AKW-*) and survivorship (*Algemene Nabestaandenwet –Anw-*). Employee insurance schemes, in turn, exist concerning the risks of temporary incapacity (wage liability under Article 629 of the seventh book of the Civil Code, and *Ziektewet –ZW-*), unemployment (*Werkloosheidswet uitkering –WW uitkering-*) and incapacity (*Wet werk en inkomen naar arbeidsvermogen –WIA-*).

Furthermore, means-tested social assistance schemes exist, including the Older and Partially Incapacitated Unemployed Employees Income Provision (*Wet Inkomensvoorziening Oudere en Gedeeltelijk Arbeidsongeschikte Werknemers –IOAW-*),[525] the Older and Partially Incapacitated Former Self-employed Income Provisions (*Wet Inkomensvoorziening voor Oudere en gedeeltelijk Arbeidsongeschikte zelfstandigen -IOAZ-*), the Suplementary Benefits (*Toeslagenwet -TW-*), the minimum income (regulated in the Participation Act -*Participatiewet*-) and the Self-Employed Assistance Decree (*Besluit bijstandverlening zelfstandigen -Bbz-*).

While general insurance schemes include all residents in the Netherlands into their scope, employee insurance schemes have a narrower scope, based on employment status (or former employment status, if the individual opt to continue being a member of the scheme even if he no longer fit into

[525] This scheme, however, is in the process of being discontinued, and is only available for persons who were born before 1955.

one of the covered professional categories). Hence, employment status in the Netherlands is relevant for having a more comprehensive access to social insurances.

6.2.1. *Unemployment*

An employee may be entitled to an unemployment benefit under the Unemployment Benefits Act (*Werkloosheidswet –WW-*), as well as to a complementary benefit, depending on income, under the Supplementary Benefits Act (*Toeslagenwet –TW-*). Self-employed persons, however, are not eligible for unemployment benefits under either of these schemes.

- In order to become entitled to an unemployment benefit under the Unemployment Benefits Act (WW), an employee who has become unemployed (i.e. has experienced a reduction on the hours of work of at least five hours) for reasons not imputable to him needs to have performed work for at least 26 weeks in the 36 weeks prior to becoming unemployed (although a person must have only worked an hour per week for that week to be taken into account). The minimum duration of the benefit is three months. The maximum duration is two years (since April 2019), with employees being entitled to one month of benefit per each year worked (up to 24 months of unemployment benefit entitlement, after which every two years worked produce one month of unemployment benefit). Only years of employment during which the claimant performed at least 208 hours of work are taking into account (which equals to four hours a week). The benefit amounts to 75% of the daily wage during the first two months, and 70% of the daily wage afterwards. The daily wage is the average daily salary prior to becoming unemployed, with a maximum of €225.57 (gross amount for 2021).[526]

- The unemployment benefit under WW may be supplemented by an extra benefit under the Supplementary Benefits Act (TW). This benefit would complement the claimant's income up to the minimum income, which depends on the personal situation of the claimant (e.g. €1,230.40 per month for a single person over the age of 21 and who lives alone).

[526] UWV, *Actuele bedragen*, retrieved on 20 July 2021 at www.uwv.nl/particulieren/bedragen/detail/maximumdagloon

- Furthermore, the Older and Partially Incapacitated Unemployed Employees Income Provision scheme (*Wet Inkomensvoorziening Oudere en Gedeeltelijk Arbeidsongeschikte Werknemers –IOAW-*) is a means-tested scheme for persons who were at least 50 years old when they became unemployed and whom unemployment benefit has ended, as well as well as persons who started receiving the long-term incapacity benefit WGA (*Werkhervatting Gedeeltelijk Arbeidsgeschikten* -see further below-) and who then lost entitlement to it because their degree of incapacity for work no longer amounted to at least 35% incapacity. The benefit amounts to €1,695.60 per month for an unemployed employee with a (married) partner, €847.80 for a single unemployed employee with 1 or more adult co-residents, and €1,338.40 for a single unemployed worker (gross amounts for 2021).[527] It should be noted that this scheme, unlike the one contained in the *Participatiewet* (which is covered below, as a minimum income scheme) does not take into account the individual's assets (although it does take into account the income generated by property).

- In a similar line, the IOW is a means-tested benefit for persons who were at least 60 years and four months of age when they became unemployed and have ended their entitlement to the contributory unemployment benefit (WW). The amount of the benefit, which cannot exceeds 70% of the minimum wage, depends on the person's income. As in the case of the IOAW, the individual's assets are not taken into account.

- Moreover, self-employed persons over a certain age may be covered by the Older and Partially Incapacitated Former Self-employed Income Provision scheme (*Wet Inkomensvoorziening voor Oudere en gedeeltelijk Arbeidsongeschikte zelfstandigen -IOAZ-*). In order to be entitled for this benefit's scheme, a self-employed needs to terminate his business activity, be 55 or older (but not having reached the retirement age), have worked continuously for the past 10 years, of which the last 3 years as a self-employed person, have worked 1,225 hours or more per year as a self-employed person, have received income on average of less than €25,909 in the last 3 years (and expected

[527] See Rijksoverheid, *Hoe hoog is mijn IOAW-uitkering?*, retrieved on 15 December 2020 at www.rijksoverheid.nl/onderwerpen/uitkering-oudere-werklozen-ioaw-iow-ioaz/vraag-en-antwoord/hoe-hoog-is-mijn-ioaw-uitkering

income in the future of approximately less than that amount) and receive income after the termination of his company of an amount that do not exceed the amount of the benefit.[528] The amount of the benefit is the same as in the case of the IOAW (mentioned above).

- Finally, in the context of the COVID-19 pandemic, [529] the Temporary Bridging Measure for Self-Employed Professionals (*Tijdelijke overbruggingsregeling zelfstandig ondernemers -Tozo-*) was created in 2020. The allowance, of maximum €1,500 per month, may supplement the income up to the social minimum (which varies between approximately €520 and €1,500 depending on household composition and age).[530]

6.2.2. *Sick pay*

There are two schemes concerning the risk of temporary incapacity available to employees and employee-like persons:

- Under the Civil Code (*Burgerlijk Wetboek -BW-*),[531] an employee would be entitled to temporary incapacity pay for a maximum period of 104 weeks paid by the employer. The benefit amounts to 70% of the daily regular wage, with a minimum of 100% of the minimum wage in the first year, and a legal maximum of 70% of the daily maximum basis for calculation. Nevertheless, occupational pension benefits (which are paid on top of the legal payment by the employer) are very common and may vary between 0% and 30% of the daily wage.

- Situations assimilated to an employment relationship which are nevertheless outside a contract of employment (i.e. the so-called 'rariteiten' -see below-), as well as the situation of persons whose employment contract ends before they recovered from their incapacity to

[528] See Rijksoverheid, *Kom ik in aanmerking voor een IOAZ-uitkering?*, retrieved on 15 December 2020 at www.rijksoverheid.nl/onderwerpen/uitkering-oudere-werklozen-ioaw-iow-ioaz/vraag-en-antwoord/kom-ik-in-aanmerking-voor-een-ioaz-uitkering

[529] There is an also allowance, the TVL, for fixed costs of self-employed persons who have lost turnover and have fixed costs, amounting to a minimum 750 per quarter.

[530] Business.gov.nl, *Temporary bridging measure for self-employed professionals (Tozo)*, retrieved on 15 December 2020 at www.business.gov.nl/subsidy/temporary-bridging-measure-self-employed-professionals-tozo/

[531] Burgerlijk Wetboek, Boek 7, Art. 629.

work or of persons working through an employment agency, are covered by the Sickness Benefits Act (*Ziektewet - ZW*-) instead of by the Civil Code. In this case, the benefit also amounts to 70% of the daily wage, unless in the case of organ donation (in which, 100% of the daily wage is covered).

Both may be complemented by the Supplementary Benefits Act, in the same way as in the case of unemployment benefit (WW).

Self-employed persons, in turn, are not covered by any of these employee insurance schemes. They may opt to join a private occupational disability insurance (*arbeidsongeschiktheidsverzekering -AOV*-) or (if they are self-employed persons without employees) a 'bread fund' (*broodfonds*). Private occupational disability insurances may include both sick pay and long-term incapacity benefits. Nevertheless, due to their high cost, most self-employed do not join a private occupational disability insurance.[532] *Broodfondsen*, in turn, are funds organised by small groups of solo self-employed and which pay benefits (depending on past contributions) to its members in case of sickness for a maximum of two years.[533]

6.2.3. *Long-term incapacity*

Persons who were insured as employees at the time of becoming incapacitated (and after having received the maximum -two years- duration of the abovementioned sick pay benefit) may receive a monthly benefit (under strict conditions) up to the retirement age through two statutory incapacity pensions (depending on the degree of incapacity), namely the Income Provision for the Fully Incapacitated scheme (*Inkomensvoorziening Volledig Arbeidsongeschikten -IVA*-) and the Partially Incapacitated Persons' Return to Work scheme (*Werkhervatting Gedeeltelijk Arbeidsgeschikten -WGA*-). Both are regulated by the Work and Income According to Labour Capacity Act (*Wet werk en inkomen naar arbeidsvermogen –WIA*-).

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[532] CBS, 4 op 10 zzp'ers geen voorziening arbeidsongeschiktheid, 04/07/2019, retrieved on 15 December 2020 at www.cbs.nl/nl-nl/nieuws/2019/27/4-op-10-zzp-ers-geen-voorziening-arbeidsongeschiktheid

[533] Vonk, G., 'Extending Social Insurance Schemes to "Non-Employees": The Dutch Example', Becker, U. and Chesalina, O. (eds.), *Social Law 4.0*, Baden-Baden: Nomos, 2021, p. 153; See also Broodfonds, *hoe het werkt*, retrieved on 15 December 2020 at https://www.broodfonds.nl/hoe_het_werkt

Persons who have at least a 80% permanent incapacity may receive a benefit under the IVA, and which amounts to 75% of the monthly wage prior to becoming incapacitated.

Persons who are able to work in a reduced capacity and had worked for 26 of the last 36 weeks before they became incapacitated, in turn, may receive a benefit under the WGA amounting to 75% of their former pay during two months, and to 70% during a maximum of 22 additional months (depending on the number of years during which the person received wages prior to becoming incapacitated).[534] If the person continues being incapacitated (as to experiencing a reduction of at least 50% of his earning capacity) after the abovementioned period, he may receive the WGA (follow-up) benefit, which amount varies depending on his incapacity rate.[535] Moreover, while recipients of the WGA benefit may be allowed to perform work, 70% of their income from work is deducted from the WGA benefit.

As in the previous cases, the WGA or IVA benefit may be complemented by the benefit under the Supplementary Benefits Act (TW).

Self-employed persons are not covered by the statutory disability pension scheme, unless they opted to continue being insured after their employment contract was terminated. Moreover, they may opt to join a private occupational incapacity insurance (AOV -already mentioned in the section 6.2.2-).

6.2.4. *Labour accidents and professional diseases*

While there is no specific statutory insurance against labour accidents and professional diseases, the compulsory employers' civil liability insurance may supplement sick pay benefit in these cases.

[534] In this regard, for the person to receive a benefit amounting to 70% of his former salary after the initial two months, he must have received wages for at least 208 hours per year during at least four of the five years prior to becoming incapacitated. If a person fulfils this requirement, he would receive said benefit for a month per year during which he received wages for at least 208 hours within the prior 10 years, as well as for half a month per year fulfilling said requirement outside of that 10 year period, see Wet werk en inkomen naar arbeidsvermogen van 10 november 2005, Arts. 15 and 61; Pennings, F., 'The Netherlands', in Van Eeckhoutte, W. (ed.), *IEL Social Security Law*, Alphen aan den Rijn: Kluwers, 2017, pp. 97-98.

[535] The benefit for a person with full (non-permanent) incapacity amounts to 70% of the person's prior salary or of the minimum wage (whichever is lower), while the benefit for a person with an incapacity rate of between 35% and 80% varies between 28% and 70% of the minimum wage (depending on the incapacity rate), see Wet werk en inkomen naar arbeidsvermogen van 10 november 2005, Art. 61; Pennings, F., 'The Netherlands', in Van Eeckhoutte, W. (ed.), *IEL Social Security Law*, Alphen aan den Rijn: Kluwers, 2017, p. 99.

Furthermore, an employer may be also liable under the Civil Code for labour accidents or professional diseases if he failed to take measures against a potentially knowledgeable risk which, if measures had been taken (in accordance with the employers' duty of care), would have prevented the accident or disease.

6.2.5. *Maternity and paternity*

Female employees are entitled to paid maternity leave for a total period of 16 weeks (four to six of which need to be taken prior to delivery, and 10 to 12 after giving birth). The amount of the benefit is 100% of the person's wages, up to a limit of about €200 a day (nevertheless, through collective agreement, many employees are entitled to their full wage even if it exceeds that amount -with the employer paying the difference-).

Paid paternity leave lasts for six weeks within the six months after the child's birth, and amounts to 100% of the person's daily wage the first week, and 70% of the daily wage for the remaining five weeks (with a minimum amount of 100% of the statutory minimum wage).[536]

Self-employed mothers are entitled to 16 weeks of paid maternity leave (*Zelfstandig en Zwangerregeling*). Persons who have performed work for at least 1,225 hours during the year prior to the claim will receive a benefit amounting to the Dutch minimum wage, while if the person did not work at least that number of hours, then the benefit will be lower (and it will depend on the person's profits that year).

6.2.6. *Retirement*

- The basic old-age pension (*Algemene Ouderdomswet –AOW-*) is a scheme linked to residence. A person accumulates 2% of the full AOW pension for each year for which he has been insured (with compulsory insurance currently starting at the age of 16). Thus, a person who has been insured continuously during the 50 years prior to retirement age (approximately 66 years and four months of age in 2021) would be entitled to a full AOW

[536] Wet Arbeid en Zorg; Wet Invoering Extra Geboorteverlof.

pension. Insurance is linked to residence in the Netherlands, notwithstanding coordination rules for aggregation of insurance periods in other EU countries.

A full AOW pension amounts to 50% of the statutory minimum wage, if the person is married with another pension's claimant; or of 70% of the minimum wage, if the person is single; or of 90%, if the person is single and is in charge of a minor.

- The AOW is, for the large majority of employees in the Netherlands, supplemented by an occupational pension benefit. Self-employed persons who used to contribute to occupational pensions as employees have the option of continuing doing so once they stop being employees during a certain period of time (between three and 10 years). Nevertheless, this option is costly (as the self-employed person needs to cover the contribution of both the employer and the employee), which might be the reason why the use of this option is quite low.[537] Most self-employed persons in the Netherlands do not contribute (or contribute in a moderate way) to a third pillar pension.

- Moreover, those persons who have income under a certain-threshold, and do not receive the full basic old-age pension and/or do not receive an occupational pension may be entitled to the means-tested supplementary income provision for the elderly (*aanvullende inkomensvoorziening ouderen* -AIO-). The benefits' full[538] amount ranges between €375.55 and €1,627.08 net per month, depending on whether the recipient lives alone or with his partner, and on whether the partner also receives the AIO benefit.[539]

6.2.7. *Minimum income*

As it has mentioned above, the Participation Act (*Participatiewet*) provides means-tested social assistance for all adult residents who are not eligible to other benefits and with a household income under a certain threshold. In this regard, the income of the cohabitation unit must be below the social

[537] Vonk, G., 'Extending Social Insurance Schemes to "Non-Employees": The Dutch Example', Becker, U. and Chesalina, O. (eds.), *Social Law 4.0*, Baden-Baden: Nomos, 2021, p. 154.

[538] Reductions on benefits apply in those cases when the person has resided less than 66 years in the Netherlands.

[539] SVB, *AIO-bedragen*, retrieved on 25 July 2021 at https://www.svb.nl/nl/aio/bedragen-aio-aanvulling/aio-bedragen

assistance standard. The financial and real estate capital of the individual is also assessed. The claimant must also reside legally in the Netherlands and be over 18 years old. The benefit ensures an amount of, approximately, between 70% to 90% of the minimum wage (depending on the composition of the household and the household's income and assets). Individuals receiving such benefit are obliged to accept offers of employment, except for single parents with children under 5 years of age.[540]

Moreover, in the context of the COVID-19 pandemic, the Temporary Support Necessary Costs (*Tijdelijke Ondersteuning Noodzakelijke Kosten -TONK-*) was created to provide additional income through the municipalities on a temporary basis for necessary expenses that can no longer be covered due to a reduction in households' revenue.

6.3. The social security position of persons in a standard employment relationship

In the previous section, the different schemes available in the Netherlands in relation to all the contingencies studied in this thesis have been analysed. In this section we will move on to study the social security position of a person in a standard employment relationship.[541] This is done in three steps: Firstly, it is considered whether a person in a standard employment relationship is covered by these schemes (i.e. 'formal access'). Secondly, it is determined whether a standard worker can meet the necessary requirements to become entitled to the benefits contained in these programmes (i.e. effective access).[542] Thirdly, it is analysed what is the content of the benefits that a person in a standard employment relationship is entitled to (i.e. their duration and amount).

Hence, a person performing work in a standard employment relationship is formally covered by all social security schemes available, both social insurance schemes and social assistance schemes. In

[540] These and other claimants' obligations, however may vary per municipality (with some municipalities even implementing experiments of basic income), see Groot, L., Muffels, R. and Verlaat, T, 'Welfare states' social investment strategies and the emergence of Dutch experiments on a minimum income guarantee', *Social Policy and Society*, vol. 18 issue 2, 2019, pp. 277-287.

[541] See the definition of a standard employment relationship used in this thesis in section 1.4.6.

[542] That is, although a person may be formally covered by a programme, if that person is not able to meet the requirements to obtain the benefits contained in that programme, he does not actually have access to the benefits despite being part of it.

that regard, standard employees are included in social insurance schemes addressing all the contingencies covered in this thesis: unemployment (through the contributory-based scheme WW-), sick pay (through the benefit contained in the Civil Code), long-term incapacity (through the statutory incapacity pension WIA-), labour accidents and professional diseases (through the employer's civil liability insurance), maternity or paternity (through paid paternity and maternity leave) and retirement (through the residence-based basic old-age pension scheme -AOW-, as well as an occupational pension).

The requirements to become entitled to these schemes' benefits would be generally fulfilled by a person in a standard employment relationship. The benefits of the social insurance schemes are generally based on the individual's prior salary, and vary (depending on the scheme) between approximately 70% and 80% of the employee's prior salary. The duration of the benefit may vary (depending on the contributions paid and the benefit) between three months and two years (with the exception of long-term full incapacity and retirement pensions, which duration is generally indefinite, and paid paternity leave, which lasts five days).

6.4. Platform work and social security in the Netherlands

6.4.1. *The legal status of platform workers*

For the moment, there have been only a handful of decisions dealing with the employment status (under labour law) of platform workers. The first two cases concerned the company *Deliveroo*, and both were presented in front of Civil Courts and not in front of the Social Security Tribunal. While traditionally there has been some differences on how these two different types of judicial bodies determined whether or not a person is an employee, there has been recently some convergency between the courts of both fields.[543] Hence, while the result of both decisions should be taken with caution when considering the legal status of platform workers for social security, they may serve as

[543] Vonk, G., 'Extending Social Insurance Schemes to "Non-Employees": The Dutch Example', Becker, U. and Chesalina, O. (eds.), *Social Law 4.0*, Baden-Baden: Nomos, 2021, p. 152.

(tentative) indicators on what a potential decision by the Social Security Tribunal on this issue might conclude.[544]

The first decision on the legal status of platform workers in the Netherlands was taken in 2018 by the Civil Court of Amsterdam[545] on first instance. This Court concluded that a person who worked for *Deliveroo* for, on average, 7.52 hours per month between late 2017 and early 2018 should not be considered to be included under a contract of employment. In the decision, the judge stressed the freedom of the rider to choose when, where and whether he would perform work, as well as to perform work for other companies. This decision was not appealed.

The second decision, a 2019 decision on first instance by the Civil Court of Amsterdam,[546] granted the claim of the trade union *FNV* that *Deliveroo* riders must be considered employees and not as self-employed persons under the Dutch Civil Code. In this case, the Court seemed to put a greater focus on the practical relationship between the parties. In this regard, the Court found the existence of a relationship of authority between the riders and *Deliveroo*, as *Deliveroo* exerts a high degree of influence on how and when riders may perform work. The court noted that, in almost all cases, the riders contributed to *Deliveroo*'s business, instead of building their own businesses. This decisions has been, nevertheless, appealed by *Deliveroo*.[547]

Following that decision came another case concerning *Deliveroo*,[548] in which it was claimed that the company must pay contributions concerning the Pension Fund for Transport from 2015. The Court ruled that *Deliveroo* had indeed to pay contributions from June 26 of 2015 to July 1 of 2018, when the company had employment contracts with its platform workers. However, the Court waited

[544] Nevertheless, it should be noted that a difference between the Civil Courts approach and their social security counterpart is that the former have a greater focus on the intention of the parties, while the later give priority to the factual relationship between the parties, as noted in Vonk, G., 'Extending Social Insurance Schemes to "Non-Employees": The Dutch Example', Becker, U. and Chesalina, O. (eds.), *Social Law 4.0*, Baden-Baden: Nomos, 2021, p. 152. This might be of relevance, given the fact that the first decision (which considered that a platform worker was a self-employed person) was in part based on the intention of the parties as expressed in the contract (as it will be analysed below).

[545] Rb. Amsterdam 23 juli 2018, ECLI:NL:RBAMS:2018:5183.

[546] Rb. Amsterdam 15 januari 2019, ECLI:NL:RBAMS:2019:198.

[547] On the 16 February 2021, the Amsterdam Court of Appeal confirmed that Deliveroo riders were indeed under a contract of employment, see Gerechtshof Amsterdam, 16 februari 2021, ECLI:NL:GHAMS:2021:392.

[548] Rb. Amsterdam 26 augustus 2019, ECLI:NL:RBAMS:2019:6292.

to conclude whether the company must pay contributions for the period after 1 July 2018 (when the company started considering its platform workers as self-employed persons) until the appeal on the decision considering *Deliveroo* riders as employees is resolved.[549]

The fourth decision concerned the platform *Helpling*, dedicated to home cleaning services. In its ruling, the Civil Court of Amsterdam[550] stated that platform workers working through *Helpling* were not employees, but that the platform acted as intermediary between the platform workers and their clients, facilitating that an employment contract was concluded between them, and charged a fee for that service. Because of that, the Court found that the platform was in breach of the Workforce Allocation by Intermediaries Act,[551] which bans recruitment fees.[552]

With these contradictory decisions, the legal status of platform workers in the Netherlands seems still unclear. As a result (and in order to cover all the bases), the social security position of platform workers in an employment relationship and of self-employed platform workers are studied below.

6.4.2. *The social security position of platform workers in an employment relationship*

As noted above, the few legal decisions that have been taken for the moment in the Netherlands on the employment status of platform workers may not be conductive yet to a definitive answer on what that legal status is. Nevertheless, the fact that in at least two of the four cases decided it was concluded that platform workers are employees indicate that with most probability at least some platform workers in the Netherlands will be considered as employees for social security purposes. Because of this, in this section we will focus on the position of platform workers who are classified as employees.

[549] While the decision on the appeal was resolved on the 16 February 2021, it has not been taken into account yet for determining whether *Deliveroo* must pay contributions concerning the Pension Fund for Transport for the period after the 1 July 2018.

[550] Rb. Amsterdam 26 oktober 2019, ECLI:NL:RBAMS:2019:4546.

[551] Wet Allocatie Arbeidskrachten Door Intermediairs van 14 mei 1998.

[552] De Stefano, V. and Wouters, M., 'Time to stop platforms from charging recruitment fees to workers', in *Regulating for Globalization*, retrieved on 15 December 2020 at http://regulatingforglobalization.com/2019/07/03/time-to-stop-platforms-from-charging-recruitment-fees-to-workers/

The formal coverage by social insurance and social assistance schemes of platform workers classified as employees is identical to the one of persons in a standard employment relationship (analysed above). Therefore, these platform workers are included in social insurance schemes addressing all the contingencies covered in this thesis: unemployment (through the contributory-based scheme WW-), sick pay (through the benefit contained in the Civil Code or -in case they are included in one of the employee-like categories -*rariteiten*- or their contract of employment ends before their recovery- sickness benefit -ZW-), long-term incapacity (through the statutory incapacity pension -WIA-), labour accidents and professional diseases (through the employer's civil liability insurance), maternity or paternity (through paid paternity and maternity leave) and retirement (through the residence-based basic old-age pension scheme -AOW-, as well as an occupational pension).

In order to become entitled to the contributory benefits (meaning all the schemes mentioned in the prior paragraph except the Basic State Pension -AOW-, which is residence-based), platform workers need typically to fulfil periods of contributions ranging between 18 and 26 weeks (depending on the scheme). It should be noted that these periods need to be fulfilled in a relative short period of time, which might restrict some platform workers to become entitled to contributory unemployment or maternity benefit (still, the importance of that restriction should not be overstated).

As it regards the level of the contributory benefits that platform workers may receive, because benefits from the contributory schemes are related to prior salary (varying between 70% and 80% of the worker's prior salary), those platform workers with low income would end up with low benefits. Nevertheless, in such cases the supplementary benefit (TW) would complement the platform worker's income up to a certain minimum, and thus reducing significantly the risk of too low benefits.

Platform workers may enjoy the abovementioned benefits for a duration that (as it will be analysed later in this thesis) is in consonance with the other countries studied. In the case of unemployment benefits, the duration depends on the periods of work, and hence those platform workers with more fragmented and irregular professional trajectories than persons in a standard employment relationship would enjoy a contributory benefit of a lesser duration.

Moreover, platform workers who have resided in the Netherlands would be entitled to the Basic State Pension (AOW), which amount varies depending on whether the recipient lives alone or with his partner and on the years resided in the Netherlands. While the amount of the benefit is by no accounts large, platform workers classified as employees would be typically also covered by an occupational pension.

For those cases where the platform worker cannot meet the requirements of the social insurance schemes, there is a comprehensive social assistance net composed of means-tested benefits. This net is composed of some schemes targeting specific groups of older workers as it regards unemployment, as well as a general minimum income scheme (regulated in the Participation Act -*Participatiewet*-) for persons who cannot claim other benefits, and which ensures an amount of between 70% and 90% of the minimum wage depending on the composition of the household and the household's income and assets.

Overall, the social security position of platform workers classified as employees as it regards formal and effective access to benefits does not seem to be dramatically different than the one of persons in a standard employment relationship. In those cases where platform workers would not be covered by social insurance schemes, they may be entitled (based on their household's income and, in some cases, assets) to several social assistance schemes (and, notably, a minimum income scheme).

6.4.3. *The social security position of self-employed platform workers*

As mentioned above, the few legal decisions that have been taken for the moment in the Netherlands on the employment status of platform workers may not allow to provide a definitive answer on their status as of now. Nevertheless, the fact is that many platform workers perform work as self-employed in the Netherlands, and in two judicial decisions that classification was confirmed. Because of this, a study of the social security position of platform workers in the Netherlands would not be completed if it would not include an analysis of what these rights are when they perform platform work as self-employed persons. Hence, in this section it will be done just that.

Platform workers who are self-employed persons are not covered by any social insurance schemes related to the contingencies studied in this thesis, with the exception of the residence-based Basic

State pension (AOW) and of a maternity scheme (*Zelfstandig en Zwangerregeling*). Nevertheless, and as noted above, the amount provided by this benefit is not great and, unlike in the case of platform workers who are employees, self-employed platform workers do not build entitlement to an occupational pension.

Moreover, platform workers may join private insurances providing sick pay and long-term incapacity benefit (AOV), or just sick pay (*broodfonds*). As it has been mentioned above,[553] the use of AOV is not significant among the general self-employed population, and no evidence has been found that this is different concerning the group of self-employed platform workers. There are no specific data available on the use of *broodfonds* by platform workers either.

Nevertheless, and as in the case of employees platform workers, there are some social assistance schemes that may guarantee certain income. In this regard, the minimum income scheme (regulated in the Participation Act -*Participatiewet*-) may have a key role in the social security position of self-employed platform workers (together with the already mentioned Basic State pension -AOW-), as it guarantees a sum between 70 and 90% of the minimum wage. There is also a specific scheme for self-employed persons aged 55 years or older who have performed their self-employed activity continuously for the last 10 years, have had relatively low income from such activity in the last three years and terminate their company. This is a benefit that might be of use for persons who were self-employed workers before the advent of the platform economy and continue exercising such an activity through platforms, but it may be questionable whether the great majority of self-employed platform workers may fulfil such requirements.

6.5. Concluding remarks

The situation of platform workers in the Netherlands concerning social security is still unclear, as no specific regulation on the issue has been created yet and no consensus on how the existing rules should be applied has been reached. In this regard, only a handful of judicial decisions on the employment status of platform workers exist, and these are contradictory. Moreover, these decisions

[553] See '*(broodfonds*' in section 6.2.2.

were given by Civil Courts, and thus they mostly assessed the employment status of platform workers under labour law, and not specifically under social security law. However, it is the current practice of many online platforms to offer their positions exclusively as self-employment positions.

There are significant differences concerning the coverage by social insurance schemes of platform workers depending on whether they are considered as employees or self-employed persons, as the latter are not included in any of the social insurance schemes except the Basic State Pension scheme (AOW). Nevertheless, the fact that the Basic State Pension scheme is based on residence and not on periods of employment, together with the fact that there is a minimum income scheme, may in part alleviate these differences.

Furthermore, while the fact that contributory benefits for platform workers in an employment relationship are based on their wage, which could result in low benefits due to platform workers' potentially low salaries, the fact that there is a minimum amount of contributory benefits (as low benefits are supplemented to reach that minimum) compensates the risk of extremely low benefits.

Self-employed platform workers in the Dutch social security system are not covered against the risk of temporary and long-term incapacity, nor unemployment. Nevertheless, as it is the case in Germany, there are options for them to join the employees' schemes: they may belong to one of the categories of employee-like self-employed, or they may opt to remain insured in the employees' scheme after they stopped performing work as employees.

In light of the increasing number of (partly vulnerable) solo self-employed in the Netherlands (which also includes platform workers), there is a political debate since 2015 about the need to create an income fund for temporary lack of work, a collectively financed compulsory disability insurance and a (supplementary) pension facility. These plans are supported by the large employers organisations, but self-employed organisations (such as Zzp Nederland) are critical about parts of these plans. The reason for this critical position is the proposition that self-employed deliberately choose to organise matters themselves. However, some self-employed are exploited workers without a secure job position (while working for only one employer). An example on which there was a lot of debate in recent years is the postman. This type of self-employment is often referred to as 'sham independence' (*schijnzelfstandigheid*). Political parties are divided with regard to the need

to protect the vulnerable self-employed if this also implies imposing additional regulation on the professional group of self-employed with higher incomes.[554]

Finally, it can be noted that, as a result of the COVID-19 pandemic, it seems that some of the gaps in the protection of vulnerable workers such as platform workers have come into the spotlight. In this regard, the Netherlands has created a specific scheme (*Tijdelijke overbruggingsregeling zelfstandig ondernemers -Tozo-*) to cover situations of loss of income due to the impact that the pandemic has had in the business of self-employed persons. Furthermore, an additional scheme to support with necessary extra costs as a result of the pandemic (the *Tijdelijke Ondersteuning Noodzakelijke Kosten -TONK-*) has also been created.

[554] European Parliament, *The Social and Employment Situation in the Netherlands and Outlook on the Dutch EU Presidency 2016*, Briefing to the European Parliament, retrieved on 15 December 2020 at https://www.europarl.europa.eu/RegData/etudes/BRIE/2015/563473/IPOL_BRI(2015)563473_EN.pdf, p. 6-7.

Conclusion Part 1

Introductory remarks

In this Part 1 of the thesis, it has been analysed what the social security position of platform workers in the selected countries is, as well as how it compares to the one of persons in a standard employment relationship. This has been done by analysing, for each country, the bases of its social security system, the social security schemes existing in the country, and how they determine the social security position of platform workers. Since, in most cases, there are no provisions specifically targeting platform work, the social security position of platform workers is essentially determined by applying the general rules of the social security system to the situations of platform work.

Through studying the social security position of platform workers and comparing it with the one of persons in a standard employment relationship, it has become clear that there are significant differences between their social security position and, more importantly, that two of those differences are present in all the countries studied. These two main common differences are the following:

- Platform workers' social security position is arguably less transparent[555] than the one of persons in standard employment relationship, meaning that it is less clear[556] and produces less legal certainty.[557]
- Platform workers are arguably less included[558] in the selected countries' social security systems than persons in a standard employment relationship. This includes that:
    - they are in some occasions not covered by contributory social schemes that do cover persons in a standard employment relationship;

[555] The concept of 'transparency' is explained further below (see section 10.2.2).

[556] For the meaning of the concept of 'clarity' in this context, see section 10.2.2.a.

[557] For the meaning of the concept of 'clarity' in this context, see section 10.2.2.b.

[558] The concept of 'inclusion' is explained further below (see section 10.2.3) but, for the purposes of this part of the thesis, it should be noted that it refers to

- they may have more difficulties reaching the requirements to become entitled to contributory social security benefits, due to what these requirements are;
- they are at risk of receiving a lower amount of benefits compared to the one that persons in a standard employment relationship receive;
- they are at risk of being entitled to a shorter duration of benefits than persons in a standard employment relationship.

While these differences between the social security position of platform workers and the one of persons in a standard employment relationship have been observed across all countries, the exact content of these differences on transparency and inclusion vary between countries.

Hence, these variations concerning transparency (in section A of these conclusions of Part 1) and inclusion (in section B) are presented below.

A. Transparency in the social security position of platform workers at national level

In all the countries studied, platform workers experience significant uncertainty about their social security position as a result of the (still ongoing) debate of their legal status, due to the fact that such legal status has such a significant influence in their social security position. Moreover, in Spain is still unclear the separation between those platform workers who perform an activity outside an employment relationship on a non-regular basis (and thus not considered as neither employees nor self-employed) and those who do so on a regular basis (and therefore are considered as self-employed persons). The former are left with access to only social assistance scheme, and thus the lack of clarity in such a demarcation arguably results in platform workers experiencing more legal uncertainty than persons in a standard employment relationship.

Furthermore, and although not explored in depth in this thesis, it might be argued that many self-employed platform workers are not suited to the responsibilities (both financial and managerial) that are linked to the position of a self-employed person, due to the fact that their position is closer to the one of persons in a standard employment relationship (as many national Courts have noted). As a result, they found themselves in a position which is less clear (for them) than the one of persons in a standard employment relationship.

B. Inclusion in the social security position of platform workers at national level

When comparing the variations between countries on how included platform workers are into the different national social security systems, each contingency is analysed separately, and differentiating between the social security position at national level of self-employed platform workers and the one of platform workers in an employment relationship. In order to do so, each contingency is analysed separately as it concerns self-employed platform workers and as it concerns platform workers in an employment relationship. Four main aspects are compared: 1) whether or not there is formal coverage for that group (i.e. formal access); 2) the requirements to become entitled to the benefit (i.e. effective access); 3) the potential amount of the benefit; and 4) the potential duration of the benefit. The focus is placed primarily in contributory schemes, which are studied first. Nevertheless, social assistance schemes are also included in the analysis, particularly as it regards their existence and the general requirements for receiving them.

Contributory unemployment schemes for platform workers in an employment relationship

In all the countries studied except Germany and the United Kingdom, platform workers in an employment relationship are (formally) covered by contributory schemes as it regards the risk of unemployment. In the case of Germany, those excluded are the persons who perform work under a mini-job contract, while in the case of the United Kingdom, this accounts for those platform workers in an employment relationship with earnings from each individual platform work position as an employee under approximately £440 per month. Nevertheless, the case of the United Kingdom in this issue should not be stressed excessively as, at least for the moment, platform workers in that country are overwhelmingly considered as self-employed (either as independent contractors or limb 'b' workers).

As it concerns the requirements to become entitled to contributory unemployment benefits, there are significant differences between countries. In this regard, Spain has (significantly) less demanding requirements (i.e. having contributed during one year[559] in the last six years). France

[559] For the purposes of facilitating comparisons, the different requirements are, when possible, translated into similar units of measurement (i.e. years and months). Nevertheless, the exact requirements appear in the units used at national level in the chapters 2 to 6 of this thesis.

also has relatively low requirements (demanding that the platform worker who is an employee have paid approximately five months and a half of contributions in the last two years). Germany has higher requirements (asking for 12 months of contributions in the last 30 months). However, the Netherlands, arguably, has the most demanding requirements to access the contributory unemployment benefit (requesting six months and a half of employment periods in the last nine months -although a person must only have worked an hour per week for that week to be taken into account-).

In terms of the amount of the benefit, the country that arguably has the highest contributory unemployment benefit is the Netherlands (consisting of 75% of the platform worker's salary during the first two months, and 70% of his salary after that). Spain, France and Germany have benefits with similar amounts (about 60% of the platform worker's average salary), with set minimum benefits in all of them. The United Kingdom is the country that undoubtedly provides the lowest unemployment benefit (consisting of approximately £240-300 per month). It should be borne in mind that, since the platform workers' wages can be low (due to its -extremely- part-time character and its predominance in sectors with typically low salaries such as food delivery or cleaning), this obviously has an impact on the amount of the unemployment benefit in the Netherlands, Spain, France and Germany. This is why it is so significant that there is a set minimum benefit in Spain, France and Germany. It should also be noted that, as will be discussed below, in several of these countries (particularly the UK, the Netherlands and France) there are social assistance benefits which supplement the income received from contributory unemployment benefits.

The benefits' duration in most of the countries studied varies according to the length of the periods contributed. This means that, in the case of platform workers, they may receive a benefit of relatively short duration simply because they have contributed for relatively short periods of time. However, this will largely depend on the particular circumstances of platform workers. It is, therefore, necessary to compare both minimum and maximum durations. In this respect, Spain, France and the Netherlands provide contributory unemployment benefits for the longest duration, which varies between approximately three months and two years. The maximum duration of benefits in Germany is shorter, i.e. one year (except for workers over 50 years of age, in which case

it can be up to 2 years). Again, the United Kingdom is the atypical case among the countries studied, granting a contributory unemployment benefit with a maximum duration of 6 months.

Contributory unemployment schemes for self-employed platform workers

Contributory social security schemes against the risk of unemployment for self-employed workers have often been a controversial issue. In all the selected countries there was no contributory scheme concerning this contingency for self-employed workers for some time. This has changed in recent years, with several of them offering protection against this risk.

In this respect, Spain and France offer contributory schemes against the risk of unemployment, while the UK, Germany and the Netherlands generally do not do so. The Netherlands and Germany, however, do allow those self-employed platform workers who have been previously in an employment relationship to continue to contribute to the employees' unemployment scheme after terminating their activity as employees. In addition, with the crisis caused by the COVID-19 epidemic, the UK and the Netherlands have created specific programmes to protect the self-employed against the reduction or cessation of activity brought about by the pandemic. The creation of these new (temporary) programmes might reflect the need for a contributory unemployment scheme accessible to the self-employed platform workers in these countries.

Spain is the country among those selected with lower requirements for self-employed platform workers to access contributory unemployment benefits, namely that they need to have carried out their activity as self-employed workers without interruption in the year prior to ceasing their activity. Despite being the lowest requirements in comparison, these requirements are undoubtedly high compared to those of platform workers in an employment relationship, and they might be difficult to fulfil for self-employed platform workers. France requires two years of contributions before the end of the self-employed activity. Again, that is a requirement that is difficult to meet for platform workers. As mentioned above, Germany and the Netherlands do not have a specific unemployment benefit for the self-employed, but the self-employed may continue to contribute to the employees' scheme if they have previously carried out an activity as employees. In this sense, the requirements for access to the benefit would be the same as for employees. However, it should be borne in mind that self-employed platform workers who opt for this alternative must have worked

as employees previously and, more importantly, must pay employer and employee contributions. These relatively high contributions could be an obstacle to platform workers' access to this scheme. As for the specific unemployment benefits for self-employed created in the UK and the Netherlands due to the COVID-19 pandemic, what is mainly required to access them is that there has been a significant reduction in income from their self-employment activity. Depending on the sector, this may be significant for platform workers.

In terms of the amount of the benefits, Spain is, in theory, the country that grants the highest benefit, consisting of 70% of the contribution base. However, it is vital to bear in mind that the self-employed persons themselves set the contribution base,[560] and that those self-employed who pay reduced contributions because it is their first year of activity (which, as has been mentioned,[561] often happens in the case of platform workers) contribute at the minimum base. However, the benefit has a minimum amount of approximately €1,000.

France, in turn, grants a benefit of €800 per month. In Germany and the Netherlands, if the platform worker has continued paying contributions to the employees' unemployment benefit, he would receive the same amounts as the employees. Concerning the schemes specifically created due to the COVID-19 pandemic, the one in the Netherlands provides benefits of between €525 and €1,512, while the benefits in the United Kingdom amount to 70% of the platform worker's average income.

In terms of duration, Spain is the country that grants the longest benefit duration, of between 4 and 24 months, depending on the contribution periods paid (which, again, can be detrimental to platform workers). Next is France, which benefit has a maximum duration of 6 months (also based on contribution periods). In the case of Germany and the Netherlands, again, if the self-employed platform worker is included in the employee scheme, the duration is calculated in the same way as in that scheme. As for the special programmes created due to COVID-19 in the Netherlands and the United Kingdom, their duration has been extended as the crisis progressed. It can be assumed that they will keep being extended as long as the disruptions caused by the pandemic continue.

[560] With a minimum and maximum base for the calculation of contributions.

[561] See section 2.1.5.

Contributory sick pay schemes for platform workers in an employment relationship

As in the case of contributory unemployment schemes, all countries except Germany and the United Kingdom (in the cases of, respectively, mini-jobs and jobs providing very low wages) include platform workers in their contributory social security scheme concerning sick pay.

Most of the countries studied have very low (or even non-existent) requirements for contributory sick pay benefit, beyond being insured and on sick leave. In this regard, the Netherlands and the United Kingdom have no eligibility requirements other than those mentioned above. France and Germany have some conditions for eligibility, but these are not very demanding. Hence, in Germany the claimant must have worked continuously for the same employer for at least four weeks before becoming sick, while in France it is necessary to have paid social security contributions during at least the 20 days within the previous three months. It should be noted that, in the French system, there is also a supplementary benefit, for which a longer period of contributions is required, namely to have worked in the same job for a year before becoming sick. Spain is the country that has relatively higher requirements for accessing this benefit, as claimants must have paid social security contributed during at least six months in the last five years, and even these requirements are arguably not excessive. Overall, it might be argued that the requirements abovementioned are not as high as to prevent most platform workers in an employment relationship from accessing this benefit.

Spain, Germany and the Netherlands provide benefits of a similar amount (i.e. approximately 70% of the worker's salary). In France's case, the basic benefit is 50% of the worker's salary, but the supplementary benefit amounts to 90% of his salary for the first month, and around 70% during the following months. Finally, the United Kingdom is again the outlier by providing around £400 per week (unless more favourable terms have been set out in the employment contract). The fact that in most countries the benefit is based on the worker's salary may obviously result in platform workers, with low income receiving low benefits.

The duration of the contributory sick pay benefit varies significantly between the countries studied. In this respect, in the Netherlands the benefit may last up to two years; in Spain and Germany, in turn, the maximum duration is of one year and a half; while in France and the United Kingdom, platform workers may receive the benefit for a maximum duration of around six months.

Contributory sick pay schemes for self-employed platform workers

There is great diversity between the countries studied on whether or not contributory sick pay schemes cover self-employed platform workers. In the United Kingdom, such schemes are not available for self-employed platform workers, while in Spain they need to be contracted through private non-profit entities. Germany allows choosing between public or private insurance. France, in turn, has compulsory insurance concerning this contingency for self-employed platform workers classified as traders or craftsmen,[562] but not for those considered liberal professionals (except if they are micro self-employed).[563] The Netherlands only offers sick pay coverage through private insurance or the so-called *broodfonds* (which are also a kind of non-public scheme).[564]

In Spain and Germany, the conditions for accessing such benefits are the same as for contributory sick pay schemes for employees (except that, in Germany, platform workers may also opt for private insurance, in which case the requirements may depend on the private insurance). In France, the conditions are different from those for employees, requiring that the claimant had paid contributions during the year prior to becoming sick. In the Netherlands, the requirements are set according to the specific private insurance.

The benefit in Spain and Germany is calculated in the same way as for employees, while in the Netherlands and Germany (if the platform worker chose to be covered by private insurance), the benefit's amount depends on the conditions set by the specific private insurance. In France, the benefit is also calculated in the same way as in the case of employees.

The same applies to the duration, which is calculated in the same way as for employees in Spain and Germany. In the Netherlands, in turn, it depends on the conditions of the specific private insurance. In France, the benefit lasts a maximum of one year.

[562] Except for those self-employed platform workers with an income from their self-employed activity below approximately €4,000 per year, who can choose not to join it

[563] See, on the forms of work available in France, section 4.1.4.

[564] See section 6.2.2.

Contributory long-term incapacity schemes for platform workers in an employment relationship

All the countries studied provide coverage against long-term incapacity through contributory schemes for all platform workers in an employment relationship (except for those included in the specific cases already mentioned above concerning Germany and the United Kingdom).

The countries studied may be arranged, according to the types of requirements, into three groups. In Spain, Germany and the Netherlands, entitlement to the pension is typically based on fulfilling a minimum period of social security contributions within a specific period of time. These requirements are relatively higher in Spain[565] than in Germany[566] and the Netherlands.[567] In turn, in the United Kingdom and France it is required to have paid social security contributions for one year[568] and that the contributions paid reach a certain minimum amount.

In all the selected countries, the amount of the pension varies according to the degree of incapacity. In addition, in Spain and Germany the pension is a percentage of the previous average salary, starting with approximately 100% of the worker's average salary for a 100% incapacity, and reducing the amount as the degree of incapacity lowers. France is an intermediate case, in the sense that the previous salary is taken into account, but that there are also limits on the maximum amount depending on the degree of incapacity. The Netherlands may be also considered an intermediate case in that, while the benefit for fully and permanently incapacitated persons (IVA) is exclusively based on prior salary, the one for partially or temporarily incapacitated persons (WGA) only initially (up to the first two years) depends on the prior salary (with later being based on the minimum wage). In the United Kingdom, the benefit consists of a fixed amount of approximately £300 or £450 per month (depending on whether or not the person can eventually transition into some form of employment).

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[565] In that regard, in Spain the claimant must be insured for 25% of the time since reaching 20 years of age and also have contributed in 5 of the 10 years prior to being disabled, see section 2.2.3.

[566] In this respect, in Germany only 5 years of contributions are required, 3 of which must have been paid in the 5 years prior to the disability, see section 3.2.3.

[567] In the Netherlands, a person who is not fully or permanently incapacitated must have worked at least 26 of the last 36 weeks before becoming incapacitated to receive the relevant benefit, see section 6.2.3.

[568] In the case of France, the year must be immediately before the materialization of the incapacity, while in the case of the United Kingdom it must be in one of the previous three years.

Contributory long-term incapacity schemes for self-employed platform workers

As in the case of the other contingencies, there are significant differences in the protection against long-term incapacity between the countries studied. In this regard, self-employed platform workers in Spain and France[569] are covered by long-term incapacity schemes, with the same requirements, amount and duration than in the case of employees. In contrast, in the United Kingdom, Germany and the Netherlands self-employed platform workers are not covered by contributory schemes concerning this contingency.

Contributory schemes concerning accidents at work and occupational diseases for platform workers in an employment relationship

All the countries selected in this thesis protect platform workers in an employment relationship against the contingency of work accidents and occupational diseases. This protection translates into an increase in the amount of sick leave benefit and long-term incapacity pension, and the elimination of contribution requirements for access to these benefits

Contributory schemes concerning accidents at work and occupational diseases for self-employed platform workers

Self-employed platform workers are insured against occupational risks and diseases in Spain, France (voluntarily), the United Kingdom (but only those platform workers who are considered limb 'b' workers) and in Germany (voluntarily through private insurance). It should be noted that, in France, platforms providing a homogeneous service are obliged to pay the contribution for the insurance against accidents at work and occupational diseases if the worker chooses to be insured against this risk, either through the public system or through a private insurance that provides an equivalent level of protection. The conditions and content of the service are similar to those of platform workers who are employed.

