The "working poor" and EU free movement: the notion of "worker" in the context of low-wage and low-hour employment

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Contents

The interpretation of the notion of "worker" is of utmost importance to the proper enjoyment of EU free movement rights by destitute mobile EU citizens. There is evidence to suggest a general trend towards a narrow interpretation of "genuine and effective" as regards the nature of the activity, in order to exclude from residence rights, and consequently from access to welfare benefits, mobile EU citizens engaged in low-wage jobs or working only a few hours a week. This approach is not consistent with EU case law, which does not set any requirements as to the minimum number of hours, the duration of the working relationship, or the level of remuneration required in order for someone to be regarded as a worker.

A narrow interpretation clearly targets mobile EU citizens with precarious working conditions who are also more vulnerable to homelessness. As a consequence, this approach jeopardises destitute mobile EU citizens' chances of accessing welfare benefits and finding a way out of destitution[1].

This report, through a case-by-case analysis, provides an overview on the application of the notion of "worker" to mobile EU citizens engaged in low-wage and low-hour employment in Belgium, Germany and the United Kingdom. It is based on contributions by Anthony Valcke (EU Rights Clinic), Matthew Evans (the AIRE Centre) and Stamatia Devetzi (University of Applied Sciences Fulda).

Executive Summary

With the emergence of new and flexible forms of employment, defining the notion of "worker" is very important. Within the framework of EU free movement, being regarded as a worker is, for mobile EU citizens, the less burdensome way to full enjoyment of residence rights. Over the past few years, FEANTSA members have come across several cases of homeless mobile EU citizens employed in low paid, precarious and atypical work who were not entitled to residence rights because they did not qualify as "workers". Indeed, there is evidence to suggest a general trend towards a narrow interpretation of "genuine and effective" as regards the nature of the activity, in order to exclude from residence rights, and consequently from access to welfare benefits, mobile EU citizens engaged in low-wage jobs or working only a few hours a week. This trend has a strong impact on homeless mobile EU citizens' chances of finding a way out of destitution and, for this reason, FEANTSA decided to analyse national case-law in Belgium, Germany and the United Kingdom and identify which criteria are used to assess whether a mobile EU citizen qualifies for worker status or not.

The EU context

The essential feature of an employment relationship is, according to Court of Justice of the European Union (CJEU) case law, that for a certain period of time a person performs services for and under the direction of another person, in return for which he or she receives remuneration. This notion includes any person who pursues activities which are genuine and effective and excludes activities carried out on such a small scale as to be regarded as purely marginal and ancillary. EU tribunals have already been confronted with cases of particularly low numbers of hours of work performed by mobile EU citizens and low levels of remuneration and have generally adopted a broad interpretation of these conditions.
The leading case regarding working hours and the recognition of worker status is *Genc*. In this judgement, the CJEU recognised that a minor activity with a weekly working time of 5.5 hours and a monthly salary of €175 may be enough for someone to be entitled to worker status. According to the Court, an overall assessment of the employment relationship of the person concerned has to be carried out and factors relating not only to the number of working hours and the level of remuneration but also to the right paid leave, to the continued payment of

[1] FEANTSA, EU Free Movement Fitness Check Reports, https://www.feantsa.org/en/report/2018/09/10/eu-free-movement-fitness-check-reports?bcParent=27

wages in the event of sickness, and to a contract of employment which is subject to the relevant collective agreement, need to be taken into account.

The criteria set by the CJEU for the recognition of worker status are interpreted and implemented differently and sometimes inconsistently at national level in many Member States. The definition of "worker" existing at EU level does allow for some discretion as it is for national authorities to establish concepts such as "marginal and ancillary" work. According to the cases collected in Belgium, Germany and the United Kingdom, the main concerns regarding a restrictive interpretation of the notion of "worker" are: the use of hours and earnings thresholds to create a presumption of marginal and ancillary work; the reversal of the burden of proof to demonstrate that the activity is genuine and effective; the refusal to recognise worker status by public authorities granting welfare benefits in Germany and the UK; the refusal to recognise worker status during the procedure for registration in Belgium.

Worker status in the UK

In 2015, the UK introduced a minimum earnings threshold (MET) test as part of its assessment of whether the work activities of mobile EU citizens constitute genuine and effective employment. The test requires public authorities to make further enquiries into whether the activity is genuine and effective when the mobile EU citizen is earning below the threshold, which is set at £162 (approximately 185 Euros) per week for the 2018/19 tax year. Those who earn more than the threshold are automatically workers (first part of the test), while those earning less will have their work assessed and must be able to demonstrate that their activity is not marginal (second part of the test). The second part of the test must in principle provide for an overall assessment of the circumstances of the case: right to paid leave, continued payment of wages, work duration, hours per week, existence of a contract of employment subject to the relevant collective agreement. However, national public authorities, in the case studies collected in the survey, show a tendency to stop at the first part of the test and automatically consider that earning below the threshold means that the activity is not genuine or effective. The implementation of the threshold, in practice, means that low-wage and part-time workers, and, in general, precarious workers, may be suspected of not carrying out genuine activities.

Worker status in Germany

In Germany, having worker status is essentially linked to a person's ability to apply for benefits. In recent years, the number of social court cases dealing with the nature of worker status and, as a consequence, with residence rights and the right to subsistence benefits, has risen significantly. Officially, there is no threshold as regards the minimum number of working hours or level of earnings that would allow authorities to regard an activity as being genuine and effective. However, the authorities tend to regard activities with a low number of weekly working hours - less than eight hours per week - as not qualifying the individual concerned for worker status. 35 decisions by the Higher Social Courts (Social Court of Second Instance in Germany) and by the Federal Social Court regarding the recognition of worker status for mobile EU citizens were analysed. All these cases dealt with mobile EU citizens with low paid jobs and/or few working hours and, in all these cases, the *Job Center* – the institution providing subsistence benefits in Germany – had denied or put in doubt the person's status as a worker. German Tribunals generally complied with the EU notion of "worker" and corrected the findings of Job Centers that took quick decisions, did not carry out an overall assessment of the circumstances of the case and refused to recognise worker status merely on the grounds of a low number of working hours or low earnings.