[569] In the case of France, only in relation to self-employed craftsmen and traders, as well as micro-entrepreneurs and some liberal professionals (depending on the sector). See section 4.2.3.

Contributory maternity and paternity schemes for platform workers in an employment relationship

All the countries selected in this thesis include platform workers in an employment relationship in the scope of their social insurance schemes concerning maternity and paternity. In most countries, namely the United Kingdom, Germany and the Netherlands, the only requirement for access to this contributory benefit is to be insured. In contrast, France and Spain do request contribution periods to be able to access these benefits. In Spain, no contribution periods are requested for workers under 21 years of age, while for older workers periods of contribution of between three months and one year are required, depending on the age of the claimant. In France, it is necessary to have worked one year in the same job and to have contributed at least 20 days within the three months before the birth.

The amount of the benefit is in most countries around 100% of the salary. In the Netherlands, the father receives 100% of his salary in the first week and 70% of it for the remaining five weeks. In the UK, 90% of the employee's salary is paid during the first six weeks. In turn, for the remaining 33 weeks, it receives £570 per month.

The duration of this benefit in the case of maternity varies from 16 weeks in France, Spain and the Netherlands, to 8 weeks in the case of Germany. In the United Kingdom, as mentioned above, the benefit can be as long as 39 weeks but, during the last 33 weeks, the amount of the benefit is low. In the case of paternity benefit, there is more diversity between the countries studied, with a duration varying between 12 weeks in Spain, six weeks in the Netherlands and around 11 days in France and Germany.

Contributory maternity and paternity schemes for self-employed platform workers

Contributory maternity schemes cover self-employed platform workers in all countries studied except in the case of Germany (where they have to resort to the social assistance system). Germany, France and Spain have the same requirements to access the benefit as for employees. In turn, in the UK and the Netherlands, a minimum working time is required in the period before pregnancy.

It should be noted that the amount of the benefit is significantly lower for the self-employed than for employees. In this respect, the benefit in Spain is equivalent to the contribution base (which, as

mentioned above, it is established by the self-employed worker himself). In the Netherlands, its maximum amount is the minimum wage. In France, it consists of a single sum of between €590 and €3,428 (depending on the worker's income) and, in the United Kingdom, the amount is approximately £600 per month or 90% of the salary, whichever amount is lower. The duration is the same or similar to that of platform workers in an employment relationship.

Retirement schemes for platform workers in an employment relationship

All the countries studied have a retirement pension system that covers platform workers in an employment relationship. In all of them except Spain, this system combines first-pillar public pensions and second-pillar pensions (the latter managed by the social partners). Sometimes these pensions are complemented by third pillar pensions (managed by the private sector). Nevertheless, there is insufficient data at the moment to determine the use of third pillar pensions by platform workers. Spain is the only country where employees generally rely only on the state pension of the first pillar, without combining it with second or third pillar pensions. In this thesis, there is a particular focus on first pillar pensions, although mentioning the existence of second and third pillar pensions and their basic regulation.[570]

To access the basic pension some countries require a minimum period of contribution (15 years in Spain, 10 years in the United Kingdom), and in all countries there is a minimum age required to access the retirement pension (which ranges from 60 to 66 years). It is also common that a certain number of contribution periods are required to qualify for the full pension. This period is approximately 35 years in the countries studied. The Netherlands' case is atypical in that the requirements to access the Basic State Pension and the calculation of its amount are not based on contributions but on periods of residence in the country. In this respect, 50 years of residence in the Netherlands are required to obtain the full pension.

The countries studied use different methods of calculating the amount of the basic pension: Spain, France and Germany mainly use a percentage of the worker's average wage. The Netherlands, in turn, based the calculation on the composition of the family unit and the years of residence in the

[570] The diversity of options in second and third pillar pensions makes it difficult to analyse them in more detail for the purposes of this thesis

country. An intermediate case is that of the United Kingdom which, although it sets an amount of £700 per month for those who have contributed for 35 years, this amount is reduced to the extent that they have contributed for less time

Retirement schemes for self-employed platform workers

In the case of the self-employed, all the countries studied offer coverage by the contributory retirement pension for self-employed platform workers, except in the United Kingdom. In Germany, joining the retirement pension scheme is generally voluntary for the self-employed, although there are several categories of self-employed who are obliged to do so.[571]

The requirements and the calculation method of the amount of the pension are very similar to those used in the case of platform workers in an employment relationship.

It is important to stress that the retirement pensions to which we have referred so far in terms of the requirements for their entitlement, as well as their amount and duration, are basic pensions (except in Spain where the abovementioned pension is the only pension for most workers). These pensions generally consist of an amount that does not allow to maintain the same standard of living as when one was working. The abovementioned pension systems (except the Spanish one) are based on the idea that these pensions are complemented by a second-pillar pension. However, in the case of self-employed platform workers, they do not have access to second-pillar pensions. This, added to the low income that a platform worker may potentially result in significantly low pensions that even require the self-employed platform worker to resort to social assistance.

Social assistance schemes concerning platform work

In the countries studied, there are typically two kind of means-tested, social assistance benefits, namely those that cover the situation of persons in a household with low earnings who experience a specific contingency, and those which address the situation of all persons in the country who are part of a household with earnings and/or property under a certain threshold.

[571] See, for more information on such categories (mainly employee-like self-employed) sections 5.1.4 and 5.2.6.

In this regard, all the countries studied have some kind of specific social assistance programme for unemployment situations based on income, both for those who have been platform workers in an employment relationship and for those who have been self-employed platform workers. The amount of these programmes is between €400 and €500. Furthermore, most countries (i.e. Spain, the Netherlands and France) provide an extra social assistance benefit for those people with low income who have received or are receiving unemployment benefit from employees. There is also some greater protection in several countries for those workers over 50 years of age. All countries also have a supplement to the old-age pension for those on low incomes. Moreover, in Spain and France there is a specific social assistance allowance for incapacitated people on low family incomes, regardless of their occupational status.

Furthermore, all countries have a social assistance programme guaranteeing a minimum income, the amount of which varies according to the composition of the family unit. In addition, in the case of the Netherlands there is a benefit which supplements those contributory benefits which are too low until they reach a minimum amount.

The existence of these social assistance benefits, and especially of minimum income schemes, goes some way to compensating for the lack of formal and/or effective coverage that platform workers often experience, as well as the low income they sometimes receive. However, one may wonder whether social assistance systems should play such an important role in the social security protection of blue-collar workers, given the potential burden on the system that this may entail.

Concluding remarks

This Conclusion of Part 1 presents the two main observations on the social security position of platform workers that are common across all the selected countries, and the different ways in which they are present in each country.

The questions of what is the social position of platform workers in the selected countries and how it compares to the one of persons in a standard employment relationship revolve in a significant part on what the employment status of platform workers is. Nevertheless, that is not the only important aspect to take into account, as there are significant differences between the social position of

platform workers and the one of persons in a standard employment relationship no matter whether platform workers are employees or self-employed. Furthermore, there is no particular country in which platform workers have the worst social security position but, instead, the way they experience social security varies greatly among countries depending on the different contingencies.

PART 2: DESCRIPTION OF THE SOCIAL SECURITY POSITION OF PLATFORM WORKERS UNDER EUROPEAN UNION LAW

Chapter 7. Access to social security by mobile platform workers under the Coordination Regulations

7.1. Introduction

In the prior chapters 2 till 6 it was analysed what the social security benefits and contributions of persons performing platform work are in Spain, France, the United Kingdom, Germany and the Netherlands. However, workers do not always remain in one Member State, but they may move across their borders. This is potentially even more the case concerning platform work, as it greatly facilitates access to work in almost any location, either location-based work or online work.

Because EU citizens are entitled to move and/or work across EU countries,[572] the social security systems of these countries need to be in some way connected. However, national social security rules only address the reality within their own country. Thus, EU rules have been created to regulate that connection between national social security systems. Accordingly, in order to fully comprehend what the social security position of platform workers is, even when they move between countries, it is necessary to determine how these EU rules apply to the specific situation of persons performing platform work.

Thus, a person performing platform work and moving across EU Member States would be subjected to the EU rules on social security coordination (hereby the Coordination Regulations) in connection with social security schemes concerning all contingencies studied in this research (i.e. work-related contingencies), with the exception of most social assistance schemes. Access to social assistance schemes is, in turn, governed by Regulation 492/2011[573] (if the person is considered a worker under EU law) and (at least indirectly[574]) Directive 2004/38/EC.[575] In this chapter, the position of

[572] Treaty on European Union, Art. 3(2); Consolidated version of the Treaty on the Functioning of the European Union, Art. 21, 45; Charter of Fundamental Rights of the European Union, Art. 45.

[573] Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union.

[574] Directive 2004/38/EC does not specifically regulate access to social assistance, but the right of EU citizens to reside.

[575] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending

cross-border platform workers under the Coordination Regulations (i.e. Regulation 883/2004 and its Implementing Regulation, Regulation 987/2009) is examined.

In order to do so, the thesis follows a similar structure than in previous chapters, in that it firsts presents the content, structure and nature of the rules (in sections 7.2 and 7.3), and then applies such rules to the specific situation of platform work (in sections 7.4, 7.5 and 7.6).

7.2. The basic fabrics of the Coordination Regulations

7.2.1. *Introduction*

The Coordination Regulations provide a set of rules that adjust social security systems of EU Member States, Switzerland, Iceland, Liechtenstein and Norway (hereinafter, Member States[576]) so as to ensure freedom of movement of persons across these countries. In other words, the Coordination Regulations is a set of compromises that Member States have agreed upon concerning their ability to determine the scope of their social security system.[577] These compromises may be generally summarised as follow: first, periods of insurance, employment, self-employment or residence completed in other Member States need to be taken into account by the competent institutions of other Member States when assessing entitlement to social security benefits (i.e. principle of aggregation)[578]; second, cash benefits acquired under the legislation of one Member State cannot be withdrawn, reduced or suspended due to the fact that the beneficiary or his family members reside in another Member State (i.e. principle of export of benefits)[579]; and third, Member States accept a unique set of rules determining the social security system to which a person in a cross-border situation belongs (i.e. rules for determining the legislation applicable or rules for the

Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

[576] While the term 'Member States' is typically used to refer to States which are members of the EU, in this thesis this term refers to all States which are parties of the Coordination Regulations.

[577] Cornelissen, R., 'The principle of territoriality and the Community Regulations on social security (Regulations 1408171 and 574172)', *Common Market Law Review*, vol. 33 issue 3, 1996, pp. 439-471.

[578] Consolidated version of the Treaty on the Functioning of the European Union, Art. 48(a); Regulation 883/2004, Art. 6.

[579] Consolidated version of the Treaty on the Functioning of the European Union, Art. 48(b); Regulation 883/2004, Art. 7.

resolution of conflict of rules). This thesis focuses primarily on the latter compromise, meaning the rules for determining the legislation applicable.

The Coordination Regulations are not very new instruments of EU law. In fact, the establishment of a legal framework for the coordination of social security systems as to not impede free movement of workers was among the first actions of the European Economic Community (EEC). This shows the importance that this issue had from the start of what would eventually become the European Union (EU). In this regard, Article 51 of the Treaty of Rome (also called EEC Treaty, as it created the EEC), enabled the creation of EU legislation on this issue, something which was done shortly after with Regulation 3/1958 and Regulation 4/1958. These two Regulations were in place for a significant amount of time, although experiencing numerous amendments. Eventually, a new set of Coordination Regulations, Regulation 1408/71 and Regulation 574/72, were enacted. These Regulations were finally replaced in 2010 by Regulation 883/2004 and Regulation 987/2009, which then experienced a set of amendments.[580] These last Regulations are the ones to which this thesis will be referring when using the term 'Coordination Regulations' hereafter unless explicitly stated otherwise.

7.2.2. *The choice of coordination of social security systems*

As noted above, the main objective of the Coordination Regulations is to ensure free movement across Member States. Generally speaking, freedom of movement of workers may be achieved by either establishing a common social security system for all Member States (i.e. by harmonising Member States' social security systems) or by coordinating the diverse social security systems of each Member State (i.e. by regulating the interconnection between social security systems[581]).

[580] Regulation (EC) No 988/2009 of the European Parliament and of the Council of 16 September 2009; Commission Regulation (EU) No 1244/2010 of 9 December 2010; Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012; Commission Regulation (EU) No 1224/2012 of 18 December 2012; Council Regulation (EU) No 517/2013 of 13 May 2013.

[581] While a definition of social security coordination cannot yet be found in either the EU treaties, the Coordination Regulations or the case law of the CJEU, a common definition may be found in Pennings, F., *European Social Security Law*, 6th ed., Cambridge-Antwerp-Chicago: Intersentia, 2015, p. 6.

The CJEU has stated on numerous occasions that Article 51 EEC Treaty (current Article 45 TFEU), on which the Coordination Regulations are based, provides for the coordination and not for the harmonisation of the social security legislation of the Member States.[582] Thus, every Member State may (still) freely design and readjust the internal features of their social security system, such as the range of social security schemes available, the conditions for joining and raising entitlement to the benefits linked to them, or the amount of contributions. In other words, "substantive and procedural differences between the social security systems of individual Member States are unaffected by Article 51 of the Treaty" (current Article 48 TFEU).[583]

In any case, the choice for coordination instead of harmonisation is only limited by EU law as far as it concerns social security system's internal market dimension. Therefore, the Coordination Regulations do harmonise the rules for determining the legislation applicable, overruling those established by the domestic legislation of each Member State.[584]

7.2.3. *Scope of the Coordination Regulations*

Like any piece of legislation, the Coordination Regulations have a specific personal, material and territorial scope that limits the situations to which these rules may be applied. The question for the purposes of this thesis is whether these limits result in platform workers being included or excluded from the scope of the Regulations.

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[582] See, inter alia, Case 41/84, *Pinna v Caisse d'allocations familiales de la Savoie*, EU:C:1986:1, para. 20; Case C-340/94, *De Jaeck*, EU:C:1997:43, para. 18; Case C-221/95, *Inasti v Hervein and Hervillier*, EU:C:1996:301, para. 16; Case C-393/99, *Hervein and Hervillier*, ECLI:EU:C:2002:182, para. 50; Case C-619/11, *Dumont de Chassart*, EU:C:2013:92, para. 40.

[583] Case C-95/18, *van den Berg and Giesen*, EU:C:2019:767, para. 59; Case C-551/16, *Klein Schiphorst*, EU:C:2018:200, para. 50; Case C-443/11, *Jeltes and Others*, EU:C:2013:224, para. 43; Case C-611/10, *Hudzinski*, EU:C:2012:339, para. 42; Case C-388/09, *Da Silva Martins*, EU:C:2011:439, para. 71; Case C-345/09; *van Delft and Others*; EU:C:2010:610; para. 99; Case C-296/09, *Baesen*, EU:C:2010:755; para. 22; Case C-3/08, *Leyman*, EU:C:2009:595, para. 40; Case C-208/07, von *Chamier-Glisczinski*, EU:C:2009:455, para. 84; Case C-393/99, *Hervein and Hervillier*, EU:C:2002:182, para. 50; Case C-266/95, *Merino García*, EU:C:1997:292, para. 27; Case C-165/91, *Van Munster*, EU:C:1994:359, para. 18; Case C-227/89, *Rönfeldt*, EU:C:1991:52, para. 12; Case C-313/86, *Lenoir*, EU:C:1988:452, para. 13; Case C-377/85, *Burchell*, EU:C:1987:354, para. 17; Case C-41/84, *Pinna*, EU:C:1986:1, para. 20.

[584] Case 276/81, *Kuijpers*, EU:C:1982:317, para. 14.

7.2.3.a. The personal scope of the Coordination Regulations

The Coordination Regulations apply to EU nationals, refugees[585] and stateless persons[586] who have been subjected to the legislation of one or more EU Member States,[587] as well as their family members, as long as they are in a situation with a cross-border element.[588]

Hence, the personal scope of the current Coordination Regulations is to a large extent determined by the legal relationship between a person and a Member State. Nevertheless, this has not always been the case. Regulation 3/58 only applied to wage earners and assimilated situations,[589] notions which were explored by the Court of Justice of the European Union (CJEU) in the *Unger* case.[590] Some 15 years later, in the beginning of the 1980s, Regulation 1408/71, which originally was restricted to workers as well, was modified to include both employed and self-employed persons[591] and to, eventually, also cover students.[592] Under the current Regulation 883/2004 and Regulation 987/2009, the professional status is no longer relevant for determining whether a person is within

[585] As defined in Art. 1 of the Convention regarding the Status of Refugees of 28 July 1951, see Regulation 883/2004, Art. 1(f).

[586] As defined in Art. 1 of the Convention regarding the Status of Stateless Persons of 28 September 1954, see Regulation 883/2004, Art. 1(g).

[587] Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality (now replaced by Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality) has extended the personal scope of the Coordination Regulations to also third-country nationals who are legal residents of an EU Member State and who are in a situation with a cross-border element (with the exception of those who move to or from Denmark, see Treaty on the Functioning of the European Union, Protocol 22 on the Position of Denmark).

[588] Regulation 883/2004, Art. 2(1); Spiegel, B., 'Article 2: Persons covered', in Fuchs, M. and Cornelissen, R. (eds.), *EU Social Security Law: A Commentary on EU Regulations 883/2004 and 987/2009*, Baden-Baden: Nomos, 2015, p. 73.

[589] Giubboni, S., et al., *Coordination of Social Security Systems in Europe, IP/A/EMPL/2017-03*, Brussels: European Parliament, 2017, p. 16.

[590] *Case 75/63, Unger*, EU:C:1964:19.

[591] Council Regulation (EEC) No 1390/81 of 12 May 1981 extending to self-employed persons and members of their families Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community.

[592] Council Regulation (EC) No 307/1999 of 8 February 1999 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 with a view to extending them to cover students.

the personal scope of the Coordination Regulations. Therefore, the fact of performing platform work does not have an impact on whether a person is in the personal scope of the Coordination Regulations.

7.2.3.b. The material scope of the Coordination Regulations

The material scope of Regulation 883/2004 is limited to a specific set of social security branches, namely those related to sickness, maternity and paternity, invalidity, old-age, survivorship, accidents at work and occupational diseases, death grants, unemployment, pre-retirement and family benefits.[593] It does not include, however, social and medical assistance benefits.[594]

In order to be included in the material scope, a social security scheme not only has to fit into these branches, but also its entitlement must be granted on the basis of a legally defined position, and it must not depend on an individual and discretionary assessment of personal needs.[595] It may occur, however, that a certain benefit, while being granted based on a legally defined position, is only provided to those persons in a position of need. This may be the case, for example, with regard to minimum subsistence benefits such as old-age pension supplements or incapacity benefits for persons without any prior professional experience. When faced with this kind of benefits during the 1970s and 1980s, the CJEU stated that they must be considered as included in the scope of the Coordination Regulations.[596] These are the so-called hybrid benefits,[597] meaning benefits that were considered by the CJEU as having characteristics of both social assistance benefits and social security benefits under the Coordination Regulations.[598] The case law of the CJEU[599] on these

[593] Regulation 883/2004, Art. 3(1). An in-depth analysis of what each branch specifically encompasses is not performed here, but may be found in, inter alia, Fuchs, M., 'Article 3: Material Scope', in Fuchs, M. and Cornelissen, R. (eds.), *EU Social Security Law: A Commentary on EU Regulations 883/2004 and 987/2009*, Baden-Baden: Nomos, 2015, pp. 81-93.

[594] Ibid., Art. 3(5).

[595] See, inter alia, Case C-396/05, *Habelt*, EU:C:2007:810, para. 63; Case C-286/03, *Hosse*, EU:C:2006:125, para. 37.

[596] See, inter alia, Case 1/72, *Frilli*, EU:C:1972:56; Case 249/83, *Hoeckx*, EU:C:1985:139.

[597] Christensen, A. and Malmstedt, M., 'Loci Laboris versus Lex Loci Domicilii - An Inquiry into the Normative Foundations of European Social Security Law', *European Journal of Social Security*, vol. 2 issue 1, 2000, p. 81; Fuchs, M., 'Article 3: Material Scope', in Fuchs, M. and Cornelissen, R. (eds.), *EU Social Security Law: A Commentary on EU Regulations 883/2004 and 987/2009*, Baden-Baden: Nomos, 2015, p. 97.

[598] Case 1/72, *Frilli*, EU:C:1972:56, para. 14.

[599] Case C-160/02, *Skalka*, EU:C:2004:269; Case C-140/12, *Brey*, EU:C: 2013:565.

benefits has developed into the introduction of the notion of special non-contributory cash benefits.[600] In order to be considered as such, a benefit needs to be related to one of the risks abovementioned (established under Article 3(1) of Regulation 883/2004), to seek to ensure a minimum income by supplementing insufficient social security benefits (or to solely provide protection for the incapacitated), its entitlement or amount must not depend on social security contributions paid by the claimant and, finally, it must be listed in Annex X of Regulation 883/2004.[601]

7.2.3.c. The territorial scope of the Coordination Regulations

Regulation 883/2004, unlike Regulation 3/1958, does not expressly state the territorial scope of the Coordination Regulations. There is no question that the Coordination Regulations applies in EU Member States (and certain overseas territories mentioned[602]), as well as in Switzerland, Iceland, Liechtenstein and Norway (as a result of specific agreements). It is less clear, however, whether (and under which circumstances) the Coordination Regulations apply to situations which occur outside these countries.

In this regard, the CJEU has stated that whether a situation is within the territorial scope of the Coordination Regulations does not depend on whether an activity is performed in the territory of a Member State, but on the link between a person and the territory of the Member State under which such person completed periods of insurance.[603] In turn, a sufficiently close connection between a person and a Member State's territory may be found when, inter alia, "an EU citizen, who is resident in a Member State, has been engaged by an undertaking established in another Member State on whose behalf he carries on his activities".[604]

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[600] Regulation 883/2004, Art. 3(3); see also Verschueren, H., 'Special Non-Contributory Benefits in Regulation 1408/71, Regulation 883/2004 and the Case Law of the ECJ', *European Journal of Social Security*, vol. 11 issue 1-2, 2009, pp. 217-234.

[601] Ibid., Art. 70.

[602] See Consolidated version of the Treaty on the Functioning of the European Union., Art. 349 and 355.

[603] See, inter alia, Case C-300/84, *van Roosmalen*, EU:C:1986:402, para. 29; Case 9/88, *Lopes da Veiga*, EU:C:1989:346, para. 15-17.

[604] Case C-631/17, *Inspecteur van de Belastingdienst*, EU:C:2019:381, para. 23; Case C-266/13, *Kik*, EU:C:2015:188, para. 43.

Furthermore, it must be noted that residing in a Member State is not a requirement in order to be subjected to the Coordination Regulations.[605] Therefore, a person who is (or has been) subjected to the legislation of a Member State in a cross border situation involving two or more Member States may be inside the scope of the Coordination Regulations, even if he resides in a third State (so not a Member State of the EU).

7.2.4. *The general principles of the Coordination Regulations*

7.2.4.a. Introduction

Principles, understood as "a fundamental truth or proposition that serves as the foundation for a system of belief or behaviour or for a chain of reasoning",[606] are common in the field of law. The general principles of EU law, specifically, serve to inform the interpretation of the written law in order to fill gaps, as well as to ensure a systematic, coherent and consistent interpretation of EU law.[607]

In the field of social security coordination, the term 'principles' is generally considered to refer to norms representing certain values, which are to be elaborated in law;[608] or to 'arteries' of the free movement of persons, meaning that they are of crucial importance for the coordination of social security.[609] However, in order to fully comprehend the meaning of the term, it may be of use to analyse which are those commonly referred to as principles of social security coordination. In this regard, Regulation 883/2004, in its Preamble, refers to the principles of equal treatment,[610] assimilation of facts,[611] aggregation of periods of insurance, employment or self-employment,[612]

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[605] It must be noted that, under Regulation (EEC) No 1408/71, the right to equal treatment under the Coordination Regulations was only granted to persons residing in a Member State. See Regulation (EEC) No 1408/71, Art. 3(1).

[606] Oxford University Press, 'Principle', *Lexico.com*, Oxford: Oxford University Press, 2019.

[607] Tridimas, T., 'Fundamental Rights, General Principles of EU Law, and the Charter', in Albors, A. et al (eds.) *Cambridge Yearbook of European Legal Studies*, vol. 16, Cambridge: Cambridge University Press, 2014, p. 379.

[608] Pennings, F., 'Principles of EU coordination of social security', in Pennings, F. and Vonk, G. (eds.), *Research Handbook on European Social Security Law*, Cheltenham, Northampton: Edward Elgar Publishing, 2015, pp. 338.

[609] Jorens, Y. and Van Overmeiren, F., 'General principles of social security coordination in Regulation 883/2004', *European Journal of Social Security*, vol. 11 issue 1-2, 2009, pp. 48-49.

[610] Regulation 883/2004, Preamble, para. 8 and 9.

[611] Ibid., para. 10.

[612] Ibid.

and single applicable legislation.[613] Moreover, the principle of good administration is mentioned in the Article of Regulation 883/2004 concerning cooperation between Member States.[614] Based on the case law of the CJEU, the doctrine also mentions the export of benefits principle and the principle of favourability (or *Petroni* principle).[615]

7.2.4.b. Equal treatment principle

While Article 18 TFEU establishes a general prohibition of discrimination based on nationality, it is Article 4 of Regulation 883/2004 that specifically forbids discrimination on nationality in the field of social security. In this regard, the latter provision establishes that " persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof".[616] The principle of equal treatment under the Coordination Regulations has been interpreted as not only prohibiting direct discrimination, but also indirect discrimination.[617]

The scope of the principle of equal treatment under the Coordination Regulations has been progressively extended, first (under Regulation 1408/71) to include family members[618] and, then (with Regulation 883/2004), by not requiring residence in a Member State in order to invoke it.[619]

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[613] Ibid., para. 18a.

[614] Regulation 883/2004, Art. 76.

[615] Fuchs, M. and Cornelissen, R., 'Introduction', in Fuchs, M. and Cornelissen, R. (eds.), *EU Social Security Law: A Commentary on EU Regulations 883/2004 and 987/2009*, Baden-Baden: Nomos, 2015, pp. 15-18; Pennings, F., 'Principles of EU coordination of social security', in Pennings, F. and Vonk, G. (eds.), *Research Handbook on European Social Security Law*, Cheltenham, Northampton: Edward Elgar Publishing, 2015, pp. 323-338; Jorens, Y. and Van Overmeiren, F., 'General principles of social security coordination in Regulation 883/2004', *European Journal of Social Security*, vol. 11 issue 1-2, 2009, p. 48; Pennings, F., 'Principles of EU coordination of social security', in Pennings, F. and Vonk, G. (eds.), *Research Handbook on European Social Security Law*, Cheltenham, Northampton: Edward Elgar Publishing, 2015, pp. 324.

[616] Regulation 883/2004, Art. 4.

[617] Case 41/84, *Pinna*, EU:C:1986:1, para. 23.

[618] Cornelissen, R., '50 Years of European Social Security Coordination', *European Journal of Social Security*, vol. 11 issue 1 and 2, 2009, p. 24.

[619] For more information concerning the arguments for this modification, see European Parliament, *Report on the proposal for a European Parliament and Council regulation on coordination of social security systems*, A5-0226/2003 FINAL, Brussels: European Parliament, 2003.

7.2.4.c. Assimilation of facts principle

This principle requires that facts and events facts that occur in one Member State must be taken into account under the legislation of other Member States as if they would have occurred there.[620] It must be noted that facts or events, however, are only assimilated once the legislation applicable has been determined[621] (and thus only for the purposes of determining whether or not a person has fulfilled the qualifying conditions under national legislation).[622] It may also not interfere with the principle of aggregation of periods of insurance, employment, self-employment or residence contained in Article 6 of Regulation 883/2004.[623]

While this principle was introduced for the first time in Regulation 883/2004, it results from case law of the CJEU, which considered that not doing so would be against the right to freedom of movement of workers.[624] The principle has been considered a sub-variety of the equal treatment principle.[625]

7.2.4.d. Aggregation of insurance periods principle

Stated in Article 48 TFEU, this principle was already present in the ILO Convention No. 48 of 1935.[626] While the principle could be found across Regulation 1408/71, it was only with Regulation 883/2004 that it was included in one single provision for the first time.

The aggregation principle establishes that the competent institution of a Member State must take into account periods of insurance, employment, self-employment or residence for the purposes of

[620] Regulation 883/2004, Art. 5(b).

[621] Regulation 883/2004, Preamble, para. 11.

[622] Jorens, Y. and Van Overmeiren, F., 'General principles of social security coordination in Regulation 883/2004', *European Journal of Social Security*, 2009, vol. 11 issue 1-2, p. 65.

[623] Regulation 883/2004, Preamble, para. 10.

[624] Case C-20/85, *Roviello*, EU:C:1988:283; Case C-349/87, *Paraschi*, EU:C:1991:372; Case C-28/00, *Kauer*, EU:C:2002:82; Case C-290/00, *Duchon*, EU:C:2002:234.

[625] Jorens, Y. and Van Overmeiren, F., 'General principles of social security coordination in Regulation 883/2004', *European Journal of Social Security*, vol. 11 issue 1-2, 2009, p. 78.

[626] Fuchs, M. and Cornelissen, R., 'Introduction', in Fuchs, M. and Cornelissen, R. (eds.), *EU Social Security Law: A Commentary on EU Regulations 883/2004 and 987/2009*, Baden-Baden: Nomos, 2015, p. 17.

determining entitlement to or coverage by social security schemes as if they would have been completed under the legislation of that Member State.[627]

The aggregation of periods of insurance, employment or self-employment for obtaining entitlement to unemployment benefits, however, is restricted by two requirements.[628] First, (and with the exception of frontier workers[629]) periods are only aggregated if a person has performed periods of insurance, employment or self-employment (depending on what is required by the unemployment scheme for raising entitlement) in the competent Member State. Secondly, if the competent Member State requires periods of insurance, then periods of employment performed under the legislation of another Member State would only be taken into account if they would be considered periods of insurance under the legislation of the competent Member State. The CJEU has stated that these restrictions to the principle of aggregation are compatible with EU law.[630]

7.2.4.e. Export of benefits principle

This principle is embedded in Article 48 TFEU, but developed further in Article 7 of Regulation 883/2004. It means that a cash benefit may not experience a reduction, amendment, suspension, withdrawal or confiscation as a result of the beneficiary or his family members residing in a Member State other than the competent Member State.[631]

As in the case of aggregation of periods, the application of this principle is restricted concerning unemployment benefits. In this regard, a person may only export his unemployment benefits for a limited amount of time (three months, with a possible extension up to six months), and only in case of seeking employment in another Member State, where the person needs to register with the employment services.[632] The CJEU has stated that this limitation is not precluded by EU law. [633]

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[627] Regulation 883/2004, Art. 6.

[628] Regulation 883/2004, Art. 61.

[629] Frontier workers are persons residing in one Member State while performing an employed or self-employed activity in another Member State. While they are generally subjected to the same rules than persons in other situations, there are some exceptions as it concerns to unemployment benefits, as established by Regulation 883/2004, Art. 65(5)(a).

[630] Case 62/91, *Gray*, EU:C:1992:177, para. 10-11.

[631] Regulation 883/2004, Art. 7.

[632] Regulation 883/2004, Art. 63.

[633] Case 62/91, *Gray*, EU:C:1992:177, para. 12.

Moreover, the principle of export of benefits is also not applicable to special non-contributory cash benefits.[634]

7.2.4.f. The neutral effect principle

This principle is but a direct consequence of the choice of coordination instead of harmonization in order to ensure free movement of workers (a choice which was explored further above). Because Member States are entitled to design their own social security systems (as long as they do not do so in a discriminatory way), there may remain significant differences between them. Thus, a person whose legislation applicable changes, may experience a rise in the amount of contributions he is obliged to pay, or he may no longer be entitled to benefits as he would be under the previous legislation. The individual may perceive these changes as a disadvantage of exercising his freedom of movement. Nevertheless, the CJEU has noted on multiple occasions that these differences in the rights or obligations between individuals working in different Member States are not prohibited by the Coordination Regulations.[635] In other words, "the Treaty offers no guarantee to a worker that extending his activities into more than one Member State or transferring them to another Member State will be neutral as regards social security",[636] but only that a worker will not be "at a disadvantage as compared with those who pursue all their activities in the Member State where [the legislation] applies or as compared with those who were already subject to it".[637]

7.2.4.g. The *Petroni* principle (or principle of favourability)

The so-called *Petroni* principle is not codified in EU law (neither in the TFEU nor in the Coordination Regulations), but developed by the CJEU. In that regard, the Court stated in the *Petroni* case that, in order to achieve the objective of ensuring free movement, a benefit under national law cannot be reduced only due to the application of the Coordination Regulations. Thus, for example, it was considered against free movement (and thus precluded by EU law) that a person

[634] Regulation 883/2004, Art. 70(4).

[635] See, inter alia, Case 41/84, *Pinna v Caisse d'allocations familiales de la Savoie*, EU:C:1986:1, para. 20; Case C-340/94, *De Jaeck*, EU:C:1997:43, para. 18; Case C-221/95, *Inasti v Hervein and Hervillier*, EU:C:1996:301, para. 16; Case C-393/99 and Case C-394/99, *Hervein and Others*, EU:C:2002:182, para. 50-53;

[636] Case C-394/99, *Hervein and Others*, EU:C:2002:182, para. 51.

[637] Ibid.

would receive a lower old-age benefit than he would be entitled to under national law only due to the application of the rules contained in the Coordination Regulations preventing overlapping of benefits.[638]

7.2.4.h. The administrative cooperation principle

The principle of administrative cooperation between the Member States' social security administrations is a basic condition for the fulfilment of the other principles abovementioned[639] (and, in general, the aim of the Coordination Regulations of ensuring freedom of movement of workers).

A general reference to such principle may be found in Article 4(3) of the Treaty of the European Union (TEU), which establishes that Member States must "facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives". The CJEU has stated that this provision contains a principle of cooperation in good faith, which requires the competent authorities in the Member States to use all the means at their disposal to achieve the aim of the provisions of the Treaties.[640]

Duties in relation to this principle are established in the Coordination Regulations, with provisions requiring communication and cooperation between Member States' competent institutions in the implementation of the Regulations.[641] These duties also include the enforcement of decisions of the judicial and administrative authorities of other Member States relating to the collection of contributions and recovery of benefits.[642]

[638] Case 24/75, *Petroni*, EU:C:1975:129.

[639] Jorens, Y. and Van Overmeiren, F., 'General principles of social security coordination in Regulation 883/2004', *European Journal of Social Security*, vol. 11 issue 1-2, p. 49.

[640] Case C-165/91, *Van Munster*, ECLI:EU:C:1994:359, para. 32-33.

[641] See Regulation 883/2004, Art. 76; Regulation 987/2009, Art. 2-5 and 20.

[642] Regulation 883/2004, Art. 84.

7.3. The rules for determining the legislation applicable

7.3.1. *Introduction*

One of the mechanisms through which the Coordination Regulations connect social security systems is by taking from the Member States the competence to determine the legislation applicable to those persons within its scope. Without the EU Coordination Regulations, every Member State would decide according to its own rules whether a person has a link strong enough with a country as to warrant that he is subjected to the legislation of that country (which generally entails the obligation to pay contributions to and the possibility to receive social security benefits from that country). Differences between Member States with regard to the rules for determining the legislation applicable may result, inter alia, in situations where a person who moves across different EU Member States would be subjected to the legislation of more than one Member State concerning the same time period (i.e. positive conflict of rules), or where he would not be subjected to the legislation of any Member State during a certain period (i.e. negative conflict of rules). The Coordination Regulations aim to avoid both outcomes by providing a complete and uniform system for the resolution of conflicts of rules when determining the legislation applicable.[643]

7.3.2. *The rules*

The fact that a person is subjected to the legislation of one specific Member State means that that person will have the same obligations to contribute to the social security system as nationals of that Member State, but also that he will be entitled to social security benefits in equal conditions with them.[644] Thus, the determination of the legislation applicable is of paramount importance when trying to establish the social security benefits and contributions of platform workers who have crossed the border between EU Member States.

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[643] See, inter alia, C-631/17, *Inspecteur van de Belastingdienst*, EU:C:2019:381, para. 33; Case C-451/17, *Walltopia*, EU:C:2018:861, para. 41; Case C-359/16, *Altun and Others*, EU:C:2018:63, para. 29; Case C-570/15, *X*, EU:C:2017:674, para. 14; Case C-569/15, *X*, EU:C:2017:673, para. 15..

[644] See Regulation 883/2004, Art. 4.

The general rule for determining the legislation applicable is that a person is subjected to the legislation of the Member State where he performs employed or self-employed activities (the state of employment principle).[645] This rule, however, is subjected to several exceptions.

First, a person performing work as a civil servant is subjected to the legislation of the Member State of the Administration which employs him,[646] and a person who has been called for military service in a Member State is subjected to the legislation of that Member State.[647]

Secondly, a person who is posted by his employer or who posts himself (in case of self-employment) to perform an activity in another Member State continues to be subject to the legislation of the 'sending' Member State during the time of posting. [648] In this regard, a person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there may be posted by that employer to another Member State to perform work on that employer's behalf, provided that the anticipated duration of such work does not exceed 24 months and that he is not sent to replace another posted person. [649] Moreover, a person who normally pursues an activity as a self-employed person in a Member State may post himself to pursue a similar activity in another Member State, provided (again) that the anticipated duration of such activity does not exceed 24 months.[650]

Thirdly, a person who normally performs activities in two or more Member States may be subjected to the legislation of the Member State of residence, the Member State where the employer's registered office or place of business is located, or the Member State where the centre of interest of his activities as a self-employed person is located. Which of those options applies, depends on whether the person performs these activities as an employed and/or a self-employed person, the percentage of his total activity performed in the Member State of residence, the location of his employer/s place/s of business, and the location of the centre of interest of his activities as a

[645] Regulation 883/2004, Art. 11(3)(a).
[646] Ibid., Art. 11(3)(b).
[647] Ibid., Art. 11(3)(d).
[648] Ibid., Art. 12.
[649] Ibid., Art. 12(1).
[650] Ibid., Art. 12(2).

self-employed person. Thus, a specific set of rules applies if the person performs employed activities in several Member States.[651] If such a person performs a substantial part of his activity in the Member State of residence, then he must be subjected to the legislation of that Member State. If, however, that is not the case, then the legislation applicable depends on whether the person works for one or more undertakings or employers, and where their registered office or place of business is located. If the person works for one undertaking or employer, or for several undertakings or employers which registered offices or places of business are located in the same Member State, then the legislation applicable will be that of the Member State where the registered office/s or place/s of business is/are located. Nevertheless, if a person works for several undertakings or employers which registered offices or places of business are based on two different Member States, then the legislation applicable is the one of the Member State that is not the Member State of residence. Finally, if a person performs work normally for undertakings or employers with registered offices or places of business located in more than two Member States, then the legislation applicable is the one of the Member State of residence.

A different set of rules applies if a person only performs self-employed activities in several Member States[652]. In that case, the legislation applicable is that of the State of residence if the person performs a substantial part of his self-employed activities in that Member State. Otherwise, the legislation applicable is that of the Member State where the centre of interests of his activities is situated. If a person normally pursues an activity as an employed person and an activity as a self-employed person in different Member States, then he must be subject to the legislation of the Member State in which he pursues an activity as an employed person or, if he does so in several Member States, to the legislation determined based on the set of rules applicable to the situation of persons only pursuing employed activities in several Member States.

The abovementioned rules, both the general rule and its exceptions, start from the idea that a person performs some sort of activity (whether it is as an employee, as a self-employed, as a civil servant or even in the military service). A different set of rules apply when that is not anymore the case, varying on the situation. If a person is no longer performing an employed or self-employed activity

[651] Ibid., Art. 13(1).
[652] Ibid., Art. 13(2).

but he is receiving short-term cash benefits as a result of such activity, then he will be subjected to the legislation of the Member State where he pursued that activity.[653] This is with the exception of the case of a person who resided in a different Member State than the one where he performed work and then became wholly unemployed, while he stayed in (or returned to) the Member State of permanent residency. If such a person would then wish to claim unemployment benefit, he would need to do so from the Member State of permanent residence.[654] In that case, he would then be subjected to the legislation of the Member State of residence.[655] Finally, if a person is not performing any of the activities mentioned above (i.e. as an employee, as a self-employed, as a civil servant or in the military service), nor receiving a short-term cash benefit, then he will be subjected to the legislation of the Member State of residence.[656]

There is however one important exception to these rules, and that is the one contained in Article 16 of Regulation 883/2004, which establishes that two or more Member States or their competent authorities may agree on exceptions to the rules on the determination applicable as long as it is in the interest of certain persons or categories of persons.[657]

In conclusion, the Coordination Regulations dispose how to determine the legislation applicable to a person, with different rules depending, in large part,[658] on whether a person performs an employed and/or self-employed activity, whether he does so in one or several Member States and, if he does so in several Member States, whether he does it for a finite period (and thus generally considered as posting) or on a regular (simultaneous or alternating) basis (and thus generally considered as normally pursuing activities in several Member States).

[653] Ibid., Art. 11(2).

[654] Ibid., Art. 65. Please note, however, that in the case of a non-frontier worker, the person may claim unemployment benefits in the Member State of employment and then export them to the Member State of residence, see Regulation 883/2004, Art. 65(5)(b).

[655] Ibid., Art. 11(3)(c).

[656] Ibid., Art. 11(3)(e).

[657] Ibid., Art. 16.

[658] This summary does not take into account the situation of civil servants and persons in the military service, explained briefly above.

7.3.3. *The principles for the determination of the legislation applicable*

7.3.3.a. Introduction

Due to the importance and unique character of the rules for the determination of the legislation applicable (as a tool for harmonisation within an instrument that seeks coordination), it may not come as a surprise that a set of principles have progressively appeared concerning these rules specifically. The use of the term 'principles' in this context is not devoid of controversy, as the Coordination Regulations (nor, in general, the CJEU) refers to them as such. Nevertheless, the reliance of the CJEU on them to inform the interpretation of the rules for the determination applicable, as well as their crucial importance within said rules, arguably fit within the definition of the term 'principles' as used previously in this thesis concerning the general principles of the Coordination Regulations. The name, however, should not distract from their value to understanding the rules for the determination of the applicable legislation.

7.3.3.b. The State of employment principle (or *lex loci laboris* principle)

As has been mentioned above, the general rule is that a person is subjected to the legislation of the Member State of employment, or *lex loci laboris*. In other words, the location where a person performs an employed or self-employed activity is the main criterion for designating the applicable legislation, which is only deviated from in very specific circumstances (i.e. posting and the performance of activities in multiple Member States).[659]

In order to apply the *lex loci laboris* principle, it is key to determine when a person is considered as performing an employed or self-employed activity. As the Article establishing such a principle (Article 11 of Regulation 883/2004) or the Title in which it is embedded (Title II) do not establish anything in particular in this regard, it is necessary to resort to Article 1 of Regulation 883/2004, where the meaning of an employed and a self-employed activity is defined, and which heavily relies on what is considered as such under the social security legislation of the Member State where the activity is performed. The specific challenges for the determination of the legislation applicable resulting from this are further explored below. However, it is important to note here that the way in

[659] Case C-137/11, *Partena*, EU:C:2012:593, para. 49; Regulation 1408/71, Preamble, para. 10-11.

which the terms 'employed activity' and 'self-employed activity' are defined means that Member States have the power, by restricting what these terms encompass under their national social security legislation, to limit (or expand) the impact of the application of the *lex loci laboris* principle.[660]

Finally, it may be argued that the *lex loci laboris* principle relies on the idea that belonging to a system needs to be related to a person's integration in a particular system, choosing the performance of work as an indicator of a person's integration. Performance of work arguably loses its use as an indicator of integration when the period of performance of work granting full protection is very brief.[661]

7.3.3.c. The binding effect principle

Many Member States in the EU require that a person resides in their territory in order to be insured by one or more of their social security schemes. The application of these requirements may result in a person being excluded from the legislation of a Member State which was determined as competent under the rules of the Coordination Regulations, just because he resides in another Member State. Regulation 1408/71 expressly prohibited this, by stating that "a person employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State".[662] This is in consonance with the fact that the Coordination Regulations harmonise the rules on determining the legislation applicable, and thus overrule national conflict rules. In other words, while it is up to each Member State to determine "the conditions creating the right or the obligation to become affiliated to a social security scheme or to a particular branch under such a scheme, […] this does not mean that the Member States are entitled to determine the extent to which their own legislation or that of another member State is applicable".[663] This has been deemed as constituting

[660] Rennuy, N., *EU Social Security Law: Territoriality, Solidarity and Equality*, Ghent: Ghent University, 2017, p. 435.
[661] Rennuy, N., 'The trilemma of EU social benefits law: Seeing the wood and the trees', *Common Market Law Review*, vol. 56 issue 6, 2019, pp. 1155-1156.
[662] Regulation 1408/71, Art. 13(2)(a).
[663] Case 276/81, *Kuijpers*, EU:C:1982:317, para. 14.

the ‘binding effect’ of the rules for determining the legislation applicable contained under the Coordination Regulations.[664]

Regulation 883/2004, unlike Regulation 1408/71, does not include a similar provision expressly stating that the legislation of the Member State of employment is applicable even if the person resides in another Member State. However, it may be assumed that the general rule on the assimilation of facts included in Article 5(b) of Regulation 883/2004 produces a similar result, as Member States must consider periods of residence in another Member State as if they would have occurred in their own territory.[665]

7.3.3.d. The practical effect principle

On some occasions, the Court has stated that an interpretation other than the one given by the Court would result in the rules determining the legislation applicable losing all practical effect in ensuring freedom of movement. Thus, the rules would lose all practical effect if, for example, a Member State would be allowed to exclude from insurance in their social security schemes those individuals subjected to its legislation under the rules of the Coordination Regulations only because they reside in another Member State.[666] It has also been considered that allowing a Member State to collect social security contributions through taxes from persons subjected to the legislation of another Member State would result in denying all practical effect to the rules determining the legislation applicable (and, specifically, imply a breach of the prohibition of double contribution).[667]

Some authors have referred to this principle as the ‘overriding effect’ of the Coordination Regulations.[668] It might be also claimed that the practical or overriding effect principle encompasses

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[664] Pennings, F., ‘European Union’, in van Eeckhoutte, W. (ed.), Van Eeckhoutte, W. (ed.), *IEL Social Security Law*, Alphen aan den Rijn: Kluwer, 2019., pp. 83-84; Schoukens, P. and Pieters, D., ‘The rules within Regulation 883/2004 for determining the applicable legislation’, *European Journal of Social Security*, vol.11 issue 1 and 2, 2009, p. 82.

[665] Pennings, F., ‘European Union’, in van Eeckhoutte, W. (ed.), *The International Encyclopaedia for Social Security Law*, Alphen aan den Rijn: Kluwer, 2019, p. 83-84.

[666] Case C-2/89, *Kits van Heijningen*, EU:C:1990:183, para. 20-21; Case C-347/10, *Salemink*, EU:C:2012:17, para. 39-40.

[667] Case C-34/98, *Commission v France*, EU:C:2000:84, para. 41.

[668] Yves, J. and Van Overmeiren, F., ‘General Principles of Coordination in Regulation 883/2004’, *European Journal of Social Security*, 2009, vol. 11 issue 1 and 2, 2009, p. 72.

the binding effect principle abovementioned. It might also be argued that the principle of practical effect would be at least partially based in the value of integration, as a short performance of work would hardly be considered as representing sufficient integration in a system to grant (full) social protection.[669]

7.3.3.e. The single applicable legislation principle (or exclusive effect principle)

Article 11(1) of Regulation 883/2004 expressly states the principle that those persons to which Regulation 883/2004 applies are subjected to the legislation of only one Member State concerning all branches of social security covered by the EU Coordination Regulations. Therefore, this provision prevents that persons subjected to Regulation 883/2004 are subject to more than one legislation applicable (i.e. positive conflict of rules), as well as ensures that they are subject to the legislation of at least one Member State (i.e. negative conflict of rules).[670]

The prohibition of being subjected to the legislation of more than one Member State concerns both the payment of social security contributions and entitlement to benefits. In that regard, the CJEU has interpreted in no uncertain terms that EU law prevents that a person (or his employer) is obliged to pay social security contributions in more than one Member State concerning the same period (and the social security branches covered by the Coordination Regulations).[671] This does not preclude, nevertheless, that a Member State raises social charges from companies established in their territory and who market the work of self-employed persons insured in another Member State, insofar as the cost of these social charges are not passed to self-employed persons.[672]

The provision also prevents that the application of the Coordination Regulations produces entitlement to several benefits concerning the same period and social security branch of compulsory insurance, something which is confirmed in Article 10 of Regulation 883/2004. The question is, however, whether it also precludes that a person raises entitlement to benefits from a Member State other than the competent Member State, and even whether non-competent Member States may be

[669] See, for example, Fuchs, M., et al., *Assessment of the impact of amendments to the EU social security coordination rules on aggregation of periods or salaries for unemployment benefits*, Brussels: European Commission, 2015, p. 7.
[670] Case C-2/89, *Kits van Heijningen*, EU:C:1990:183, para. 12; Case C-196/90, *De Paep*, EU:C:1991:381, para. 18.
[671] See, inter alia, Case C-169/98, *Commission v. France*, EU:C:2000:85.
[672] Case C-68/99, *Commission v. Germany*, EU:C:2001:137.

obliged to grant entitlement to benefits. This question, which has been addressed by the CJEU in several cases, is analysed below.

Evolution of the single-state-principle

In the beginning, the rules on the determination of the applicable legislation under Regulation 3/58 did not include any provision prohibiting the simultaneous application of several legislations. Without such an explicit prohibition, the CJEU concluded that the application of the legislation of the non-competent Member State was not precluded, except when it resulted in the levying of social security contributions by that State while not resulting in any supplementary social security protection.[673] The Court confirmed this interpretation in *Van der Vecht*[674] and in *De Jaeck.*[675]

Regulation 24/64, which amended Regulation 3 by introducing exceptions to the principle of *lex loci labori*, mentioned as one of the motivations for this change the aim of ensuring that persons performing activities in the territory of several Member States were subjected to the legislation of only one Member State.[676] However, it was only with Regulation 1408/71 that a provision was introduced stating *clearly* that "a worker to whom this Regulation applies shall be subject to the legislation of a single Member State only".[677] After this, the CJEU changed its approach to the issue with *Ten Holder*.[678] In this case, the Court stated that not only other Member States besides the competent Member State are forbidden from raising social security contributions, but also from providing benefits.[679]

More than twenty years later, however, the CJEU changed its approach again in *Bosmann*. In this case, the Court stated that, while Community law did not require the institutions of a Member State to grant family benefits to a person subjected to the legislation of another Member State, it did not

[673] Case C-92/63, *Nonnenmacher*, EU:C:1964:40, pp. 288-289.
[674] Case C-19/67, *van der Vecht*, EU:C:1967:49, p. 354.
[675] Case C-340/94, *De Jaeck*, EU:C:1997:43.
[676] Règlement No 24/64/CEE du Conseil du 10 mars 1964 portant modification de l'article 13 du Règlement No 3 et de l'article 11 du Règlement No 4, Préambule.
[677] Regulation 1408/71, Art. 13.
[678] Case C-302/84, *Ten Holder*, EU:C:1986:242.
[679] Ibid., para. 22.

preclude it either.[680] The CJEU justified this statement by referring to Article 42 EC (current Article 48 TFEU) and, particularly, to an interpretation[681] entailing that "migrant workers must not lose their right to social security benefits or have the amount of those benefits reduced because they have exercised the right to freedom of movement conferred on them by the EC Treaty".[682] It also invokes the first recital in the preamble to Regulation 1408/71, which states that its provisions "fall within the framework of freedom of movement for workers who are nationals of Member States and *should contribute towards the improvement of their standard of living and conditions of employment*" (italics added).[683] The Court, however, did not seem to sufficiently explain its deviation from its previous case law.[684]

This line of reasoning was confirmed and expanded in *Hudzinsky and Wawrzyniak*, where the CJEU went further by stating that a non-competent Member State was not precluded from providing benefits, even when a person was not negatively affected (i.e. loss of benefits) by exercising its right to free movement.[685] Furthermore, the CJEU noted that other links besides residence, such as the fact of being subjected to unlimited tax liability, may trigger the application of the *Bosmann* doctrine.[686]

In *Franzen*, the Court confirmed again that a migrant worker subjected to the legislation of the State of employment was not precluded from receiving, by virtue of the national legislation of the Member State of residence, an old-age pension and family benefits from the latter State.[687]

It must be noted that, up until that point, the Court's interpretation was limited to whether it was precluded that a person received a benefit from a non-competent Member State. It had not provided an answer yet, however, on whether EU law may preclude a rule that explicitly rejected the

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[680] Case C-352/06, *Bosmann*, EU:C:2008:290, para. 27-28.

[681] See, inter alia, Case C-205/05, *Nemec*, EU:C:2006:705, para. 37-38; Case C-406/93, *Reichling*, EU:C:1994:320, para. 24; Case C-31/96, *Naranjo Arjona*, ECLI:EU:C:1997:475, para. 20.

[682] Case C-352/06, *Bosmann*, EU:C:2008:290, para. 29.

[683] Ibid. para. 30.

[684] Pennings, F., 'European Union', in van Eeckhoutte, W. (ed.), Van Eeckhoutte, W. (ed.), *IEL Social Security Law*, Alphen aan den Rijn: Kluwer, 2019, p. 79.

[685] Joined Cases C-611/10 and C-612/10, *Hudziński and Wawrzyniak*, EU:C:2012:339.

[686] Ibid., para. 66.

[687] Case C-382/13, *Franzen*, EU:C:2015:261.

provision of social security benefits to residents subjected to the legislation of another Member State (even when the person is not insured concerning pension or family benefits in the competent Member State). This was, in turn, the question that was asked to the Court in *Van den Berg and Others*.[688]

The Van den Berg decision

In this case, the CJEU reminded that EU law and, particularly, Article 45 TFEU, may not be interpreted as ensuring to a migrant worker the same social security coverage to which he would be entitled if he would be working in the Member State of residence.[689] It also noted that Article 48 TFEU provides for a system of coordination of the Member States' social security systems, not of harmonisation.[690] In other words, the Court stated that EU law is neutral concerning national social security, and thus it does not protect a migrant worker from potential negative disadvantages on his social security protection as a result of exercising his right to free movement.[691]

The Court underpinned its decision by explaining that an interpretation of Article 48 TFEU as requiring from a non-competent Member State to grant social security coverage to a person working (and subjected) to the legislation of another Member State would result in a situation in which only the legislation of the State providing the more favourable social security protection would be applicable,[692] a situation which may be financially unsustainable for non-competent Member States.[693]

Nevertheless, the Court then proceeds with mentioning the possibility of Member States to conclude an agreement under Article 17 of Regulation 1408/71 (equivalent to Article 16 of Regulation 883/2004) establishing exceptions to the principle of the single applicable legislation for certain categories of persons, even noting how especially appropriate such a practice would be in a situation like the one at hand, where the claimants would have been insured concerning family benefits and

[688] Joined Cases Case C-91/18 and Case C-96/18, *Van den Berg and Others*, EU:C:2019:767.
[689] Ibid., para. 58.
[690] Ibid., para. 60.
[691] Ibid., para 56, 63.
[692] Ibid., para. 61.
[693] Ibid., para. 62

old-age pensions if they would have remained unemployed in the Member State of residence.[694] This was also suggested by Advocate General Sharpstone, who nonetheless did go further by stating that " the complete rejection of the parties to the main proceedings from the social security system in the Netherlands goes beyond what is necessary to ensure the financial balance of the social security system".[695]

Finally, the CJEU confirms that a Member State where a person subjected to another State's legislation resides may grant an old-age person to that person, although entitlement to such a pension may not be linked to the payment of social security contributions, as that would mean the application of two legislations simultaneously concerning the payment of contributions.

Overall, the *Van den Berg* decision confirms that a person may be insured concerning old-age pension in the country of residence while being subjected to the legislation of another State, while at the same time appeasing the fears of some Member States of being obliged to insure those residents not contributing to its system. If anything, it might be argued that the decision avoids considering whether a strict exclusion of all residents subjected to another State's legislation from all social insurance, without taking into account the individual circumstances, might be proportionate. This need for an analysis of the proportionality of the measure in situations where an individual is excluded from any protection as a result of applying the rules on conflicts of rules has been highlighted by both Advocate General Sharpstone[696] and Advocate General Spuznar.[697]

7.3.3.f. A 'complete system' principle?

As noted before, the CJEU has stated on numerous occasions that the Coordination Regulations seek to provide a complete and uniform system for the resolution of conflicts of rules when determining the legislation applicable.[698] The Court, however, has not provided any in-depth

[694] Ibid., para. 65.

[695] Joined Cases Case C-91/18 and Case C-96/18, *Van den Berg and Others*, EU:C:2019:252, AG Sharpston's Opinion, para. 48.

[696] Ibid., para. 57.

[697] Case C-569/15, *X*, EU:C:2017:181, AG Spuznar's Opinion, para. 46-47; Case C-382/13, *Franzen*, EU:C:2014:2190, AG Spuznar's Opinion, para. 88-89.

[698] See, inter alia, C-631/17, *Inspecteur van de Belastingdienst*, EU:C:2019:381, para. 33; Case C-451/17, *Walltopia*, EU:C:2018:861, para. 41; Case C-359/16, *Altun and Others*, EU:C:2018:63, para. 29; Case C-570/15, X,

explanation on the specific meaning of the term 'complete'. Nevertheless, the term is generally found to mean "having all appropriate or necessary parts" or "entire or full".[699] Thus, it might be wondered whether, when the CJEU mentions a 'complete system for the resolution of conflicts of rules', it is referring to a system that has all appropriate or necessary provisions to solve conflicts of rules concerning all situations within their scope. This would be in consonance with the fact that the term is generally used by the Court to support the argument that the rules for the determination of the legislation applicable under the Coordination Regulations do not allow for the existence of negative conflict of rules (i.e. situations in which a person is not subjected to any legislation applicable).

While the Court has not directly referred to the notion that the Coordination Regulations' system for the resolution of conflict of rules is a complete system as a principle, it might be argued that this idea in practice functions as a principle, as it is used to inform the interpretation of the rules for the determination of the legislation applicable, contained in Title II of Regulation 883/2004. The complete system principle may also be found in a specific provision of the Coordination Regulations, specifically Article 11(3)(e) of Regulation 883/2004, which states that a person in a situation that is not specifically regulated under Article 11 would be subjected to the legislation of the Member State of residence.[700]

7.3.3.g. A 'uniform system' principle?

The same reasoning as stated just above might be also used to suggest the existence of a uniform system principle. The CJEU does (again) not define such a 'uniform system for the resolution of conflicts of rules'. Resorting again to a grammatical interpretation of the term, it may be deemed to

EU:C:2017:674, para. 14; Case C-569/15, *X*, EU:C:2017:673, para. 15. While in most cases the term 'complete and uniform system' is preferred, in a handful of cases the Court only refer to a 'complete system', see C-543/13, *Fischer-Lintjens*, EU:C:2015:359, para. 37; Case C-103/13, *Somova*, EU:C:2014:2334, para. 54; Case C-548/11, *Mulders*, EU:C:2013:249, para. 40; Case C-345/09, *van Delft and Others*, EU:C:2010:610, para. 51; Case C-372/02, *Adanez-Vega*, EU:C:2004:705, para. 18; Case C-2/89, *Kits van Heijningen*, EU:C:1990:183, para. 12; Case C-60/85, *Luijten*, EU:C:1986:307, para. 14; Case C-302/84, *Ten Holder*, EU:C:1986:242, para. 21.

[699] Lexico, *complete*, Oxford: Oxford University Press, 2019. A similar definition may be found in Cambridge Dictionary, Cambridge: Cambridge University Press, 2019.

[700] Regulation 883/2004, Art. 11(3)(e); C-631/17, *Inspecteur van de Belastingdienst*, EU:C:2019:381, para. 31.

mean "remaining the same in all cases and at all times; unchanging in form or character".[701] Thus, it is proposed here that a 'uniform system' could be interpreted as a system which application remains consistent (as in 'the same') in all cases. Following that definition, a uniform system principle refers to the idea that the application of the rules for determining the legislation applicable contained in Title II of Regulation 883/2004 needs to be the same concerning situations that are similar.

Such an interpretation might be supported by the fact that it has parallels with the EU principle of transparency. This principle has been found to require that legislation is "clear, obvious and understandable, without room for ambiguities"[702], and it is often interpreted as also requiring consistency.[703] The principle of transparency and legal certainty has been in fact used by the CJEU in cases requiring a clear delimitation of the entitlement to social security benefits under Member States' social security legislation,[704] as well as when assessing the limits on access to social assistance for non-active persons.[705]

Based on this, it might be wondered whether a principle requiring the uniform application of the rules for the determination of the legislation applicable, as to allow individuals to clearly ascertain the legislation applicable to them, might exist.

7.3.3.h. The 'avoidance of impractical effects' principle?

In one of its first decisions on posting, the seminal case *Manpower*[706] from 1970, the CJEU stated that the rule on posting contained in Regulation 3/58 aimed to avoid obstacles to freedom of movement of workers "whilst avoiding administrative complications for workers, undertakings and social security organizations",[707] and as "the worker would suffer more often than not because

[701] Lexico, *uniform*, Oxford: Oxford University Press, 2019. A similar definition may be found in Cambridge Dictionary, Cambridge: Cambridge University Press, 2019.

[702] Buijze, A., *The principle of transparency in EU law*, Utrecht: Utrecht University, 2013, p. 267.

[703] Ibid., pp. 163, 164, 167.

[704] Case C-4/13, *Fassbender-Firman*, EU:C:2014:2344, para. 44.

[705] Case C-67/14, *Alimanovic*, EU:C:2015:597, para. 59-61; Case C-299/14, *García-Nieto*, EU:C:2016:114, para. 49; Case C-158/07, *Förster*, EU:C:2008:630, para. 57.

[706] Case C-35/70, *Manpower*, EU:C:1970:120.

[707] Ibid, para. 10.

national legislative systems generally exclude short periods from certain social benefits".[708] The decisions on posting *FTS* and *Plum* (taken 30 years later) also stated as a justification for posting the avoidance of administrative complications.[709] It is however interesting to note that these later decisions also mention as a justification (and, in the opinion of some,[710] give more importance to) the promotion of freedom to provide services, and no longer allude to the aim of avoiding the fragmentation of insurance periods that was mentioned in *Manpower*.

In any case, from these cases it is apparent that it is (at least one of the aims) of the provisions on posting to avoid administrative complications that may derive from the change of the legislation applicable as a result of the performance of work of short duration in another Member State.

Furthermore, in the case *Van der Vecht* (concerning the potential performance of work in several Member States) the CJEU stated that, "in the interests of both workers and employers as much as of insurance funds, the aim of the regulation is to avoid any plurality or purposeless confusion of contributions and liabilities which would result from the simultaneous or *alternate* application of several legislative systems"[711] (emphasis added). The CJEU then stated that this interpretation of the *lex loci laboris* principle was confirmed by the exceptions on this principle contained in Regulation 3/58 (concerning, inter alia, posting of workers),[712] in an antecedent to the reasoning presented in the cases *Manpower, FTS* and *Plum* which was analysed above. However, the reasoning in *Van der Vecht* referred to a more general issue than administrative complications, meaning the "purposeless confusion of contributions and liabilities". And, more importantly, the CJEU in *Van der Vecht* referred to the avoidance of this issue as a general aim of the Coordination Regulations, and not only of the posting rules.

In a similar way, Advocate General Slynn, in its Opinion in *Brusse* (a case on the application of the provision allowing Member States to make agreements concerning the legislation application), stated that "complicated accumulations and divisions of contributions and benefits are to be avoided

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[708] Ibid., para. 12.

[709] Case C-202/97, *FTS*, EU:C:2000:75, para. 28; Case C-404/98, *Plum*, EU:C:2000:607, para. 19.

[710] Houwerzijl, M.S., et al., *A hunters' game: How policy can change to spot and sink letterbox-type practices*, Brussels: ETUC, 2016, p. 55.

[711] Case 19-67, *van der Vecht*, EU:C:1967:49, p. 353.

[712] See Regulation 3/58, Art. 12.

in favour of a simple practical scheme".[713] An almost identical statement was made by Advocate General Bot in the much more recent *Bogdan* case (on the legislation applicable to a person who claimed to be normally performing employed activities in several Member States).[714]

The CJEU in *Van der Vecht*, the Advocate General Slynn in *Brusse* and the Advocate General Bot in *Bogdan* referred to the aim of avoiding 'confusion' and 'complications' in connection with the principle that the social security system of only one country should apply at the same time. It might be argued, in fact, that the single applicable legislation principle and the impractical effect principle are linked, as both seek the same goal: to avoid barriers to freedom of movement of workers through the reduction of 'complications'.[715]

In conclusion, it might be wondered, based on the abovementioned case law, whether an (implicit) impractical effect principle (as in avoiding administrative complications resulting from frequent changes in the legislation applicable that may hinder freedom of movement) has informed the interpretation by the Court of the rules for determining the legislation applicable.

7.4. Potential issues concerning the application of the rules for the determination of the legislation applicable to platform workers

7.4.1. *Introduction*

In the prior sections, the Coordination Regulations and, particularly, the rules for the determination of the legislation applicable, have been explored in depth, not only regarding their content, but also regarding their underpinning principles. Through that analysis, it has been shown that applying the rules for the determination of the legislation applicable hinge in great part on a set of factual

[713] Case 101/83, *Brusse*, AG Opinion, EU:C:1984:113, p. 2243.

[714] Case C-189/14, *Bogdan*, EU:C:2015:345, para. 60. This case, however, was never decided up, see further Peers, S., 'The Fake Client: The case that bamboozled the CJEU', in *EU Law Analysis*, 22 December 2015, retrieved on 15 December 2020 at www.eulawanalysis.blogspot.com/2015/12/the-fake-client-case-that-bamboozled.html

[715] See further above on the single applicable legislation principle and, inter alia, Case 276/81, *Kuijpers*, EU:C:1982:317, para. 10.

elements, such as whether a person performs an employed or self-employed activity, where he does so, or where his employer's place of business or registered office is located.

In the following sections, the rules for the determination of the legislation applicable will be applied to the specific situation of platform work, with a focus on whether the use of the factual criteria on which the rules depend may be deemed compatible with the principles elaborated upon above (including the three new principles proposed by myself). As it will be argued, the challenges presented in the current and the following sections (i.e. sections 7.5 and 7.6) give reason to contend that one or more social security principles (either general principles or those specifically related to the determination of the legislation applicable) are not respected in a sufficient manner.

Thus, in this section, the challenges resulting from the use of criteria on which all rules for the determination of the legislation applicable depend will be analysed. Sections 7.5 and 7.6, in turn, deal with the specific challenges to be faced when trying to apply the rules concerning posted workers and persons pursuing activities in multiple Member States, respectively, with regard to platform workers.

In order to address these challenges, the thesis will go in greater detail than up to this point on the specific phrasing of the rules on the determination of the legislation applicable and the interpretation of these rules by the CJEU and the Administrative Commission. When analysing the interpretation of the latter, one key instrument that will be referred often through the chapter is the *Practical guide on the applicable legislation in the European Union (EU), the European Economic Area (EEA) and in Switzerland*. In this guide, the Administrative Commission provides clarification on the rules for the determination of the legislation applicable. Sometimes this clarification is based on the case law of the CJEU, but others this clarification seem to come directly from the Administrative Commission. Because of that, it is important to provide some light on the legal value of the Practical Guide before exploring the challenges for the application of the rules for the determination of the legislation applicable. In this regard, it is important to be aware that the internal rules of the Administrative Commission do not refer to any form of instrument such as the *Practical Guide*, but

only to Decisions.[716] The *Practical Guide* is, by its own statement, intended to assist all actors involved in determining the legislation applicable.[717] It may thus be assumed that the *Practical Guide* was not intended to have the same status as a Decision. Regarding these Decisions of the Administrative Commission, the CJEU has stated that they only have the status of an Opinion when the competent courts or tribunals asses the validity or content of the Coordination Regulation.[718] In any case, the CJEU has stated very clearly that, "even though [the Practical Guide and Explanatory notes] are useful tools for interpreting Regulation No 883/2004, they are not legally enforceable and cannot, therefore, bind the Court in the interpretation of that regulation".[719] However, this does not mean that the content of the Practical Guide should be completely ignored, as the CJEU has resorted to it in prior occasions to obtain insight on the purpose behind the Coordination Regulations' provisions.[720]

7.4.2. *The qualification of an activity under the Coordination Regulations*

7.4.2.a. Introduction

As analysed above, the personal scope of the Coordination Regulations has broadened to a point where it is no longer dependent on a person's professional status. Nevertheless, the professional status is still relevant for the Coordination Regulations, as the substance of the provisions coordinating social security systems and harmonising the rules on determining the legislation applicable often vary depending on such status.

In this regard, the Coordination Regulations often refer to the terms 'civil servant', 'activity as an employed person' and 'activity as a self-employed person'. As it was shown in the chapters

[716] Administrative Commission for the Coordination of Social Security Systems, Rules of the Administrative Commission for the Coordination of Social Security Systems attached to the European Commission of 16 June 2010, OJEU 6.8.2010.

[717] Administrative Commission for the Coordination of Social Security Systems, *Practical guide on the applicable legislation in the European Union (EU), the European Economic Area (EEA) and in Switzerland*, Brussels: European Commission, 2013, p. 1.

[718] Case 19/67, *van der Vecht*, EU:C:1967:49, p. 355, as noted in Case C-322/17, *Bogatu* [2019] EU:C:2018:818, AG Mengozzi Opinion, footnote 12.

[719] Case C-631/17, *Inspecteur van de Belastingdienst*, EU:C:2019:381, para. 41.

[720] Case C-33/18, *V*, EU:C:2019:470, para. 46.

analysing the situation of platform workers at national level (chapters 2 to 6), in order to assess the situation of platform workers, the meaning of the two latter terms (i.e. activity as an employed and as a self-employed person) is of crucial importance. These two notions are defined under Article 1(a) and 1(b) of Regulation 883/2004 as "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". Therefore, what is considered as an employed or self-employed activity for the purposes of the Coordination Regulations depends on the legislation of the State where such activity is performed. In other words, when a person performs employed or self-employed activities in several Member States, the legal qualification of each activity is determined based on the social security legislation of the Member State where the activity takes or took place[721] (unless the person does so as a posted self-employed person, as is explored further below). Thus, for example, a person performing platform work through the platform *Deliveroo* in Spain and in the United Kingdom might be considered for the purposes of the Coordination Regulations respectively as an employee under Spanish social security legislation,[722] and as a self-employed under British national social security legislation,[723] even though the person may be performing these activities in an identical way in both countries, and as a matter of fact doing so for the same company (or companies that belong to the same parent company).

Moreover, platform work is not always easy to classify in either employment or self-employment under national social security legislation. Hence, there are situations, where it may not be considered as a professional activity at all, or where it would be classified as an intermediate professional status in between employment and self-employment.

Furthermore, due to the potentially unclear professional status of platform workers, it is still possible that issues concerning that status pop up in cross-border situations where it is necessary to determine the legislation applicable. This might be the case when the professional status of a platform worker is different under the legislation applicable than under the legislation of the country where the

[721] Case C-121/92, *Zinnecker*, EU:C:1993:840; Case C-340/94, *De Jaeck*, EU:C:1997:43, para. 19.

[722] See chapter 2, section 2.3.

[723] See chapter 3, section 3.3.

activity was performed. But it can also happen when the platform workers' status is changed by a national judge's ruling.

This research now proceeds to analyse whether (and how) the abovementioned (hypothetical) situations may challenge the application of the Coordination Regulations.

7.4.2.b. Non-professional activities under the Coordination Regulations

It is not only necessary to differentiate between whether an activity is an employed or self-employed activity, but also whether an activity is either of those (or, in other words, whether an activity is a professional activity). This is certainly true for platform work, since it is very easy to perform such 'tasks' incidentally on a non-professional basis, due to features such as its on-demand character and the fact that it requires very little to none entrepreneurial infrastructure from the part of the platform worker.[724]

The CJEU has addressed on certain occasions the question of whether employed or self-employed activities of very short duration should not be taken into account for the application of the Coordination Regulations. In such cases, the CJEU has stated that, in order to be considered as an employed or self-employed activity for the purposes of the Coordination Regulations, an activity need only to be considered as such for the purposes of the social security legislation of the Member State where it is performed.[725]

In the case of the performance of activities as an employee, it may be argued that the differentiation between professional and non-professional activities is generally clear in the countries selected in this research. In this regard, in Spain,[726] France[727] and the Netherlands[728] all persons who perform an activity as an employee, no matter their duration or wage, are considered as such under national

[724] See chapter 1 for more information on the main features of platform work.
[725] Case C-2/89, *Kits van Heijningen*, EU:C:1990:183, para. 10; Case C-382/13, *Franzen*, EU:C:2015:261, para. 46.
[726] See section 2.1.4.
[727] See section 4.1.4.
[728] See section 6.1.4.

social security legislation. That is also the case in Germany[729] and the United Kingdom,[730] although in these countries the social security system allows for the performance of work as an employee under a certain income threshold without being within the scope of most social security schemes related to work (something which may create undesired consequences in the case of cross-border workers, as it will be analysed further below).

In the case of the performance of activities outside an employment relationship, however, some countries allow doing so in what may be referred to as a non-professional manner. That is the case in Spain, [731] where persons who perform a self-employed activity on a non-regular basis (which may mean, inter alia, to receive income from the self-employed activity above a certain threshold) are not considered as self-employed persons under Spanish social security legislation. This is also the case in the United Kingdom.[732] In both cases, however, the intention of the person who performs such an activity plays a significant role in the qualification of the activity. Thus, a person may opt to consider himself as a self-employed person, and thus be obliged by the same obligations as self-employed persons who perform a self-employed activity on a regular basis. In such situations, it may be claimed that the person has a choice between performing a non-professional or self-employed activity, a choice that would have consequences for the determination of the legislation applicable. However, that is not *per se* the case. For example, it seems to be a common practice among online platforms in the delivery sector in Spain[733] and the Netherlands[734] to demand from potential delivery riders a proof of been registered as a self-employed person, no matter their intention of performing such an activity on a regular or non-regular basis.[735]

Furthermore, in some of the selected countries, a person receiving income due to his self-employed activity under a certain threshold is not compulsorily insured in the social security schemes which

[729] See section 5.1.4.

[730] See section 3.1.5.

[731] See section 2.1.4.

[732] See section 3.1.4.

[733] See Ranz Martín, R., et al. *El trabajo en las plataformas digitales de reparto*, Madrid: UGT, 2019, p. 26.

[734] See Rb. Amsterdam 15 januari 2019, ECLI:NL:RBAMS:2019:198, para. 45.

[735] Such a registration, however, is typically not decisive for the determination of the legal status of platform workers. In this regard, how the contract is actually performed, and now how it is labelled, is key. See, for example Rb. Amsterdam 15 januari 2019, ECLI:NL:RBAMS:2019:198.

self-employed persons with higher income must join. That is the case in the United Kingdom and France, although in both countries the person may opt to join voluntarily.[736]

7.4.2.c. Availability

Once an activity is considered to be an employed or self-employed activity under the national social security legislation of the Member State where such activity is pursued, the CJEU has stated that it is not of relevance for the application of the Coordination Regulations the fact that it is performed for a very short duration[737] (such as two hours a week[738] or even two or three days per month[739]), or that it results from an on-call contract.[740] Concerning the application of the Coordination Regulations to on-call contracts, however, the Court has only stated that the Regulations do apply to part-time activities, and that the legislation applicable determined would be the same one during the time that the person performs work *and* the time he does not (but is still under the contract).[741] However, the exact implications of said considerations of the Court might not be completely clear.

Thus, a broad interpretation of this CJEU line of reasoning might mean that a person living in the Netherlands who has worked through a platform established in Germany (and on the premise that the platform is seen as the employer or as the principal) for very few hours only, but does not pursue any other activity (either with the same platform or in another manner) would be subjected to the legislation of Germany until the end of his contract with the platform. However, the duration of said contract might be unclear, as platforms are typically entitled to rescind the contract (and/or deactivate the account) in a broad series of events. While the deactivation of inactive accounts is typical, there is no guarantee that the platform would do so. In that case, a person may be subjected

[736] Moreover, in Spain, as it has been already analysed, whether an activity is performed regularly is one of the criteria for considering such an activity as self-employment (and, in order to measure the regularity of an activity of an activity, the earnings from work are taken into account). This situation is different to those mentioned concerning France and the United Kingdom, where those persons who are classified as self-employed may be excluded or exempted from paying certain social security contributions due to their low earnings from self-employment.

[737] This, of course, is with the exception of Art. 14(5b) of Regulation 987/2009 stating that marginal activities must be disregarded for the purpose of determining the legislation applicable under Art. 13 of Regulation 883/2004.

[738] Case C-2/89, *Kits van Heijningen*, EU:C:1990:183, para. 10.

[739] Case C-382/13, *Franzen*, EU:C:2015:261, para. 46.

[740] Ibid., para. 68.

[741] Ibid., para. 48.

(for a potentially unforeseeable period of time) to the legislation of a country to which the only link he has is a few hours of employment in one occasion, and which does not grant him social security protection. As a result, the person may not be able to become entitled to benefits from the social security system where he resides (due to the single applicable legislation principle analysed above).

7.4.2.d. Intermediate activities

In some countries, a person may perform work through legal statuses that provide coverage concerning some contingencies for which (regular) self-employed persons are not insured. Such situations are often considered of being in the intersection between the status of 'employee' and the one of 'self-employed worker'. This is certainly true in Germany, where persons performing work as economically dependent (employee-like) self-employed, artists and home traders are compulsory insured under the employees' social security scheme concerning old-age pensions. All those categories might potentially include platform workers.

It is not clear how these legal statuses may fit within the binary system of the Coordination Regulations; i.e. a system that still revolves around two professional categories (i.e. an employment relationship and self-employment).

The CJEU, in *Van Roosmalen*,[742] noted that, when the national legislation is not clear on whether an activity may be considered employment or self-employment, the classification will depend on the definitions provided by the Coordination Regulations (at that time, Section I of Annex I of Regulation 1408/71 provided a set of clarifications on legal status classification). If that is not sufficient, the legal classification for the purposes of the Coordination Regulations would depend on the concepts as applied by EU primary law concerning freedom of movement of workers.[743] However, in that case it may be difficult to say whether platform work would be considered as being performed under the direction and control of the platform, which would be necessary in order to classify it as an employment relationship (with the platform).

[742] Case C-300/84, *Van Roosmalen*, EU:C:1986:402, para. 46.
[743] Ibid., para. 13-23.

Another approach may be to resort to considering all professional categories (even varieties of self-employment under national law) insured in schemes for employees as employed activities for the purposes of the Coordination Regulations, in analogy to earlier decisions, in particular under the old Regulation 3/1958.[744] This approach would result in, for example, classifying as employed activities for the purposes of the Coordination Regulations platform work performed under the professional status of economically dependent self-employed, artists or home traders in Germany. Nevertheless, the significant change in both the personal scope of Regulation 3/1958 (that at the time did not cover self-employed persons) and the definitions of employment and self-employment (which depended on insurance) compared with Regulation 883/2004 may put into question the application of such an approach.

7.4.2.e. Issues concerning the determination of platform workers' professional status after the legislation applicable was determined

As noted above, determining whether platform work may fit in the available and relevant professional categories (i.e. 'activity as an employed person' and 'activity as a self-employed person' -or neither of those, as in the case of non-professional activities-) is necessary because, in some cases, different rules of the Coordination Regulations apply depending on the professional category. However, there are circumstances where the professional category might need reassessment after the legislation applicable is determined.

In this regard, once the legislation applicable is determined, that legislation must be applied. Most often, national social security legislation also relies on the professional status of an activity to determine the rights and obligations that derive from it. It is not clear, however, whether an activity's qualifications, made for the purposes of the Coordination Regulations, must still be maintained (once a legislation has been deemed applicable) for the purposes of applying national law. For example, if a person performs activities for the company *Deliveroo* in both France and Spain and he is considered a self-employed worker for his activities for *Deliveroo* in France, and an employee

[744] Case C-75/63, *Unger*, EU:C:1964:19; Case C-19/68, *De Cicco*, EU:C:1968:56.; Case C-23/71, *Janssen*, EU:C:1971:101; Case C-17/76, *Brack*, EU:C:1976:130; Case C-143/79, *Walsh*, EU:C:1980:134. See also Strban, G. et al., *Social security coordination and non-standard forms of employment and self-employment: Interrelation, challenges and prospects*, Brussels: European Commission, 2020.

for his activities for the same company in Spain, and the Spanish legislation is the one applicable for all the persons' activities (under Article 13 of Regulation 883/2004), must the Spanish social security administration then take into account that the activities as a platform worker in France are deemed to be self-employed-activities? According to the (seemingly) consensus amongst the members of the Administrative Commission that the competent Member State could requalify the activity for the purposes of the application of his social security legislation, the answer to this question would be no.[745]

Another issue derives from the employment status' reclassification of a person for whom the applicable legislation has already been determined. In this regard, several judicial decisions (some of them affecting hundreds of workers, as in the case of Spain) found that platform workers in Spain and France were incorrectly classified as self-employed workers, while their real professional status was the one of employees. While this issue is not addressed explicitly by the Coordination Regulations, it might be argued that the obligation of mutual information under Article 76(4) of Regulation 883/2004 would apply in this case, and thus the competent institution of the Member State where the activity was performed should inform the competent institution of the Member State of residence which, in turn, would have to review the legislation applicable. If the change in legal status would result in a change of the legislation applicable, and if that change would result in contributions or benefits needing to be collected, then Article 84 of Regulation 883/2004 might help in that effort. This provision establishes that decisions of judicial and administrative authorities relating to the collection of contributions or the recovery of undue benefits must be recognized and enforced by a Member State at the request of the competent Member State. It does seem questionable whether benefits paid to an individual could be reclaimed as a result of such requalification if the individual behaved in good faith. It may however be more obvious that unpaid contributions are collected from the relevant online platform. Notwithstanding the possibility to invoke Article 84 Reg. 883/2004, a retroactive change of legislation applicable as a result of a reclassification of an activity's legal status might be difficult to fit within the Coordination Regulations and/or come with many administrative hurdles. A less burdensome alternative might

[745] Conclusion discussion Administrative Commission, 21 December 2017, as noted by Strban, G. et al., *Social security coordination and non-standard forms of employment and self-employment: Interrelation, challenges and prospects*, Brussels: European Commission, 2020, pp. 28-29.

be to conclude an agreement under Article 16(1) of Regulation 883/2004, although even such a practice may be questioned (particularly if it would result in any disadvantage for the individual involved, as such agreement must take into account the individual's interest[746]).

7.4.3. *Marginal activities*

Marginal activities are activities that, due to their small importance (either because of their short duration, their ancillary character or the small income that they provide) are not considered relevant. They should not be confused with non-professional activities (analysed above[747]).

The Coordination Regulations refer to the concept of marginal activities in connection to the rules for determining the legislation applicable when a person normally pursues activities in several Member States. The challenges presented by this concept are elaborated upon in the section below. However, the Coordination Regulations do not refer to a similar concept when a person is not comprised in a situation of working in two or more Member States. In other words, there are no general rules addressing the approach towards marginal activities for the determination of the legislation applicable.

As a result, a person performing a short-term employed or self-employed activity in a Member State outside the situations of posting or the performance of activities in multiple Member States may potentially be subjected to sudden changes in the legislation applicable. Such a situation would result in administrative complexities that might be considered as constituting an obstacle to the free movement of workers (as per the 'avoidance of impractical effects' principle proposed in this thesis and analysed above[748]).

7.4.4. *The period considered in order to determine the legislation applicable*

It is not clearly stated in the Coordination Regulations what period might or should be taken into account when assessing the legislation applicable to a person who may be pursuing one or more

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[746] See Cornelissen, R., '*Conflicting Rules of Conflict: Social Security and Labour Law'*, in Verschueren, H. (ed.), Residence, Employment and Social Rights of Mobile Persons, 2018, p.270-271.

[747] See section 7.4.2.b.

[748] See section 7.3.3.d

activities in several Member States.[749] The most relevant provision is Article 14(10) of Regulation 987/2009, which states that, in order to assess whether a person pursues a substantial part of his employed or self-employed activity in the Member State of residence, as well as in order to determine the centre of interest of a self-employed person, the competent institution must take into account the situation projected for the upcoming 12 months.[750] Nevertheless, it might not be too big of a leap to assume that other elements also need to be considered for the application of Article 13, as far as they are foreseeability for the upcoming 12 months.[751] In this respect, the existence of a stable working pattern may be required (as the Administrative Commission does in its Practical guide).[752]

In light of what has been discussed in previous chapters with regard to the nature of platform work, it may not come as a surprise that foreseeability of working patterns is however not the platform work's strongest suit. In such a situation, and taking into account that future working patterns are often undefined in the contract, past working patterns might be the only way to predict in some way future working patterns. Nevertheless, no provision on the Coordination Regulations seems to indicate that past performance should also be taken into account when assessing the legislation applicable under this Article, even when it is not possible to achieve a decision based on probable working patterns. The Administrative Commission has suggested doing so when considering if a person has performed a substantial part of his activities in the Member State of residence,[753] but it is unclear whether such an interpretation could be extended to the determination of other aspects.

The lack of a clear answer in the (case law of the CJEU interpreting the) Coordination Regulations on how to address the potentially unpredictable working patterns of platform work and, particularly, on whether past working patterns may be used to predict future working patterns, may result in

[749] See, on the procedure for the application of Art. 13 of the basic Regulation, Regulation 987/2009, Art. 16.

[750] Regulation 987/2009, Art. 14(10).

[751] Administrative Commission for the Coordination of Social Security Systems, *Practical guide on the applicable legislation in the European Union (EU), the European Economic Area (EEA) and in Switzerland*, Brussels: European Commission, 2013, p. 34.

[752] Ibid., p. 26.

[753] Ibid., p. 28.

Member States potentially providing very diverse answers to this issue (and, thus, a potential violation of the uniform system principle[754]).

7.5. Potential issues concerning the application of the rules on posting to platform workers

7.5.1. *Introduction*

The rules on posting are construed as an exemption to the *lex loci laboris* principle. The reason for this exemption, as noted above, was that a strict application to the *lex loci laboris* principle to situations as those covered by posting (i.e. temporary performance of work in another Member State) might result in administrative complexities that hinder the free movement of workers.

As an exemption, the application of the rules on posting is restricted to a specific set of circumstances: it is only possible for activities with a short duration (24 months), the employer or self-employed needs to normally perform a similar activity in the Member State from where posting takes place, and the posted person must have been subjected to the legislation of that Member State prior to the posting. Furthermore, employees need to be posted on their employer's behalf (a direct relationship that must consist during the entire period of the posting) and cannot replace another posted employee.

The limitations on the application of the rules of posting are particularly important because they prevent potential abuses of such rules. In this regard, an employer (or self-employed) who is allowed to perform work in a Member State while subjected to the social security legislation of another Member State with, for example, lower social security contributions, may experience a competitive advantage compared to those subjected to the social security legislation of the Member State where work is performed.

In light of this rationale, it may not be surprising that the interpretation of these limitations on the application of the rules of posting has been a contentious issue, inducing a significant amount of case law by the CJEU. Neither would it be surprising if this contentiousness would in the near future

[754] See section 7.3.3.g.

extend to how said (very specific) limitations work out in situations of (bogus) posted platform workers.

A future debate concerning posted platform work might be exacerbated by the fact that the provisions on posting could be seen as particularly attractive in connection to platform work due to its potential to circumvent stricter regulations on the qualification of the employment relationship in the Member State where the person is posted. In this regard, the Coordination Regulations refer to the situation of a person who normally pursues an activity as a self-employed person in a Member State and who goes to pursue a *similar activity* in another Member State. That the term 'similar activity' is used instead of 'an activity as a self-employed person' when referring to the activity pursued in the Member State where the person posts himself, is of crucial relevant. In this regard, it has been clarified that an activity is considered to be similar to the self-employed activity normally pursued based with regard to its actual nature, and not with a view to its legal qualification under the legislation of the Member State where it is performed.[755] In other words, such a similar activity would be treated as a self-employed activity for the purposes of social security, even if it is not qualified as such under the legislation where such activity is performed. In contrast, and as noted above, when a person normally pursues activities in several Member States, the legal qualification of each activity will depend on the social security legislation of the Member State where such activity is performed. This makes the difference between being considered a posted self-employed person or a person normally pursuing a self-employed activity in multiple Member States, even more relevant, as it means that a person might potentially take advantage of the fact that the social security legislation of the Member State where he normally performs his activities provides a broad concept of what self-employment encompasses, and post himself to pursue such an activity as a self-employed in another country where such an activity is considered an employed activity.

Below, it will be analysed whether the provisions on posting may, in fact, be applied to the situation of persons performing platform work, by studying the requirements for posting which might be challenging for platform workers. As online platforms are typically designed to not operate with platform workers as their own employees, it is considered very unlikely that, at least in the foreseeable future, they will opt to post platform workers to perform employed activities on their

[755] Regulation 987/2009, Art. 14(4); Case C-178/97, *Banks and Others*, EU:C:2000:169, para. 25.

behalf. Therefore, in the section below only the possibility of platform workers posting themselves as self-employed workers will be further explored.

7.5.2. *Reasoning behind posting*

The original idea behind posting was that a company would send workers to a different country because the place where work needed to be performed was there.[756] Some forms of platform work still rely on the performance of work at a specific physical location. However, many others do not. For instance, a person may perform work anywhere by accessing the internet via a computer.

In the latter situation, the reason for a self-employed worker who performs online work to post himself to perform work in a different location might not have anything to do with the work performed (which, again, may be performed anywhere), but with other, perhaps personal, reasons. Consider, for example, the situation of a platform worker residing and working through his computer in Germany, but who needs to spend three months in France to take care of his (temporarily) ill mother, a period during which he will continue performing work through the online platform. In such a situation, which is temporary, the platform worker may wish to post himself as to continue being insured under the legislation of Germany in order to avoid burdensome changes in the legislation applicable and the related administrative complexities (which is the reasoning behind the posting rules, as noted above).

It is however unclear from either the Coordination Regulations or the CJEU case law whether a professional motivation is required for posting. The only indication may be perhaps taken from the way Article 12 is redacted. In that regard, Article 12(2) refers to a person who "goes to pursue a similar activity in another Member State". The choice of the words 'goes to pursue' instead of the simpler 'pursues' may be understood as indicating that the person goes to that Member State to pursue a similar activity to the one he was performing in the country from where he posts himself.

In any case, Article 12(2) requires for a person to be posted that "the anticipated duration of such an activity does not exceed 24 months". Thus, even if it would be accepted that the motivation for

[756] See, in this regard, the explanation of the AG Dutheillet De Lamothe on the origin of the posting provisions, in Case 35-70, *Manpower*, AG Opinion, EU:C:1970:104.

the temporary movement might be other than professional, a person would need to seek an activity with a certain anticipated duration in order to be able to post himself. As it is analysed just below, determining the anticipated duration in platform work is a challenge in itself.

7.5.3. *Foreseeability of the activity to be performed as a posted worker*

One of the characterizing features of posting is that it is performed for the completion of a determined project, of which is known its duration, the general tasks to be performed and the Member State where it will be performed. This information is key in order to assess whether the projected duration of the posting will exceed 24 months, whether the activity that will be performed is of a similar nature to the one performed by the employer or self-employed person in the Member State of origin, and in order to issue an A1 certificate.

Particularly, the requirement that the activity to be performed has a known anticipated duration before the person is posted may be a challenge for platform workers. In this regard, in particular on-line platform work (crowdwork[757]) is composed of very short-term tasks (with a typical duration of less than a few hours), performed in the framework of an on-demand contract for the performance of work. Depending on how this is construed, it may or may not be possible to anticipate the duration of the activity.

Thus, the duration of the activity may not be anticipated if the 'activity' is considered to be the combination of all tasks performed, as then the duration depends on the online platform, the clients of the platform and the platform worker, due to the fact of being an on-demand form of work. In that case, it may not be considered a defined task, which duration is determined in advance, and thus it may not be considered as posting.[758] In contrast, if each task is considered as an individual activity, then its duration might be anticipated. In the latter case, the question is then whether a person may succeed periods of posting. The Administrative Commission, on its Decision A2, has

[757] For an overview of the concept of crowdwork, see De Stefano, V., The Rise of the "Just-in-Time Workforce": On-Demand Work, Crowdwork, and Labor Protection in the "Gig Economy", *Comparative Labor Law & Policy Journal*, vol 37 issue 3, 2016, Issue 37 Vol 3, pp. 471-504.

[758] Case C-178/97, *Banks and Others*, EU:C:2000:169, para. 27; see also Case C-178/97, *Banks and Others*, AG Colomer's Opinion, EU:C:1998:571, para. 57 (in which the Advocate General considers that this would preclude to consider successive tasks as an unique posting).

stated that postings concerning the same worker, undertaking and Member State may not typically be succeeded during at least two months.[759] The same Decision, nonetheless, does not establish any limits on the succession of posting periods concerning self-employed workers, and thus it might be assumed that successions of posting periods are allowed as long as the self-employed person maintains the infrastructure needed to pursue his activity in the State in which he is established. Nevertheless, it is questionable whether such a practice would be in consonance with the character of the provision on posting, which constitutes only an exception to the *lex loci laboris* principle.

7.5.4. *Maintenance of infrastructure in the State of establishment*

In order to be considered as being posted, a self-employed person needs to maintain in his Member State of origin the infrastructure necessary to be able to pursue his activity at his return.[760] What such an infrastructure specifically entails is, nevertheless, unclear. The CJEU only provides a set of examples, such as "the use of offices, payment of social security contributions, payment of taxes, possession of a work permit and VAT number, or registration with chambers of commerce and professional organisations",[761] leaving the interpretation of the term to the competent authorities of the Member State of origin to decide.[762] Such a situation, in turn, may result in major differences in national approaches. The Administrative Commission, however, has required that the criteria used for assessing the existence of infrastructure are "applied consistently and evenly in the same or similar situations".[763]

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[759] Administrative Commission, *Decision No A2 of 12 June 2009 concerning the interpretation of Art. 12 of Regulation (EC) No 883/2004 of the European Parliament and of the Council on the legislation applicable to posted workers and self-employed workers temporarily working outside the competent State*, 2010/C 106/02, para. 3(c).

[760] Case C-178/97, *Banks and Others*, EU:C:2000:169, para. 25.

[761] Ibid., para. 26.

[762] Schoukens, P. and Pieters, D., 'The rules within Regulation 883/2004 for determining the applicable legislation', *European Journal of Social Security*, vol.11 issue 1 and 2, 2009, p. 87.

[763] Administrative Commission, *Decision No A2 of 12 June 2009 concerning the interpretation of Article 12 of Regulation (EC) No 883/2004 of the European Parliament and of the Council on the legislation applicable to posted workers and self-employed workers temporarily working outside the competent State, 2010/C 106/02,* Brussels: European Commission, 2009, para. 6.

7.6. Potential issues concerning the application of the rules on the normal performance of activities in several Member States to platform workers

7.6.1. *Introduction*

Due to the impossibility or impracticality of applying the *lex loci laboris* principle to situations where a person normally pursues employed or self-employed activities in two or more Member States, a specific set of rules has been created to determine the legislation applicable in these situations. Below it is performed an analysis of the potential challenges involved in applying those rules to platform work, and which derive to a large extent from the reliance of said rules on working patterns and concepts with a still relatively uncertain meaning (particularly as some of them were newly established under Regulation 883/2004 and have not been yet subject of the CJEU's analysis).

7.6.2. *The notion of 'normally'*

Article 13 of Regulation 883/2004, in both its paragraphs one and two, refers to persons who normally perform an activity in two or more Member States. The notion of 'normally' was already used in Article 14 of Regulation 1408/71, even in its original version. Nevertheless, an explanation of the meaning of this notion was first included in the Coordination Regulations with Regulation 987/2009. In this regard, its Article 14(5) states that 'normally pursuing an activity in two or more Member States' means that a person "simultaneously, or in alternation, for the same undertaking or employer or for various undertakings or employers, exercises one or more separate activities in two or more Member States".

When one or more activities are permanently pursued in several Member States simultaneously or in alternation, it may be argued that such activities are pursed normally in several Member States (even though, even in those circumstances, an overall assessment is necessary).[764] However, circumstances in which the performance of activities in several Member States is not clearly permanent are more challenging. This may be, for example, the situation of a person residing in France and working through the online platform *Deliveroo* in Germany, while also performing work for the online platform *Amazon Mechanical Turk* wherever he is (usually in France or Germany but,

[764] Regulation 987/2009, Art. 14(7).

during holidays, perhaps also in countries like Spain, the Netherlands and the United Kingdom). In the case of both online platforms, the amount of work that is offered to the platform worker depends exclusively on the platform, with no guarantee that the person may be offered work even if he is available to the online platform for a significant amount of time. Furthermore, because the work performed through the platform *Amazon Mechanical Turk* does not require that it is performed on a specific location, the place of work may vary greatly, while there might (in retrospective) clearly be a situation of work being performed in several Member States for a continuous period of time.

Because of the lack of clarity in the Coordination Regulations on the meaning of 'normally', it would be tempting to apply by analogy the clearer interpretation of the same term when used in connection to posting. In this regard, the CJEU clarified in *Banks*[765] that the term 'normally' under Article 14a of Regulation 1408/71, concerning the posting of self-employed persons, meant that the person *habitually* carried out significant activities, an interpretation which was continued in *Fitzwilliam*.[766] The CJEU, in *X v Staatssecretaris van Financiën*, has extended this interpretation to the meaning of the same term under Article 14(2)(b) of Regulation 1408/71, concerning persons pursuing employed activities in several Member States.[767] When Regulation 987/2009 was enacted, the interpretation of 'normally' as habitually carrying significant activities was introduced when referring to a self-employed person who posts himself, or to the employer of a posted employee.[768] Nevertheless, it must be noted that the legislator opted to not introduce this interpretation of the term 'normally' concerning the rules for persons pursuing activities in several Member States. The legislator did include, under Article 14(5b) of Regulation 987/2009, a provision stating that marginal activities should be disregarded for the purposes of determining the legislation applicable under Article 13 of Regulation 883/2004, but it did not link such notion to the concept of 'normally'.

The meaning of the term 'normally' may have been clearer in the original version of Article 14(5) of Regulation 987/2009, prior to its amendment by Regulation 465/2012. Back then, it was stated that a person who 'normally pursues an activity as an employed person in two or more Member States' referred to a person who performed a separate activity in one or more Member States, no

[765] Case C-178/97, *Banks and Others*, EU:C:2000:169, para. 25.
[766] Case C-202/97, *Fitzwilliam*, EU:C:2000:75, para. 45.
[767] Case C-570/15, *X*, EU:C:2017:673, para. 19.
[768] Regulation 987/2009, Art. 14(2) and Art. 14(3).

matter the duration or nature of it, while simultaneously maintaining an activity in another Member State; or to a person who continuously performed alternating activities, with the exception of marginal activities, in two or more Member States, irrespective of the frequency or regularity of the alternation. Nevertheless, this arguably more certain explanation was replaced by the one referred above. The reasons for such a modification were not clarified in the Preamble of Regulation 465/2012.

With the current regulation, the Administrative Commission seems to put significant importance on whether or not a repetitive working pattern is foreseeable for the future.[769] This element of foreseeability brings us to the second hurdle for determining the legislation applicable concerning situations in which persons might be normally pursuing activities in several Member States: the period considered in order to determine the legislation applicable.

Finally, another question is whether 'normally pursuing activities in several Member States' means the normal performance of activities in the same Member States either simultaneously or in alternation, or the normal performance of activities in several Member States, even when those Member States may change. In other words, would the situation of a person who normally performs work in several Member States, but who does so in different Member States, be considered as a situation of a person normally performing work in several Member States for the purposes of Article 13 of Regulation 883/2004? In the *Bogdan Chain* case, the Advocate General answered this question in the affirmative, stating that Article 13 of Regulation 883/2004 may be applicable when it is only known that the person will normally perform employed activities in several Member States, without being clear in which Member States or for how long the person would do so.[770] The CJEU, however, never provided a judgement on this case after the reference for a preliminary ruling was withdrawn by the Cypriot referring court. If the Court would have answered the abovementioned question in the same way that the Advocate General did, that may have resulted in a situation in which the

[769] Administrative Commission for the Coordination of Social Security Systems, *Practical guide on the applicable legislation in the European Union (EU), the European Economic Area (EEA) and in Switzerland*, Brussels: European Commission, 2013, pp. 26-27.

[770] Case C-189/14, *Bogdan Chain*, Opinion AG Bot, EU:C:2015:345, para. 89-90.

legislation applicable is determined *à la carte*,[771] not by the what the country of work is, but by the choice of the employer.[772]

7.6.3. *The notion of a 'substantial part of employed or self-employed activity'*

As mentioned above, the first criterion for determining the legislation applicable concerning a person normally pursuing an employed or self-employed activity in several Member States is whether the person performs a substantial part of his activity in the Member State of residence. If so, then the person would be subjected to the legislation of that country.[773]

As the reader may have guessed, the lack of foreseeability of platform work, both concerning the amount of work and where it is performed, makes determining whether a platform worker performs a substantial part of his activities in the Member State of residence rather challenging. This challenge is exponentially elevated by the fact that the notion of a 'substantial part' of the individual's activity is an addition introduced by Regulation 883/2004 (and so the CJEU not having an opportunity yet to fully analyse its meaning) which meaning is not clearly stated in the Coordination Regulations. In this regard, Regulation 987/2009 states that a 'substantial part' means a "quantitatively substantial part of all the activities of the employed or self-employed person", and it does not have to be necessarily the majority of its activities.[774] Moreover, the notion of what constitutes a substantial part of a person's activities is further indicated by stating that, as part of an overall assessment, a share of less than 25% of the person's employed or self-employed activity must be taken as an indicator that a substantial part of the person's activity is *not* being pursued.[775] That such criteria are presented as an indicator, instead of a definitive threshold, together with the fact that it only provides information on what does not constitute a substantial part of a person's

[771] Schoukens, P. and Pieters, D., 'The rules within Regulation 883/2004 for determining the applicable legislation', *European Journal of Social Security*, vol.11 issue 1 and 2, 2009, p.108.

[772] Houwerzijl, M.S., et al., *A hunters' game: How policy can change to spot and sink letterbox-type practices*, Brussels: ETUC, 2016, p. 63.

[773] Regulation 883/2004, Art. 13(1)(a) and Art. 13(2)(a).

[774] Regulation 987/2009, Art. 14(8).

[775] Ibid.

activity, shows the divided opinions among the Member States on this matter, therefore making it impossible for the EU legislator to adopt a clear and watertight definition of this notion.

A crucial element for understanding the meaning of this notion is how the employed or self-employed activity is calculated (both concerning the activity performed in the Member State of residence and all the activity performed by the person in all Member States). In this regard, Regulation 987/2009 merely states that working time and/or remuneration must be taken into account in order to assess whether a substantial part of the employed activities are performed in the country of residence, while turnover, working time, number of services and/or income are the elements that must be considered when analysing the same concerning the self-employed activities.[776] These indicative criteria might be classified partly as temporal elements (i.e. working time), partly as economic elements (remuneration, turnover and income), and (regarding the criterion 'number of services') partly as an, arguably, somewhat intermediate element.

The use of the coordinating conjunctions 'and' and 'or' (as in "working time and/or remuneration"[777]) creates additional ambiguity, as it allows to either take into account all the criteria or ignore some of them, and it does not precisely indicate any hierarchy between these criteria. It is unclear why, if an overall assessment is necessary, the legislator then allows to ignore some elements which are most probably relevant in some way. It might be the intention of the legislator to allow the national competent institutions to decide whether any of those elements are relevant (although at least one must be taken into account). However, by not clarifying the reason behind such phrasing (and by not stating more clearly that all relevant criteria must be taken into account), a literal interpretation of the rules may give leeway instead to competent institutions to ignore relevant criteria.

Furthermore, it is not explicitly stated in Regulation 987/2009 whether this list of criteria that must be taken into account is exhaustive. The Administrative Commission, in its *Practical Guide,* assumes that this is not the case, and thus that "other criteria may also be taken into account", reinforcing immediately afterwards that "it is for the designated institution to take into account *all*

[776] Ibid.

[777] Regulation 987/2009, Art. 14(8).

relevant criteria and to undertake an overall assessment of the person's situation before deciding on the applicable legislation".[778] While no examples of other criteria are provided, it may be assumed that those criteria must be quantitative criteria, and not criteria regarding the type of activity performed, based on the statement mentioned above that "a 'substantial part of employed or self-employed activity' pursued in a Member State shall mean a quantitatively substantial part of all the activities of the employed or self-employed person pursued there".[779]

In any case, the Administrative Commission has not explained any further its reasoning behind such an assumption. In such state of affairs, it might be wondered whether such an interpretation may derivate from the use of the phrasing 'in the framework of an overall assessment' in Article 14(8) of Regulation 987/2009. If that is the case, it must be noted that such a phrase is not mentioned immediately before listing the indicative criteria that shall be taken into account, something which might have justified such an interpretation. Instead, it appears in the context of an explanation of what it might not be considered as a substantial part of the activities. But, even if it would be taken as an indication by the legislator concerning how to determine whether a substantial part of a person's activities is pursued in the State of residence, an alternative interpretation might be that it refers to an 'overall assessment' of the criteria explicitly mentioned.

Following the same example used in the previous section 7.6.2, imagine a person residing in France and pursuing a self-employed activity through the online platform *Deliveroo* in Germany for approximately 30 hours per week (although he usually remains available to the platform for around 40 hours). At the same time, he also performs a self-employed activity through the online platform *Amazon Mechanical Turk* wherever he is (usually in France or Germany but, during holidays, also in countries like Spain, the Netherlands and the United Kingdom), for an average duration of 20 hours per week, although he typically remains available to the platform for a total of 40 hours per week. For simplicity's sake, it is assumed that both activities provide the same amount of income. The first issue to be addressed in this example is which elements will be prioritised when determining the legislation applicable: whether working time, income, number of services, or other

[778] Administrative Commission for the Coordination of Social Security Systems, *Practical guide on the applicable legislation in the European Union (EU), the European Economic Area (EEA) and in Switzerland*, Brussels: European Commission, 2013, p. 28.

[779] Regulation 987/2009, Art. 14(8).

elements which are not included in the (non-exhaustive) list. Prioritising income may be a challenge, as the different tasks performed through *Amazon Mechanical Turk* may vary greatly regarding the income they generate. Furthermore, it may not be always straightforward to determine where each task was performed, particularly if the person receives payment per group of tasks completed. If, in turn, the focus is on working time, then it must be considered whether waiting time is considered as working time, something for which EU law does not provide an answer yet (apart from situations in the context of a - standard - employment relationship[780]). No matter how work is measured (i.e. working time, income or other - or a combination of all -), it may be a challenge to determine the amount of work performed in the Member State of residence, and the line separating between what is considered a substantial part of the person's activities in the Member State of residence and what is not considered as such may be fine. Assuming that waiting time is not considered as working time for either activity, an activity of 12,5 hours per week performed in Germany through *Amazon Mechanical Turk* would amount to 25% of the person's total activity.

Overall, the national competent institutions are left significant leeway to determine whether a substantial part of a person's activities is pursued in the Member State of residence, [781] a situation which may result in lack of legal certainty for those persons and companies subjected to Article 13 of Regulation 883/2004. In this regard, very little information is publicly available on how Member States determine what a substantial activity is.

An argument for the measuring of an activity in connection with working time might be the significant differences in wages between Member States.[782] However, it might be a challenge to use working time as the main factor in connection to platform workers, due to the flexible and on-demand character of platform work. Finally, some authors have signalled that the concept of 'substantial activity' developed by the CJEU in cases such as *FTS*[783] may show a preference by the

[780] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, Art. 2.

[781] Administrative Commission for the Coordination of Social Security Systems, *Practical guide on the applicable legislation in the European Union (EU), the European Economic Area (EEA) and in Switzerland*, Brussels: European Commission, 2013, p. 23.

[782] Jorens, Y. and Lhernould, J.P., *trESS European report 2011*, Brussels: European Parliament, 2011, p. 26.

[783] Case C-202/97, *FTS*, EU:C:2000:75, para. 34-45.

Court for focusing on 'legal' factors (such as where the majority of contracts with clients are concluded, or which law is applicable to the contracts signed with clients).[784]

On a separate note, it is not clear whether, when the definition of 'substantial part' refers to "all the activities of the employed or self-employed person", it includes also marginal activities as defined under Article 14(5b) of Regulation 987/2009. Marginal activities, as will be analysed further below, are activities that must be disregarded for the purpose of determining the legislation applicable to a person normally pursuing one or more activities in several Member States. So, a literal interpretation of Article 14(5b) may give the impression that marginal activities must not be included in the assessment. It is not clear whether this was intended by the legislator, particularly as it might have specifically stated 'all activities except marginal activities'.

In summary, determining whether a person performs a substantial part of his activities in the country of residence is a fundamental aspect for determining the legislation applicable and, yet, the Coordination Regulations leave great uncertainty on how to perform this assessment. Furthermore, the ways of measuring that the Coordination Regulations do suggest seem to be quite unfit for the particular nature of platform work. In this regard, neither working time nor turnover are typically reliable proxies in the case of platform work, as a platform worker may remain available for a much longer period of time than when he is actually performing work, without having any control on how much of the time he remains available is spent performing work. Neither are the number of services a clear indicator, as the duration of each task (or the income that it may provide) may fluctuate widely.

7.6.4. *The meaning of the concept of 'marginal activities'*

Regulation 987/2009, in its Article 14(5b), establishes that "marginal activities shall be disregarded for the purposes of determining the applicable legislation under Article 13" of Regulation 883/2004. This is of great relevance for the purposes of determining the legislation applicable to persons performing platform work, as this form of work often allows the performance of work for a very short duration and/or very low income, as well as a great degree of variety in the location where

[784] See Paolin, G., *Europe Sociale et Travailluers Pluriactifs*, Bruxelles: Larcier, 2015, pp. 59-60, 63, 65.

work is performed (which often depends exclusively on the platform worker). It thus seems very likely that if persons would perform platform work in several Member States, these activities will at least partly include marginal activities in some or at least one of countries involved. Yet, as will be shown below, the concept of marginal activities is arguably even less clear than the concept of 'a substantial part of an individual's activities'. In contrast to the latter, did the concept of marginal activities not yet exist under Regulation 1408/71 (and thus the CJEU has had the opportunity to analyse its meaning in one case only, which will be discussed below). Moreover, there are no definitions of this concept provided in the Coordination Regulations.

Notwithstanding, the notion of marginal activities did not appear in a vacuum. The CJEU already stated in *Levin*,[785] in 1982, that the rules on freedom of movement of workers (at that time, regulated by Article 48 of the Treaty of Rome -EEC Treaty-) only covered "the pursuit of effective and genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary". It was a few months later, in *Kuijpers*,[786] that the CJEU applied this idea to the interpretation of Regulation 1408/71.[787]

Some 30 years later, the Administrative Commission, in its *Practical Guide*, notes that "marginal activities are activities that are permanent but insignificant in terms of time and economic return. It is suggested that, as an indicator, activities accounting for less than 5% of the worker's regular working time and/or less than 5% of his overall remuneration should be regarded as marginal activities. Also, the nature of the activities, such as activities that are of a supporting nature, that lack independence, that are performed from home or in the service of the main activity, can be an indicator that they concern marginal activities".[788]

By mentioning for example the nature of the activities as an element to take into account, the Administrative Commission arguably establishes a different way of calculating whether an activity is marginal than it is used to determine whether an activity in the Member State of residence

[785] Case C-53/81, *Levin*, EU:C:1982:105.

[786] Case C-276/81, *Kuijpers*, EU:C:1982:317.

[787] See also *Franzen*, EU:C:2014:2190, para. 90 AG Spuznar Opinion.

[788] Administrative Commission for the Coordination of Social Security Systems, *Practical guide on the applicable legislation in the European Union (EU), the European Economic Area (EEA) and in Switzerland*, Brussels: European Commission, 2013, p. 27.

amounts to a substantial part of all the activities of the employed or self-employed person. In that regard, in the latter case (i.e. when determining whether an activity in the Member State of residence is substantial), 'substantial' means quantitatively substantial,[789] while, in the former, 'marginal' seems to be understood by the Administrative Commission as either or both quantitative and qualitative marginal.

Furthermore, it is unclear (as is the case concerning the notion of 'substantial part of an individual's activities') whether the set percentage (i.e. 5%) must be applied to the overall working time or rather to the remuneration of the activities.

The case *Szoja*[790] provided the first (and so far only) opportunity for the CJEU to give some clarity on the notion of marginal activities under Article 14(5b) of Regulation 987/2009. In this case, a Polish national performed simultaneously an activity as a self-employed person in Poland and another activity as an employed person in Slovakia. As a result of the latter activity, he was registered in the Slovakian register of assured persons. Nevertheless, the Polish authorities, applying the procedure established in Article 16 of Regulation 987/2009, decided that the activity performed in Slovakia as an employee was a marginal activity, and thus, following Article 14(5b) of Regulation 987/2009, should not be taken into account for determining the legislation applicable. As a result, the Polish authorities concluded that Polish legislation was applicable, a conclusion that the Slovakian authorities did not challenge, and thus the decision became final under Article 16(3) of Regulation 987/2009. As a result, Mr Szoja was no longer covered since 1 February 2013 by the Slovakian compulsory health insurance, pension insurance and unemployment benefit insurance. Mr Szoja appealed against this decision before the Slovak court. The Supreme Court of the Slovak Republic (*Najvyšší súd Slovenskej republiky*), when analysing the case, decided to refer some questions to the CJEU for preliminary ruling, such as: whether the marginal character of an activity (under Article 14(8) of Regulation 987/2009) shall be taken into account when determining the legislation applicable under Article 13(3) of Regulation 883/2004; and whether the interpretation

[789] In this regard, Article 14(8) of Regulation 987/2009 notes that "For the purposes of the application of Article 13(1) and (2) of the basic Regulation, a 'substantial part of employed or self-employed activity' pursued in a Member State shall mean a *quantitatively* substantial part of all the activities of the employed or self-employed person pursued there, without this necessarily being the major part of those activities" (italics added).

[790] Case C-89/16, *Szoja*, EU:C:2017:538.

of the provisions of the Basic Regulation adopted by the Administrative Commission shall be considered a binding interpretation made by an EU institution. The CJEU only addressed the first question, and reformulated it as "whether *Article 13(3) of the Basic Regulation must be interpreted as meaning that*, in view of the determination of the national legislation applicable by virtue of that provision to a person such as the applicant in the main proceedings who normally pursues an activity as an employed person and an activity as a self-employed person in different Member States, *the requirements laid down in Articles 14(5b) and 16 of the Implementing Regulation must be taken into account*".[791]

The CJEU confirmed that whether an activity is marginal must be taken into account when determining the legislation applicable under Article 13 of Regulation 883/2004. The CJEU did not took this opportunity to provide an explanation of the meaning of the concept 'marginal activities' under Article 14(8) Regulation 987/2009 (which, in fairness, was not a question that was -explicitly- put before the Court). Instead, it clearly relies on the Polish authorities for determining the marginal character of the activity.[792] Therefore, it is not clear from the case what were the factors taken into account by the Polish authorities for assessing the activity as marginal. It is thus unclear from this case how the concept of 'marginal activity' under Article 14(8) of Regulation 987/2009 must be interpreted, and even whether the 5% criterion used by the Administrative Commission is valid for the CJEU. What the CJEU does make clear in the *Szoja* case is its refusal to allow the 'cherry picking' of the legislation applicable, of choosing it *a la carte*. In this regard, the Court states that "it must be recalled that since the conflict rules laid down by the Basic Regulation are mandatory for the Member States, a fortiori it cannot be accepted that insured persons falling within the scope of those rules can counteract their effects by being able to elect to withdraw from their application"[793]

Finally, it must be noted that, according to the Administrative Commission in its Practical Guide, marginal activities are not ignored completely but, instead, "if the marginal activity generates social security affiliation, then the contributions shall be paid in the competent Member State for the

[791] Case C-89/16, *Szoja*, EU:C:2017:538, para. 33.
[792] Ibid., para. 39.
[793] Ibid., para 42.

overall income from all activities".[794] This interpretation seems to follow Article 13(5) of Regulation 883/2004, which states that persons performing multiple activities must be treated as if they were doing so and receiving all their income in the Member State which legislation is deemed applicable. Thus, because Article 14(5b) of Regulation 987/2009 establishes that marginal activities must only be disregarded *for the purposes of determining the applicable legislation* under Article 13 of Regulation 883/2004, the provision of Article 13(5) of Regulation 883/2004 still would apply, as this provision is not for the purposes of determining the applicable legislation.

Overall, the notion of marginal activities, while potentially very significant for determining the legislation applicable to platform workers, seems at this moment in time to be lacking enough clarity to provide certainty (or, even, to provide an example of potential interpretations without being purely speculative).

7.6.5. *The identification of the employer*

In order to determine the employer's registered office or place of business it is necessary to determine who is the employer, a task which is not as evident as it may look like. This is not only due to the often complex corporate structures of companies operating online platforms (as it may already be evident from the analysis above regarding the registered office or place of business), but also to the possibility that persons who contract a service through an online platform (the clients or end-users of the service) might, under certain circumstances, be considered as the employer of the platform worker under national legislation. Adding to this challenge is the fact that there is no definition of the term 'employer' in the Coordination Regulations. In the seminal case *Manpower*, the CJEU seems to use the fact that an entity pays a person's salary and may dismiss him as indicators that such entity maintains an employment relationship (and thus is the employer) of a person.[795] Moreover, in a more recent case, AG Pikamae's Opinion states that "all the relevant objective circumstances of the case are taken into account to determine whether there exists a

[794] Administrative Commission for the Coordination of Social Security Systems, *Practical guide on the applicable legislation in the European Union (EU), the European Economic Area (EEA) and in Switzerland,* Brussels: European Commission, 2013, p. 27.

[795] Case 35-70, *Manpower*, ECLI:EU:C:1970:120, para. 18. Such an interpretation of the Manpower case is also suggested in AG Pikamae's Opinion, ECLI:EU:C:2019:1010, para. 46.

hierarchical relationship characterising an employment relationship",[796] after which he takes into account who has recruited the person concerned, to whom the person concerned is de-facto fully available for an indefinite period, who exercises effective control over the person concerned and who actually bears the wage costs in order to determine the employer under the Coordination Regulations.[797] The CJEU, in its decision on the same case, instructed the use of similar objective criteria to determine who the employer is, such as whether there is a hierarchical relationship between the alleged employee and the employer, as well as to focus on how previous contractual agreements between them have been performed in the past.[798]

Unfortunately, these criteria are not always easily applicable to a situation of platform work, in which at least part of the control is exercised by automated algorithms, while other aspects of control, as well as other indicators such as who carries out the recruitment or who bears the wage costs may be performed by other subsidiaries or companies. This is thus another aspect that may need future clarification in order to ensure a uniform interpretation across Member States.

7.6.6. *The notion of 'registered office or place of business'*

The notion of 'registered office or place of business' plays a key role in Article 13(1) of Regulation 883/2004.[799] In this regard, and as mentioned before, when a person does not perform a substantial part of his activity in the Member State of residence, then the location of the employer's (or employers') registered office(s) or place of business is (are) essential for determining the legislation applicable.

The notion is, arguably, particularly important concerning platform work due to the lack of a traditional work place where platform workers work together with managerial staff. Platform workers, who typically operate from a multitude of locations, will rarely (if at all) visit the registered office or place of business of the company operating the platform. Their connection with the digital platform is by default exclusively online, via a series of apps or other digital tools. Through those

[796] Case C-610/18, *AFMB and Others*, AG Pikamae's Opinion, ECLI:EU:C:2019:1010, para. 44.
[797] Ibid., para. 62.
[798] Case C-610/18, *AFMB and Others*, ECLI: EU:C:2020:565, para. 48-58.
[799] As it already did in Article 14(2)(b) of Regulation 1408/71.

tools, they communicate their availability to work and receive offers to perform tasks. Furthermore, the location from where digital platforms exercise some of the functions of the management of the company (regarding their relationship to both platform workers and clients), and the location from where the algorithms and digital tools are designed and maintained (as well as from where the company's core strategy is determined) may be in different countries, particularly if the digital platform operates in multiple countries. In some cases, the algorithm's intellectual property may be owned by a subsidiary which place of business is located in a third country. Sometimes, one or more of these countries are not EU Member States, in part due to the fact that many of the main platforms active in the countries studied in this thesis are multinationals. And while the presence of multinational companies is not, of course, a feature exclusive to the platform economy, it is argued here that the nature of platform work promotes even more their prevalence. In this regard, once an online platform becomes the main actor concerning a particular service, there are many advantages for both clients and platform workers to use it instead of its competitors: for both, the chances of accessing quickly to a service will be much greater with the main actor. The platform economy is thus an economy where scale is a key element. This, arguably, promotes the success of platforms operated by multinational companies, which mobilize a greater amount of resources and capital.

Because of all this, it may be argued that a clear notion of the concept of registered office or place of business as far as the Coordination Regulations are concerned is paramount. However, the notion is only broadly defined in the Coordination Regulations (specifically, in Article 14(5a) of Regulation 987/2009) as the place where "the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out". This definition, furthermore, was not already laid down in the Regulation 987/2009 when it was enacted, but was instead added later on by Regulation 465/2012. The stated reasoning behind this amendment was the codification of prior CJEU case law, as well as, and notably, to serve "as a stepping stone for additional elements to be defined by the Administrative Commission".[800]

[800] European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004, p. 9.

While the Administrative Commission has not done so through a Decision yet, it did provide some clarification on the concept in its *Practical Guide on the applicable legislation*, where it referred to *Planzer Luxembourg*.[801] In this case, the CJEU defined the place of business as being the place where the central administration is performed, where the company's directors meet, and where the company's general policy is established. The Court stated that, if these criteria are not sufficient, then also other indicators may be taken into account, such as the place where the main directors' residence is located, where general meetings take place, where documents concerning the company's accounts and administration are held, and where most banking transactions take place.

In addition to the criteria derived from the *Planzer* case, the Administrative Commission suggested to take into account how long the company has been established in that country, how many administrative staff work at the office, where is the employer's registered office and administration, where is located the office that sets company policy and operational matters, where are located the main financial functions, where most contracts with clients are concluded, where the workers are recruited, and where the company is obliged to maintain records as a result of EU regulatory requirements.[802] If, after examining all these factors, it has not been possible to determine the registered office or place of business, then the establishment with which the employee has the closest connection as far as the performance of his work is concerned would be considered as the country where the registered office or the place of business for the purposes of determining the legislation applicable is located.[803]

Remarkably, the definition of 'registered office or place of business' provided by the Administrative Commission is not based on a case concerning the application of the Coordination Regulations, but from a tax-related case, where the place of business under Directive 79/1072/EEC of 6 December 1979 on the harmonisation of the laws of the Member States relating to turnover taxes (VAT) had

[801] Case C-73/06, *Planzer Luxembourg*, EU:C:2007:397.

[802] Administrative Commission for the Coordination of Social Security Systems, *Practical guide on the applicable legislation in the European Union (EU), the European Economic Area (EEA) and in Switzerland*, Brussels: European Commission, 2013, pp. 14-15.

[803] Ibid., p. 36.

to be established. Therefore, it is not self-evident that it is suited for the purposes of determining the applicable legislation in social security situations.

It is a common practice among online platforms[804] to set up a national company (usually referred to under the name of the parent company followed by the name of the country) which then hires employees to manage the day-to-day operations of the company at national level, and which performs contracts with the individual platform workers and other parties at national level (such as restaurants). In some cases, a parent company based in an(other) EU country with a beneficial tax regulation such as the Netherlands owns the intellectual property. Nevertheless, it is in the headquarters (so, the parent company) where the general policy of the company is set, as well as where the design and update of the algorithms on which the online platform is based are performed. Furthermore, it is presumed that it is from the headquarters that the significant capital invested in these companies is raised, and where the directors of the company meet. As a result, applying the notion of 'registered office or place of business' to a situation such as the one of platform work may be complex (as wills, most probably, be heavily argued by the online platforms themselves).

Since many platforms have their headquarters outside the EU, it might be necessary to determine the legislation applicable concerning a platform worker who "pursues his activity as an employed person in two or more Member States on behalf of an employer established outside the territory of the Union, and […] resides in a Member State without pursuing substantial activity there".[805] In such situations, the legislation applicable is the one of the Member State of residence.

7.6.7. *The prevalence of employed activities over self-employed activities*

As noted above (see section 7.3.2), the Coordination Regulations establish that, if a person normally pursues an activity as an employed person and an activity as a self-employed person in different Member States, then he must be subject to the legislation of the Member State in which he pursues an activity as an employed person. [806] Hence, in such circumstances, the employed activity prevails

[804] See, for example, an analysis of the corporate structure of *Uber* in De Masi, F., *The Uber case: a ride for the future of the European Single Market*, Rome: LUISS, 2017, pp. 13-14.
[805] Regulation 987/2009, Art. 14(11).
[806] Regulation 883/2004, Art. 13(3).

over the self-employed activity for the determination of the legislation applicable. The legislator also states that, if a person normally pursues an activity as an employed person in two or more Member States while also pursuing an activity as a self-employed person, then the legislation applicable should be determined based on the set of rules applicable to the situation of persons only pursuing employed activities in several Member States (and thus, again, there is a prevalence of an employed activity -even if performed in multiple Member States- over a self-employed activity).[807] Nevertheless, the legislator does not explicitly clarify how to determine the legislation applicable when a person normally pursues an employed activity in one or more Member States while also pursuing a self-employed activity in *several* Member States. Based on the previous statements by the legislator and, particularly, given the fact that no other explanation is provided within the Coordination Regulations on how to address such a situation, it might be assumed that, in that case, a prevalence would still be given to employed activities over self-employed activities. But the lack of a clear statement by the legislator in that direction might result on uncertainty.[808] Because platform work, by design, facilitates the performance of flexible work (which is often considered as self-employment, at least by the online platforms themselves), it might be within the realm of possibilities that platform workers find themselves in situations where they normally perform self-employed activities in several Member States within a 12 month period while also pursuing an employee activity in at least one Member State.

Moreover, by given such prevalence to employed activities over self-employed activities (instead of focusing in other aspects in such situations, such as where the person resides or where his centre of interests is located), the rules for the determination of the legislation applicable are increasing the risk of platform workers finding themselves in an uncertain position if their employment status is reclassified, as that might suddenly result in a change of legislation applicable (even, arguably, retroactively -see section 7.4.2.e-).

[807] Ibid.

[808] Schoukens, P. and Pieters, D., 'The rules within Regulation 883/2004 for determining the applicable legislation', *European Journal of Social Security*, vol.11 issue 1 and 2, 2009, p. 100.

7.6.8. *Differentiation between posting and working in several Member States*

There is a 'grey zone' between situations of posting and situations of working (simultaneously or in alternation) in two or more Member States. Some countries seem to use as an indicator to differentiate between posting and working simultaneously or in alternation in several Member States, the number of short periods of work performed abroad within a year, considering that a person is normally performing simultaneously an activity in several Member States if he has more than a certain number of assignments abroad a year.[809]

A similar issue appears in the intersection between both situations. In other words, when a person neither fulfils the criteria for being considered as posted, nor is deemed to normally perform activities in several Member States. This may happen, for example, when a person normally performs work in several Member States, but does so in different States (as it was the situation which was presented in front of the Court in the -unresolved- *Bogdan* case-),[810] without fulfilling the criteria for being considered as a posted worker. If such a situation is not considered as performing work in multiple States (as understood under Article 13 of Regulation 883/2004), then the general principle of *lex loci laboris* would have to be applied. This would mean regular changes in the legislation applicable, with each legislation being applicable for a relatively short amount of time, a result that might not be very practical.

7.7. Conclusions

The current system for the coordination of social security has attempted to bridge the differences among national social security systems through two methods.

The first one is by designing the system of social security coordination, since its inception, around the standard employment relationship, a form of work which regulation is fairly similar across the EU. Even after the extension of its personal scope to encompass most cross-border situations, the

[809] Jorens, Y.and Hadjú, J., *trESS European report 2008*, Brussels: European Parliament, 2008, p. 27; Jorens, Y.and Hadjú, J., *trESS European report 2009*, Brussels: European Parliament, 2009, p. 29.
[810] See further information on the *Bogdan* case in section 7.6.2.

Coordination Regulations have depended on the stability and foreseeability associated with the standard employment relationship. Instead of accommodating non-standard forms of work (of which platform work is only the most extreme example) by adapting the Coordination Regulations to its divergent features, the EU institutions (and, particularly, the CJEU) have attempted to fit these forms of work into a system that was not designed for them. The result did often have disputed consequences, such as nuancing the exclusivity principle.

The second method for bridging national differences in the coordination of social security at EU level is by leaving significant leeway to Member States in interpreting key notions on which the Coordination Regulations depend, such as substantial activity, marginal activity or registered office or place of business. One of the results of such an approach may nevertheless be a substantial lack of legal certainty among persons performing platform work regarding the outcome of the rules' application, as well as a lack of transparency with regard to how that outcome is decided.

Instead of managing the existing diversity in the EU labour market (and how this is approached by EU Member States), the current system for the coordination of social security seems to be set on ignoring it. And thus, while the Coordination Regulations may indeed provide for a complete system for the resolution of conflicts of rules[811] (in great part due to its residual clause), the application of such a system to the pluriform situation of persons performing platform work is very challenging, as has been argued above in this Chapter.

Overall, an analysis of the application of the Coordination Regulations to platform workers reveals the dire need of these rules to adapt to the specific features of this new form of work (as well as to other similar forms of non-standard work). This adaptation, if not brought through legislative reform, will most probably occur in practice through agreements among Member States under Article 16 of Regulation 883/2004.[812]

[811] This is so in great part due to its residual clause, contained in Article 11(3)(e) of Regulation 883/2004, which states that any other which is not included in one of the situations described in Article 11(3)(a) to 11(3)(d) (situations that are described in section 7.3.2) shall be subject to the legislation of the Member State of residence. See also section 7.3.3.f on the proposed 'complete system' principle.

[812] As it may have been subtly noted by the CJEU in Van den Berg.

Chapter 8. Access to social assistance by mobile platform workers under other EU provisions

8.1. Introduction

As mentioned in the prior chapter, the Coordination Regulations explicitly exclude social assistance from their material scope.[813] This apparently clear-cut statement, however, does not necessarily mean that all schemes qualified as social assistance under national law would automatically be outside the scope of the Coordination Regulations. In that regard, special non-contributory benefits, which share features with both social assistance and social security benefits, are included in the scope of the Coordination Regulations. Those benefits which, in turn, fit into the definition of social assistance under the Coordination Regulations provided by the CJEU, would be excluded from the scope of the Coordination Regulations. According to the CJEU, such social assistance benefits are benefits which entitlement is based on need, on a consideration of each individual case, and not on the fulfilment of minimum periods of insurance, employment or contribution.[814]

Platform workers, who (as analysed in chapters 2 till 6 of this thesis) often lack entitlement to employee-related social security benefits, may need to resort to benefits fitting into that definition. When they invoke such social assistance in a Member State other than their Member State of origin, and assuming that they are EU citizens,[815] their potential entitlement on an equal basis with nationals of that country will be modulated by a set of provisions of EU law. These provisions are found in Regulation 492/2011, [816] concerning free movement of workers, and Directive 2004/38/EC, [817] on free movement of EU citizens. This chapter analyses the content of the provisions modulating access to social assistance contained in Regulation 492/2011 (in sections 8.2.1, 8.2.2, 8.2.3 and 8.2.4) and

[813] Regulation 883/2004, Art. 3(5)(a).

[814] Case 1/72, *Frilli*, EU:C:1972:56, para. 14.

[815] See Brouwer, E. and De Vrier, K., 'Third-country nationals and discrimination on the ground of nationality: Art. 18 TFEU in the context of Art. 14 ECHR and EU migration law: time for a new approach', in Van den Brink, M. et al., *Equality and human rights: nothing but trouble?*, Utrecht: SIM, 2015.

[816] Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union.

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

in Directive 2004/38 (in sections 8.3.1, 8.3.2, 8.3.3 and 8.3.4), as well as how they apply to situations of platform work (in sections 8.2.5 -concerning Regulation 492/2011-, 8.3.5 -concerning Directive 2004/38- and 8.4 -concerning both-).

8.2. Regulation 492/2011

8.2.1. *Introduction*

Regulation 492/2011 develops the right of workers to freedom of movement across the EU as contained in Article 45 TFEU, and it is the successor of Regulation 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community. As its name indicates, the main idea behind the Regulation is to eliminate barriers for the free movement of workers between EU Member States (barriers that the nationals of the Member State to which the person moves do not experience). Therefore, the Regulation focuses on those issues that workers moving between Member States may experience specifically because they are workers.[818] More precisely, the Regulation addresses (inter alia) potential obstacles for taking up employment in another Member State, to perform work under the same conditions enjoyed by nationals of that State, as well as to enjoy the same social and tax advantages as national workers of that State. The latter is of relevance for this thesis because platform workers (as it has been noted before in this thesis) may rely on such social advantages (which, as it will be analysed below, may be social assistance schemes).

The provision on equal access to social advantages is contained in Article 7(2) of Regulation 492/2011, which establishes that "[A worker who is a national of a Member State] shall enjoy the same social and tax advantages as national workers". This provision thus prohibits direct or indirect discrimination based on the nationality of workers who are nationals of a Member State. Indirect

[818] The more general regulation of the freedom of movement of all EU citizens is addressed by Directive 2004/38, analysed below.

discrimination, however, may be allowed if it can be proved that, for the specific benefit in question, the requirement of a link with the society of the Member State is justified.[819]

In any case, Article 7(2) arguably hinges on two concepts: 'worker' and 'social and tax advantages'. In order to determine how in a cross-border situation platform workers' access to social assistance may be affected by Regulation 492/2011, the meaning of the terms 'worker' and 'social advantage' will be analysed below.[820] Moreover, and as it will be analysed, the CJEU has extended through its case law the right to equal access to social advantages to (some) self-employed persons. Because of that, the content of the term 'self-employment' in that context will be also explored.

8.2.2. *The concept of 'social advantage' under Regulation 492/2011*

The concept of 'social advantage' has been defined by the CJEU as including those benefits "which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and whose extension to workers who are nationals of other member states therefore seems likely to facilitate the mobility of such workers within the community".[821] It includes both financial and non-financial benefits. Examples of benefits which have been considered to be social advantages under Regulation 492/2011 are child-raising allowance,[822] redundancy payment,[823] public transport fare reductions,[824] funeral payment,[825] study grants,[826] public assistance[827] and minimum subsistence payments.[828]

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[819] Case C-213/05, *Geven*, EU:C:2007:438; Pennings, F., EU Citizenship: Access to Social Benefits in Other EU Member States, *The International Journal of Comparative Labour Law and Industrial Relations*, vol 28 issue 3, 2012, p. 316.

[820] Tax advantages will not be analysed below as they are beyond the scope of this thesis.

[821] Case 249/83, *Hoeckx*, EU:C:1985:139, para. 20; Case C-85/96, *Martinez Sala*, EU:C:1998:217, para. 25.

[822] Case C-212/05, *Hartmann*, EU:C:2007:437.

[823] Case C-57/96, *Meints*, EU:C:1997:564.

[824] Case 32/75, *Cristini*, EU:C:1975:120.

[825] Case C-237/94, *O'Flynn v Adjudication Officer*, EU:C:1996:206.

[826] Case 337/97, *Meeusen*, EU:C:1999:284.

[827] Case 248/83, *Hoeckx*, EU:C:1985:139.

[828] Case 75/63, *Unger*, EU:C:1964:19; Case 22/84, Scrivner, EU:C:1985:145.

8.2.3. *The concept of 'worker' under Regulation 492/2011*

Regulation 492/2011 elaborates and operationalizes the right to free movement of workers enshrined in Article 45 TFEU.[829] It is therefore logical that the concept of worker used in Regulation 492/2011 is similar to the concept of 'worker' under Article 45 TFEU,[830] which, as established by the CJEU in its famous judgment *Lawrie-Blum*, has an independent EU meaning.[831] Its essential content is that it is a person who, for a certain period of time, performs services for and under the direction of another person, in return for which he receives remuneration.[832]

Through the years, the CJEU has developed a set of criteria to determine whether a person may be performing services for and under the direction of another person.[833] Some of these criteria are purely managerial, mainly who determines the services to be performed by the person (as well as how and when they are performed)[834] and who has powers of management, supervision and sanctioning.[835] Other indicators are of an economic nature, such as who assumes the financial risk[836] and whether the person performing the professional activity and the undertaking form a single economic unit.[837] The application of these criteria depends, logically, on the specific situation at issue. Nevertheless, apart from the cases in which platform workers have been already considered to be in an employment relationship under national law, it might be a challenge to include platform workers in the concept of 'worker' developed in relation to Article 45 TFEU, due to the application by the CJEU of a strict subordination test.[838]

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[829] Regulation 492/2011, Preamble, para. 3.

[830] For further analysis on the concept of 'worker' under Article 45 TFEU, see also section 9.4.2.a.

[831] Case 75-63, *Unger*, EU:C:1964:19.

[832] Case 66/85, *Lawrie-Blum*, EU:C:1986:284, para. 17.

[833] Risak, M. and Dullinger, T., 'The concept of 'worker' in EU law: Status quo and potential for change', *ETUI Research Paper-Report*, Brussels: ETUI, 2018, pp. 35-37, 42-43.

[834] Case C-270/13, *Haralambidis*, EU:C:2014:2185, para. 33; Case C-256/01, *Allonby*, EU:C:2004:18, para. 72.

[835] Case C-270/13, *Haralambidis*, EU:C:2014:2185, para. 30.

[836] Case C-3/87, *Agegate*, EU:C:1989:650, para. 36.

[837] Case C-22/98, *Becu and Others*, EU:C:1999:419, para. 26.

[838] Van Peijpe, T., 'EU Limits for the Personal Scope of Employment Law', *European Labour Law Journal* vol. 3 issue 1, 2012, p. 37.

Furthermore, in order to be considered a worker in the meaning of Article 45 TFEU, a person must engage in an activity that is effective and genuine, and not of such a small scale as to be considered as purely marginal and ancillary.[839] The CJEU has particularly noted a low number of hours performed by an employee, as well as an activity's irregular nature, as indicators of marginal and ancillary activities.[840] Nevertheless, the Court has stated that there is no specific threshold below which an economic activity may be considered as marginal.[841] Arguably, the lack of such a threshold (and, instead, requiring an overall assessment of the situation[842]) may result in uncertainty when attempting to determine the nature of platform work under Regulation 492/2011.

The CJEU has stated that, when assessing whether a person is a worker within the meaning of Article 45 TFEU, only the occupational activities that the person concerned has pursued within the territory of the host Member State should be taken into account (and thus the activities pursued in other Member States should not be considered for that purpose).[843] This is obviously detrimental to platform workers who perform work in several Member States simultaneously or in alternation (a situation which was analysed, as far as it concerned the Coordination Regulations, on the previous chapter in detail).

Importantly, a person may be within the scope of Article 7(2) even if he is no longer in an employment relationship,[844] if the reason why he is no longer active is involuntary unemployment.[845] In this regard, being unemployed because of the end of a fixed-term contract might be considered as being involuntarily unemployed,[846] depending, among other things, on whether fixed-term contracts are common in that specific sector and on the possibility of renewing

[839] Case C-53/81, *Levin*, EU:C:1982:105, para. 17.

[840] C-357/89, *Raulin*, EU:C:1992:87, para. 14.

[841] See C-413/01, *Ninni-Orasche*, EU:C:2003:600, para. 25; Houwerzijl, M.S., 'European Union cross-border worker mobility in light of digitalisation of labour - more fragmentation underway', in Ahlberg, K. and Bruun, N. (eds.), The New Foundations of Labour Law, Frankfurt am Main-Berlin-Bern-Bruxelles-New York-Oxford-Wien: Peter Lang International Academic Publishers, 2017, pp. 233-254.

[842] C-14/09, *Genc*, EU:C:2010:57, para. 27 and 28.

[843] C-357/89, *Raulin*, EU:C:1992:87, Operative part, para. 2.

[844] Case C-39/86, *Lair*, EU:C:1988:322, para. 36.

[845] Ibid., para. 37.

[846] Case C-413/01, *Ninni-Orasche*, EU:C:2003:600, para. 32.

the contract or finding employment which is not fixed-term.[847] Nevertheless, access by involuntary unemployed persons to social advantages under Article 7(2) of Regulation 492/2011 might depend on whether the person needs such social advantage for training in a related field to the one of the previous activity, or on whether he is obliged by the labour market conditions to retrain himself in a different field,[848] and on whether the person has not entered in a Member State other than his Member State of origin to benefit from a social advantage after a very short period of employment.[849] Other situations in which a non-active person retains his status as an employed person is when a person ceases working during the last stages of pregnancy and the period immediately after childbirth, given that she returns to that or another job in a reasonable interval (based on the personal circumstances and the maternity leave in the relevant Member State).[850] Furthermore, as the concept of worker is unique to EU law, the formal consideration of a person as a self-employed person under national law does not exclude the possibility that a person may be classified as a worker under EU law.[851]

In a separate note, it should be noted that, while it is not clearly stated in Regulation 492/2011, the provision of Article 7(2) may also be invoked by frontier workers.[852]

8.2.4. *The concept of 'self-employed person' for the purposes of equal access to social advantages*

Self-employed persons are not included in the personal scope of Regulation 492/2011. Nevertheless, self-employed persons do enjoy similar rights as Article 7 Reg 492/2011, although not based upon this Regulation but directly on the basis of Article 49 TFEU. In this regard, the CJEU has stated that self-employed persons are also entitled to the right to access social advantages (specifically, a

[847] Ibid., para. 44-45.

[848] Case C-39/86, *Lair*, EU:C:1988:322, para. 39; Case C-413/01, *Ninni-Orasche*, EU:C:2003:600, para. 35; Case C-357/89, *Raulin*, EU:C:1992:87, para. 21. This case law concerned specifically the right to Access to student allowances, albeit it might be extended by analogy to other social advantages.

[849] Case C-413/01, *Ninni-Orasche*, EU:C:2003:600, para. 35.

[850] Case C-507/12, *Saint Prix*, EU:C:2014:2007; O'Brien, C., et al., *The concept of worker under Art. 45 TFEU and certain non-standard forms of employment*, Brussels: European Commission, 2016.

[851] See Case C-256/01, *Allonby*, EU:C:2004:18, para. 71. This case concerned treatment of male/female workers, but might shed some light on potential interpretations of Art. 45 TFEU by the CJEU.

[852] Case C-57/96, *Meints*, EU:C:1997:564, para. 50; Case C-337/97, *Meeusen*, EU:C:1999:284, para. 21.

guaranteed minimum income scheme) in an equal basis with national workers on the basis of Article 49 TFEU on freedom of establishment and an analogue interpretation of Regulation 492/2011.[853]

The question is then which situations of self-employment are exactly included under Article 49 TFEU. For this, it is necessary to resort to the definition of the concept of 'establishment' by the CJEU, which has been defined as involving "the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period".[854]

Hence, first (and as in the case of the concept of 'worker'), a person needs to be performing an economic activity[855] which is "genuine and effective and not such as to be regarded as purely marginal and ancillary"[856] to be considered a self-employed person. In order to be considered as 'genuine and effective', a self-employed activity needs to be carried out for profit.[857]

And, second, the activity must be performed through stable arrangements in the host Member State, understood as having in that State the necessary equipment for the provision of the specific services concerned,[858] as well as the infrastructure enabling to perform the professional activity in a stable and continuous manner.[859]

Some further light on the content of the concept of self-employment as it relates to freedom of establishment was shed in the CJEU case Jany. Although the decision on this case was published before Directive 2004/38 existed and concerned (at that time) third country nationals, it contains one of the most complete definitions on the concept. In it, the Court stated that, in order for a person to be considered that an activity is performed in a self-employed capacity in the context of freedom of establishment, an activity must be

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[853] Case C-299/01, *Commission v Luxembourg*, EU:C:2002:394; Case C-299/01, *Commission v Luxembourg*, Opinion of the Advocate General, EU:C:2002:243.

[854] Case C-221/89, *Factortame*, EU:C:1991:320, para. 20.

[855] Risak, M. and Dullinger, T., 'The concept of 'worker' in EU law: Status quo and potential for change', *ETUI Research Paper-Report*, Brussels: ETUI, 2018, p. 30.

[856] Case C-196/87, *Steymann*, EU:C:1988:475, para. 13.

[857] Case C-13/76 Donà, EU:C:1976:115, p. 1336; European Commission, *Guide to the Case Law of the European Court of Justice on Art. 49 et seq. TFEU*, Brussels: European Commission, 2017, pp. 14-15.

[858] Case C-230/14, *Weltimmo*, EU:C:2015:639, para. 30.

[859] Case C-215/01, *Schnitzer*, EU:C:2003:662, para. 32.

performed "outside any relationship of subordination concerning the choice of that activity, working conditions and conditions of remuneration; under that person's own responsibility; and in return for remuneration paid to that person directly and in full".[860]

In summary, self-employed persons under Article 49 TFEU are persons who perform an economic activity in a stable and continuous way outside any relationship of subordination, under their own responsibility and in exchange of remuneration [861]

It should be noted that, contrary to the free movement of workers under the TFEU (which is regulated primarily under Article 45), the free movement of self-employed persons is spread over two Articles: Article 49 (on freedom of establishment) and Article 56 TFEU (on freedom to provide services). Article 56 TFEU covers the right of self-employed persons "to offer and provide their services in other Member States on a temporary basis while remaining in their country of origin".[862] However, the CJEU has not stated yet whether a similar application by analogy may also be applied to those situations covered by Article 56 TFEU. Hence, while a self-employed person established in a Member State is entitled to social advantages on an equal basis with nationals of that Member State, it is questionable that the same may be said about a self-employed person who provides services in the Member State of the social advantages on a temporary basis, but who remains established in a different Member State.

[860] Case C-268/99, *Jany*, EU:C:2001:616, para. 70-71. Although the decision was published before Directive 2004/38 existed and concerned (at that time) third country nationals, it contained a very important definition of self-employed in the meaning of the freedom of establishment

[861] European Parliament, 'Freedom of establishment and freedom to provide services', in *Fact Sheets on the European Union*, 2020, retrieved on 15 December 2020 at https://www.europarl.europa.eu/factsheets/en/sheet/40/freedom-of-establishment-and-freedom-to-provide-services; Moreover, for a detailed explanation on the freedom of establishment under EU law, see European Commission *Guide to the case law of the European Court of Justice on Art. 49 et seq. TFEU*, European Commission: Brussels, 2017.

[862] European Parliament, 'Freedom of establishment and freedom to provide services', in *Fact Sheets on the European Union*, 2020, retrieved on 15 December 2020 at https://www.europarl.europa.eu/factsheets/en/sheet/40/freedom-of-establishment-and-freedom-to-provide-services; Moreover, for a detailed explanation on the freedom of establishment under EU law, see European Commission *Guide to the case law of the European Court of Justice on Art. 56 et seq. TFEU*, European Commission: Brussels, 2017.

8.2.5. *Access to social assistance by platform workers under Regulation 492/2011*

Article 7 of Regulation 492/2011 requires Member States to ensure equal access to social advantages between EU workers and their own nationals. As a result, it acts as a key provision for determining whether platform workers may access to some forms of social assistance when moving between Member States. It is thus of key importance to understand how the limitations of Regulation 492/2011 as it regards its application to the specific situation of platform workers' access to social assistance. These limitations derive from the meaning of the terms analysed above and, particularly, the one of the terms 'worker' and 'self-employed, and how they may cover situations of platform work.

In this regard, Regulation 492/2011, being focused on regulating the freedom of movement of workers, has its personal scope limited to those persons considered as workers. As noted above, the concept of worker under the Regulation may be summarised as a person who, for a certain period of time, performs services for and under the direction of another person, in return for which he receives remuneration.[863] The different elements of this definition has been developed further through the case law of the CJEU. The way the CJEU has interpreted, particularly, what it constitutes to perform services *for and under the direction of another person* and, specifically, the application by the CJEU of a strict subordination test,[864] may result on platform workers not being considered as workers under the Regulation.

The requirement of performing a genuine and effective activity is a criterion that would be fulfilled by platform work as defined in this thesis. Nevertheless, it must be noted that the concept of 'genuine and effective' seems to be less well developed concerning the concept of 'establishment' (and, by extension, that of a 'self-employed person') than in the case of the concept of 'worker', with the CJEU putting more emphasis on the requirement that the economic activity is stable and continuous.[865]

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[863] Case 66/85, *Lawrie-Blum*, EU:C:1986:284, para. 17.

[864] Van Peijpe, T., 'EU Limits for the Personal Scope of Employment Law', *European Labour Law Journal* vol. 3 issue 1, 2012, p. 37.

[865] Case C-384/08, *Attanasio*, EU:C:2010:133, para. 36. In this case (same paragraph), the CJEU highlights the broadness of the concept of 'establishment'.

Furthermore, the CJEU has stated that self-employed persons are also entitled to the right to access social advantages (specifically, a guaranteed minimum income scheme) on an equal basis with national workers on the basis of Article 49 TFEU on freedom of establishment and an analogue interpretation of Regulation 492/2011.[866] Hence, in order to understand the concept of self-employment for the purposes of the Regulation, it is necessary to resort to the case-law of the CJEU in the context of the freedom to provide of establishment. As noted above, the notion of establishment, however, revolves in no small part around the idea that the professional activity needs to be performed in a stable and continuous manner, a requirement which is, arguably, difficult to apply in relation to the on-demand and flexible nature of platform work.

Even if the notion of establishment might be applied to the situation of platform work, it is possible that such implementation would result in considering (some) self-employed platform workers as persons performing activities of marginal or ancillary character (something which may also happen in the case of them considered as workers), and thus treated as non-active persons.

Platform workers who are not considered as workers or self-employed persons based on the notions developed under Article 45 TFEU and Article 49 TFEU (respectively) because they are considered to not be active would not be entitled to equal access to social advantages under this legal instrument.

8.3. Directive 2004/38/EC

8.3.1. *Introduction*

The right of EU citizens to move freely across the EU[867] and to not be discriminated on grounds of nationality[868] is concretised by Directive 2004/38 (the so-called Citizens Directive). Directive 2004/38 is different from Regulation 492/2011 in multiple ways: it has to be transposed through

[866] Case C-299/01, *Commission v Luxembourg*, EU:C:2002:394; Case C-299/01, *Commission v Luxembourg*, Opinion of the Advocate General, EU:C:2002:243.

[867] Treaty on the Functioning of the European Union, Art. 21.

[868] Ibid., art 18.

national legislation in the different Member States[869] and it has a different (and broader) legal basis (which includes the free movement of workers, but also the prohibition of discrimination on grounds of nationality under Article 18 TFEU, as well as the promotion of free movement of EU citizens under Article 21 TFEU and of freedom of establishment under Article 50 TFEU). Its primary goal is to regulate the right of EU citizens (and their family members) to enter and reside in a Member State other than their State of origin. In doing so, the Directive establishes the right of these persons residing in a Member State other than their State of origin to invoke social assistance on an equal basis with nationals of that State. [870] Member States, however, are not obliged under the Directive to ensure entitlement to social assistance during the first three months of residence, as well as concerning jobseekers.[871]

However, Directive 2004/38 also establishes that the right of EU citizens to reside in another Member State other than the State of origin after the first three months of residence[872] will depend, during the first five years of residence, on whether the person is a worker, a self-employed person or a person who has sufficient resources for himself and his family members not to become a burden on the social assistance system of the host Member State during this period of residence.[873] Still, the Preamble to the Directive states that the resort to social assistance by non-active EU citizens may not result in automatic expulsion. Instead, the host State should analyse the individual circumstances, the duration of residence and whether temporary difficulties motivate the resort to social assistance.[874]

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[869] For an in-depth analysis of the implementation of Directive 2004/38 in some Member States, see European Citizen Action Service, *Comparative study on the application of Directive 2004/38/EC of 29 April 2004 on the Right of Citizens of the Union and their family members to move and reside freely within the territory of the Member States*, Brussels: European Parliament, 2009; Valcke, A., *A comparative study on the implementation of the Free Movement Directive: Transposition, Application and Enforcement in Belgium, Italy and the UK Compared*, Palermo: Università degli Studi di Palermo, 2016.

[870] Directive 2004/38., Art. 24(1).

[871] Ibid., Art. 24(2).

[872] All EU citizens have the right to enter any Member State and reside there for a period of three months, without any other requirement than to possess a valid identity card or passport, as noted in Directive 2004/38, Art. 5 and 6.

[873] Ibid., Art. 7(1).

[874] Directive 2004/38, Preamble, para. 16.

8.3.2. *The concept of 'social assistance' under Directive 2004/38*

The concept of social assistance under Article 24 of Directive 2004/38 has been defined by the CJEU as "all assistance schemes established by the public authorities, whether at national, regional or local level, to which recourse may be had by an individual who does not have resources sufficient to meet his own basic needs and those of his family and who by reason of that fact may, during his period of residence, become a burden on the public finances of the host Member State which could have consequences for the overall level of assistance which may be granted by that State".[875] The CJEU has stated that the concept of social assistance must not be interpreted narrowly, and encompasses benefits which aim to cover "the minimum subsistence costs necessary to lead a life in keeping with human dignity".[876] Benefits of a financial nature which aim to facilitate access to the labour market, in turn, are not considered as social assistance within the meaning of Article 24(2) of Directive 2004/38.[877]

8.3.3. *The concept of 'worker' under Directive 2004/38*

It must be noted that, while both Regulation 492/2011 and Directive 2004/38 have as their legal basis Article 45 TFEU and thus generally rely on the concept of worker under Article 45 TFEU (and thus it will not be analysed again here), Directive 2004/38 has a broader personal scope that exceeds that concept.[878] This should be kept in mind when observing the different approach of each instrument towards the retention of the worker status.

As mentioned above, under Regulation 492/2011 the status of worker might be retained if a person is involuntarily unemployed but, in that case, the Court heavily relied on whether the specific social advantage was conducive to train the person in a similar field to his previous occupation, or whether the person needs to be retrained in a different field due to the labour market situation. In contrast,

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[875] See, inter alia, Case C-333/13, *Dano*, EU:C:2014:2358, para. 63. For a seminal explanation of the concept and the case law on which is based, see Case C- 140/12, *Brey*, EU:C:2013:565, para. 61.

[876] Case C-67/14, *Alimanovic*, EU:C:2015:59, para. 45-46.

[877] Joined Cases C-22/08 and C-23/08, *Vatsouras*, EU:C:2009:344, para. 45.

[878] This is consistent with its legal base, which (as mentioned already in this thesis) includes the free movement of workers, but also the prohibition of discrimination on grounds of nationality under Art. 18 TFEU, as well as the promotion of free movement of EU citizens under Art. 21 TFEU and of freedom of establishment under Art. 50 TFEU.

Directive 2004/38 does not stipulate such requirements in order for an involuntarily unemployed person to retain his status as a worker or self-employed person. According to this Directive, if he becomes involuntarily unemployed after having performed work in the host Member State, he may retain his status as a worker if he is in vocational training.[879] The Directive 2004/38 also extends the status of 'worker' to persons who are involuntarily unemployed.[880] Nevertheless, such status is not granted equally to all persons who involuntarily stop being economically active, but only to those who make a transition from being in an employment relationship to becoming involuntarily unemployed.[881] What is more, the Directive provides that the worker status should be retained for at least six months in the case of persons who were in a fixed-term contract for a period of less than a year,[882] while granting that status indefinitely to workers who were for a longer duration working on employment contracts. This may be in consonance with the purpose of Directive 2004/38, which is to modulate the right of EU citizens to reside in an EU Member State, while trying to avoid that these persons (as long as have not resided in the Member State for a sufficiently long duration) become an excessive burden to the hosting Member State. Nevertheless, the preferential treatment that the Directive provides concerning the longer-term employment relationship is particularly significant for a form of work, i.e. platform work, which is characterised for its instability and fragmentation, as well as (at least for the moment) the use by online platforms of the legal status of self-employment.

Apart from situations of involuntarily unemployment, under said Directive a person retains his status as a worker or a self-employed person as well when he is temporarily unable to work due to accident or illness.[883]

8.3.4. *The concept of 'self-employed person' under Directive 2004/38*

Similar to the concept of 'worker', the concept of 'self-employed' has not been interpreted by the Court in the context of Directive 2004/38 directly. Instead, it is necessary to resort to the Court's

[879] Directive 2004/38, Art. 7(3)(b) and 7(3)(c).

[880] Ibid.

[881] See Verschueren, H., 'Being Economically Active: How It Still Matters', in Verschueren, H. (ed.), *Residence, Employment and Social Rights of Mobile Persons*, Cambridge-Antwerp-Chicago: Intersentia, 2016.

[882] See Case C-483/17, *Tarola*, ECLI:EU:C:2019:309.

[883] Directive 2004/38, Art. 7(3)(a).

case law on Article 49 TFEU on freedom of establishment,[884] as it was the case when defining the concept of 'self-employed' for the purposes of Regulation 492/2011 above. Hence, and to use the summary of the definition also mentioned in the section on Regulation 492/2011, a self-employed person for the purposes of Directive 2004/38 is a person who performs an economic activity in a stable and continuous way outside any relationship of subordination, under his own responsibility and in exchange of remuneration.[885]

It must be noted that a self-employed person who becomes involuntarily unemployed does not maintain his status as such for the purposes of Directive 2004/38 but, instead, he is considered instead as non-active.[886]

8.3.5. *Access to social assistance by platform workers under Directive 2004/38*

Because, as mentioned above, Directive 2004/38 also relies on the concepts of 'worker' (under Article 45 TFEU) and self-employed (under Article 49 TFEU) to (partially) determine its scope, it includes the same challenges for its application to the specific nature of platform work as have been discussed in the section devoted to Regulation 492/2011, thus resulting in similar issues of legal (un)certainty and lack of protection for (certain) platform workers. There is however, one exception, and it is the fact that the Directive 2004/38, unlike Regulation 492/2011, also includes jobseekers in its scope (although with some limitations).

In summary, there is a double possibility that platform workers would be considered non-active persons, either while performing platform work considered of ancillary character or while being unemployed due to the unstable and flexible nature of this form of work. As a result, is very likely that a significant share of platform workers under the scope of the Directive will experience the restriction on their right to access social assistance linked with the non-active status (and, of course, the possibility of losing their right to reside in that Member State, the regulation of which is the

[884] This was also confirmed in Case C-544/18, *Dakneviciute*, EU:C:2019:761.

[885] See section 8.2.4.

[886] This is observed from the fact that Art. 7(3)(b) and 7(3)(c) of Directive 2004/38 only refer to periods of employment and to an employment contract, respectively, and not to periods of self-employment.

primary focus of Directive 2004/38), thus leaving these workers in a more vulnerable position than persons performing other forms of work.

8.4. Conclusion on access to social assistance by mobile platform workers

When analysing the right of an EU citizen performing platform work in a Member State other than his Member State of origin to access social assistance on an equal basis with nationals of that Member State, it is crucial to know whether he is classified under EU law as a worker (in connection with Article 45 TFEU), as a self-employed person (in connection with Article 49 TFEU) or neither.

Platform workers considered as either workers or self-employed persons are generally covered by provisions ensuring access to social assistance on an equal basis with nationals of the Member State to which they have moved. Moreover, under Directive 2004/38, platform workers who become involuntarily unemployed after their first three months of residence may retain the status of worker for the purposes of accessing social assistance for a period which may be indefinite, if they were employed for longer than a year prior to becoming unemployed.

Finally, platform workers who are classified as non-active persons (due to, for example, their activities as platform workers being considered as marginal or ancillary, or because of having become involuntarily unemployed after performing a self-employed activity) or (in the case of the Directive 2004/38) jobseekers after a certain period may experience significant limitations on their access to social assistance in Member States other than their State of origin during the first five years residing there. In this regard, they may be unable to resort to social assistance schemes (with the potential exception of special non-contributory benefits covered in the prior chapter) during their first three months residing in the host Member State. After that period, and during their first five years of residence, they may risk being expelled if they are considered a burden for the social assistance of the Member State. Moreover, platform workers who become unemployed within their first three months of residing in a Member State may be also unable to access social assistance benefits (and even risk being expelled if they are considered a burden) during those first three months (unless they can profit from insurance periods in other countries -see chapter Chapter 7 of this thesis-).

In conclusion, access to social assistance by platform workers (who are EU citizens) in Member States other than their State of origin is in great part determined by whether they are classified as workers, a self-employed persons or a non-active persons under EU law. Due to the fact that the criteria used to determine to which of these three categories a person belongs are generally not well adapted to the specific features of platform work, it is often unclear to which status a platform worker belongs. And, because of the importance of such classification, the situation of platform workers as it regards their access to social assistance is arguably surrounded by legal uncertainty.

Chapter 9. Social security and platform work under the lens of the Council Recommendation on access to social protection for workers and the self-employed

9.1. Introduction

As it has become abundantly clear in the previous chapters, when this thesis addresses the question of what are the social security rights and obligations of platform workers in selected EU countries, it does so by analysing both national and EU legislation. The latter is vital to determine the social security rights and obligations of platform workers who exercise their right to free movement. Apart from the legal instruments discussed in Chapters 7 and 8, there is yet another way in which EU legislation affects the social security rights and obligations of platform workers, even if indirectly: this is the setting of common approaches towards social security through (non-binding) legal instruments, the so-called soft law. This chapter will focus on how the most recent (and, arguably, most ambitious) of these soft-law instruments, namely the Council Recommendation on access to social protection for workers and the self-employed,[887] may be applied to the situation of platform workers.

The choice to give a closer look to the Council Recommendation is not randomly made. Said Recommendation advocates that all workers and the self-employed should be formally and effectively covered by social protection schemes that provide adequate protection in a transparent way. This makes the Recommendation a very relevant instrument in the context of the central research question of this thesis, namely for assessing the social security rights and obligations of platform workers, even despite its non-binding character. Furthermore, as will be elaborated upon in the concluding Chapter 10 of this thesis, the Recommendation presents some of the essential issues (noted throughout the previous chapters of this thesis) regarding the social protection of platform workers.

In order to understand how the Council Recommendation may be applied to the specific situation of platform workers, it is necessary to understand its content. However, because the

[887] Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed (2019/C 387/01).

Recommendation arguably leaves many of its fundamental notions undefined (or underdefined) and because no monitoring of this instrument's implementation has been performed yet, this is not a very easy exercise. Because no case law (or any other authoritative interpretation) exists on how to interpret the Recommendation, this chapter relies heavily on the Recommendation's text, sometimes to the smallest detail. The interpretation of this text will be informed by the Recommendation's preparatory documents, the Recommendation's position within the EU social acquis and, especially, the analysis performed in the previous chapters of this thesis on EU and national approaches towards the social security rights and obligations of platform workers.

The chapter will start with an overview of the winding path that has led to the Council Recommendation (section 9.2). Doing so is essential for grasping the relevance of the Recommendation within the EU social *acquis*. This will be followed by a brief overview of the Recommendation's content, objectives and inherent limits (section 9.3).

The chapter will then continue with scrutinizing the Recommendation's text and analysing the potential meaning of each of the key concepts on which the Recommendation relays (section 9.4). This will serve as the basis for the assessment of how each of the Recommendation's substantial provisions may be applied to the specific situation of platform workers (sections 9.5 to 9.9). The chapter ends with a summarizing conclusion (section 9.10).

9.2. The winding path towards the Council Recommendation on access to social protection for workers and the self-employed

In November 2019 the EU Council approved a Recommendation on access to social protection for workers and the self-employed.[888] This Recommendation is the continuation of the EU's long-term trajectory of promoting adequate access to social protection, as well as fighting exclusion and poverty, across EU Member States.

[888] Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed (2019/C 387/01).

Already in 1957, in the Treaty of Rome, Member States agreed on the need "to promote the improvement of the living and working conditions of labour so as to permit the equalisation of such conditions in an upward direction",[889] with the European Commission aiming "to promote close collaboration between Member States in the social field".[890]

The Community Charter of the Fundamental Social Rights of Workers, adopted on December 1989 by all the then Member States of the European Communities (except the United Kingdom) went further. In this regard, it stated that "the completion of the internal market must offer improvements in the social field for workers of the European Community, especially in terms of (. . .) social protection"[891] and "that the implementation of the Single European Act must take full account of the social dimension of the Community and that it is necessary in this context to ensure at appropriate levels the development of the social rights of workers of the European Community, especially employed workers and self-employed persons".[892] More importantly, the Charter established that "every worker of the European Community shall have a right to adequate social protection and shall, whatever his status and whatever the size of the undertaking in which he is employed, enjoy an adequate level of social security benefits"[893] and that "persons who have been unable to enter or re-enter the labour market and have no means of subsistence must be able to receive sufficient resources and social assistance in keeping with their particular situation".[894] It also established that "any person who has reached retirement age but who is not entitled to a pension or who does not have other means of subsistence, must be entitled to sufficient resources and to medical and social assistance specifically suited to his needs".[895]

In the wake of this, the Council of the European Communities adopted in 1992 two Recommendations, one on common criteria concerning sufficient resources and social

[889] Treaty establishing the European Economic Community, Art. 117.
[890] Ibid., Art. 118.
[891] Community Charter of the Fundamental Social Rights of Workers of 9 December 1989, 7th recital.
[892] Ibid., 13th recital.
[893] Ibid., Art. 10.
[894] Ibid.
[895] Ibid., Art. 25.

assistance in social protection systems[896] and another one on the convergence of social protection objectives and policies.[897] In the latter, it was recommended that Member States provided to employed persons who ceased working due to retirement, sickness, accident, maternity, invalidity or unemployment, a replacement income that maintains their standard of living in a reasonable manner in accordance with their participation in appropriate social security schemes.[898]

These Recommendations set the bases for the Treaty of Amsterdam of 1999,[899] which provided the EU with explicit competencies to adopt measures as regards social security and social protection of workers, as well as measures designed to combat social exclusion.[900] Based on this, the European Commission published in the same year a Communication on a 'Concerted Strategy for Modernising Social Protection', shortly followed by a political decision by the Council of launching such concerted strategy. Following this, an Interim High-Level Working Party on Social Protection started meeting, which was replaced in that same year by the Social Protection Committee.

Since then, and in collaboration with the Social Protection Committee, the EU has provided a framework for the development at national level of strategies on social protection through the Open Method of Coordination (OMC), particularly regarding pensions and social inclusion.[901] This action

[896] *Council Recommendation of 24 June 1992 on common criteria concerning sufficient resources and social assistance in social protection systems (92/441/EEC).*

[897] Council Recommendation of 27 July 1992 on the convergence of social protection objectives and policies (92 /442 /EEC).

[898] Ibid., A(1)

[899] European Commission, *Analytical document Accompanying the document 'Consultation Document Second Phase Consultation of Social Partners under Article 154 TFEU on a possible action addressing the challenges of access to social protection for people in all forms of employment in the framework of the European Pillar of Social Rights',* SWD(2017) 381 final, Brussels: European Commission, 2017, p. 60.

[900] European Social Observatory, *Social Policy at the EU Level: from the Anti-Poverty Programmes to Europe 2020*, VC/2012/0658, Brussels: OSE., 2012, p.11.

[901] For a detailed analysis of the OMC see, inter alia, Haar, B.P., *Open method of coordination. An analysis of its meaning for the development of a social Europe*, Doctoral thesis, Faculteit der Rechtsgeleerdheid, Leiden University, 2012; Vanhercke, B.W.R., *Inside the Social Open Method of Coordination: The hard politics of 'soft' governance*, Doctoral thesis, Amsterdam Institute for Social Science Research, University of Amsterdam, 2016.

has been eventually included in the Europe 2020 strategy, implemented through, inter alia, the European Semester.[902]

The European Pillar of Social Rights[903] is arguably the next step of the (sometimes twisted[904]) path of EU social policymaking, an attempt to modernise the EU social *acquis*.[905] While the Pillar itself is not legally binding,[906] it served as the basis for a broad range of actions by EU institutions in twenty social policy domains, among which is social protection. One of those actions is the Council Recommendation on access to social protection for workers and the self-employed.

In this regard, in its resolution on the European Pillar of Social Rights, the European Parliament called on the European Commission to propose a Council Recommendation on social protection for people in all forms of employment and self-employment.[907] Some months after, in April 2017, the Commission initiated its first phase of consultations with social partners under Article 154 TFEU on a possible EU action to address the challenges of access to social protection and related employment services for workers in non-standard employment. Such consultation is mandatory for the Commission before submitting proposals in the social policy field.[908] The social partners were also asked[909] on potential EU actions to address the challenges of access to social protection for the self-employed. This consultation was raised from concerns on this issue stated by stakeholders

[902] See Schoukens, P., De Becker, E., & Smets, J. B., 'Fighting social exclusion under the Europe 2020 strategy: Which legal nature for social inclusion recommendations?', *International Comparative Jurisprudence*, vol. 1 issue 1, 2015, pp. 11-23; Schoukens, P., *EU Social Security Law: the Hidden Social' Model*, Tilburg: Tilburg University, 2016.

[903] Commission Recommendation of 26.4.2017 on the European Pillar of Social Rights, C(2017) 2600 final; Council of the European Union, *Proposal for an interinstitutional proclamation endorsing the European Pillar of Social Rights*, 13129/17, Brussels: Council of the European Union, 2017.

[904] See Vanhercke, Bart, et al., 'Conclusions: the twists and turns of two decades of EU social policymaking', in Bart, et al. (eds.) *Social policy in the European Union 1999-2019: the long and winding road*, 2020, pp. 183-202.

[905] Sabato, S. and Vanhercke, B., 'Towards a European Pillar of Social Rights: from a preliminary outline to a Commission Recommendation', in Vanhercke, B., Sabato, S. and Bouguet, D. (eds.) *Social Policy in the European Union: state of the play*, Brussels: ETUI, 2017, p. 75.

[906] See Rasnača, Z., *Bridging the gaps or falling short? The European Pillar of Social Rights and What it Can Bring to EU-Level Policymaking*, Brussels: ETUI, 2017, pp. 14-15.

[907] European Parliament, *European Parliament Resolution of 19 January 2017 on a European Pillar of Social Rights* (2016/2095(INI)), Brussels: European Parliament, 2017, para. 22.

[908] Consolidated version of the Treaty on the Functioning of the European Union, Art. 154(2).

[909] Albeit on a voluntary basis, as that is outside the scope of Article 154 TFEU.

during the preparation of the European Social Pillar.[910] The consultation document already introduced the main issues which the future Recommendation eventually addressed, namely gaps in (formal and effective) access to social protection by non-standard workers and the self-employed,[911] as well as lack of transparency[912] and transferability of entitlements to social protection when a person transitions between employment and self-employment.[913] The Commission, however, left open then the specific form of action that the EU might take, even mentioning the possibility under Article 155 TFEU that, following such a consultation, social partners would negotiate agreements pertaining to workers.[914] Nevertheless, after the first phase consultation, it was clear that, while social partners generally agreed with regard to the identified issues, there was a significant divide in how they perceived the need for an EU initiative in this regard. Thus, while Trade Unions were in favour of such an initiative, employers' associations did not agree, maintaining that the Open Method of Coordination and the European Semester process would be more appropriate tools at EU level to act on tackling these issues.[915] In its second phase consultation, the Commission presented all these options, namely non-legislative instruments, a Council Recommendation or a Directive. A few months later, however, in the Commission's Impact Assessment, a Council Recommendation was presented as the Commission's preferred option. The lack of support among many of the Member States for a strong action at EU level may explain the choice of a Council Recommendation as the most suitable legal instrument. There was concern that

[910] European Commission, *'Hearing 3: Future of Welfare Systems', in Work stream 'future of work and of welfare systems', SWD(2017) 206, 30 June 2016*, Brussels: European Commission, 2016, Brussels, as referenced in European Commission, *First phase consultation of Social Partners under Art. 154 TFEU on a possible action addressing the challenges of access to social protection for people in all forms of employment in the framework of the European Pillar of Social Rights*, Brussels: European Commission, 2017, p. 2.

[911] Ibid., pp. 5-6.

[912] Ibid., p. 7.

[913] Ibid., pp. 6-7.

[914] Ibid., pp. 10, 13.

[915] European Commission, *Second Phase Consultation of Social Partners under Article 154 TFEU on a possible action addressing the challenges of access to social protection for people in all forms of employment in the framework of the European Pillar of Social Rights,* C(2017) 7773 final, Brussels: European Commission, 2018, p. 3.

non-soft-law instruments, such as a Directive, may not gather the sufficient support to be approved.[916]

By March 2018, the European Commission published a Proposal for a Council Recommendation on access to social protection for workers and the self-employed.[917] Because of the legal basis of the Council Recommendation (Articles 153(1) and 153(2) TFEU, in connection with Article 352 TFEU), the Recommendation needed to be approved in unanimity by the Council. The Recommendation was finally adopted in November 2019, over a year and a half after the Commission's Proposal was published.

9.3. Introduction to the Council Recommendation on access to social protection for workers and the self-employed

As mentioned above, the Council Recommendation stems from the European Pillar of Social Rights. Specifically, it elaborates upon its principle twelve, which states that "regardless of the type and duration of their employment relationship, workers, and, under comparable conditions, the self-employed have the right to adequate social protection".[918] Social protection was not included as a principle of the Pillar in the Pillar's Preliminary Outline, where it appeared instead as a chapter (chapter 3, entitled 'adequate and sustainable social protection').[919] The final version of the Pillar,

[916] European Commission, *Commission Staff Working Document Impact Assessment Accompanying the document Proposal for a Council recommendation on access to social protection for workers and the self-employed* (SWD(2018)70 final), Brussels: European Commission, 2018, pp. 44-45.

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

[918] European Pillar of Social Rights, COM(2017)251.

[919] European Commission, First preliminary outline of a European Pillar of Social Rights Accompanying to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions launching a consultation on a European Pillar of Social Rights, COM(2016) 127 final, Annex 1, 2016, p. 1.

instead, renamed title 3 as 'social protection and inclusion'[920] and included a specific principle entitled 'social protection'.[921]

Elaborating upon said principle, the Recommendation urges the Member States to provide access to adequate social protection to all workers and self-employed persons, as well as to establish minimum standards in the field of social protection.[922] These general aims are developed further via a specific set of recommendations, distributed in four main sections, i.e. formal coverage, effective coverage, adequacy and transparency (as well as another one setting measures to implement it). Thus, in brief, the Recommendation advocates that all workers and the self-employed (so, regardless their professional status) should be formally and effectively covered by social protection schemes that provide adequate protection in a transparent way.

By doing so, the Recommendation rejects the idea that some forms of work cannot (or should not) grant access to social security schemes concerning certain contingencies (such as unemployment). The importance of such a stance, which the EU had never taken so clearly before, should not be understated.

However, such lofty aims are modulated by the Recommendation's legal nature and the restricted competence of the EU with regard to social policy. As a non-binding legal act, the value of a Council Recommendation mainly resides in its indirect effect and political significance.[923] In this regard, the Recommendation seeks (in the words of the Commission) to "create momentum supporting and

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[920] See further Sabato, S. and Vanhercke, B., 'Towards a European Pillar of Social Rights: from a preliminary outline to a Commission Recommendation', in Vanhercke, B., Sabato, S. and Bouguet, D. (eds.) *Social Policy in the European Union: state of the play*, Brussels: ETUI, 2017, p. 85.

[921] Despite this, the last version of the Pillar still maintained principles on specifics policy areas concerning social protection, namely childcare and support to children (principle eleven), unemployment benefits (thirteen), minimum income (fourteen), old-age income and pensions (fifteen), healthcare (sixteen), inclusion of people with disabilities (seventeen), long-term care (eighteen), housing and assistance for the homeless (nineteen) and access to essential services (twenty). See Council of the European Union, *Proposal for an interinstitutional proclamation endorsing the European Pillar of Social Rights*, 13129/17, Brussels: Council of the European Union, 2017.

[922] Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed (2019/C 387/01), point 1.

[923] Soldatos, P. and Vandersanden, G., 'La recommandation, source indirecte du rapprochement des législations nationales dans le cadre de la Communauté économique européen', in de Ripainsel-Landy, D., et al. *Les instruments du rapprochement des législations dans la Communauté économique européen*, Brussels: Éditions de l'Université de Bruxelles, 1976, p. 101.

complementing national debates and reforms, guide Member States in their efforts and create consensus on the best reform options".[924] An initiative such as this, "aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences" should exclude "any harmonisation of the laws and regulations of the Member States"[925] (something which applies to the Recommendation not only as far as it concerns workers, but also the self-employed[926]). Moreover, such an instrument may neither "affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof".[927] In this line of thought, the Recommendation notes that the provision of access to adequate social protection to all workers and self-employed persons in the Member States should be done "without prejudice to the powers of the Member States to organise their social protection systems".[928] Furthermore, it must be noted that the Recommendation concerns an area which does not fall within its exclusive competence, so the EU can only act "if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at the central level or at the regional and local level, but can rather, because of the scale or effects of the proposed action, be better achieved at Union level"[929] (i.e. principle of subsidiarity) and under the condition that the content and form of such action may not exceed what is necessary to achieve the objectives of the Treaties[930] (i.e. principle of proportionality).

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[924] European Commission, *Commission Staff Working Document Impact Assessment Accompanying the document Proposal for a Council recommendation on access to social protection for workers and the self-employed (SWD(2018)70 final)*, Brussels: European Commission, 2018, pp. 8-9.

[925] Consolidated version of the Treaty on the Functioning of the European Union, Art. 153(2)(a); European Commission, *Commission Staff Working Document Impact Assessment Accompanying the document Proposal for a Council recommendation on access to social protection for workers and the self-employed* (SWD(2018)70 final), Brussels: European Commission, 2018, p. 44.

[926] Consolidated version of the Treaty on the Functioning of the European Union, Art. 352(3).

[927] Consolidated version of the Treaty on the Functioning of the European Union, Art. 153(4).

[928] Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed (2019/C 387/01), point 1(1.1.).

[929] Consolidated version of the Treaty on European Union, Art. 5(3). This is so also concerning measures under Art. 352 TFEU, as it is the case of those included in the Recommendation related to the self-employed, see Consolidated version of the Treaty on the Functioning of the European Union, Art. 352(2).

[930] Ibid., Art. 5(4).

The Recommendation seems to find a balance between its ambitious aims and the restricted scope of action of the EU legislator concerning social security of workers and the self-employed by leaving significant space to the Member States on how to follow it, or even whether to follow it (given the abovementioned non-binding character of the Recommendation).

Still, a defeatist approach towards the Recommendation, focused on its limitations, may result in restricting its significant potential. Introducing through an EU legal instrument the idea that all persons performing work through employment or self-employment shall have effective and adequate access to social security, is undoubtedly a victory for all those who advocate for the EU as an actor for promoting social progress. And, because of the way it has been phrased, the Recommendation is in many ways a blank canvas at the moment, as far as the (yet) uncertain content of several key concepts on which the Recommendation hinges may lead to very diverse interpretations. How these 'black boxes' and *lacunae* will be filled will determine in great part the significance of the Recommendation within the EU social *acquis*, and whether it will amount to an actual step forward in finding solutions to the very real concern of lack of adequate social security protection of persons in certain forms of employment or self-employment, such as platform workers.

Below, it will be analysed what different options platform workers may have, as well as what consequences for their social security protection comes along with choosing each option. Before doing so, the first issue to be addressed is how some crucial concepts in the Recommendation may be interpreted. This will serve as the basis for the analysis of the Recommendation's provisions.

9.4. Definitions

9.4.1. *Introduction*

One of the first things that may surprise those who want to understand how the Council Recommendation may be implemented at the national level is how many of the notions around which it revolves are left undefined. Thus, while the Recommendation provides a few definitions

of key concepts[931] (some of which will be analysed later in this chapter), it is striking that the notions of 'workers', 'self-employed' and 'social protection' (which form the Recommendation's title) are not among them. These three notions are essential for the application of most provisions of the Recommendation, including those relative to the Recommendation's scope. Other concepts on which specific provisions of the Recommendation hinge have also been left undefined.

Interestingly enough, the European Commission's Proposal for the Council Recommendation provided some information on the meaning of many of these undefined concepts,[932] but that information was not included in the final version of the Recommendation. The reasons for why information on the meaning of those concepts was left out are unclear. However, because these concepts are essential to assess the application of the Council Recommendation, a choice on their meaning *will* have to be made when monitoring the Recommendation's implementation. In fact, it may be reasonable to assume that the European Commission and the Social Protection Committee will have to make some choices already when they establish a monitoring framework.[933] Even not clarifying the meaning of those concepts around which the Recommendation's provisions hinge would be a choice in itself, as it would allow the Member States to decide by themselves on these concepts' meaning. It is thus pertinent that the implications of choosing each option are carefully measured so that an informed decision may be taken. Of particular importance is to determine how each option may impact the relevance of the Recommendation for the social protection of platform

[931] The concepts defined are 'type of employment relationship', 'labour market status', 'social protection scheme', 'benefit', 'formal coverage', 'effective coverage', 'preservation of rights',
'accumulation of rights', 'transferability' and 'transparency'. See Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed (2019/C 387/01), point 7.

[932] In this regard, the terms 'worker', 'employment relationship', 'duration of benefits', 'qualifying period', 'minimum working period' and 'economic sectors' were defined under Article 7 of the Proposal. Moreover, the definition of 'social protection schemes' in the Proposal included the stated that «the social protection branches referred to in paragraph 5 of this Recommendation are defined in accordance with Regulation (EC) No 883/2004 of the European Parliament and of the Council». See European Commission, Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union (COM(2017) 797 final), Brussels: European Commission, 2017, p. 22.

[933] In this regard, Point 18 of the Recommendation states that "By 15 November 2020, the Commission should, jointly with the Social Protection Committee, establish a monitoring framework". Nevertheless, no monitoring framework has been made public by the 30 November 2020.

workers, due to the novel and unpredictable nature of this form of work. This is, in fact, the purpose of this section.

In general, the types of choices to be made when defining each concept vary greatly between the concepts. However, in the particular case of the concepts of 'worker' and 'self-employed', the options seem to be restricted to five choices that will be discussed below, first regarding the concept of 'worker', than regarding the concept of 'self-employed'. These are the five options:

1) using the concepts of 'worker' and 'self-employed' as currently defined by the CJEU (respectively discussed in section 9.4.2.a and section 9.4.3.a) ;

2) relying on the definitions of 'worker' and 'self-employed' under the social security legislation of the Member State where work is performed (respectively discussed in section 9.4.2.b and section 9.4.3.b);

3) using a national definition 'with consideration to the case-law of the Court of Justice (respectively discussed in section 9.4.2.c and section 9.4.3.c);

4) establishing a concept of 'worker' and 'self-employed' which is different from those abovementioned (respectively discussed in section 9.4.2.d and section 9.4.3.d); or

5) avoiding to set the meaning of these concepts and thus leave each Member State to decide (arguably among the abovementioned options) (respectively discussed in section 9.4.2.e and section 9.4.3.e).

9.4.2. *The definition of the term 'worker'*

The Council Recommendation did include a definition of the term 'worker' in its Proposal for a Council Recommendation (as well as in the Impact Assessment accompanying this Proposal). In that Proposal, the Commission defined 'worker' as "a natural person who for a certain period of

time performs services for and under the direction of another person in return for remuneration".[934] This is the identical definition found in the Commission's Proposal for a Directive on Transparent and Predictable Working Conditions in the European Union,[935] which, in turn, was based on the definition developed by the CJEU under EU law (and, primarily, under Article 45 TFEU on freedom of movement of workers).[936] This definition, however, disappeared during the process leading to the final version of the Council Recommendation.

In its final version, the Recommendation provides very little information about the meaning of the term 'worker'. Perhaps the only slight clarification of its meaning may be found in the Recommendation's definition of the term 'labour status' as "the status of a person as either working in the framework of an employment relationship (worker) or working on their own behalf (self-employed)". From this statement, it may be claimed that the term worker refers to a person working in the framework of an employment relationship. Besides this, the meaning of the term 'worker' is arguably quite open for interpretation.

The concept of 'worker' for the interpretation of the Recommendation is important for two reasons. First, this concept, together with the one of 'self-employed', defines in great part[937] the Recommendation's personal scope. In other words, for the Recommendation to be relevant to a person's situation, he needs to be considered as either a 'worker' or a 'self-employed'. This typically boils down to whether the person is considered to be performing activities on a professional basis. Second, the recommendations are sometimes different depending on whether they relate to workers or the self-employed. This is particularly so in the case of the recommendations on formal coverage,

[934] European Commission, *Commission Staff Working Document Impact Assessment Accompanying the document Proposal for a Council recommendation on access to social protection for workers and the self-employed* (SWD(2018)70 final), Brussels: European Commission, 2018, pp. 22, 52.

[935] European Commission, *Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union* (COM/2017/0797 final), Brussels: European Commission, Art. 2(1)(a).

[936] Ibid., p. 11.

[937] As it is analysed below, the Recommendation's personal scope is not only limited to these two categories, but also to people transitioning from one status to the other, people having both statuses and people whose work is interrupted due to the occurrence of one of the risks covered by social protection.

as the Recommendation does not put the same emphasis on compulsory coverage for the self-employed as it does in the case of workers.

9.4.2.a. Option 1: Using the concept of 'worker' developed by the CJEU

General remarks

The Council Recommendation is not the only piece of EU legislation or provision in EU law that lacks a definition of the term 'worker', even when such term is essential for determining its personal scope. This is the case of Article 45 TFEU, the Citizens' Rights Directive[938] and Regulation 492/2011,[939] as well as the Working Time Directive[940] and the Collective Redundancies Directive.[941] Confronted with the need to define the meaning of the concept of 'worker' in these pieces of legislation,[942] the CJEU has resorted to developing and applying an autonomous[943] and broad[944] interpretation of the concept of 'worker'.

As was already noted in chapter 8 of this thesis,[945] this concept was first established in 1986 in the case *Lawrie-Blum*.[946] In its most recent version, the concept is defined as "any person who pursues activities that are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, […] that for a certain period of time […] performs services for and under the direction of another person in return for which he receives

[938] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

[939] Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union Text with

[940] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time.

[941] Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies.

[942] As well as in others, as the abovementioned list is not exhaustive, with other instruments of EU law that also relying on the concept of 'worker' while not defining it (e.g. some legal instruments in the field of equal treatment).

[943] See, for the first reference to the autonomous meaning of the concept of 'worker' under EU law, Case 75/63, *Unger*, EU:C:1964:19, p. 181 (in the English version).

[944] Case 53/81, *Levin*, EU:C:1982:105, para. 11.

[945] See section 8.2.3

[946] Case 66/85, *Lawrie-Blum*, EU:C:1986:284.

remuneration".[947] The CJEU's case law clarifying this definition, which may be organised around the notions of 'real and genuine', 'performance of services for and under the direction of another person' and 'remuneration', is presented just below.

The meaning of 'real and genuine'

The real and genuine character of an activity must be determined by the national courts based on objective criteria, and after "all the circumstances of the case relating to the nature of both the activities concerned and the employment relationship at issue" are assessed as a whole.[948] In doing so, they may take into account the number of hours of work performed,[949] the irregular nature of the services performed,[950] the fact that the person must remain available to work if called upon to do so by the employer (where relevant),[951] and the level of remuneration.[952]

The fact that a person is given a legal status that provides rights granted typically to workers[953] (e.g. the right to paid sick leave, paid leave and to be subjected to relevant collective agreements) may also be taken into account.[954]

The fact that an activity provides low levels of remuneration or consists of a small number of hours is a crucial factor.[955] However, it may not, by itself, determine whether an activity is considered as not real and genuine.[956] In this regard, an activity may be considered real and genuine even when it

[947] Case C-143/16, *Abercrombie & Fitch Italia*, EU:C:2017:566, para. 19, referencing Case 66/85, *Lawrie-Blum*, EU:C:1986:284, para. 16 and 17; Case C-138/02, *Collins*, EU:C:2004:172, para. 26; and Case C-337/10, *Neidel*, EU:C:2012:263, para. 23).

[948] Case C-413/01, *Ninni-Orasche*, EU:C:2003:600, para. 27.

[949] Case C-357/89, *Raulin*, EU:C:1992:87, para. 14; Case C-14/09, *Genc*, EU:C:2010:57, para. 27; Case C-46/12, *L.N.*, EU:C:2013:97, para. 41.

[950] Case C-357/89, *Raulin*, EU:C:1992:87, para. 14. See also, for a case in which a person performing work on an irregular basis is considered a 'worker', Case C-256/01, *Allonby*, EU:C:2004:18.

[951] Case C-357/89, *Raulin*, EU:C:1992:87, para. 14.

[952] Case C-14/09, *Genc*, EU:C:2010:57, para. 25.

[953] Risak, M. and Dullinger, T., 'The concept of 'worker' in EU law: Status quo and potential for change', *ETUI Research Paper-Report, 140*, 2018, p. 32.

[954] Case C-14/09, *Genc*, EU:C:2010:57, para. 27; Case C-432/14, *O*, EU:C:2015:643, paragraph 25.

[955] Risak, M. and Dullinger, T., 'The concept of 'worker' in EU law: Status quo and potential for change', *ETUI Research Paper-Report, 140*, 2018, p. 33.

[956] In this regard, the CJEU has accepted as real and genuine under either Art. 45 TFEU or Art. 157 TFEU activities with a very low number of hours of work performed (including activities consisting on between 3 and 14 hours per

does not ensure the individual's livelihood.[957] The CJEU (in cases concerning freedom of movement of workers) has, in fact, often taken into account an individual's intention to pursue an effective and genuine economic activity, rather than a simple quantitative assessment.[958]

It may be argued that the CJEU's significantly broad vision of what constitutes a real and genuine activity[959] may generally accommodate platform work as understood in this thesis (and as long as, of course, the other elements of the concept of 'worker' are fulfilled). This statement, however, should be taken with great caution, as a significant degree of uncertainty exist on how the CJEU may react to forms of platform work consisting of extremely short tasks performed for a very diverse arrange of clients.[960]

The meaning of 'under the direction of another person'

The CJEU has interpreted the fact that an individual is under the direction and supervision of his contractual partner as in that he must follow the contractual partner's instructions and must observe his rules[961] and, when appropriate, the contractual partner may sanction him.[962] What constitutes a sanction is unclear. However, it may be noted that in some judgements in Spain it has been concluded that the fact that an online platform reduces the number of tasks offered to platform workers who reject the performance of work within their allocated time slot acted as a sanction.[963]

week, as in *Geven*). See Case 53/81, *Levin*, EU:C:1982:105, para. 15-18; Case C-102/88, *Ruzius-Wilbrink*, EU:C:1989:639; Case 139/85, *Kempf*, EU:C:1986:223; Case 171/88, *Rinner-Kühn*, EU:C:1989:328; Case C-213/05, *Geven*, EU:C:2007:438.

[957] Case 53/81, *Levin*, EU:C:1982:105, para. 16; Case 139/85, *Kempf*, EU:C:1986:223.

[958] See Case 53/81, *Levin*, EU:C:1982:105, para. 17, 23; C-109/01, *Akrich*, EU:C:2003:491, para. 55. See also O'Brien, C., et al., *The concept of worker under Art. 45 TFEU and certain non-standard forms of employment*, Brussels: European Commission, 2016, p. 16.

[959] Kountouris, N., 'The Concept of 'Worker' in European Labour Law: Fragmentation, Autonomy and Scope', *Industrial Law Journal*, vol. 47, issue 2, 2018, pp. 192-225.

[960] See, in a similar line, Bednarowicz, B., *Platform work through the lens of the EU social acquis*, Doctoral dissertation, Antwerp: Universiteit Antwerpen, 2019, p. 94.

[961] Case 66/85, *Lawrie-Blum*, EU:C:1986:284, para. 18.

[962] Case C-270/13, *Haralambidis*, EU:C:2014:2185, para. 30.

[963] See Juzgado de lo Social de Barcelona No. 11, sentencia de 29 de Mayo de 2018, p. 4; Juzgado de lo Social de Barcelona No. 31, sentencia de 11 de Junio de 2019, p. 37; Tribunal Superior de Justicia de Madrid, Sala de lo Social, Sección Pleno, sentencia de 27 de Noviembre de 2019, ECLI:ES:TSJM:2019:11243, p. 15.

More specifically, the CJEU has noted that it is key to determine whether an individual is free to decide which work he performs,[964] and how, [965] when[966] and where[967] he does it.

Determining which services are to be performed is typical of those platforms that focus on one specific service, such as the delivery of food. Thus, this indicator may point in certain forms of platform work indeed in the direction of an employment relationship.

Proving whether the platform determines how the services are to be performed, in turn, is not always evident. The practice of providing recommendations through guidelines and a specific app is quite common among online platforms,[968] but whether that may be considered as determining how the service is performed, however, may be a matter of discussion.

Freedom to decide when work is to be performed is a contra-indicator of an employment relationship that may again be more difficult to apply to the situation of platform workers. While, at first sight, the fact that platform worker may decide whether to accept an assignment seems to indicate that this indicator would be fulfilled, that is not always the case. In fact, the Court has noted that "the fact that no obligation is imposed on them to accept an assignment is of no consequence"[969] and that particular attention must be paid to any limitations on their freedom to choose their timetable.[970] These might be relevant for the specific situation of platform workers, who in some cases have to choose their working schedule way in advance and within a limited range of options. Nevertheless, the CJEU in a recent case on a platform worker performing delivery services seemed to attach diminished importance to whether time slots are used, stating that such timeslots are inherent to the very nature of that service.[971]

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[964] Case 66/85, *Lawrie-Blum*, EU:C:1986:284, para. 18.

[965] Case C-256/01, *Allonby*, EU:C:2004:18, para. 72; Case C-270/13, *Haralambidis*, EU:C:2014:2185, para. 33.

[966] Case 66/85, *Lawrie-Blum*, EU:C:1986:284, para. 18; Case C-256/01, *Allonby*, EU:C:2004:18, para. 72.

[967] Case C-256/01, *Allonby*, EU:C:2004:18, para. 72.

[968] De Stefano, V. and Aloisi, A., *European legal framework for "digital labour platforms*", Luxembourg: European Commission, 2018, pp. 19-22; Kilhoffer, Z. et al., *Study to gather evidence on the working conditions of platform workers, VT/2018/032*, Brussels: European Commission, 2020, pp. 54-59.

[969] Case C-256/01, *Allonby*, EU:C:2004:18, para. 72.

[970] Ibid.

[971] Case C-692/19, *Yodel Delivery Network*, EU:C:2020:288, para. 42.

As to whether platform workers are free to decide where platform work is to be performed, that is very much dependent on the platform. Location-dependent varieties of platform work (such as the delivery of food or the transport of passengers) typically set specific areas within which the platform worker should perform work. In contrast, platform work to be performed online is typically allowed to be performed at any location.

All these abovementioned factors focus on the personal element of subordination. However, the CJEU has also considered what might be deemed as the economic side of subordination (or dependence), albeit in a very limited number of cases.[972] These indicators are whether the individual is incorporated into his contractual partner's organisation, forming an economic unit with it, [973] "whether he does not determine independently his own conduct on the market, but is entirely dependent on his principal",[974] whether he assumes the commercial risks of the business[975] and whether he may engage his own assistants.[976]

Whether the individual forms an economic unit with his putative employer and whether he determines his own conduct on the market might be relevant indicators for platform workers, as it has been often considered that their activity is intrinsically linked to that of the online platforms. This was, in fact, the interpretation of the British Court of Appeal in the seminal case *Aslam and Farrar v Uber*, where it stated that "the notion that Uber in London is a mosaic of 30,000 small businesses linked by a common 'platform' is to our minds faintly ridiculous".[977]

[972] Risak, M. and Dullinger, T., 'The concept of 'worker' in EU law: Status quo and potential for change', ETUI Research Paper-Report, 140, 2018, p. 11.

[973] Case C-413/13, *FNV Kunsten*, EU: C:2014:2411, para. 34, 36; Case C-22/98, *Becu and Others*, EU:C:1999:419, para. 26.

[974] Case C-413/13, *FNV Kunsten*, EU: C:2014:2411, para. 33.

[975] Case C-3/87, *Agegate*, EU:C:1989:650, para. 36; Case C-413/13, *FNV Kunsten*, EU: C:2014:2411, para. 34; C-355/06, *Van der Steen*, EU:C:2007:615, para. 24-25; Case C-202/90, *Ayuntamiento de Sevilla*, EU:C:1991:332, para. 13. It should be noted that the late two cases (*Van der Steen* and *Ayuntamiento de Sevilla*) concerned the Sixth VAT Directive and referred to remuneration rather than meaning of 'under the direction of another person'.

[976] Case C-3/87, *Agegate*, EU:C:1989:650, para 36; Case C-413/13, *FNV Kunsten*, EU:C:2014:2411, para. 33; Case C-692/19, *Yodel Delivery Network*, EU:C:2020:288, para. 31.

[977] Yaseen Aslam, James Farrar and Others v Uber B.V., Uber London Ltd, Uber Britannia Ltd, case No. 2202550/2015, Reasons for the reserved judgement of the Employment Tribunal, 28 October 2017, para. 90.

Who assumes the commercial risks of the business, in turn, is an indicator that might produce very different results depending on whether the assessment focuses only on the individual or on the entire activity of the platform. If what is assessed is the entire activity of the online platform, then it is clear that the platform assumes substantial risks (such as the setting and maintaining of the platform).

Whether platform workers are allowed and/or able to use assistants, or whether they may (also in reality) replace themselves, are questions that have been addressed at length in several Member States. In recent years, it has become common that online platforms in their contractual terms and conditions allow platform workers to replace themselves with other persons, as long as they follow the procedure established by the platform (which typically involves informing the platform and, in some cases, receiving its permission). It might be claimed, however, that the capacity to be replaced is not the same as using assistants. The CJEU has mentioned as an indicator of lack of dependence the fact that a platform worker was allowed to use subcontractors.[978] However, it has not addressed the situation of platform workers that are only allowed to find replacement in a more restricted way.

The meaning of 'remuneration'

While remuneration is required in order for a person to be considered as a worker, the CJEU has typically used a very broad notion of 'remuneration'. For example, it was considered remuneration when a wage was supplemented by financial assistance,[979] as well as when it consists of a share of the employer's benefits[980] or is provided in kind.[981] The fact that the remuneration consists of a low amount has not been considered as relevant either (as long as work is considered effective and

[978] Case C-692/19, *Yodel Delivery Network*, EU:C:2020:288.

[979] Case C-139/85, *Kempf*, ECLI: EU: C:1986:223. Please note, however, that this financial assistance was the general social assistance referred to in Regulation 492/2011 and Directive 2004/38.

[980] Case C-3/87, *Agegate*, EU:C:1989:650, para 36.

[981] Case 196/87, *Steymann*, EU:C:1988:47, para 12. See also (albeit in the framework of the EU-Turkey association agreements, Case C-294/06, *Payir and Others*, EU:C:2008:36 -where an au pair activity was considered an employment relationship-).

genuine).[982] In this regard, it has been argued that remuneration is not an essential part of the notion of 'worker' under EU law.[983]

Remuneration is thus arguably the element of the EU concept of 'worker' which platform workers may with less difficulty reach, and thus it will not be explored in great detail here. Particularly as this thesis focuses on those forms of platform work in which work is performed in exchange for remuneration.[984]

Would platform workers be considered as 'workers' under the concept of 'worker' developed by the CJEU?

Some persons performing platform work in EU Member States would undoubtedly fulfil the abovementioned criteria, and thus be deemed as 'workers' under EU law. However, this would depend on the particular features of the platform work activity (which vary greatly) and on how national courts consider the facts of the case.

The importance of how national courts assess the fulfilment of the abovementioned indicators was perhaps confirmed in the recent CJEU's order on *Yodel Delivery Network*,[985] which was the first time the CJEU addressed whether a platform worker fitted in the concept of 'worker' (for the purposes of Directive 2003/88/EC, on the organisation of working time). In this order, the CJEU considered that the claimant had a great deal of latitude in relation to his putative employer.[986] This, together with the fact that the platform worker is allowed to rely on subcontractors,[987] reject tasks[988] and perform work for other companies,[989] may indicate that the platform worker is independent and not in a relationship of subordination.[990] However, the Court then stated that it is up to the referring

[982] Case C-316/13, *Fenoll*, EU:C:2015:200, para. 34.
[983] O'Brien, C., et al., *The concept of worker under Article 45 TFEU and certain non-standard forms of employment*, Brussels: European Commission, 2016, p. 20.
[984] See section 1.4.4.
[985] Case C-692/19, *Yodel Delivery Network*, EU:C:2020:288.
[986] Ibid., para. 35.
[987] Ibid., para. 38-39.
[988] Ibid., para. 40.
[989] Ibid., para. 41.
[990] Ibid., para. 43.

court to classify the relationship based on the criteria that the CJEU has stated in its prior case law.[991] This first judgment, of course, does not mean that the Court may not explore further the concept of 'worker' under EU law, providing further clarifications on how it may be applied to the specific situation of platform workers.

Should the Recommendation rely on the CJEU's concept of 'worker'?

The autonomous concept of worker developed for the purposes of EU law by the CJEU has been generally used when a piece of EU legislation lacked a definition of said term. It thus might be considered as logical to do the same in the case of the Council Recommendation. And yet, several reasons may discourage this.

The concept of 'worker' as developed by the CJEU has primarily revolved around the promotion of freedom of movement of workers (as contained in Article 45 TFEU),[992] an aim that is different from the one of the Recommendation. And, because the Recommendation is not a binding piece of EU legislation, the CJEU will not have the chance to assess whether the EU concept of 'worker' may need any adaptations for its application in the framework of the Recommendation.

Furthermore, and as analysed above, there are still many questions on how the EU concept of 'worker' may apply to situations of platform work. Waiting for the CJEU to do so (even assuming it will have the intention and the opportunity to do so) may take time, during which the nature of platform work may continue to evolve (and other new forms of work may have appeared).

Using a concept of 'worker' under national social security legislation, and thus more in contact with the reality of social protection and the challenges at the national level, might solve some of these issues. This is, in fact, the approach that is examined below.

[991] Ibid., para. 44.

[992] See, inter alia, Risak, M. and Dullinger, T., 'The concept of 'worker' in EU law: Status quo and potential for change', *ETUI Research Paper-Report*, Brussels: ETUI, 2018, pp. 18, 42-46; Nogler, L., 'Rethinking the Lawrie-Blum Doctrine of Subordination', *International Journal of Comparative Labour Law and Industrial Relations*, vol. 26 issue 1, 2010, pp. 83-102.

9.4.2.b. Option 2: Relying on national definitions of 'worker'

The second option put forward in section 9.4.1, may be to rely on the definition of 'worker' under the social security legislation of the Member State where work is performed, in a similar way as how the Coordination Regulations operate. Doing so would enable the Member States (as far as it regards their country) firstly, to influence the Recommendation's personal scope and secondly, to determine in which situations the Recommendation's provisions concerning 'workers' apply (since these are the two functions of the concept of 'worker' within the Recommendation).

However, such an approach may arguably go against the spirit and purpose of the Recommendation. In this regard, Member States could opt to exclude from the scope of the Recommendation certain situations in which work is performed by simple establishing in its national legislation that those situations are to be considered as non-professional activities. This result would be, arguably, against the inclusive aim of the Recommendation.

Moreover, differences among Member States regarding who is considered a 'worker' might hinder the possibility to compare the extent to which each Member State follows the Recommendation, as well as (arguably) reduce the value of the data gathered in the monitoring process.[993] The fact that in some Member States there are different definitions of the concept of 'worker' depending on the social protection scheme may also contribute to hinder comparisons across Member States.

Furthermore, it would be a challenge to apply the Recommendation to potential intermediate professional legal statuses, as the Recommendation relies on only two legal status (i.e. 'worker' and 'self-employed'). This same issue was also addressed above, when analysing the implementation of the Coordination Regulations to platform workers.[994]

All these challenges are extremely relevant to situations of platform work, as they may often be in the grey zone between being considered employees or self-employed (as well as between being

[993] While little information is available yet on how the Recommendation will be implemented, it is clear that it will motivate some form of gathering of data on social protection of workers and the self-employed, as noted in Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed (2019/C 387/01), point 17.

[994] See Chapter 7.

considered as performing a professional or a non-professional activity). A suggestion would be to include them into a potential third category. And even if said challenges may not exist in (all) the Member States at the moment, they might be present in the (near) future. Thus, relying on a national concept of 'worker', which would inherently be hindered by the abovementioned challenges, may mean that the Recommendation would not be future-proof.

The abovementioned challenges were already at the base of the proposal for including a specific concept of 'worker' in the new Directive on Transparent and Predictable Working Conditions.[995] Similar reasons may also be behind the CJEU's new approach (in a significant departure from previous jurisprudence[996]) of applying elements of the concept of 'worker' under EU law to EU provisions and instruments that rely rather on national conceptions of 'worker', when necessary to achieve the aims of the legal instrument at stake.[997] This might justify the next approach, namely to rely on a national definition of 'worker' while keeping in mind the definition under EU law.

9.4.2.c. Option 3: Using a national definition 'with consideration to the case-law of the Court of Justice'

General remarks

The third, somewhat intermediate option put forward in section 9.4.1, is to use a *hybrid* definition, meaning one that relies on the concept of 'worker' at national level but 'with consideration to the case-law of the Court of Justice'.

Such an approach may be inspired by the recent case law of the CJEU. In this regard, the CJEU (in a significant departure from previous jurisprudence[998]) has started applying (elements of) the

[995] European Commission, *Commission Staff Working Document REFIT Evaluation of the 'Written Statement Directive'* (Directive 91/533/EEC) (SWD(2017) 205 final), Brussels: European Commission, 2017, p. 25.

[996] Kountouris, N., 'The Concept of 'Worker' in European Labour Law: Fragmentation, Autonomy and Scope', *Industrial Law Journal*, Vol. 47, issue 2, 2018, pp. 192-225.

[997] Case C-393/10, *O'Brien*, EU:C:2012:110, para. 34, 41 (concerning the Framework agreement on part-time work); Case C-216/15, *Betriebsrat der Ruhrlandklinik*, EU:C:2016:883, para. 36, 43 (concerning the Directive 2008/104 on temporary agency work).

[998] Kountouris, N., 'The Concept of 'Worker' in European Labour Law: Fragmentation, Autonomy and Scope', *Industrial Law Journal*, Vol. 47, issue 2, 2018, pp. 192-225.

concept of 'worker' under EU law to EU provisions that rely on national conceptions of 'worker' when necessary to achieve the aims of the provision.[999] This might justify the next approach, namely to rely on a national definition of 'worker' while keeping in mind the definition under EU law.

It is in the Directive on Transparent and Predictable Working Conditions where a hybrid concept of 'worker' is for the first time explicitly included in a piece of EU legislation. Hence, the Directive relies on the concepts of 'employment contract' or 'employment relationship' "as defined by the law, collective agreements or practice in force in each Member State", but "*with consideration to the case-law of the Court of Justice*" (italics added). This hybrid definition of the concept of 'worker' is a unique approach towards the interpretation of this concept in an EU provision. As such, it is difficult to foresee how it might be implemented in the framework of monitoring the implementation of an EU act. However, some advantages and disadvantages of this approach might be foreseen and will be discussed below.

Should the Recommendation rely on a hybrid concept of 'worker'?

In theory, relying on the national definitions of 'worker' while also taking into consideration the CJEU definition might compensate some of the disadvantages of both prior options. Thus, it might lead to a definition of 'worker' more tailored to Member States' social security systems than the EU definition. At the same time, it might also ensure a minimum level of homogeneity among the national approaches.

However, it is unclear how this hybrid definition of worker (of which there has not been a precedent in the EU social *acquis*) would fare, particularly in the case that the definition under national law would directly contradict the definition of 'worker' established by the CJEU.[1000]

A specific concept of 'worker' created with the aims (and limitations) of the Recommendation in mind by those in charge of monitoring its implementation might be another option to solve the

[999] Case C-393/10, *O'Brien*, ECLI:EU:C:2012:110, para. 34, 41 (concerning the Framework agreement on part-time work); Case C-216/15, *Betriebsrat der Ruhrlandklinik*, EU:C:2016:883, para. 36, 43 (concerning the Directive 2008/104 on temporary agency work).

[1000] Bednarowicz, B., 'Delivering on the European Pillar of Social Rights: The New Directive on Transparent and Predictable Working Conditions in the European Union', *Industrial Law Journal*, vol. 48 issue 4, 2019, pp. 613-614.

challenges abovementioned in a similar way as a hybrid concept would do, while at the same ensuring sufficient clarity to actually make it operable. That is what it will be addressed below.

9.4.2.d. Option 4: Establishing a specific concept of 'worker'

General remarks

As has been just mentioned, another, fourth, option is to establish a concept of 'worker' for the specific purposes of the Recommendation. Doing so would allow tailoring the concept of 'worker' to the aims of the Recommendation.

When creating such a concept, it might be advisable to do so by using as inspiration the concept of 'worker' developed by the CJEU. This was the option chosen by the Commission in its Proposal for a Council Recommendation (as well as in the Commission's Proposal for a Directive on Transparent and Predictable Working Conditions[1001]). In that Proposal, the Commission used a barebone definition based on the one first developed in *Lawrie-Blum*.[1002] Hence, a 'worker' was defined as "a natural person who for a certain period of time performs services for and under the direction of another person in return for remuneration".[1003]

Developing a definition using as a basis the EU concept of 'worker' has the advantage of relying on a concept that is generally accepted. Moreover, the simplicity of the definition included in the Proposal may be an asset, as it would permit an interpretation that is specifically tailored to both the reality of platform work and the aims of the Council Recommendation. Below it is analysed how a tailored definition of 'worker' may solve many of the potential flaws (as it relates to platform work and social security) of the EU concept of 'worker'.

[1001] European Commission, *Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union* (COM(2017) 797 final), Brussels: European Commission, 2017, Art. 2(1)(a).

[1002] Case 66/85, *Lawrie-Blum*, EU:C:1986:284, para. 17.

[1003] European Commission, *Proposal for a Council Recommendation on access to social protection for workers and the self-employed* (COM(2018) 132 final), Brussels: European Commission, 2018, p. 22; European Commission, *Commission Staff Working Document Impact Assessment Accompanying the document Proposal for a Council recommendation on access to social protection for workers and the self-employed* (SWD(2018)70 final), Brussels: European Commission, 2018, p. 52.

In this regard, the concept of 'worker' developed by the CJEU prioritises the personal factors of subordination and dependence. A specific concept for the purposes of the Recommendation could pay equal attention to economic indicators of subordination and dependence,[1004] such as whether the individual assumes the commercial risks of the business, whether he is incorporated into (and forms an economic unit with) the undertaking and whether he may rely on subrogates for the performance of work. These factors have proven to be particularly relevant for platform work. Moreover, for the purposes of social security, economic dependence might be, in many ways, more relevant than personal subordination.

The use by the CJEU of the indicator of who assumes the commercial risks has been scarce and restricted.[1005] The construction of a specific concept of 'worker' for the Recommendation may be the perfect opportunity to develop further this indicator. When doing so (and as noted when analysing the concept of 'worker' developed by the CJEU), it is critical that such risks are assessed concerning the online platform's business as a whole (and not only regarding the work performed by the specific platform worker, as an isolated business).

Whether the individual is incorporated into (and forms an economic unit with) the undertaking is a consideration with great potential for expanding the current notion of 'worker' under EU law.[1006] Nevertheless, such indicator has only been used for the time being within the context of competition law.[1007] A concept of 'worker' that relies on it would fit well in the current debate on the employment status of platform workers, and may arguably be more receptive of the particular nature of platform work.

[1004] Risak, M. and Dullinger, T., 'The concept of 'worker' in EU law: Status quo and potential for change', *ETUI Research Paper-Report*, Brussels: ETUI, 2018, p. 42.

[1005] In fact, the used of this indicator has being restricted to a mere mention (within an enumeration of many other indicators). See Case C-3/87, *Agegate*, ECLI:EU:C:1989:650, para. 36; Case C-692/19, *Yodel Delivery Network*, EU:C:2020:288, para. 31. A slightly clearer interpretation (referring to the notion of undertaking) may be found in Case C-413/13, *FNV Kunsten*, EU:C:2014:2411, para. 33.

[1006] Risak, M. and Dullinger, T., 'The concept of 'worker' in EU law: Status quo and potential for change', *ETUI Research Paper-Report*, Brussels: ETUI, 2018, p. 43.

[1007] See Case C-22/98, *Becu and Others*, EU:C:1999:419, para. 25-26; Case C-413/13, *FNV Kunsten*, EU:C:2014:2411, para. 34.

In some cases, platform workers are allowed to replace themselves with another worker (typically after having requested permission from the online platform). As noted above, however, being allowed to replace oneself is not the same as being able to use assistants. Having assistants seems to be a more stable circumstance, linked to the existence of some entrepreneurial structure. The Council Recommendation may be a good opportunity to address this difference.[1008]

One of the advantages of relying more on economic indicators of dependency is that they may serve to clarify whether intermediate categories (which often lack personal subordination but have some elements of economic dependence) fit into the concept of 'worker' or 'self-employed' for the purposes of the Recommendation.

It should also be noted that the inclusive character of the Recommendation may justify a definition of 'worker' that discriminates as little as possible between activities considered as genuine and those considered as marginal (in a similar way as to how the concept of 'worker' developed by the CJEU does).

Article 45 TFEU, on which the concept of 'worker' under EU law is primarily based, uses the concept of 'worker' as the main gate into a Member State's circle of solidarity.[1009] The Council Recommendation, in contrast, seeks to promote access to effective and adequate social protection among all workers and the self-employed. This aim may, arguably, justify a more inclusive personal scope. Therefore, it might be fitting that a concept of 'worker' for the purposes of the Recommendation does not emphasize whether an activity is genuine and effective. Moreover, the Recommendation already allows for provisions seeking to prevent abuses (as well as to ensure the financial sustainability of the system) concerning the social protection scheme's effective coverage.[1010] It thus might be claimed that the prevention of abuses should not be sought through

[1008] As the only existing case yet on the concept of 'worker' under EU law did not have the chance to address this due to the fact that the claimant could in fact use assistants, and not just replacements, see Case C-692/19, *Yodel Delivery Network*, EU:C:2020:288, para. 31.

[1009] See section 8.2 of this thesis on Regulation 492/2011; Verschueren, H., 'European (Internal) Migration Law as an Instrument for Defining the Boundaries of National Solidarity Systems', *European Journal of Migration and Law*, vol. 9 issue 3, 2007, pp. 307-346.

[1010] Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed (2019/C 387/01), point 9.

limiting formal access to social protection schemes, as potential restrictions could be established later, through the rules governing the benefits and contributions of the scheme's members.

Should a specific concept of 'worker' be developed for the purposes of the Recommendation?

Against this backdrop, there are, in fact, two parallel questions: first, whether a specific concept of 'worker' should be used for the purposes of the Recommendation; and, second, if so, what features that concept would have.

Establishing a concept of 'worker' for the purposes of the Recommendation has the advantage that such a concept may be tailored to the nature of both the Recommendation and platform work. Furthermore, a concept of 'worker' developed by those in charge of monitoring the Recommendation would enable them to adjust it based on (1) how the Member States interpret it; (2) the changes the Member States introduce into their social security systems; and (3) the evolution of the labour market(s). The extremely fluid nature of non-standard forms of work (and, particularly, platform work) requires progressive adaptations and re-interpretations of the concept of 'worker'. However, because the Recommendation is a non-binding piece of EU law, the CJEU would not have a chance to (adaptively) interpret it. Hence, a definition of the concept of 'worker' that is not flexible and adaptable may soon make the Recommendation outdated in this respect.

Some might claim that using any specific (uniform) concept of 'worker' may be against the principles of subsidiarity and proportionality. This was, in fact, argued by the employers' associations when a similar approach was introduced during the process of drafting the Transparent and Predictable Working Conditions Directive.[1011] The Directive and the Council Recommendation, however, are very different instruments as it regards their legal nature, issues that they address and overall content. The non-binding character of the Recommendation, as well as the fact that the Recommendation does not state how Member States achieve its aims, should be especially taken into consideration.

[1011] European Commission, *Commission Staff Working Document accompanying the Consultation Document 'Second phase consultation of Social Partners under Article 154 TFEU on a possible revision of the Written Statement Directive (Directive 91/533/EEC) in the framework of the European Pillar of Social Rights',* (SWD(2017) 301 final), Brussels: European Commission, 2017, p. 8.

If using a tailored concept of 'worker' is the option chosen, then it is critical which features such a concept would have. Several ideas were presented above on how some of the potential flaws of the EU concept of 'worker' may be solved through a tailored definition. In summary, a concept of 'worker' that takes into account both personal and economic indicators of dependence may be best suited to address platform work. Moreover, the inclusive nature of the Recommendation may justify the use of a broad definition, able to encompass all the different ways in which platform work may be performed (and thus including marginal work).

9.4.2.e. Option 5: Avoiding to set the meaning of the concept of 'worker'

General remarks

A final, fifth option put forward in section 9.4.1, is to avoid any definition of the concept of 'worker'. However, as noted above, it is essential for interpreting and implementing the Recommendation to know what 'worker' means within it. Without a definition of this concept, it is not possible to determine the personal scope of the Recommendation. Neither is it possible to know to which persons those provisions specifically targeting workers may apply.

Thus, without an official definition of the concept of 'worker', Member States would be free to decide how to define this concept when applying the Recommendation. Arguably, they may do so by relying upon one of the options above.

Then, those in charge of monitoring the application of the Recommendation may either accept the choice made by each Member State or, alternatively, suggest corrections of such definitions when they result on an application of the Recommendation that deviates from the Recommendation's purpose.

Should the concept of 'worker' not be defined?

If the different Member States are left free to decide how to define the concept of 'worker' for the implementation of the Recommendation, it is rather likely that they would opt for different approaches. This would result in difficulties when comparing how different Member States follow the Recommendation. Comparisons would be even harder if in all likely hood Member States would

not be consistent in their definitions of the concept of 'worker' across different social security schemes or across time. Moreover, this approach would not ensure that the Member States would use a concept of 'worker' that takes into account the specific nature of platform work and the Recommendation.

The fact that a choice on how the concept of 'worker' should be defined is not made at a central level does not necessarily mean that the Member States have absolute freedom in deciding the meaning of such a concept. It might be the case that those in charge of monitoring the Recommendation, while not establishing completely how the term should be defined, set certain limits on how the Member States define it. This would be a way of guaranteeing that the definitions used by the different Member States do not prevent reaching the Recommendation's aims. It is unclear, however, what these limits should look like. Even if those limits are established, it is questionable whether they may help as much in achieving the Recommendation's goals as a tailored concept of 'worker' would.

9.4.3. *The definition of the term 'self-employed'*

As with the concept of 'worker', the concept of 'self-employed' is not defined in the Recommendation. Unlike in the case of 'worker', however, 'self-employed' was not defined in the Proposal for the Council Recommendation either. A definition was provided in the Impact Assessment for the Proposal. However, this definition was meant to be only used in the context of the Impact Assessment, and not with an eye to any legal consequence.[1012] This may indicate an even greater reluctance to provide a definition of 'self-employed' than in the case of the notion of 'worker'.

In any case, the need for a definition of 'self-employed' is as acute as in the case of the term 'worker', and for the same reasons: in order to both determine the personal scope of the Recommendation and apply its provisions when they are based on a differential treatment between those persons included in the meaning of the term 'worker' and those classified as 'self-employed'

[1012] European Commission, *Commission Staff Working Document Impact Assessment Accompanying the document Proposal for a Council recommendation on access to social protection for workers and the self-employed* (SWD(2018)70 final), Brussels: European Commission, 2018, p. 52.

for the Recommendation. The notion 'self-employed' is also extremely relevant as it regards platform work (as has been already shown through this thesis on multiple occasions). Because of this, the different possible approaches on how to define the notion 'self-employed' will be studied.

9.4.3.a. Option 1: Using the concept of 'self-employed' developed by the CJEU

The first option mentioned in section 9.4.1 is to use the concept of 'self-employed' developed by the CJEU. As it has been mentioned before in this thesis,[1013] the meaning of the concept of worker under EU law might be informed by the CJEU's case law on the concept of 'establishment' under Article 49 et seq. TFEU, as well as on the concept of 'service provider' under Article 56 et seq. TFEU.

As it regards the concept of 'establishment', the CJEU has defined it as involving "the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period".[1014] Therefore, and like in the case of the concept of 'worker', in order to be considered self-employed, a person needs to be performing a genuine and effective[1015] economic activity.[1016] The notion of 'genuine and effective', however, is less well defined than in the case of the notion of 'worker'. The main criterion is that the activity needs to be carried out for profit.[1017] This would be fulfilled by platform workers in the scope of this thesis.

The definition of the concept of 'establishment' under EU law also requires that the economic activity is stable and continuous,[1018] meaning that it must be pursued through a fixed establishment for an indefinite period. This is understood as having the necessary equipment for the provision of the specific services concerned,[1019] as well as the infrastructure enabling to perform the professional

[1013] See chapter 8.

[1014] Case C-221/89, *Factortame*, EU:C:1991:320, para. 20.

[1015] Case C-196/87, *Steymann*, EU:C:1988:475, para. 13.

[1016] Risak, M. and Dullinger, T., 'The concept of 'worker' in EU law: Status quo and potential for change', *ETUI Research Paper-Report, 140*, 2018, p. 30.

[1017] Case C-13/76, *Donà*, EU:C:1976:115, p. 1336; European Commission, *Guide to the Case Law of the European Court of Justice on Art. 49 et seq. TFEU*, Brussels: European Commission, 2017, pp. 14-15.

[1018] Case C-384/08, *Attanasio*, EU:C:2010:133, para. 36. In this case (same paragraph), the CJEU highlights the broadness of the concept of 'establishment'.

[1019] Case C-230/14, *Weltimmo*, EU:C:2015:639, para. 30.

activity in a stable and continuous manner.[1020] While, generally, platform workers are required to have some basic equipment (e.g. a bicycle and a mobile phone, in the case of riders, or a computer with Internet access, in the case of persons performing crowd work), it has been argued in some instances that the main means of production is the platform itself.[1021] This, if taken into account with other indicators of lack of intention to perform a stable and continuous activity in the host Member State, might lead to consider a platform worker as not being included in the concept of self-employed as based on the concept of 'establishment' under Article 49 et seq. TFEU.

Nevertheless, the concept of self-employment under EU law has another perspective, namely the one contained in Article 56 et seq. TFEU on the freedom to provide services, and how those provisions (and the CJEU when it interpreted it) define the concept of 'service provider'. Such concept encompasses situations in which the provision of services in a particular Member State has a temporary nature.[1022]

It is, however, unclear whether a concept of 'self-employed' under the Recommendation would lean towards the one of Article 49 TFEU or the one of Article 56 TFEU, or a mixture of both. As mentioned above, a focus on the stable nature of an activity to be considered as a self-employed activity might result in the exclusion from such a concept of some platform workers (as they might struggle to fulfil it).

In any case, the potential lack of flexibility and adaptability of the CJEU's concept of 'worker' also applies to the concept of 'establishment' under EU law, making it arguably unfit as a concept for the purposes of the Recommendation.

[1020] Case C-215/01, *Schnitzer*, EU:C:2003:662, para. 32.

[1021] See, inter alia, Yaseen Aslam, James Farrar and Others v Uber B.V., Uber London Ltd, Uber Britannia Ltd, appeal No. UKEAT/0056/17/DA, 10 November 2017; Juzgado de lo Social No. 6 de Valencia, sentencia de 1 Junio de 2018, p. 7; Juzgado de lo Social de Gijón No. 1, sentencia de 20 de Febrero de 2019.

[1022] The concept under Article 56 also requires that the activity performed is of an economic nature. For a detailed explanation on the freedom of establishment under EU law, see European Commission *Guide to the case law of the European Court of Justice on Art. 56 et seq. TFEU*, European Commission: Brussels, 2017.

9.4.3.b. Option 2: Relying on national definitions of 'self-employed'

The second option mentioned in section 9.4.1 is to rely on national definitions of 'self-employed'. A key aspect of the concept 'self-employed' under the national legislation of the countries studied is that the activity is performed on a professional basis. What this means, however, varies widely across these countries. As a result, the use of the concept of 'self-employed' at national level for the purposes of the Recommendation may hinder comparisons between the Recommendation's implementation across Member States. Moreover, relying on national legislation would not guarantee that the concept used is as broad and as inclusive as the nature of the Recommendation may demand.

9.4.3.c. Option 3: Using a national definition 'with consideration to the case-law of the Court of Justice'

The third option mentioned in section 9.4.1 is to use a hybrid concept of 'self-employed'. While the use of a hybrid definition of the concept of 'worker' would arguably produce too much uncertainty to be feasible, that would be even more the case with a hybrid definition of the concept 'self-employed'. In this regard, as noted above in subsection 9.4.3.a, the EU notion arguably lacks the clarity to inform the interpretation of the national concepts of 'self-employed' in any way that may facilitate the use of the notion in connection with both the Recommendation and platform work.

9.4.3.d. Option 4: Establishing a specific concept of 'self-employed'

As for the concept of 'worker', a fourth option mentioned in section 9.4.1, is to use a specific notion for the purposes of the Recommendation. This would have the advantage of being able to tailor such a specific notion to both the character and purpose of the Recommendation and the future evolutions of the labour market.

Unlike in the case of the concept of 'worker' (and as analysed above), the concept developed by the CJEU may not be adequate for the purposes of the Recommendation. Perhaps for similar reasons, the European Commission established in its Impact Assessment of the Council Recommendation a concept of 'self-employed' that was not based on the case law of the CJEU. In this regard, and for purposes of the Commission's Impact Assessment of the Council Recommendation,

'self-employed' was defined as "employment in which persons pursue a gainful activity for their own account".[1023] This is a definition similar to the one used by Directive 2010/41/EU[1024] (which defines self-employed as "all persons pursuing a gainful activity for their own account, under the conditions laid down by national law"[1025]), and has as an advantage its broadness.

9.4.3.e. Option 5: Avoiding to set the meaning of the concept of 'self-employed'

The fifth option mentioned in section 9.4.1., avoiding to establish the meaning of the concept 'of 'self-employed' is an approach that, in my opinion, should be discouraged for the same reasons as have been put forward in the case of the concept of 'worker'.

9.4.4. *The definition of the term 'social protection'*

From its title to its aims, and including its scope, it is clear that the Recommendation addresses social protection. The choice of the term 'social protection' over 'social security' is of importance. Paragraph c of Article 153 TFEU, which constitutes the legal basis for the Recommendation,[1026] refers to both social security and social protection of workers, and thus the Recommendation could have opted for either term.

By choosing 'social protection', it may be argued that the Recommendation is following the choice already made in principle 12 of the European Pillar of Social Rights, which refers to social protection instead of to social security.

The Recommendation does not provide a formal definition of the term 'social protection', albeit some keys for understanding the meaning of this term for the Recommendation may be found across its Preamble. In this regard, it is stated that social protection's main function is "to protect people

[1023] European Commission, *Commission Staff Working Document Impact Assessment Accompanying the document Proposal for a Council recommendation on access to social protection for workers and the self-employed* (SWD(2018)70 final), Brussels: European Commission, 2018, p. 52.

[1024] Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC.

[1025] Ibid., Art. 2.

[1026] See Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed (2019/C 387/01), Preamble, Obs. 3.

against the financial implications of social risks, such as illness, old age, accidents at work and job loss, to prevent and alleviate poverty and to uphold a decent standard of living".[1027]

The issue with using the term 'social protection' is that such term has been generally considered as a broader and more inclusive term than 'social security', encompassing social insurance, social assistance and private measures for providing social security.[1028] The use of such an inclusive term seems to be in direct contradiction with the material scope stated by the Recommendation, which explicitly excludes social assistance and private insurance products.[1029] One might wonder whether using the term 'social protection' in the Recommendation is a sign that the concepts 'social assistance' and 'private insurance' should be interpreted in a narrow way.

9.4.5. *Challenges on defining other terms*

The lack of definition of the terms 'worker', 'self-employed' and 'social protection' is very significant because of the Recommendation revolves around this key terminology. However, there are other terms which meaning is also crucial to understand the Recommendation. In this regard, how the different social security branches are defined is connected to the Recommendation's material scope. The notion of 'contributions' is a crucial element of the provisions on effective coverage and adequacy. The terms 'people whose work is interrupted due to the occurrence of one of the risks covered by social protection' and 'persons transitioning from one status to the other' are relevant for understanding the Recommendation's personal scope. Finally, the term 'in light of national circumstances' relates to how broad the margin of appreciation provided to the Member States may be when monitoring whether they follow the Recommendation.

9.4.5.a. Social security branches

One of the, perhaps, more baffling changes from the Commission's Proposal to the final version of the Council Recommendation is that the Recommendation does no longer rely on the case law on the Coordination Regulations to define the social security branches within the Recommendation's

[1027] Ibid., Obs. 8.

[1028] Bonilla García, A. and Gruat, J.V., *Social protection: a life cycle continuum investment for social justice, poverty reduction and development*, Geneva: International Labour Office, 2003, p. 14.

[1029] See section 9.5.2.

scope. Using the detailed case law of the CJEU on the content of each branch would have facilitate comparing how different Member States implement the Recommendation. By not providing any definition, those in charge of monitoring the Recommendation have the same five options as in the case of the concepts of 'worker' and 'self-employed' (see section 9.4.1): (1) relying on the concepts as defined by the CJEU; (2) using the definitions under the social security legislation of the Member State where work is performed; (3) using a national definition 'with consideration to the case-law of the Court of Justice'; (4) establishing specific concepts for the purpose of the Recommendation; or (5) avoiding to set the meaning of these concepts and thus leave each Member State to decide.

Many of the advantages and disadvantages of each choice are similar to those analysed in the case of the concepts of 'worker' and 'self-employed', and thus will not be mentioned here again. However, it is submitted that, in the case of the branches of social security, there is less need for flexibility in the definition that adapts to potential changes than regarding the concepts of 'worker' or 'self-employed'. Because of that, it might be advisable to rely on the stable and time-proven definitions of the social security branches as defined by the CJEU in its case law on the Coordination Regulations.

9.4.5.b. Contributions

The Recommendation does not provide any definition of the term 'contributions'. The term, nevertheless, seems to be construed as one of many forms of financing social security (together with general budget and other sources).[1030] As such, it might be understood as referring to taxes levied upon professional income and specifically designated for the financing of one or more particular social security schemes.[1031] Nevertheless, current social security systems finance their social security schemes with a broad arrange of sources, including contributions and general taxes. Therefore, in order to address the reality of current social security systems, it may be advisable that

[1030] Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed (2019/C 387/01), point 7(c).

[1031] See, for a similar definition, Schoukens, P., *Thematic Discussion Paper for the Mutual Learning on Access to social protection for workers and the self-employed 3rd Workshop: Adequacy and financing*, Brussels: European Commission, 2020, p. 17.

the Recommendation takes into account all these different sources of financing when referring to the individuals' contributory capacity.[1032]

9.4.5.c. 'People whose work is interrupted due to the occurrence of one of the risks covered by social protection'

The notion 'people whose work is interrupted due to the occurrence of one of the risks covered by social protection' appears when the Recommendation establishes its personal scope (which will be analysed below). In this regard, the Recommendation states that it applies to "workers and the self-employed, *including* people transitioning from one status to the other or having both statuses, *as well as people whose work is interrupted due to the occurrence of one of the risks covered by social protection*".[1033] The fact that the word 'including' is used after the mention of statuses of worker and the self-employed may be interpreted as that 'people whose work is interrupted due to the occurrence of one of the risks covered by social protection' retain the status they had when they were performing work (i.e. worker, self-employed or both). This is an approach similar to the Citizens Directive[1034] and (to a lesser extend) the Coordination Regulations.[1035]

It is notable that the Recommendation does not state that a person must have received or must be in the process of receiving a benefit (or even to have been insured under any social security scheme) in order to be considered as a worker or a self-employed person, but only that his work has to have been interrupted due to the occurrence of one of the risks covered by social protection. Thus, it may be interpreted that a person who was a worker or a self-employed person and who becomes involuntarily unemployed (a risk which is generally covered by social protection, at least concerning workers) would still be considered as a worker or a self-employed person under the Recommendation as long as he remains involuntarily unemployed, no matter how long that may be

[1032] Ibid.

[1033] Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed (2019/C 387/01), point 3(3.1.).

[1034] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, Art. 7(3).

[1035] In this regard, the rules for the determination of the legislation applicable establish that persons receiving short-term cash benefits because of their activity as an employed or self-employed person should be considered to be pursuing the said activity, see Regulation 883/2004, Art. 11(2). While not the same approach, the CJEU has extended the concept of 'worker' to jobseekers, see Case C-138/02, *Collins*, EU:C:2004:172; C-22/08, *Vatsouras*, EU:C:2009:344.

or how short a period he was a worker or a self-employed prior to becoming unemployed. The consequences of performing such an interpretation will be explored further below when analysing the provisions on formal and effective coverage.[1036]

It is also not stated by which notion of social protection must the risk be covered. It may refer to a general notion of social protection (as the one which is mentioned when the concept of 'social protection' was addressed above) or a national notion. In the latter case, it may be interpreted as referring to a risk against which social protection[1037] is provided in a Member State. This would have been clearer if the Recommendation would have instead referred to 'people whose work is interrupted due to the occurrence of one of the risks covered by social protection *schemes*' or to 'people whose work is interrupted due to the occurrence of *a risk insured by social protection schemes*'.[1038]

In a similar line, the Recommendation could have referred to 'people whose work is interrupted due to the occurrence of one of the risks covered *by any of the social protection branches within the scope of this Recommendation, insofar as they are provided in the Member States*'. However, the fact that it does not do so, may imply that the Recommendation intends to refer to any risk covered by social protection, even if outside the branches to which the Recommendation applies.

9.4.5.d. 'In light of national circumstances'

The Recommendation uses the phrases 'in light of national circumstances', 'in accordance with national circumstances' and 'in line with national circumstances' at several places in the Recommendation. It does so when recommending Member States to extend formal coverage to all workers and the self-employed, when recommending them to ensure that entitlements may be transferred and preserved across all forms of work, when recommending them to make sure that their schemes provide an adequate level of protection to their members, and when recommending that exceptions or reductions in social contributions are applied to all forms of work. The use of

[1036] See sections 9.6 and 9.7.

[1037] Again, with the caveats on its interpretation addressed already

[1038] This last option has arguably a different meaning, and follows the phrasing of one of the provisions on adequacy. See Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed (2019/C 387/01), point 11.

these phrases to qualify some of the key recommendations was not in the Commission's Proposal for the Council Recommendation.[1039] While its importance may be significant, at the end of the day this, self-evidently, would depend on the exact meaning of such phrasing, something that is not clarified in (the context of) the Recommendation.

The same way of referencing to national circumstances is used in the ILO Social Protection Floors Recommendation,[1040] to which the Council Recommendation refers in its Preamble.[1041] The importance of using such phrases within the ILO Recommendation was further emphasized by its repeated use in the more recent ILO General Survey on said Recommendation.[1042]

The phrase was also used in a study conducted for the European Parliament on Social Protection Rights of Economically Dependent Self-employed Workers, where the provision of a more universal protection that was designed 'in accordance with national circumstances', was recommended.[1043]

Moreover, during the process of consultation on the Social Pillar, employer associations, the Dutch Government and the Committee of the Regions advocated for an integrated approach towards seeking adequate and sustainable social protection for all people regardless of their employment status that would take into account the national circumstances.[1044]

The referring multiple times to national circumstances is particularly important in light of how this phrasing has been interpreted by several Member States already in their statements during the

[1039] See European Commission, *Proposal for a Council Recommendation on access to social protection for workers and the self-employed* (COM(2018) 132 final), Brussels: European Commission, 2018.

[1040] Social Protection Floors Recommendation (No. 202), 2012, Art. 4.

[1041] Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed (2019/C 387/01), Preamble, obs. 28.

[1042] International Labour Office, 'Universal social protection for human dignity, social justice and sustainable development' (ILC.108/III/B), in *International Labour Conference 108th Session*, Geneva: ILO, 2019.

[1043] Werner, E., et al., *Social Protection Rights of Economically Dependent Self-employed Workers*, Brussels: European Parliament, 2013.

[1044] See European Commission, *Report of the public consultation Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Establishing a European Pillar of Social Rights* (SWD(2017) 206 final), Brussels: European Commission, 2017, p. 47.

process of approval of the Council Recommendation at the Council of the European Union. In this regard, the Dutch government stated that the fact that point 8 of the Recommendation (on formal coverage) refers to national circumstances "entails that Member States can make exceptions in light of these circumstances, for instance with regard to the application of the Recommendation to workers and self-employed. This is in line with standard treaties of the International Labour Organization (ILO) and Council of Europe (ILO 102 and European Code of Social Security) in which groups can be excluded".[1045] It might be argued that such an interpretation would directly contradict the aim of the Recommendation, which clearly seeks to ensure social protection for all workers and the self-employed.

In a similar line, the government of the Slovak Republic noted that excluding the self-employed from social protection against labour accidents was based on a fundamental principle of the national social protection system, after which it stated that "in light of the previous text, the Slovak Republic considers the Recommendation an instrument seeking to provide guidance for Member States when progressively adapting social protection systems in light of national circumstances".[1046]

9.5. Scope

When analysing any piece of legislation, it is particularly important to study its personal and material scope. In the case of the Recommendation, that is in theory determined in its point 3. That provision, however, relies heavily on many of the concepts whose uncertain meaning has been already noted above. Still, some general idea of the potential scope of the Recommendation might be provided.

9.5.1. *Personal scope*

The personal scope of the Recommendation is restricted to workers and the self-employed, including persons transitioning from one status to the other; persons having both statuses and

[1045] The Netherlands, Explanation of vote on the Council Recommendation Access to social protection for workers and the self-employed

[1046] Statement by the Slovak Republic into the Council minutes Council Recommendation on the Access to Social Protections for workers and self-employed persons.

persons whose work is interrupted due to the occurrence of one of the risks covered by social protection.[1047]

It is thus crucial to determine what are the outer limits of the concepts of 'worker' or 'self-employed'. That would most probably depend on whether a person performs an activity that is not marginal or ancillary (with the meaning of this depending, in turn, on how the concepts of 'worker' and self-employed' are defined).

Another essential aspect is how the concept of 'persons whose work is interrupted due to the occurrence of one of the risks covered by social protection' is defined.

Overall, it might be surprising if the Recommendation, which was motivated by a concern about the lack of access by persons performing non-standard forms to effective and adequate social protection, would exclude from its scope some of those non-standard forms of work. This may justify an approach as inclusive as possible, as to best inform national debates and reforms.

9.5.2. *Material scope*

The Recommendation "applies to the branches of social protection which are often more closely related to participation in the labour market and mostly ensure protection from loss of work-related income upon the occurrence of a certain risk".[1048] As a result, the Recommendation only concerns social security schemes dealing with the risks of unemployment, sickness (including healthcare), maternity (and paternity), invalidity, old-age, survivorship and accidents at work and occupational diseases.[1049] Furthermore, the Recommendation only applies to the abovementioned branches of social protection "insofar as they are provided in the Member States".[1050] Such a statement may be interpreted as that Member States are only recommended to provide access to those of the mentioned social protection branches that are available to at least some persons performing work. This may be confirmed by the fact that the specific provision of the Recommendation requiring that Member

[1047] Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed (2019/C 387/01), point 3(3.1.).
[1048] Ibid., Preamble, Obs. 3.
[1049] Ibid., Art. 3(3.2.).
[1050] Ibid., Art. 3(3.2.).

States provide an adequate level of protection seems to only apply concerning "a risk insured by social protection schemes for workers and for the self-employed".[1051] The Recommendation, therefore, seems to refrain from actively suggesting that Member States *at least* provide social protection concerning the abovementioned branches. Thus it seems to allow that a Member State that has opted to not provide any social protection (no matter the labour market status) concerning one or more of these branches would not be compelled to do so. Furthermore, and perhaps more importantly, this might also be interpreted as that a Member State may not be compelled to provide some forms of social protection that other Member States do provide (such as, for example, partial unemployment benefit). This may conform to the fact that the Recommendation may not "affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof".[1052] However, Council Recommendation 92/442/EEC on the convergence of social protection objectives and policies[1053] took a broader approach, namely by opening the possibility of recommending on the content of each branch involved. Overall, it looks like a lost opportunity that the Council Recommendation did refrain from providing any guideline on what minimum features each branch should include.

One branch of social security that is not included in those listed by the Recommendation is family benefits. This might be due to the fact that the Recommendation focuses on those branches which are closely related with participation in the labour market, and which generally ensure protection from loss of work-related income upon the occurrence of a certain risk, features that family benefits may not fulfil. Nevertheless, social security branches in most current social security systems are not isolated but interrelated. And certain forms of work (such as characterised by a large amount of flexibility and uncertainty) may put greater demands on parents (for example, in order to access child care). By not paying attention to the composition of the household of a worker/self-employed in relation to his need for social protection, the Recommendation seems to overlook the importance of this factor. Furthermore, if the Recommendation would have included family benefits in its material scope, it would have been more in line with established regulations on social security such

[1051] Ibid., Art. 11.

[1052] Consolidated version of the Treaty on the Functioning of the European Union, Art. 153(4).

[1053] Council Recommendation of 27 July 1992 on the convergence of social protection objectives and policies (92 /442 /EEC).

as the Coordination Regulations[1054] or the ILO Convention 102,[1055] as well as with the Council Recommendation 92/442/EEC on the convergence of social protection objectives and policies.[1056]

Private insurance products are not within the scope of the Recommendation,[1057] as neither are social assistance and minimum income schemes.[1058] These exclusions are significant, particularly in the case of platform workers, as they often need to rely on such kind of arrangements.

It is questionable whether an analysis that excludes social assistance and minimum income schemes does provide an accurate representation of the reality that platform workers face regarding their social security. The exclusion is particularly shocking due to the fact that the Recommendation, when addressing adequacy, advocates for taking into account the whole social protection system of a Member State. Furthermore, it was stated in the Explanatory Memorandum of the Commission's Proposal for the Council Recommendation that social protection "is generally provided through social assistance schemes that protect all individuals (based on their citizenship/residency and financed through general taxation) and through social security schemes that protect people in the labour market, often based on contributions related to their work-income. Social security includes several branches, covering a variety of social risks ranging from unemployment to illness or old age".[1059]

These contradictions might be overcome if 'social protection' would be defined in a similar way as 'social security' is defined under the Coordination Regulations. Thus, under the Coordination Regulations, 'social security' is defined as each benefit that fits into one of the branches specifically mentioned by the Coordination Regulations (and which are generally the same as the ones included in the Recommendation, except for family benefits) and whose entitlement must be granted on the basis of a legally defined position, and not depending on an individual and discretionary assessment

[1054] Regulation 883/2004, Art. 3(1)(j).

[1055] ILO Convention 102 on Social Security (Minimum Standards), 1952, Art. 39-45.

[1056] Council Recommendation of 27 July 1992 on the convergence of social protection objectives and policies (92 /442 /EEC), Art. I(B)(6).

[1057] Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed (2019/C 387/01), point 1(1.2.).

[1058] Ibid., Art. 8(4).

[1059] European Commission, *Proposal for a Council Recommendation on access to social protection for workers and the self-employed* (COM(2018) 132 final), Brussels: European Commission, 2018, p. 1.

of personal needs.[1060] Using such an interpretation of the concept of 'social protection' in the Recommendation would mean that some benefits that are considered at the national level as social assistance, or as social advantages in the meaning of Regulation 492/2011,[1061] would be included in its scope.

9.6. Formal coverage

9.6.1. *Introductory remarks*

So far, this chapter has dealt with the limits and potential of the Recommendation as they relate to the Recommendation's position within the social acquis (section…), its legal basis (section….) and the meaning of its key concepts (sections 9.4 and 9.5). Such analysis, however, would be meaningless on its own. It is the Recommendation's ambitious aim of promoting effective access for all workers and the self-employed to adequate social protection. This is what makes the potential limits on its interpretation so important and that is what will be discussed in this section (on formal coverage) and sections 9.7 (on effective coverage) and 9.8 (on adequacy).

The Recommendation's first step towards said aim is promoting the improvement of the formal coverage of social protection schemes (concerning the branches within the scope of the Recommendation) and its extension to all workers and the self-employed.[1062] Member States are recommended to do so through mandatory coverage in the case of workers, and through at least voluntary coverage (and, when appropriate, mandatory coverage) in the case of the self-employed.

Thus, as soon as a person performing platform work is considered a worker or a self-employed, he should be granted formal access to social security schemes regarding the branches within the scope of the Recommendation.

[1060] See, inter alia, Case C-396/05, *Habelt*, EU:C:2007:810, para. 63; Case C-286/03, *Hosse*, EU:C:2006:125, para. 37.

[1061] See, for a definition of 'social advantage' under Regulation 492/2011, section 8.2.2.

[1062] Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed (2019/C 387/01), point 8.

The recommendation on formal coverage introduces two topics of great importance towards the social protection of platform workers. First and foremost, it provides the strong message that it is technically possible to provide formal coverage for all workers and the self-employed (which thus includes platform workers -as long as they are included in that categories-). And, second, it poses the important question of when it is appropriate to provide coverage to the self-employed on a voluntary basis (as opposed to doing so on a compulsory basis). Both issues will be addressed below.

9.6.2. *The formal coverage of all workers and the self-employed*

One of the most important contributions of the Council Recommendation to the EU social acquis is its clear stance that all workers and the self-employed should be formally covered by social protection schemes concerning all the branches within the scope of the Recommendation. This is not a minor issue, as may be observed from how some Member States reacted to it.[1063]

9.6.2.a. The formal coverage of self-employed platform workers

All Member States studied in this thesis (with the exception of Spain) do not provide social security coverage for the self-employed concerning one or more contingencies linked to the performance of work. There are, however, some social risks against which it may be harder to provide formal coverage to self-employed persons than others. Thus, it is relatively common that self-employed persons are allowed to join social protection schemes providing old-age and survivorship pensions (even if, as will be analysed below in section 9.6.3, ensuring effective access to the self-employed in these branches may require some adaptations).

Providing coverage for the self-employed concerning work incapacity has proven to be more challenging.[1064] In this regard, sick pay and invalidity schemes generally protect against the risk of loss of income as a result of an incapacity to work due to ill health. Nevertheless, incapacity to work does not necessarily mean loss of income in the case of self-employed persons, as they may have

[1063] See Council of the European Union, Statement by the Republic of Bulgaria, Meeting of the Employment, Social Policy, Health and Consumer Affairs Council, Brussels: Council of the European Union, 2018.

[1064] See Schoukens, P., *Thematic Discussion Paper for the Mutual Learning on Access to social protection for workers and the self-employed 1st Workshop: Extending formal coverage*, Brussels: European Commission, 2019, pp. 3-4.

employees or receive income as a return from capital.[1065] It is thus typically harder to measure the loss of income due to incapacity to work experienced by self-employed persons than by employees. Moreover, in the case of sick pay for employees, the employer continues paying (all or a part) of the employee's salary. This allows to redistribute the risk and creates an incentive to avoid abuses. However, an employer typically does not exist in the case of self-employed persons. Moreover, the fluctuating and often unpredictable income that characterises self-employment hinders the calculation of the loss of income due to incapacity.

These arguments against including (traditional and therefore not per se solo) self-employed persons in schemes concerning sick pay and invalidity may not necessarily apply to the situation of platform workers. Hence, like the typical self-employed sketched above, platform workers most often lack employers and the capacity to reorganise their activity in order to continue earning a living despite being incapacitated to perform their usual work. However, the online platforms through which they get (and/or) perform their work, often present many of the features of an employer, and so they might exercise a similar function of control in order to avoid abuses. And, while in theory platform workers' earnings are also unpredictable, this is partly linked to the unpredictability of the number of offers they may (or may not) receive to perform work. Online platforms, having significant information on the number of offers of work available per day, could play a significant role in curbing that unpredictability.

Another contingency with which social security schemes often struggle to protect self-employed persons concerns labour accidents and professional diseases.[1066] These schemes typically originate from the civil liability of the employer as a result of not being able to ensure a healthy work environment for his employees. Eventually, in most systems, that civil liability was solidarized through social security. As self-employed persons do not have an employer, it is generally considered that they may not be covered against the risk of labour accidents and professional diseases. This is so much the case that, during the process leading to the Council recommendation,

[1065] Ibid., p. 3.

[1066] Ibid., p. 5.

Bulgaria considered allowing self-employed persons to be insured against that risk to be against one of the basic principles of the Bulgarian insurance model.[1067]

It is submitted, however, that those online platforms that set a very specific framework within which platform work is performed should be held liable if an accident occurs (and thus the use of such a scheme would be adequate). For example, if a platform strongly incentives that platform workers through its platform perform as many deliveries as possible, it might not be far-fetched that the platform is held liable if an accident occurs.

Another reason behind not including self-employed persons in the scope of schemes concerning labour accidents and professional diseases is that it is difficult to determine whether the person was performing a self-employed activity when the accident occurred. On the one hand, platform work brings its own challenges in connection to this, as it often allows integrating work in the person's private life up to a point where it is difficult to separate both. On the other hand, monitoring when a platform worker is performing work may be facilitated by the fact that workers need to be connected to the online platform while performing work.

Finally, protection against the risk of unemployment through social security schemes is generally denied to self-employed persons in most countries. This may be, in part, due to the difficulties in controlling whether self-employed persons are truly unemployed. Again, this is a challenge that could be overcome in the case of platform workers, especially with the support of online platforms, which have detailed information on the activity of platform workers.

9.6.2.b. The formal coverage of persons performing marginal platform work

It is common among several of the countries studied that work providing earnings under a certain threshold is excluded or exempted from producing coverage by one or more social security schemes. Some of the reasons behind this are the prevention of potential abuses, the avoidance of

[1067] See Statement by the Republic of Bulgaria, Meeting of the Employment, Social Policy, Health and Consumer Affairs Council, Brussels, December 6th, 2018.

administrative overburdening and the promotion of the use of flexible forms of work.[1068] While the Recommendation is clear in its stance that all employees and self-employed persons should be formally covered concerning labour-related contingencies, it does not provide any clarification on whether the same would apply to persons performing work in a way (e.g. generating low earnings) that excludes them from being considered as self-employed persons under some national systems of social security. The challenge of addressing, within the framework of the Recommendation, the lack of coverage experienced by some persons performing platform work on a marginal basis is also linked to the unclear definition of the concepts of 'worker' and 'self-employed' under the Council Recommendation.[1069]

9.6.3. *The appropriateness of providing voluntary coverage to the self-employed*

The fact that the Member States are recommended to provide formal coverage for the self-employed "at least on a voluntary basis and where appropriate on a mandatory basis" is not a trivial matter. Here the relevance of the compulsory aspect of social security coverage must be noted. Social security is generally being considered to be compulsory coverage. This is not necessarily always the case, but it is the general rule, for several reasons.

First, social security is generally based on redistribution and (at least builds to some extent on) solidarity. That is also why the choice of the term 'social protection' is not trivial, as (as it was already mentioned above) this term generally includes not only social security (which, in turn, is deemed to include social insurance and social assistance), but also private insurance arrangements. The latter are not typically based on the principle of solidarity, and may have a very restricted redistribution (if any at all) among its members.[1070] In any case, the idea is that all persons, no matter how high is the risk that they may experience a contingency, would be included in a scheme in order to redistribute the level of risk among all members. This is particularly favourable, of course, for those individuals who experience a higher risk of a contingency materialising. Those individuals

[1068] Schoukens, P., Barrio, A. and Montebovi, S., 'Social protection of non-standard workers: the case of platform work', in Devolder, B. (ed.) *The Platform Economy: Unravelling the Legal Status of Online Intermediaries*, Cambridge-Antwerp-Chicago: Intersentia, 2019, pp. 250-252.

[1069] See section 9.4.2.

[1070] Pieters, D., *Social Security: An Introduction to the Basic Principles* (second edition), Alphen aan den Rijn: Kluwer International, 2006.

with a lower risk of that risk materializing, might be better off not joining such a social security scheme together with individuals with higher risk. However, the general idea that individuals with higher risk should not be left to fend for themselves, even if that means others with lower risks have to pay a bit more is generally accepted among EU social security systems. Nevertheless, this idea is nowhere mentioned in the Recommendation. And, by allowing that Member States provide voluntary coverage to self-employed persons, what the Recommendation is doing is to allow that those individuals who are self-employed may opt whether or not to join the system. This, as noted above, may result in those individuals with low risk deciding not to join the scheme, making the scheme more expensive for those who do join.

Secondly, it cannot always be assumed that individuals are actors (with, furthermore, perfect information at their disposal that allows them to properly assess the level of risk) who will (or even be able to) join the scheme when they think there is a good chance that they may suffer the contingency. Many individuals may prioritise the immediate gain (i.e. no or lower social security contributions) over the potential future cost (i.e. the cost that the contingency materialise). Others may not be able to afford the cost of joining the scheme, and so if the option is left to them, they will not do so. When individuals opt to not join the scheme, and the contingency actually materialises, that is not only a cost for the individual. Because, as a society, it is generally considered necessary that no members are left in poverty, so when a person falls into poverty, social assistance is generally provided. Therefore, when the cost that the risk materialises without the individual being insured results in the individual falling into poverty, all citizens (and not only those who are members of a particular social security scheme) are assuming the materialisation of a risk (i.e. that the individual falls into poverty). Generally, it is preferred that the risk of a (protected) contingency materialising is primarily assumed by the members of a social security scheme, and thus avoiding that society always pick up the cost is another reason to force individuals to join a social security scheme.

By allowing self-employed persons (or certain varieties of self-employed people) to opt freely whether or not to join a certain social security scheme, it makes it extremely attractive for certain persons to be self-employed instead of employees (in order to escape compulsory insurance). But this is done with a cost for society as a whole.

Currently, there is a strong discussion on both the professional status of platform workers and how they should be protected. While both discussions are connected (as a professional status is generally linked to certain formal coverage by social insurance schemes), they should not always be: a professional status is linked to a factual situation, a person either is or is not within the scope of a professional status; in contrast, the discussion on the social protection of persons is more complex than that. The Recommendation is based on the idea that all workers and self-employed persons deserve effective and adequate social protection. That goes further than whether a certain professional reality fulfils a set of (technical) criteria. Instead, it revolves around issues such as need and vulnerability. The question is whether the Recommendation chooses a side in the current discussion of whether, in a Member State, all workers and the self-employed receive an effective and adequate social protection or, instead, it merely requires effective and adequate social protection for those already entitled to protection in the current national systems of social protection. In other words, does or does not the Recommendation advocate for an extension of the social protection to all (solo) self-employed persons so that they will be adequately and effectively protected against all contingencies within the scope of the Recommendation? The answer to this question seems to hinge on how the requirement for formal coverage of all the self-employed must be interpreted and, in particular, on how the phrase "at least on a voluntary basis and *where appropriate* on a mandatory basis" must be understood (italics added).

In light of the important societal role that compulsory social security coverage plays in providing income security for the (working) population, it might be claimed that, at least as it concerns self-employed platform workers with low-earnings, compulsory social security coverage should always be deemed appropriate. In this regard, low-earning self-employed platform workers are particularly prone to fall into poverty if they suffer the additional costs linked to the materialisation of one of the contingencies included in the material scope of the Recommendation without being insured. In order to prevent this, it is appropriate that they are compulsorily included in the coverage of social security schemes. Otherwise, they would have to rely on social assistance to avoid falling into poverty, while the Recommendation seems to favour social insurance schemes as the main mechanism for fighting in-work poverty. Moreover, by making coverage compulsory, the cost of joining a scheme would be assumed by all self-employed platform workers, avoiding that some

platform workers would be able to perform work for a lower (immediate) cost because they opted to not join a social security scheme.

The need for a scheme covering for a risk similar to unemployment concerning self-employed persons has been arguably shown with the current crisis provoked by the COVID-19 epidemic, as a result of which many of the countries studied in this thesis created programmes in order to provide financial support to those self-employed which business was affected.[1071]

Furthermore, it is submitted that it would also be appropriate that self-employed persons performing work in arguably a more stable manner than platform workers (and thus with a lower risk of becoming unemployed) should be obliged to join the same social security schemes against unemployment or end of activity as low-earning self-employed platform workers, since this combination of self-employed with higher and lower risks (and earnings) would significantly reduce the costs to uphold a scheme- protecting against such risks. Protecting low-paid self-employed platform workers and other solo self-employed in similar precarious situations may also be achieved by partly financing social security schemes through the public budget. This way, the public budget may compensate for the higher cost of being insured in a scheme where most participants have a high risk of becoming unemployed.

9.7. Effective coverage

9.7.1. *Introductory remarks*

The Council Recommendation does not limit itself to advocating formal access, but also invites Member States to ensure effective coverage for all workers and the self-employed. In order to achieve that, the Recommendation notes that the rules governing contributions and benefits should not, in practice, prevent individuals from accruing or accessing benefits because of their type of employment relationship or labour market status.[1072] Moreover, when Member States apply specific rules concerning contributions and benefits for different types of employment relation or labour

[1071] See B. Inclusion in the social security position of platform workers at national level.
[1072] Ibid. Art. 9(a).

market status,[1073] these differences should be proportionate and reflect the specific situation of beneficiaries.[1074] And, when entirely different social security schemes exist concerning the same risks across different sectors or occupations, the Recommendation indicates that entitlements should be preserved, accumulated and/or made transferable across all types of employment and self-employment statuses and across economic sectors.[1075]

The recommendations on effective coverage, however, come with two caveats.

The first one is that, while they apply to both workers and the self-employed, concerning the latter, it is noted that the recommendations apply "under the conditions set out in point 8". Clearly, this refers- to the statement in point 8 of the Recommendation that the self-employed should be formally covered by social protection schemes "at least on a voluntary basis and where appropriate on a mandatory basis".[1076] It is unclear, however, why such a reference is made, as the Recommendation in any case requires that coverage is provided also to self-employed persons, even if that may be at least on a voluntary basis (and, when appropriate -which, as noted above, may often be the case concerning platform workers- on a compulsory basis). As a result, self-employed persons should always have the choice to opt-in to a social protection scheme, and thus the Recommendations seeks to ensure that persons within the scope of this instrument are not prevented from effective access to social protection schemes that are in any case applicable to them. It may even be claimed that is even more so when a self-employed person has a choice between joining or not joining a scheme, because then it is fundamental that the rules governing the contributions and entitlements linked to a scheme do not incentivize self-employed persons to opt-out (due, for example, to contributions that may be unaffordable or to rules for the determination of entitlement that in practice hinder effective access to a benefit).

The second caveat is that Member States are recommended to ensure effective coverage "while also preserving the sustainability of the system and implementing safeguards to avoid abuse".[1077] None

[1073] See Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed (2019/C 387/01), Preamble, obs. 19.
[1074] Ibid. Art. 9(a).
[1075] Ibid., Art. 10.
[1076] Ibid., Art. 8(b).
[1077] Ibid., Art. 9.

of these terms, however, is defined. In the Preamble 'sustainability' is referred to as follows: "the financial sustainability of social protection schemes is essential for the resilience, efficiency and effectiveness of such schemes" and thus "the implementation of this Recommendation should not significantly affect the financial equilibrium of Member States' social protection systems". While, in light of these wordings, it may seem logical to interpret the term 'sustainability' as corresponding first and foremost to 'financial sustainability', it should not be forgotten that other forms of sustainability (including social sustainability) are also important (and particularly relevant in connection with the European Social Pillar).[1078]

9.7.2. *No prevention of access to benefits due to labour market status*

The Recommendation states that the rules governing contributions (e.g. qualifying periods, minimum working periods) and entitlements (e.g. waiting periods, calculation rules and duration of benefits) should not prevent individuals from accruing or accessing benefits because of their type of employment relationship or labour market status.[1079] Obviously, rules governing access to (as well as duration and amount of) benefits will always, by their very nature, prevent some individuals from accruing or accessing benefits. Nevertheless, what this provision states is that these limits should not prevent individuals from accruing or accessing benefits *because of their type of employment relationship or labour market status*. In other words, the requirements for entitlement, as well as the rules determining the amount and duration of a benefit, should not constitute "unduly high obstacles to accessing social protection"[1080] for certain persons because they have 'atypical' types of employment or labour market statuses.

9.7.3. *Proportionality in differences between labour market statuses*

The Recommendation states that differences in the rules governing the schemes between labour market statuses or types of employment relationship should be proportionate and reflect the specific situation of beneficiaries.[1081] This is the logical corollary of the prior provision. Thus, if the

[1078] McGuinn, J., et al. *Social Sustainability. Concepts and Benchmarks*, PE 648.782, Brussels: European Parliament, 2020.
[1079] Ibid., Art. 9(a).
[1080] Ibid., Preamble, obs. 19.
[1081] Ibid. Art. 9(b).

application of the rules governing contributions and benefits prevent persons from accessing benefits because of their labour market status or type of employment relationship, then said rules should be adapted to avoid that. The provision might be interpreted as that the overall aim of the rules concerning different labour market status and types of employment relationships should be the same, even if the means to achieve them are adapted.[1082]

An example of an adaptation that is tailored to the specific situation of beneficiaries may be found in France, where, for self-employed platform workers who opt-in to a voluntary scheme against labour accidents and professional diseases, the cost of joining such a scheme must be assumed by the online platform.[1083]

9.7.4. *Preservation, accumulation and transferability*

The Recommendation urges Member States to ensure that entitlements (whether they are acquired through mandatory or voluntary schemes) are preserved, accumulated and/or made transferable across all types of employment and self-employment statuses and across economic sectors, throughout the person's career or during a certain reference period and between different schemes within a given social protection branch.[1084]

'Preservation of rights' means that rights acquired are not lost even when a person changes schemes or type of employment relationship.[1085] This implies that a person may maintain and use his accumulated benefits,[1086] although it is not established for how long he may continue to do so. The term 'preservation' may also imply that persons are allowed to continue contributing to former schemes, or that benefits are adjusted based on inflation rate or salary level.[1087]

[1082] Schoukens, P., *Thematic Discussion Paper for the Mutual Learning on Access to social protection for workers and the self-employed 2nd Workshop: Effective coverage*, Brussels: European Commission, 2019, p. 12.

[1083] Décret n° 2017-774 du 4 mai 2017 relatif à la responsabilité sociale des plateformes de mise en relation par voie électronique; Code du Travail, Art. L7342-2. See also section 4.1.3.d of this thesis.

[1084] Ibid., Art. 10.

[1085] Ibid., Art. 7(g).

[1086] European Commission, *Commission Staff Working Document Impact Assessment Accompanying the document Proposal for a Council recommendation on access to social protection for workers and the self-employed* (SWD(2018)70 final), Brussels: European Commission, 2018, p. 42.

[1087] Ibid., p. 27.

'Accumulation of rights' refers to both the possibility of combining entitlements and to qualifying periods concerning different occupations.[1088] 'Transferability', in turn, means that a person is able to transfer acquired entitlements to other schemes.[1089] Accumulation and transferability may be achieved by, notably, "establishing mandatory transferability of accumulated entitlements and allowing the aggregation of periods upon changes between schemes".[1090]

As is submitted above, the Recommendation seems to advocate the accumulation of entitlements *and qualifying periods*. However, this is not fully certain. In this regard, point 10 of the Recommendation only refers to the preservation, accumulation and/or transferability of *entitlements*. At the same time, point 7(h) states that the term 'accumulation of rights' "includes making qualifying periods in a previous labour market status (or in concomitant labour market statuses) count towards the qualifying periods in the new status".[1091] Thus, it might be assumed that, by referring to 'accumulation', the Recommendation is also alluding to qualifying periods (such as periods of contributions). Still, it should be noted that the terms 'preservation of rights' only refers to acquired rights,[1092] while qualifying periods might be considered as rights in the process of being acquired. The term 'transferability', in turn, refers to "the possibility of transferring accumulated entitlements to another scheme".[1093] Hence, the Recommendation seems to advocate the possibility that persons are allowed to use within the same social protection scheme the qualifying periods fulfilled because of different occupations. Nevertheless, it might be argued that the Recommendation does not specifically recommend the Member States to ensure that qualifying periods may be transferred between schemes concerning the same branch, as well as preserved (but neither does it recommend against it).

[1088] Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed (2019/C 387/01), point 7(h).

[1089] Ibid., point 7(i).

[1090] European Commission, *Commission Staff Working Document Impact Assessment Accompanying the document Proposal for a Council recommendation on access to social protection for workers and the self-employed* (SWD(2018)70 final), Brussels: European Commission, 2018, p. 37.

[1091] Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed (2019/C 387/01), point 7(h).

[1092] Ibid., point 7(g).

[1093] Ibid., point 7(j).

Moreover, by focusing on entitlements, acquired rights or qualifying periods, the Recommendation does not take into account (as regards transferability, preservation or accumulation) periods of work that may be too short to produce any entitlements, acquired rights or (even) qualifying periods.

Preservation, accumulation and transferability of rights are often critical for the social protection of persons who perform, simultaneously or in alternation, different occupations, as platform workers probably often do. Therefore, the fact that the Recommendation addresses this issue is highly relevant for the situation of platform workers. The importance of this provision might be in part diminished by the fact that qualifying periods may only be accumulated (and not transferred or preserved) and that very short periods of work might not be accumulated, transferred or preserved (if they do not amount to either rights or qualifying periods). However, these issues could perhaps be solved by interpreting the provisions on adequacy. That is to which we now turn.

9.8. Adequacy

9.8.1. *Introduction*

Adequacy of social protection is a crucial element of the Council Recommendation. Article 9 TFEU, which partly inspired the Council Recommendation,[1094] stipulates that the EU, when defining and implementing its policies and activities, must take into account, inter alia, requirements linked to the guarantee of adequate social protection.[1095] Moreover, principle 12 of the European Pillar of Social Rights, to which implementation the Council Recommendation contributes,[1096] states that "regardless of the type and duration of their employment relationship, workers, and, under comparable conditions, the self-employed have the right to adequate social protection".[1097]

[1094] Ibid., Preamble, obs. 2; European Commission, *Commission Staff Working Document Impact Assessment Accompanying the document Proposal for a Council recommendation on access to social protection for workers and the self-employed* (SWD(2018)70 final), Brussels: European Commission, 2018, p. 16.

[1095] Consolidated version of the Treaty on the Functioning of the European Union, Art. 9.

[1096] European Commission, *Commission Staff Working Document Impact Assessment Accompanying the document Proposal for a Council recommendation on access to social protection for workers and the self-employed* (SWD(2018)70 final), Brussels: European Commission, 2018, p. 19.

[1097] European Pillar of Social Rights, COM(2017)251.

The Recommendation, however, does not limit itself to state the need to ensure adequate social protection. Instead, the Recommendation takes it a step further and provides some information on what constitutes adequate benefits and adequate contributions.

9.8.2. *Benefits' adequacy*

9.8.2.a. General remarks

Where a risk insured by social protection schemes for workers and the self-employed occurs, the Recommendation advises Member States to ensure that schemes provide an adequate level of protection to their members in a timely manner and in line with national circumstances, maintaining a decent standard of living and providing appropriate income replacement, while always preventing those members from falling into poverty.[1098] There is, thus, a significant amount of information in this cited paragraph, which is analysed below, not only in isolation but also in the broader context of the whole Recommendation.

9.8.2.b. Adequate entitlements: 'decent level of protection'

The Council Recommendation seems to provide several, overlapping visions of what 'a decent level of protection' means: the provision of an appropriate income replacement, the maintenance of a decent standard of living, and the prevention of the schemes' members falling into poverty. It might be claimed that each vision is based on a different type of social security scheme, depending on who is included in its personal scope (economically active persons or the entire population -representing, respectively, the Bismarckian or the Beveridgian approaches-),[1099] with the third vision of what 'adequacy' means noting the absolute minimum that must be achieved (i.e. the prevention of the schemes' members falling into poverty).

[1098] Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed (2019/C 387/01), point 11.

[1099] See Schoukens, P., *Thematic Discussion Paper for the Mutual Learning on Access to social protection for workers and the self-employed 3rd Workshop: Adequacy and financing*, Brussels: European Commission, 2020, pp. 7, 8, 16.

'Providing appropriate income replacement'

The Recommendation does not provide any explanation on what 'an appropriate income replacement' entails. However, inspiration about what it means may be found in international instruments such as the ILO Convention 102 of 1952, the European Code of Social Security of 1964 and the Revised European Code of Social Security of 1990 (even if the latter has not entered into force yet due to a lack of sufficient ratifications).[1100] In this regard, the first two instruments state that benefits should at least amount to between 40% and 50% (depending on the contingency) of the previous earnings of the beneficiary[1101] (assuming that the beneficiary is a man with a wife and two children, otherwise the benefits "shall bear a reasonable relation to the benefit for the standard beneficiary"[1102]). Under the Revised European Code of Social Security, in turn, benefits should amount to a minimum of between 50% and 80% of the beneficiary's earnings (depending on whether he is considered alone or with dependents, as well as on the contingency).[1103]

'Maintaining a decent standard of living'

The maintenance of a decent standard of living, in turn, is usually the focus of universal social security schemes. However, as the Recommendation does not link this requirement to only universal social security schemes, it might not be a stretch to claim that also professional schemes (which, as mentioned above, generally provide benefits proportional to the individual's prior income) should ensure a decent standard of living.[1104] This may not be that important for full-time employees in a country with a minimum wage that ensures a decent standard of living, but it might be more relevant in the case of persons performing economic activities (on either a part-time or full-time basis) which produce low earnings (including the self-employed, who are generally not covered by minimum

[1100] Schoukens, P., *Thematic Discussion Paper for the Mutual Learning on Access to social protection for workers and the self-employed 3rd Workshop: Adequacy and financing*, Brussels: European Commission, 2020, pp. 13-14.

[1101] ILO Convention 102 on Social Security (Minimum Standards), Art. 65(1), Schedule to Part XI; European Code of Social Security, Art. 65(1), Schedule to Part XI.67.

[1102] ILO Convention 102 on Social Security (Minimum Standards), 1952, Art. 65(5); European Code of Social Security, 1964, Art. 65(5).

[1103] European Code of Social Security (Revised), 1990, Art. 71, Schedule to Part XI.

[1104] This is, in fact, the path taken by the Netherlands, which provides a supplementary benefit (under the Supplementary Benefits Act -TW-) that complements the claimant's income up to a certain minimum income, which depends on the personal situation of the claimant. See section 6.2.1.

wage regulations). In this regard, it is common among professional social security schemes to set a minimum. Nevertheless, most often this applies to those persons with earnings over a certain income. Extending minimum social protection to all workers and the self-employed, no matter their earnings would require to study how such a form of redistribution may be compatible with financial sustainability.[1105]

'Preventing those members from falling into poverty'

The prevention of the schemes' members falling into poverty, as noted above, seems to be the minimum that is expected concerning the level of social protection benefits (based on the use of the phrase "while always"[1106]). Notably, social assistance is explicitly excluded from the material scope of the Recommendation. The fact that the Recommendation considers social protection schemes that do not have the character of social assistance as *the* instrument to prevent that workers and the self-employed fall into poverty must not be overlooked. Furthermore, the statement does not seem to differentiate between those performing an economic activity on a full-time or a part-time basis. While this is not specifically stated, except in the recommendation on effective coverage (which was required "regardless of the type of employment relationship"), it might be understood from the general aim of the Recommendation.

Specific provision on self-employed persons: equivalence

Member States are also recommended to ensure that the calculation of the social protection contributions and entitlements of the self-employed are based on an objective and transparent assessment of their income base, taking account of their income fluctuations, and reflecting their actual earnings.[1107] This statement, found in a provision of the Recommendation separate from the recommendations noted above, stresses an equivalence between earnings, on one hand, and entitlements and contributions, on the other. The issue is to determine how this focus on the equivalence between earnings and entitlements may fit with the general recommendation of

[1105] Schoukens, P., *Thematic Discussion Paper for the Mutual Learning on Access to social protection for workers and the self-employed 1st Workshop: Extending formal coverage*, Brussels: European Commission, 2019, p. 6.
[1106] Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed (2019/C 387/01), point 11.
[1107] Ibid., point 14.

providing social protection that ensures an adequate level of protection, particularly in the case of persons with low earnings.[1108]

Contributions' adequacy

The Recommendation explicitly advocates that contributions to social protection should be proportionate to the contributory capacity of workers and the self-employed.[1109] This is not that problematic for those platform workers classified as employees at the national level, as employees' contributions (at least in all countries in the scope of this research) are generally related to their income. Nevertheless, it is more of an issue when platform workers are classified as self-employed.

In this regard, there are several ways in which social security schemes establish self-employed persons' contributions that are not necessarily linked to earnings. This is the case in Spain, where the basis for calculating a self-employed persons' social security contributions is determined by the self-employed person himself, and there is a minimum basis for the calculation of contributions that is compulsory for all persons performing self-employment, no matter their earnings (with an exemption for self-employed persons in their first year of activity).[1110]

Perhaps because of this, Member States are recommended to ensure that the calculation of the social protection contributions and entitlements of the self-employed are based on an objective and transparent assessment of their income base, taking account of their income fluctuations, and reflect their actual earnings. [1111]

Reductions on contributions must be applied across all labour market status

The Recommendation also establishes that "in light of national circumstances and where appropriate, Member States are recommended to ensure that any exemptions or reductions in social

[1108] Schoukens, P., *Thematic Discussion Paper for the Mutual Learning on Access to social protection for workers and the self-employed 1st Workshop: Extending formal coverage*, Brussels: European Commission, 2019, p. 6.
[1109] Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed (2019/C 387/01), point 12.
[1110] See section 2.1.5.
[1111] Ibid., Art. 14.

contributions provided for by national legislation, including those for low-income groups, apply to all types of employment relationship and labour market status".[1112]

This provision may aim to avoid that Member States incentivise the use of certain labour market status. It is however surprising that it specifically requires to extend reductions or exemptions of contributions for low-income groups. In this regard, such reductions or exemptions might be considered as following the recommendation that contributions should be proportionate to the contributory capacity of individuals, while also ensuring that individuals receive an adequate benefit.

It should be noted, in any case, that this recommendation is preceded by a double qualifier (i.e. in light of national circumstances and where appropriate), which might indicate that the EU legislator was aware of how delicate such a recommendation may be.

Activation measures

It should also be noted that the Recommendation, while it considers in its Preamble that adequacy of social protection also includes contributing, "where appropriate, to activation and facilitating the return to work", does not develop this reference to activation in its provisions. It might be argued that this is a deliberate choice of the EU Council. As such, it might be read as an indicator that the main aim of social protection systems is to ensure adequate social protection (within the realms of sustainability), instead of focusing primarily on facilitating the return to work. This is particularly relevant as it relates to potential sanctions to persons who did not take the necessary steps in order to return to work. Thus, the Recommendation's provisions might be interpreted as requiring adequate social protection, even when individuals did not fulfil said obligations. Nevertheless, this is an issue best clarified by those in charge of monitoring the Recommendation's implementation.

Social protection system as a whole

The assessment of the adequacy of protection is performed by taking into account the whole Member State's social protection system ("When assessing adequacy, the Member State's social

[1112] Ibid., Art. 13.

protection system needs to be taken into account as a whole"[1113]). This statement contrasts with measuring adequacy as it relates to particular scheme's members (i.e. "Member States are recommended to ensure that schemes provide an adequate level of protection to their members"). As noted above, when analysing the material scope of the Recommendation, it might be claimed that the statement that "social protection system needs to be taken into account as a whole" indicates that social assistance benefits to which the individual might be entitled should also be taken into consideration when assessing adequacy.

9.9. Transparency

Member States are recommended to ensure transparency in the conditions and rules for entitlement, as well as to provide individuals with free access to updated, comprehensive and clearly understandable information about their individual entitlements and obligations.[1114] This is particularly important in the case of platform work as, because of its often short and fragmented character, it may be a challenge for platform workers to know with certainty whether they might fulfil the requirements for access and, even, whether they may be considered as performing a professional activity linked to compulsory or voluntary social security insurance.

The Recommendation also states that administrative proceedings should be simplified when necessary, another relevant aspect for platform workers. In this regard, many persons who might lack the knowledge and means to start a traditional activity as a self-employed person might do so as platform workers because of the online platform's ability to significantly reduce the transaction costs.[1115] These persons might be more easily dissuaded by the administrative procedures linked to starting such an activity than traditional self-employed persons.

Nevertheless, possibly the greatest challenges faced by platform workers concerning transparency lie in the typical lack of clarity concerning their labour market status, as often their social security

[1113] Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed (2019/C 387/01), point 11.
[1114] Ibid., Art. 15.
[1115] See further section 1.1.1. of this thesis.

rights and obligations will vary significantly depending on it. While the proposal does not mention such difficulties in determining labour market status, the Commission's Impact Assessment seemingly expected that the differentiation between labour market statuses would be clarified by the (then Proposal for a) Directive on transparent and predictable working conditions.[1116]

9.10. Conclusions

The Council Recommendation is the most recent step of the EU in promoting convergence among the policies of its Member States with regard to ensuring access to social protection for workers and the self-employed. While, as a Recommendation, it lacks binding effect, it provides a unique view of the horizon towards which the EU is marching. It is thus of paramount importance to determine how platform work fits into that path, whether it is part of it and, if so, how much distance there currently is between the horizon and the reality.

The purpose of the Recommendation is primarily to provide guidance on the very important topic of social protection of all workers and the self-employed. But, by doing so, it raises important questions on some critical choices regularly made in the design of social security schemes. More importantly for the purposes of this thesis, the Recommendation, with its broad and ambitious aim, is an excellent tool to examine and discuss whether social security systems are sufficiently adapted to forms of work that deviate from the standard employment relationship as far as platform work does.

However, discussion without action is arguably not enough. In the following months (from the date of this writing) the European Commission and the Social Protection Committee will have the very important task of clarifying the framework for the monitoring of the Recommendation.

In this regard, one crucial aspect to which this chapter has drawn attention is that many key concepts on which the Recommendation hinges need further interpretation. Depending on that interpretation, the Recommendation may turn out to be more or less relevant to the situation of platform workers.

[1116] Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed (2019/C 387/01), p. 31.

Among the crucial concepts that wait for interpretation, the notions of ‘worker’ and ‘self-employed’ stand out. In this sense, the Council Recommendation may act as the next step in the development of the EU concepts of ‘worker’ and of ‘self-employed’. Because of its non-binding character, it may be argued that the Council Recommendation is the perfect instrument to experiment with colouring these concepts based on the unique aims of social security.

Finally, the Council Recommendation is an interesting instrument, since it is in the intersection between national and EU law. From that perspective, it may be seen as a potential building block to harmonising some basic aspects of social security systems in order to achieve optimal social security coordination for platform workers.

Conclusion Part 2

Introduction

There are rules at EU level that (should) ensure that platform workers work in different EU countries without suffering negative consequences on their social security position simply because they move. These are the Coordination Regulations, Regulation 492/2011 and (indirectly) Directive 2004/38, as well as Article 18 TFEU on the prohibition of discrimination on grounds of nationality, Article 21 TFEU on free movement of EU citizens, Article 45 TFEU on free movement of workers and Article 49 TFEU on freedom of establishment. In addition, the recently created Council Recommendation seeks to ensure for all workers and the self-employed (which may include platform workers) formal and effective access, an adequate level of social protection and transparency in their social security position.

However, the application of this legal framework, which in principle is (relatively[1117]) satisfactory concerning the situation of workers in a standard employment situation, generates different results when applied to the situation of platform workers. We will now briefly describe (summarizing the chapters in Part 2 of this thesis) how platform workers experience access to social security within that framework, highlighting especially those situations that are common across the different legal instruments analysed above and that particularly affect the social security position of platform workers. In this regard, and as it was the case concerning Part 1 of this thesis,[1118] there are two main aspects across all the EU legal instruments involved that define the social security position of platform workers, namely lack of transparency (section A), as in both legal certainty on their rights and clarity on what these rights actually are (and how to have access to them), and difficulties in being included in the different social security systems (section B).

[1117] There are some issues, particularly concerning the differentiation between what is considered posting and what is considered the performance of activities in multiple Member States (see section 7.6.8), that might also be problematic in the case of persons in a standard employment relationship, but the magnitude of the problem is arguably much greater in the case of platform workers due to the flexibility and fragmentation, as well as the potential high mobility, which characterise this form of work (see section 1.4.4).

[1118] See Conclusion Part 1.

A. Transparency

The EU provisions are particularly problematic on the matter of transparency (as in legal certainty and clarity), which is not surprising taking into account the very restricted competences of the EU as to determine the content of the national social security systems. Instead, the EU legal instruments focus primarily on coordinating and mollifying the differences between the different national social security systems as to ensure the freedom of movement of workers, self-employed persons and EU citizens. In other words, they influence the 'gate' to national social security systems. Because of the sensitivity of this task, there has often been a significant amount of tension and negotiation on the EU rules relating to social security, which has often resulted in rules that might be slightly imprecise concerning some aspects on which reaching a compromise is especially difficult. These imprecisions have an especial relevance when the rules are applied to forms of work with extreme differences with the standard employment relationship (on which the EU legal instruments, as it was the case with the national instruments, were based when they were designed). In this regard, all the EU legal instruments studied (as well as the case law of the CJEU interpreting them), when applied to the situation of platform workers, have gaps in their interpretation, or elements which may be interpreted in different ways (and with significantly different outcomes depending on which interpretation is chosen). In this section, the content of these gaps or imprecisions that are common across all the EU legal instruments studied, as well as their consequences for the situation of platform workers, will be summarised (based on the analysis perform in chapters 7, 8 and 9).

Lack of clarity in the meaning of key concepts

Lack of clarity in the content of key concepts. The case of the concepts of worker and self-employed and what is considered work has already been mentioned. But the lack of clarity extends to many other concepts on which the determination of the social security position of platform workers depends, such as 'normally',[1119] 'substantial part of employed or self-employed activity',[1120]

[1119] See section 7.6.2.

[1120] See section 7.6.3.

'marginal activities',[1121] 'employer'[1122] and (as already analysed above) 'registered office or place of business'.[1123]

This lack of clarity obviously affects the ability of platform workers to understand their legal position. But, in addition, depending on how these concepts are interpreted, this can have consequences.

Regulation of the concept of worker and self-employed

How the concept of worker and self-employed is regulated, as well as the concept of work in general, in EU law may result in platform workers not being certain about their social security position, as well as limiting their formal and effective access to social security benefits, and even the amount of said benefit.

The Coordination Regulations depend on how the different forms of work are classified in the country where they take place. This can result in confusion for the platform worker working in different countries. In this regard, even if they work in the same way in all of them, or even for the same platform, they may be classified differently in each of country.

In turn, Regulation 492/2011 and Directive 2004/38 depend on the definitions of 'worker' and 'self-employed' developed by the CJEU, which presents its own set of challenges. In this respect, while the concept is fairly broad, there are still many aspects of it which are still fairly unclear, and some of these aspects are key for the situation of platform workers under these legal instruments. This is particularly the case concerning whether an activity is considered 'marginal' or 'stable' (the latter being relevant for the concept of self-employment under Article 49 TFEU).

Finally, the Council Recommendation does not define the concepts of 'worker' and 'self-employed', which (at least until an authoritative interpretation of the instrument is reached) leave many paths open for such definitions. The definition that is chosen will have a significant influence in the personal scope of the Recommendation. Moreover, if different Member States opt for different

[1121] See section 7.6.4.
[1122] See section 7.6.5.
[1123] See section 7.6.6.

definitions (and, perhaps, each State opting for the definition more convenient for their own system), the aim of the Recommendation of ensuring certain minimums on access to social protection for workers and the self-employed might be compromised.

Lack of adaptation to the specific characteristics of platform work

On several occasions it has been observed through the analysis performed in the previous chapter of this Part 2 that some provisions of the EU legal instruments studied are difficult to apply to the situation of platform workers. In this sense, the high mobility allowed by platform work (which can sometimes be performed from any location) sometimes struggles to fit into the rules for determining the applicable legislation, which place a lot of importance on the place where the work is performed. The possibility offered (and even imposed) by platform work of carrying out work for a few hours (and/or very variable hours), as well as its on-demand character, clashes in occasion with many of the key concepts in which the studied EU legal instruments are based and which, coupled with the imprecision of these key concepts, results in significant uncertainty of how these concepts (mentioned above) may be applied to their situation.

Lack of conceptual unity

There is a lack of unity in the concepts used by the legal instruments relevant to the social security position of platform workers. In this sense, and as mentioned above, there is no unity in the concepts of 'worker' and 'self-employed' between the Coordination Regulations, the Regulation 492/2011 and the Directive 2004/38 (these two using a similar concept) and the Council Recommendation. But this is not the only aspect where there is no unity. Something similar occurs with the concepts of social assistance and social benefit.

B. Inclusion

As we have seen in the chapters looking at the situation at the national level, social assistance programmes, whether linked to a particular contingency or to minimum income, are essential for platform workers. But platform workers moving between countries are not always guaranteed access to these programmes in the host country. This may be because such programmes sometimes

fall outside the material scope of the Coordination Regulations. But it may also be because they are considered as non-workers or inactive and, as a result, cannot benefit from the provisions on access to social advantages on an equal footing with nationals of the host country (Regulation 492/2011) or may be considered a burden on the national social assistance system and could therefore be denied access to these programmes or even expelled from the country (Directive 2004/38).

This is made worse by the fact that the Council Recommendation on access to social security for workers and the self-employed does not seem to include in its provisions the guarantee of access to social assistance and minimum income schemes.

In other words, there seems to be a gap in the EU's right to guarantee access to social assistance for (certain) platform workers. And this gap is especially significant given how important access to social assistance can be for platform workers. This gap may result in a lack of formal protection.

PART 3: EVALUATION OF THE SOCIAL SECURITY POSITION OF PLATFORM WORKERS UNDER NATIONAL AND EUROPEAN UNION LAW

Chapter 10. Conclusions and Recommendations

10.1. Introduction: Towards an evaluative framework

This thesis has analysed, contrasted and compared, the link between platform work and social security in five national legal frameworks and in EU law. In particular the focus was on determining the social security position of platform workers and how it compares to the one of persons in a standard employment relationship. Up to this point, the thesis has shown what is the social security position of platform workers under national and EU law, and how it often deviates from the social security position of persons in a standard employment relationship. In fact, these previous chapters have focused on the descriptive element of the term 'social security position', a term which plays a central role in the research question of this thesis, namely:

> **What is the social security position of persons performing platform work under the law of five selected European countries and under European Union law, and how does it compare to the social security position of persons performing work in a standard employment relationship?**

This last chapter, in turn, focuses on the normative element of the term 'social security position'. In this regard, some aspects of the social security position of platform workers, as well as some of the differences between their social security position and the one of persons in a standard employment relationship, are not neutral. Instead, they may result in *undesirable* consequences for platform workers and society as a whole. In order to determine which of these differences from the 'standard social security protection' are undesirable, it is necessary to resort to an evaluative framework. In this context, 'desirable' refers to national and/or EU provisions which respect the principles that inform the evaluative framework, while 'not desirable' would be those provisions not deemed in conformity with such framework.

In the following section (section 10.2), a possible evaluative framework is construed, composed by the principles of transparency (understood as both legal certainty and clarity) and inclusion (understood as encompassing formal coverage, effective coverage and adequate coverage). These principles are selected based both on how some provisions of EU law revolve around their

content,[1124] as well as on how relevant they are to the social security position of platform workers studied in the previous chapters. Then, these two principles are used to evaluate whether the implementation of the national and EU rules applicable to situations of platform work is *desirable*. Or, in other words, in which measure the social security position of platform workers resulting from the application of said rules achieve the principles of transparency and inclusion (section 10.3). Finally, the evaluation will be used to present a set of recommendations that may improve the position of platform workers in line with these to principles (section 10.4).

10.2. Key principles concerning social security and platform work: The 'TraIn' approach

10.2.1. *Introductory remarks*

The discussion on what are the principles of social security is a long and complex one. This thesis does not seek to provide the final answer to this question. Instead, it approaches this question from the perspective of platform work, and thus with a clear focus on margins and extremes. As such, the aim is not to question basic principles of social security, such as solidarity[1125] and proportionality.[1126] Instead, the thesis focuses on those principles that most specifically address the differences between the social security position of platform workers and the one of persons in a standard employment relationship.

In this respect, the analysis performed in Part 1 on the social security position of platform workers under the law of the selected countries as compared to the one of persons in a standard employment relationship has shown that platform workers, in all countries studied, experience less transparency in their social security position, both in terms of less legal certainty on the rights and obligations to which are entitled (as a result, among other reasons, to the -still ongoing- legal debate on their legal

[1124] This is the case of the principles of the Coordination Regulations, presented in sections 7.2.4 and 7.3.3, as well as (and especially) those principles which may be derived from the content of the provisions of the Council Recommendation on access to social protection for workers and the self-employed, analysed in sections 9.6, 9.7, 9.8 and 9.9.

[1125] See Pieters, D., *Social Security: An Introduction to the Basic Principles* (second edition), Alphen aan den Rijn: Kluwer International, 2006, pp. 2, 4, 5, 7, 21, 29.

[1126] See Schoukens, P., *Thematic Discussion Paper for the Mutual Learning on Access to social protection for workers and the self-employed 3rd Workshop: Adequacy and financing*, Brussels: European Commission, 2020, pp. 16-17.

status) and of less legal clarity (something which may not be unique of platform workers, and may extend to all self-employed persons, but which is particularly significant in the case of platform workers due to their arguably more vulnerable position).[1127]

Moreover, the analysis performed in Part 1 has also shown that platform workers are in some occasions not covered by contributory social schemes that do cover persons in a standard employment relationship; that they may have more difficulties reaching the requirements to become entitled to contributory social security benefits, due to what these requirements are; that they are in risk of receiving a lower amount of benefits compared to the one that persons in a standard employment relationship receive; and that they are in risk of being entitled to a shorter duration of benefits than persons in a standard employment relationship. In other words, this thesis has shown that platform workers are less included in the studied national social security systems than persons in a standard employment relationship.[1128]

Something similar has been shown when studying the EU legal instruments modulating the social security position of platform workers that move across EU countries in Part 2 of this thesis, where it was illustrated how this kind of workers experience less transparency in their social security position[1129] and greater difficulties in obtaining access to the national social security systems of EU countries[1130] than persons in a standard employment relationship.

Nevertheless, the fact that the platform workers' social security position is less transparent, or that they are less included in social security systems, are observations. It is necessary an evaluative framework to determine whether such differences are *negative, undesirable*, and that as a result changes should be made. In this thesis, the evaluative framework used are the principles of transparency and inclusion as derived from EU law. In particular, these two principles are drawn from the right to free movement of workers enshrined in Article 45 TFEU and the Coordination Regulations, as well as from the Council Recommendation on access to social protection for all workers and self-employed. Using these legal provision and instruments is in consonance with the

[1127] See section A. Transparency in the social security position of platform workers at national level

[1128] See section B. Inclusion in the social security position of platform workers at national level

[1129] See section A. Transparency

[1130] See section B. Inclusion

EU's role as a 'linking pin' between the national systems in situations of cross-border movement. Moreover, the EU legal provisions and instruments analysed in this thesis result from the political agreement of all EU Member States on common challenges in the field of social security coordination. From that perspective, they serve as the perfect source for a set of common principles.

The following two sections will explain in detail what the principles of transparency (section 10.2.2) and inclusion (section 10.2.3) entail, and how they are used as the constitutive parts of the framework to evaluate the current position of platform workers under national and EU social security legislation. By using the first syllables of the words 'transparency' and 'inclusion' as an acronym, the inclusion of said principles in the evaluative framework is referred to below as the 'TraIn approach'.

10.2.2. *Transparency*

Transparency has increasingly gained traction as a principle of EU law.[1131] From that perspective, its inclusion in the Council Recommendation on access to social protection for all workers and self-employed did not come as a surprise. Following the Recommendation, as well as the case law of the CJEU on social security coordination, this thesis distinguishes two correlated (sub)principles hiding under the umbrella of transparency, namely clarity and legal certainty.

10.2.2.a. Transparency as clarity

Transparency as requiring clarity is found in the Council Recommendation, which states that "Member States are recommended to simplify, where necessary, the administrative requirements of social protection schemes for workers, the self-employed and employers".[1132] Furthermore, the CJEU, in its case law on the Coordination Regulations, has stated on numerous occasions that it is the purpose of the rules on posting to avoid administrative complications that may derive from the

[1131] See Buijze, A., *The principle of transparency in EU law*. Utrecht: Utrecht University, 2013; Karageorgou, V., *Transparency principle as an evolving principle of EU law: Regulative contours and implications*, Athens: Panteion University, 2006; Prechal, S. and De Leeuw, M., 'Dimensions of Transparency: the building blocks for a new legal principle?', *Review of European Administrative Law*, vol. 1 issue 1, 2007, pp. 51-62.

[1132] Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed (2019/C 387/01), point 15.

change of the legislation applicable as a result of the performance of work of short duration in another Member State.[1133] The CJEU has also noted that the rules on the determination of the legislation applicable seek to "avoid any plurality or purposeless confusion of contributions and liabilities which would result from the simultaneous or alternate application of several legislative systems".[1134] This avoidance of administrative complications that has driven the case law of the CJEU culminates in what is referred to previously in this thesis as the 'practical effect principle'.[1135]

10.2.2.b. Transparency as legal certainty

Transparency as a form of legal certainty, in turn, refers to the fact that the effects of legislation must be predictable for those subjected to it.[1136] This idea is found in the Council Recommendation when it establishes that "Member States are recommended to ensure that the conditions and rules for all social protection schemes are transparent".[1137] The principle of transparency as a form of legal certainty has also been used on several occasions by the CJEU in cases requiring a clear delimitation of the entitlement to social security benefits under Member States' social security legislation,[1138] as well as when assessing the limits on access to social assistance for non-active persons.[1139] Moreover, the principle of transparency fits into the CJEU's interpretation that the Coordination Regulations seek to provide a complete and uniform system for the resolution of conflicts of rules when determining the legislation applicable.[1140] As proposed earlier in this thesis,[1141] said statement by the Court may be seen as revealing the existence of two other principles.

[1133] Case C-35/70, *Manpower*, EU:C:1970:120; Case C-202/97, *FTS*, EU:C:2000:75, para. 28; Case C-404/98, *Plum*, EU:C:2000:607, para. 19.

[1134] Case 19-67, *van der Vecht*, EU:C:1967:49, p. 353.

[1135] See section 7.3.3.d.

[1136] See Case C-212/80, *Meridionale Industria Salumi*, ECLI:EU:C:1981:270; Karageorgou, V., *Transparency principle as an evolving principle of EU law: Regulative contours and implications*, Athens: Panteion University, 2006, pp. 10-11.

[1137] Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed (2019/C 387/01), point 15.

[1138] Case C-4/13, *Fassbender-Firman*, EU:C:2014:2344, para. 44.

[1139] Case C-67/14, *Alimanovic*, EU:C:2015:597, para. 59-61; Case C-299/14, *García-Nieto*, EU:C:2016:114, para. 49; Case C-158/07, *Förster*, EU:C:2008:630, para. 57.

[1140] See, inter alia, C-631/17, *Inspecteur van de Belastingdienst*, EU:C:2019:381, para. 33; Case C-451/17, *Walltopia*, EU:C:2018:861, para. 41; Case C-359/16, *Altun and Others*, EU:C:2018:63, para. 29; Case C-570/15, *X*, EU:C:2017:674, para. 14; Case C-569/15, *X*, EU:C:2017:673, para. 15.

[1141] See sections 7.3.3.f and 7.3.3.g.

The first one is the 'complete system principle', which entails that the system for the resolution of conflict of rules under the Coordination Regulations must have provisions to solve conflicts of rules concerning *all* situations within its scope.[1142] The second one is the 'uniform system principle', meaning that the application of the rules for determining the legislation applicable contained in the Coordination Regulations needs to be always the same concerning situations that are similar.[1143]

10.2.3. *Inclusion*

The term 'inclusion' is generally understood as referring to the integration of something into something else.[1144] When used in the social field, however, it is considered that a certain element of accommodation of differences may exist in the process of inclusion.[1145] It is this accommodation of the divergent features of non-standard forms of work in order to include them in the scope of labour-related social security schemes what seems to be the one of the main values driving the Council Recommendation. In this regard, the preparatory works for the Recommendation already stated that, while Member States have generally inclusive social protection systems in theory, in practice some workers are excluded from social protection.[1146] Arguably influenced by this analysis, the Recommendation sets as its main objective that *all* workers and self-employed are provided access to adequate social protection in the Member States.[1147] This aim is operationalised through provisions promoting formal coverage, effective coverage and schemes' adequacy. While an in-depth analysis of the text of the Recommendation was already performed above,[1148] the

[1142] This principle is supported by a grammatical interpretation of the CJEU abovementioned case law, as well as by the inclusion in the Coordination Regulations of a catch-all provision with Art. 11(3)(e) of Regulation 883/2004 (see see Regulation 883/2004, Art. 11(3)(e); C-631/17, *Inspecteur van de Belastingdienst*, EU:C:2019:381, para. 31.).

[1143] This 'uniform system principle' is again sustained by a grammatical interpretation of the CJEU abovementioned statement, as well as by the Court's use of the transparency principle (see Buijze, A., *The principle of transparency in EU law*, Utrecht: Utrecht University, 2013, pp. 163, 164, 167, 267).

[1144] See 'inclusion' at Cambridge Dictionary, Cambridge: Cambridge University Press, 2019; Merriam-Webster.com (consulted online at merriam-webster.com).

[1145] See 'inclusion' at Merriam-Webster.com (consulted online at merriam-webster.com), third and fourth acceptations.

[1146] European Commission, *Analytical document Accompanying the document 'Consultation Document Second Phase Consultation of Social Partners under Article 154 TFEU on a possible action addressing the challenges of access to social protection for people in all forms of employment in the framework of the European Pillar of Social Rights',* SWD(2017) 381 final, Brussels: European Commission, 2017, p. 32.

[1147] Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed (2019/C 387/01), point 1.1.

[1148] See Chapter 9.

Recommendation will be used in the current section rather as a guiding instrument with regard to the principle of inclusion.[1149] Before doing so, some clarifications in relation to this principle may be necessary.

Concerning formal coverage, the Recommendation is clear in that Member States should strive to provide coverage concerning labour-related contingencies to *all* persons performing work as workers or self-employed persons. While the Recommendation does allow for this coverage being provided *at least* on a voluntary basis for self-employed persons (while it should be provided on a compulsory basis to those classified as employees), it also notes that compulsory coverage should be chosen when appropriate to self-employed persons.[1150]

Regarding effective coverage, the core of the principle of inclusion might be summarised as that the type of relationship of employment or self-employment through which an individual performs work, should not result in an unsurmountable obstacle for obtaining entitlement to benefits from social security schemes.[1151] This key message might serve as a basis for claiming that social security schemes which exclude platform workers from being entitled to benefits because said schemes are not adapted to the technical specificities of platform work, are not in conformity with the inclusion principle. In a similar line of thought, it might be claimed that the social security coverage provided to an individual should be construed in a way that performing multiple jobs or economic activities will not negatively impact access to benefits (including transferability between schemes, when schemes for different legal statuses or occupations exist).[1152]

In order to evaluate schemes' adequacy, it is helpful to distinguish between adequacy of protection and adequacy of contributions. Starting with the latter, there is 'adequacy of contributions' if

[1149] This also implies that, in this section, terminology such as, for example, 'social security' or 'worker', is not used (per se) in accordance with how it is understood in the Council Recommendation, but in accordance with these concepts have been used and/or defined throughout this thesis (and, particularly, in section 1.4.

[1150] Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed (2019/C 387/01), point 8.

[1151] Ibid., point 9.

[1152] See, for a general basis for this, Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed (2019/C 387/01), point 10.

contributions are proportionate to the individual's contributory capacity.[1153] Regarding the former, 'adequacy of protection' cannot be generally defined, since it may differ depending on the type and, in particular, the specific aim of each social security scheme. Hence, social assistance schemes seek to prevent falling into poverty, social insurance schemes aim to preserve the individual's standard of living, and universal schemes attempt to ensure a decent minimum standard of living.[1154] Nevertheless, the Recommendation, while mentioning these three aims, clearly articulates that benefits need to always at least prevent falling into poverty,[1155] and thus an inclusion principle based on the Recommendation needs to also take that 'bottom line' into account.

While the inclusion principle is arguably less developed in other EU legal instruments besides the Council Recommendation, some glimpses of it might nevertheless be traced. For instance, in several cases concerning social security coordination, the CJEU seemed to be adverse to situations in which individuals are being denied of social security protection only has a result of applying the rules for the determination of the applicable legislation[1156] (even while also allowing such situations as the correct interpretation of the Coordination Regulations[1157]).

[1153] See Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed (2019/C 387/01), point 11-12. It should be noted, however, that this is not an attempt to define the concept of adequacy in detail, but only as it relates to the Council Recommendation. Other elements outside (such as the financial viability of society as a whole or solidarity notions) may be also considered part of the concept of adequacy. See, for example, Van den Berg, L., *Tussen feit en fictie. Rechtspersoonlijkheid en de verzekerings- en premieplicht voor de werknemersverzekeringen*, Den Haag: Boom Juridische uitgevers, 2010.

[1154] Clasen, J. and Van Oorschot, W., 'Changing Principles in European Social Security', *European Journal of Social Security*, vol. 4 issue 2, 2002, p. 94.

[1155] Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed (2019/C 387/01), point 11.

[1156] See, inter alia, Case C-352/06, *Bosmann*, EU:C:2008:290, para. 29; Joined Cases C-611/10 and C-612/10, *Hudziński and Wawrzyniak*, EU:C:2012:339; Case C-382/13, *Franzen*, EU:C:2015:261.

[1157] See Joined Cases Case C-91/18 and Case C-96/18, *Van den Berg and Others*, EU:C:2019:767. In this regard, it is of note how the Court in this case suggest the conclusion of an agreement between Member States (under Art. 16 of Regulation 883/2004) in order to avoid a literal interpretation of the Coordination Regulations.

10.3. Applying the principles of transparency and inclusion to social security protection for platform workers: Taking the TraIn approach

10.3.1. *Introductory remarks*

In this section, it is studied whether the application of social security provisions at national and EU level to situations of platform work results in (dis)satisfactory outcomes regarding the principles of transparency and inclusion presented above.

Before doing so, it is good to bring in remembrance the definition of platform work used in this thesis,[1158] namely remunerated work performed personally and in an on-demand basis by a person selected online from a pool of workers through the intermediation of an online platform, and consisting of short-term tasks for different end-users (persons and/or companies). Hence, a key feature of platform work is that work is performed on-demand, which applies to both the platform worker (who has a relative freedom on determining whether and when he wishes to perform work, and is generally paid by task completed), and the online platform (which does not have an obligation to offer work to platform workers). Furthermore, the work itself consists of specific and clearly delimitated tasks, typically of short duration. Connected to all these features is the key intermediary role of the online platform, which enables the interaction between the platform worker and those receiving his services (and typically controls all the information exchanged between them), facilitates payment (and, in the case of some platforms, sets prices) and monitors whether all actors involved respect the rules set by the platform itself (imposing sanctions if they do not, which may include the expulsion from the platform).

In previous chapters of this thesis, it has been explored how, because of the features recapitulated above, the application of EU and national provisions on social security to situations of platform work sometimes results in outcomes that are different from those deriving from the application of the same rules to persons in a standard employment relationship. Now, using the principles of transparency and inclusion, as outlined in the section above as an evaluative framework, an answer will be provided below to the question of whether the application of social security legislation to

[1158] See section 1.4.4.

situations of platform work shows just different outcomes, or also (un)desirable outcomes. This will contribute to answer the main research question of this thesis, that is 'What is the social security position of persons performing platform work under the law of five selected countries and under European Union Coordination Regulations, and how does it compare to the social security position of persons performing work in a standard employment relationship?'. In particular, it will address the question's normative element,[1159] namely whether platform workers' social security position is 'desirable', in the sense of whether it is in consonance with the social security principles of transparency and inclusion.

10.3.2. *Challenges to transparency*

Throughout the thesis, it has become apparent how difficult it is to apply labour-related schemes to some (or many) situations of platform work. This is in large part due to how the provisions related to these schemes depend on some specific features of the standard employment relationship which are hard(er) to identify in the case of platform work. More particular, the provisions studied put particular emphasis on concepts such as 'subordination' (and related notions like 'control', 'dependency' or 'direction'), 'working time' and 'earnings' from work. Applying these notions to the specific nature of platform work is often a challenge. However, said notions are of crucial importance for determining whether a platform activity is 'work' and whether it should be classified as employment or self-employment.

This section will address the challenges of fitting platform work within these complex notions, and how social security provisions that rely heavily on them (as the ones analysed in this thesis) challenge the principle of transparency as both clarity and legal certainty. and how uncertain the situation of platform workers is because of those challenges.

[1159] See section 1.4.3.

10.3.2.a. Uncertainty on whether an activity is considered as 'work'

In all the countries selected in this thesis, platform work performed in the context of an employment relationship is considered as 'work' (as in a professional activity) by social security legislation.[1160] There are more country differences, however, regarding the question of whether platform work that is (deemed to be) performed outside an employment relationship is considered a professional activity (and thus covered by social security legislation). In Spain, a person needs to perform an activity on a regular basis in order to be considered a self-employed person for the purposes of social security legislation.[1161] Hence, persons performing platform work without fulfilling the criteria for being considered employees and doing so on a non-regular basis would not be considered self-employed (nor, obviously, employees). Among the indicators suggesting that an activity is performed regularly are that the person earns from such activity at least the minimum wage annually.[1162] The legislations of the other selected countries are less clearly requesting that a self-employed activity is performed regularly. However, underlying all these legislations is the idea that the self-employed activity is performed professionally, something that might be linked to regularity in practice.[1163]

This criterion, however, might be difficult to fulfil in situations of platform work, which characteristic fragmentation and on-demand character might result in very variable earnings, making it difficult to predict whether they might exceed such threshold.

Including platform work in the notion of 'work' is not only challenging under national law, but also with regard to determining the legislation applicable under the Coordination Regulations. Because the Coordination Regulations rely on an activity's professional qualification at national level, the

[1160] See sections 2.4.1, 4.4.2, 5.4.2 and 6.4.2. In the United Kingdom, platform work is typically not considered to be included in an employment relationship (see section 3.4.2), and thus this section is less relevant for this country.

[1161] See section 2.1.4; Ley 20/2007, de 11 de julio, del Estatuto del Trabajo Autónomo, Art. 1(1).

[1162] Ibid.

[1163] See, for example, the case in Germany of activities performed for a duration of less than 70 days per year and employment of no primary importance to ensure livelihood (see section 5.1.4).

challenges on determining what is 'work' under national legislation (mentioned above) are transferred to the application of the Coordination Regulations.[1164]

10.3.2.b. Uncertainty on whether an activity produces formal coverage

It should also be noted that, while platform work performed in the context of an employment relationship is considered as 'work' in all the selected countries, that does not mean that platform work performed in the context of an employment relationship always produces social security coverage concerning labour-related schemes. In Germany, persons performing platform work through mini-jobs find themselves in such a situation, in which while they are performing work, they are excluded from (most) social insurance schemes.[1165]

Again, the fragmented and on-demand character of employee-based platform work may hinder predictions on earnings, which may, in turn, challenge the determination of whether platform workers may join certain social security schemes.

Here again, the differences across Member States regulating the formal coverage of activities producing low earnings translate also in being a challenge concerning the determination of the legislation applicable.[1166] Arguably, many questions still exist on how to approach this issue, producing further uncertainty for platform workers, online platforms and Member States' social security institutions.

10.3.2.c. Uncertainty on where the employer is located

An additional challenge at cross-border level only, concerns the country of establishment of the platform. As mentioned before, the rules for determining the legislation applicable in the Coordination regulations use as one of their criteria the location of the registered office or place of business, something that is often unclear due to the complex structures of online platforms (which sometimes perform functions indicating the presence of the registered office or place of business

[1164] See section 7.4.2.

[1165] See section 5.4.2.

[1166] See section 7.3.3.b and section 7.4.2.b.

across offices in different Member States), as well as because of the inherent unclarity of the concept 'registered office or place of business' as developed in the Coordination Regulations.[1167]

10.3.2.d. Uncertainty exacerbated due to a lack of clarity and openness

Moreover, the Coordination Regulations are unclear concerning the meaning of several notions that are essential for determining the legislation applicable in instances of platform work, such as 'normally',[1168] 'substantial part of employed or self-employed activity',[1169] 'marginal activities',[1170] 'employer'[1171] and (as already analysed above) 'registered office or place of business'.[1172] As a result, there may be many instances in which different legislations may be applicable depending on the interpretation of such concepts. In these cases, it thus may be almost impossible to foresee what the legislation applicable may be, which produces uncertainty.[1173] The Coordination Regulations seem to have foreseen such kind of difficult or complex situations by introducing the possibility for Member States to make agreements concerning specific situations (under Article 16 of Regulation 883/2004).[1174] However, these agreements are not generally made public, which is allowed under the Coordination Regulations. As a result, individuals are unable to know whether an agreement similar to the one he is requesting has been already performed by that country.

10.3.2.e. Lack of certainty concerning the determination of hours of work performed or income earned

As mentioned above, the fragmented and on-demand character of platform work makes it very challenging to predict the earnings that may be produced on average through platform work for a

[1167] See section 7.6.6.

[1168] See section 7.6.2.

[1169] See section 7.6.3.

[1170] See section 7.6.4.

[1171] See section 7.6.5.

[1172] See section 7.6.6.

[1173] This lack of certainty is of course worsen by the significant complexity of both the rules for the determination applicable and the case law interpreting them, which has been shown amply in Chapter 7. See also Verschueren, H., 'The role and limits of European social security coordination in guaranteeing migrants social benefits', *European Journal of Social Security*, vol. 22 issue 4, 2020, pp. 398.

[1174] See sections 7.3.2 and 7.3.3.e

specific individual. In many cases, the earnings might be marginal, which contributes to the challenges of taking them into account. For instance, the calculation of hours of work performed is not easy, with different criteria among online platforms and national provisions on what constitutes work (and, specifically, on whether waiting time might be considered as work). These issues are aggravated by the fact that platform workers typically perform work for a great variety of clients (end-users), and sometimes also through several different platforms. Despite all the issues for the calculation of both earnings produced from work and hours of work performed, provisions at national and EU level rely heavily on these two factors. As a result, there is often a significant lack of clarity and predictability for the calculation of key aspects of social security such as contributions, benefit entitlement and the legislation applicable under the Coordination Regulations.

10.3.2.f. The differentiation between employment and self-employment

As already became clear at many instances above in this thesis, whether a person is classified as an employee or a self-employed has very important consequences for social security purposes. Platform work, because of its very nature (and, particularly, due to its on-demand character), blurs the boundaries between autonomy and subordination,[1175] which is in most national systems the key feature for determining whether an activity should be considered as employment or self-employment. As a result, there has been a long string of judgements at national level[1176] (as well as in two CJEU cases touching -one indirectly[1177] and one in a more direct manner-[1178]) regarding the legal status of platform workers, with many contradictory decisions. This is aggravated by the fact that online platforms frequently change the contractual terms under which platform work is performed (a process that seems to follow judicial decisions against the platform's goals). All this has created a climate of significant uncertainty for all actors involved.

[1175] De Stefano, V. and Aloisi, A., *European legal framework for "digital labour platforms*", Luxembourg: European Commission, 2018, p. 7.

[1176] See sections 2.4.1, 3.4.1, 4.4.1, 5.4.1 and 6.4.1.

[1177] Case C-434/15, *Elite Taxi v Uber*, EU:C:2017:981.

[1178] C-692/19, *Yodel Delivery Network*, EU:C:2020:288.

10.3.3. *Challenges to inclusion*

10.3.3.a. Lack of formal coverage

In some of the countries studied above, platforms workers cannot be covered concerning all contingencies. This is so because either they are not considered as performing (professional) work at all, they are considered as self-employed, or they are subjected to specific provisions that exclude them because of the features of platform work (e.g. work under a certain number of hours, or work with earnings under a certain threshold[1179]).

As noted in the brief overview above, platform workers performing mini-jobs in Germany are excluded from certain social insurance schemes. Hence, platform workers classified as employees and having earnings from their work through one platform under a certain threshold (approximately €450 per month) are not covered by compulsory contributory unemployment insurance (*Arbeitslosengeld I*). In case that the activity not only (1) does not provide income over that amount, but also is (2) of no importance to ensure the individual's livelihood and (3) does not exceed a certain duration per year (approximately three months), it does neither produce insurance regarding the statutory pension scheme (*Rentenversicherung*) (which includes both old-age and incapacity pension).[1180] A similar situation exists in the United Kingdom in the case of employees with earnings under a certain threshold, although that is not relevant for this thesis due to the fact that platform workers in this country are not typically classified as employees (with the discussion in front of the courts revolving primarily on whether or not they may be classified as a sub-category of self-employment -limb 'b' workers-).[1181] All other selected countries provide formal coverage concerning all risks within the material scope of this thesis for those persons performing platform work as employees. That is, however, not the case when the individual performs platform work as a self-employed.

[1179] In other words, an activity may be excluded from social insurance coverage because it is not considered professional work, or it may be excluded from coverage even though it is considered professional work (e.g. because its low number of hours or the low level of earnings it provides makes it too costly to regulate and monitor in relation to the contributions and benefits it may report).

[1180] See section 5.1.4.

[1181] See section 3.4.1.

In this regard, in the United Kingdom, self-employed platform workers are excluded from formal coverage by contributory social security schemes regarding unemployment benefit, benefits in respect of accidents at work and occupational diseases and sickness benefit. There are, however, two means-tested social assistance schemes (the *Universal Credit* and the *Maternity Allowance*) that provide a minimum income in the case of all the contingencies covered in this thesis.[1182]

In Germany, self-employed platform workers are excluded from formal coverage by contributory social security schemes concerning old-age pension, incapacity pension, unemployment insurance and health insurance. They may, however, opt to join the professional accident insurance scheme (*Unfallversicherung*) and the state pension insurance scheme (*Rentenversicherung*) (which includes both old-age and incapacity pension). Moreover, in the case of unemployment, they may resort to a means-tested social assistance scheme, the *Arbeitslosengeld II* . Furthermore, Germany has a means-tested minimum income scheme, the Current Assistance for Living Expenses Outside the Institutions scheme (*Hilfe zum Lebensunterhalt*), for persons who do not have access to the main social security benefits, and which provides basic needs such as food, clothing, personal hygiene items, energy and household items, as well as a small amount of income.[1183]

In France, a person performing work as a self-employed craftsmen or trader platform worker would be covered by contributory schemes concerning all contingencies covered in this thesis. If, however, the self-employed platform worker is classified as a liberal professional, he would be excluded from formal coverage by contributory schemes providing sickness benefits. Nevertheless, platform workers no matter their legal status are entitled to a means-tested allowance for long-term incapacitated elderly persons (*Allocation Aux Adultes Handicapés*), a means-tested retirement pension (*Allocation de solidarité aux personnes âgées*) and a minimum income scheme (*Revenu de Solidarité Active*).[1184]

In the Netherlands, self-employed platforms workers are only formally covered (as far as it concerns non-private schemes related to those contingencies within the scope of this thesis) by the state old-age pension (*AOW*) and maternity benefit. Nevertheless, its complete system of general social

[1182] See section 3.4.2.

[1183] See section 5.4.3.

[1184] See section 4.4.3.

assistance mitigates this issue. In this regard, self-employed platform workers (as well as the general population) are covered by a means-tested minimum income scheme (included in the *Participatiewet*). Moreover, self-employed platform workers aged 50 years or older -or having lost their long-term incapacity benefit- and who fall into unemployment are entitled to a means-tested benefit (*Wet Inkomensvoorziening Oudere en Gedeeltelijk Arbeidsongeschikte Werknemers*).[1185]

In Spain, platform workers classified as self-employed are covered by contributory social security schemes concerning all contingencies. This is, however, with the exception of those persons who perform platform work outside an employment relationship and on a non-regular basis, and who would not be covered by any contributory social security scheme. Nevertheless, platform workers no matter their status may resort to the means-tested social assistance schemes as it regards unemployment (a scheme managed by the Regions), long-term incapacity, maternity allowance and the newly created minimum income scheme.[1186]

Moreover, it is of note that, as a result of the COVID-19 pandemic, the Netherlands (with the Temporary Bridging Measure for Self-Employed Professionals (*Tijdelijke overbruggingsregeling zelfstandig ondernemers -Tozo-*)[1187] and the United Kingdom (with the *Self-Employed Income Support Scheme*)[1188] have created specific schemes to cover situations of loss of income due to the impact that the pandemic has had on the business of self-employed persons. Furthermore, the Netherlands have created an additional scheme to support with necessary extra costs as a result of the pandemic (the *Tijdelijke Ondersteuning Noodzakelijke Kosten -TONK-*).

10.3.3.b. Lack of effective coverage[1189]

Besides the exclusion of formal coverage already mentioned, it is sometimes the case in all the selected countries that, even when platform workers are formally covered by social security

[1185] See section 6.4.3. Also, as noted in these sections, this is so if the self-employed platform worker has not performed an employee activity before an opted (within the 13 weeks after having stopped being an employee) to continue contributing for the employee insurance.

[1186] See section 2.4.3.

[1187] See section 6.2.1.

[1188] See section 3.2.1.

[1189] Here, and elsewhere in this chapter, the term 'effective coverage' is used with the same meaning as in the Council Recommendation (for an analysis on that meaning, see section 9.7).

schemes, they are not able to reach the criteria for becoming entitled to benefits. The obstacles to effective access do vary between contingencies and countries.

In this regard, the fragmented character and flexibility of platform work may hinder in occasion access to benefits, particularly when such requirements are arguably demanding. Thus, platform workers in an employment relationship may be challenged to access to contributory unemployment benefits in the Netherlands (as they have to have performed six months and a half of employment periods in the last nine months), as well as contributory long-term incapacity in France (where the claimant is required to have paid social security contributions for one year immediately before the materialization of the incapacity, and that the contributions paid reach a certain minimum amount). Also, self-employed platform workers in France may be challenged to fulfil the requirements to access sick pay (namely, to have paid contributions during the year prior to becoming sick).

All the countries studied provide social assistance schemes guaranteeing a minimum income, which might reduce the hardest consequences of the obstacles that platform workers experience to access to formal and effective access to social security benefits. However, most of these social assistance benefits are of a low amount (and thus might not be considered adequate) and, furthermore, it may be questioned whether social assistance systems should play such an important role in the social security protection of blue-collar workers, given the potential burden to the system that this may entail.

Furthermore, as a result of the COVID-19 pandemic, many countries have reduced or eliminated the requirements as it concerns periods of contributions in order to access contributory unemployment benefits. This is the case in Spain (concerning both employees -in which the requirements were eliminated- and self-employed persons),[1190] France[1191] and Germany.[1192]

[1190] See section 2.2.1.

[1191] See section 4.2.1.

[1192] See section 5.2.1.

10.3.3.c. Adequacy

Adequacy, as noted above,[1193] is analysed in this thesis as concerning both adequacy of benefits[1194] and adequacy of contributions.

Concerning whether benefits are appropriate in connection with prior income, it must be noted that in all selected countries except the United Kingdom, benefits are linked directly to prior income. The fact that benefits in the United Kingdom typically consists of a flat rate, in a purely Beveridgean fashion, might result in them being inappropriate to certain categories of workers or of the self-employed.[1195]

It may be argued that, particularly when benefits at minimum income level and other social assistance benefits are not taken into account, in many occasions benefits of the countries studied in this thesis, seem to fail the test of adequacy as construed by the Council Recommendation.[1196]

Thus, in the case of countries where benefits are dependent on prior earnings, platform workers (either in an employment or self-employment relationship) with low earnings often receive very low benefits. In some cases there is a minimum amount, but this typically does not ensure a benefit amounting above the poverty line by itself. In the case of universal flat-rate benefits as those found in the United Kingdom, their amount (approximately €600 per month) does neither ensure an income level above the poverty line.[1197] Overall, it may be questioned whether countries currently consider their social security benefits related to work as their main instrument to combat in-work poverty or if, instead, that is done through other benefits such as family benefits and general resident-based social assistance (as a last safety net).

Adequacy of contributions is another challenge for platform workers in several of the countries studied in this thesis. This is particularly so in the case of countries which establish a minimum

[1193] See section 10.2.3.

[1194] Adequacy of benefits is referred before in the thesis (see previous footnote) as adequacy of protection, but for the purpose of this section both terms are considered as synonyms.

[1195] See section 3.2.

[1196] See, on how the Council Recommendation on access to social protection for workers and the self-employed construes such test, section 9.8.2.b.

[1197] See section 2.1.5.

amount of contributions for the self-employed not related to a percentage of their earnings (as in Spain), as such contributions are not proportionate to their contributory capacity. Finally, it should be noted that reduced contribution rates for newly self-employed applied in Spain[1198] and France,[1199] excluding employees, as well as self-employed persons with higher earnings, which may be not in consonance with the recommendation that any reduction of contributions must be applied across all labour market status.[1200]

10.4. Recommendations: Let the TraIn lead the way

10.4.1. *Introductory remarks*

These principles have therefore been used to assess the situation at national and European level. And, for the same reason, they will be used to make recommendations that can improve the position of platform workers. These recommendations are largely based on practices that already exist in some of the countries studied, or on proposals made by academics or legislators in these countries. These proposals for improving the protection of platform workers in the future will be presented below.

10.4.2. *Transparency*

10.4.2.a. A wider definition of 'work' at national level

The concepts of 'worker' (or 'employee', in the Coordination Regulations) and 'self-employed' as construed at EU level may serve as a guide, given its relatively broad scope.[1201] Particularly, the use of 'regularity' for a platform activity to be considered a self-employed activity (as in Spain) might have to be reassessed, particularly when such activities are not considered as employment either. Perhaps a solution might be to use an indicator of 'regularity' that already exists under

[1198] See section 3.1.5.

[1199] See section 3.3.

[1200] See Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed (2019/C 387/01), point 13. See also the analysis of such provision in section 0.

[1201] See sections 8.2.3 and 9.4.2.a for an overview on the content of the concept of 'worker' under EU law.

Spanish legislation, albeit it is not applied to situations of platform work yet. This indicator is the existence of an establishment open to the public.[1202] If having a profile on online platforms is considered analogue to having an establishment open to the public, then platform activities might be considered as activities performed regularly. Such an indicator of 'regularity' might also be useful in other jurisdictions when it is questioned whether the platform activity is performed professionally.

10.4.2.b. Establishment of a concept of 'work' at EU level

By establishing a uniform concept of 'work' at EU level, issues may be avoided regarding the determination of the legislation applicable in cross-border situations of platform work where different definitions of 'work' (or professional activity) exist between Member States. In the proposal for (what is now) the Directive on Transparent and Predictable Working Conditions, a uniform EU definition of 'worker' was included. However, this attempt did not make it to the finally adopted text.[1203]

If an uniform concept of 'work' at EU level may not be achieved, it may at least be useful if the Coordination Regulations would provide more precise information on what a marginal activity for the purposes of determining the legislation applicable is. Specifically, a broad interpretation of the concept that would focus on the qualitative indicator of the nature of the activities, instead of a strict application of the 5% threshold, might nevertheless serve to overcome difficulties in interpretation of other elements of the test for determining the legislation applicable which will be analysed further below (such as the 'registered office or place of business', or the 'centre of interests').

10.4.2.c. A mandatory publication of agreements between countries regarding the determination of the legislation applicable

As noted above,[1204] Member States are allowed to conclude agreements under Article 16 of Regulation 883/2004 in order to establish the legislation applicable, as long as these agreements

[1202] See Todolí, A., *El Trabajo en la era de la Economía Colaborativa*, Valencia: Tirant lo Blanch, 2017, p. 100.

[1203] *European Commission, Commission Staff Working Document REFIT Evaluation of the 'Written Statement Directive' (Directive 91/533/EEC) (SWD(2017) 205 final), Brussels: European Commission, 2017*, p. 25.

[1204] See section 7.3.2.

seek the best interest of the individuals affected by them. These agreements seems to be used to solve some of the limitations of the Coordination Regulations. However, as discussed above, Member States are no compelled to share information on these agreements, and therefore very little is known about their content. Openness with regard to these agreements would make it easier to check whether individuals in similar situations receive equal treatment. Moreover, it would help monitoring that the rules for the determination applicable are applied uniformly across all Member States. Furthermore, because these agreements often reveal potential gaps in the rules, their systematic publication might provide policy makers with important information on such lacunae (and how might be addressed).

10.4.2.d. Establishment of clear, well-delimitated legal statuses at national level

While the need of well-delimitated legal statuses at national level may seem obvious, this thesis hopefully has convincingly made clear that doing so is far from easy, certainly (but not only) in situations of platform work. Since this challenge is not unique to the social security field, inspiration for solutions might draw on proposals made by scholars in the field of EU labour law. A very relevant one for the purposes of this thesis might be the proposal made by RISAK and DULLINGER, to include in the tests for determining whether a person performs platform work through an employment relationship criteria indicating economic dependency, instead of focusing (often exclusively) on those elements determining personal subordination.[1205] Such an initiative might help overcome the challenge of determining the legal status of platform workers due to platform work's specific features (such as its on-demand character).

10.4.3. *Inclusion*

10.4.3.a. Towards a broad concept of work

It is a fact that those persons considered as professionally active are covered by social security schemes providing a protection that is more comprehensive and adequate[1206] than the one provided

[1205] Risak, M. and Dullinger, T., 'The concept of 'worker' in EU law: Status quo and potential for change', *ETUI Research Paper-Report 140*, Brussels: ETUI, 2018, pp. 46-47.

[1206] Here the term 'adequate' is used, in a similar way than in the Council Recommendation on social protection for workers and the self-employed, as referring to protection that maintains a decent standard of living, provides appropriate

by those schemes available to persons who are not considered as professionally active. Furthermore, social security systems rely heavily for their financing on contributions from professional activities, while mostly ignoring non-professional activities.

As it has been shown above, differentiating between a professional and a non-professional activity may be a challenge, particularly in the case of activities performed in the framework of platform work. This has the consequence of creating uncertainty for all parties involved, a challenge already addressed above, but also of producing lack of coverage for part of the people performing platform work.

Said challenge may be addressed, at least in part, by broadening what is considered a professional activity as much as possible. This might even mean to consider any activity that produces remuneration as a professional activity. Of course, such a wide definition presents its own challenges, particularly with regard to the question of how much time must pass after a person performed his last activity, before he is not seen anymore as performing a professional activity. Such devils in the details might be solved at national level in light of other elements in the national system(albeit with the principle of inclusion at the core of the regulatory process).

Another approach may be to eliminate as much as possible the differences between coverage of those performing professional activities and those who are deemed not to do so. In this regard, the starting point is that a person needs an income to survive. That income may come from work (as will be the case, to a greater or lesser degree, for the absolute majority of individuals), earnings from property, income provided by other individuals (such as parents or a partner) or income provided by the State (through, for example, social insurance or social assistance benefits). Social security schemes might be redesigned through this lens, albeit without losing perspective of the social risk against which they protect. In this regard, the Netherlands may serve as an example with its residence-based basic pension[1207] (which thus reduce the importance between legal statuses). The other minimum income schemes available in Spain (which has been newly created in part in

income replacement and prevents individuals from falling into poverty, see Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed (2019/C 387/01), point 11.

[1207] See section 6.2.6.

the context of COVID-19),[1208] France,[1209] the UK,[1210] Germany[1211] and the Netherlands,[1212] may be also of use.

10.4.3.b. Reshaping the role of platform work within the labour market

The determination of the legal status for the performance of work should not be a choice. In other words, the legal classification of an individual should derive from the reality, from how he factually performs work.[1213] However, in practice, the big difference between the obligations and rights that derive from each legal status causes strong incentives for the (strongest) party who offers the work to look for the status with the lowest costs and risks involved, enabling him to shift these to the (weakest) party that has to conduct the work. This is certainly visible in the case of platform work.

In light of this practice, it would be good if legislators would attempt to reduce the incentives for online platforms to offer fragmented and on-demand work. This might be done, for example, through measures treating in an equal manner as it regards taxes and social security contributions the different forms of work available in a country (i.e. employment, self-employment and its different subvarieties).[1214] Another approach could be the establishment of a specific tax for online platforms, which might be earmarked for social security purposes.[1215] While these measures are for the moment theoretical proposals, and it is not the aim of this thesis to study the (undoubtedly complex) effect they may have, it is nevertheless important to note the need of further consideration

[1208] See section 2.2.7.

[1209] See section 4.2.7.

[1210] See section 3.2.7.

[1211] See section 5.2.7.

[1212] See section 6.2.7.

[1213] This focus in the reality of the situation rather than in the (contractual) intention of the parties has been stressed in several relatively recent judicial cases, including one in the Netherlands involving Deliveroo. See Rb. Amsterdam 15 januari 2019, ECLI:NL:RBAMS:2019:198.

[1214] This proposal was made in the report published recently by the *Borslap* Committee, an independent committee which was charged by the Dutch Government to assess whether the current labour market regulation is up to date. See, for a reference of the specific proposal within the report, Vonk, G., 'Extending Social Insurance Schemes to "Non-Employees": The Dutch Example', in Becker, U. and Chesalina, O. (eds.), *Social Law 4.0*, Baden-Baden: Nomos, 2021, pp. 157-158.

[1215] Suárez, B., 'The 'Gig' Economy and its Impact on Social Security: The Spanish example', *European Journal of Social Security*, vol. 19 issue 4, 2017, p. 308.

and research on them, as a potentially (partial) solution to the challenges posed by the platform economy.

One measure that reduces the online platforms' incentives to offer fragmented and on-demand work and that it did have been implemented is the French initiative of obliging online platforms (that provide a homogenized service) to cover the cost of insurance against labour accidents and professional diseases of those self-employed persons working via them and who have opted to have such an insurance (in contrast, self-employed persons who are not working through that kind of online platforms have to cover such a cost themselves).[1216]

10.4.3.c. Flexibility regarding the criteria for entitlement

As it has been observed above, based on the national country studies,[1217] whether effective social security coverage[1218] for platform workers can be achieved depends partly on the combination of the following factors: the length of the period of insurance or employment required, the time-frame in which such period must have been completed, and how such period is measured (either by the number of hours - which is to the detriment of part-time workers-, or by days - which typically is to the detriment of those part-time workers which working time is concentrated on a few specific days per week -, or by weeks -which would typically benefit part-time workers -). Therefore, having a set of criteria from which platform workers may opt depending on their personal circumstances may facilitate effective coverage, at least in its meaning of not preventing individuals from accruing or accessing benefits because of their type of employment relationship or labour market status.[1219]

[1216] See section 4.3.2.b.

[1217] See section B. Inclusion in the social security position of platform workers at national level.

[1218] The term 'effective social security coverage' is used as having the same meaning as 'effective coverage' under the Council Recommendation, meaning "a situation in a specific social protection branch where the individuals in a group have an opportunity to accrue benefits and the ability, in the event that the corresponding risk materialises, to access a given level of benefits" (see Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed (2019/C 387/01), point 7(f). For further analysis on the meaning of effective coverage within the Recommendation, see section 9.7.

[1219] See Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed (2019/C 387/01), point 9(a).

10.5. Final remarks

In 1999, an analysis of the social position of self-employed persons concluded that these persons often did not receive an equivalent social protection as persons in a standard employment relationship, but that this issue could be solved if/when the social security schemes' features were adapted to the specific features of self-employment.[1220] Since 1999, many new forms of work have appeared, and some forms of work that were considered marginal (including some varieties of self-employment) have become increasingly accepted as part of the labour market. Platform work stands out among these new forms of work due to its combination of many features that deviate from those of the standard employment relationship, such as its on-demand and flexible character, the significant geographical mobility that it allows and the low income that it may generate.[1221] In recent years, many academics, social partners and public officials have wondered whether and in which way platform work's unique features may challenge social security systems. Taking into account and trying to address these concerns, this thesis examined the question of what was the social security position of platform workers under the law of the EU and of selected EU countries, and how that position compared to the one of persons performing work under a standard employment relationship.[1222]

The thesis has shown that platform workers often experience differences in their social security position when compared to the social security position of persons performing work in a standard employment relationship. These differences typically concern two key social security principles, namely transparency and inclusion, principles that are promoted through the new Council Recommendation on social protection for workers and the self-employed.[1223] Seen from the angle of these principles, the current national social security systems studied in this thesis, as well as the EU rules related to social security seem, with regard to platform work, like a labyrinth, an

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[1220] Schoukens, P., *De sociale zekerheid van de zelfstandige en het Europese Gemeenschapsrecht: de impact van het vrije verkeer van zelfstandigen*, Leuven: Acco, 2000.

[1221] See section 1.4.4 on the features of platform work.

[1222] See, for a reminder of the research question of this thesis (and the content of its components), section 1.4.

[1223] See, on the content of the principles of transparency and inclusion, sections 10.2.2 and 10.2.3. Also see section 9.9 on the principle of transparency under the Council Recommendation, and sections 9.6, 9.7 and 9.8 on the Recommendation's points on formal coverage, effective coverage and adequacy of protection (on which the principle of inclusion is primarily based).

inhospitable construction that, either by design or by accident, exclude platform workers from fully participating into social security systems. This has been made particularly evident as a result of the COVID-19 pandemic, to which all the countries studied have had to respond by temporary filling the gaps on the social security position of their most vulnerable workers, which includes platform workers.

As it is submitted in this thesis, it is not desirable to stick to an approach that allows such significant differences between the social security position of platform workers and the one of persons in a standard employment relationship. This thesis proposes an alternative approach, inspired by the principles of transparency and inclusion (the TraIn approach), in which the specific features and needs of platform workers are taken into account.

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H. Legislation of Spain

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J. Legislation of France

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K. **Legislation of Germany**

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