Worker status in Belgium

In Belgium, registration with the municipality where they reside is compulsory for both EU citizens and their non-EU family members within three months of their arrival. Decision-making is shared between municipalities and the Immigration Office. Municipalities generally handle cases involving EU citizens who can show proof of work, self-employment or enrolment on a course of study. In this context, municipalities have reportedly refused to register as workers mobile EU citizens on short-term contracts and with atypical work. In particular, public authorities contest the genuine and effective nature of the activity of mobile EU citizens who are engaged in activities that generate low wages, or that involve working on a part-time basis. In such cases, the Belgian authorities tend to refuse to regard such mobile EU citizens as workers and instead register them as jobseekers and therefore limit their ability to claim a right to reside beyond six months after their registration with the municipality. It has been reported that in Belgium, work not exceeding 12 hours per week is quasi-irrefutable evidence of the activity being marginal and ancillary. Moreover, the review of case law in Belgium suggests that, unlike in the UK or Germany, lodging an appeal before the national courts in Belgium was in some cases not sufficient to overturn a decision made by the public authorities.

Conclusions

The lack of a common EU notion of "worker" and, as a result, the different interpretation of the notion of "worker" and the diversity in national approaches to what is meant by "marginal and ancillary activities" creates uncertainty within the framework of EU free movement of workers. Indeed, the same working activity could entitle someone to worker status in some Member States and not in others, or, even worse, lead to different assessment of worker status within the same Member State depending on the practices of different local jurisdictions or public authorities involved in the case.

In the absence of a reliable and common EU definition of the notion of "worker", mobile EU citizens, particularly those who are destitute and with precarious administrative status, encounter significant obstacles to exercising their free movement rights. The cases reported show that the restrictive approach taken by national authorities may undermine the free movement rights of mobile EU citizens, especially in terms of registration with the municipal authorities and access to welfare benefits. The EU institutions must therefore counter any restrictive interpretation of the notion of "worker" and set more precise criteria by providing a broad and inclusive definition of "marginal and ancillary activity" in line with CJEU case law.

1. General remarks on the notion of "worker"

1.1 The notion of "worker" at EU level

In the changing climate of labour relations, with the emergence of new and flexible forms of employment, defining the notion of "worker" is very important.
So that they may benefit from the right to reside in another EU Member State (MS) for over three months, Directive 2004/38[2] requires EU citizens to fulfil different conditions pertaining to the nature of their residence in the host Member State. Being regarded as a worker is, for mobile EU citizens, the less burdensome way to full enjoyment of residence rights. Indeed, EU citizens who can demonstrate that they are economically active do not need to demonstrate that they have sufficient resources not to be a burden on the social assistance system or that they hold comprehensive sickness insurance. Mobile EU citizens who are regarded as workers also qualify for equal treatment as regards their access to welfare benefits and tax advantages[3].

[2] Directive 2004/38/EC on the rights of residence of EU citizens and their family members [2004] OJ L 158/77.
[3] Regulation 492/2011 on the free movement of workers [2011] OJ L 141/1, art 7(3).

The CJEU maintains that the term "worker" has a Union meaning and must not be interpreted narrowly at national level[4]. The essential feature of an employment relationship is, according to agreed case law, that for a certain period of time a person performs services for and under the direction of another person in return for which he or she receives remuneration[5]. This notion includes any person who pursues activities which are genuine and effective and excludes activities carried out on such a small scale as to be regarded as purely marginal and ancillary. Marginal and ancillary activities do not therefore fall within the scope of the free movement of workers[6]. It is therefore essential to establish the scope and the clear meaning of "marginal and ancillary" activities.

1.2 Carrying out marginal and ancillary activities and living in another MS: on the fringes of the notion of "worker"

Remuneration and the performance of services for a particular period of time are two essential features of the notion of "worker". EU tribunals have already been confronted with cases of particularly low numbers of hours of work performed by mobile EU citizens and low levels of remuneration and have generally adopted a broad interpretation of these conditions.

As regards remuneration, the CJEU has made clear that the fact that a worker's earnings do not provide for all of her or his needs cannot preclude her or him from being regarded as a worker. Neither the limited amount of remuneration nor the fact that the person in question seeks to supplement that remuneration through other means of subsistence, such as social welfare benefits, can have any consequence in regard to whether or not the person is a worker for the purposes of European Union law[7]. Along the same lines, with regard to the amount of weekly working hours, the CJEU refused to exclude *a priori* low-hour employment from the scope of the EU notion of "worker".

The approach taken by EU tribunals is that, although a person's working a low number of hours may suggest that the activity is marginal and ancillary[8], there is no threshold regarding working hours or remuneration that automatically excludes certain activities or categories of workers from the scope of the notion of "worker". On the contrary, the CJEU has consistently maintained that only an overall assessment of the employment relationship, regardless of the limited level of remuneration and the number of hours of work, may confirm whether or not the activity in question is genuine and effective[9].

For instance, regarding length of employment, the Court did not exclude that working for a period of two and a half months may be sufficient for the person concerned to be regarded as a worker[10]. In another case, the EU tribunals considered it possible that someone could be a worker by engaging in a "brief minor professional activity" that did not ensure a livelihood or in an activity that "lasted barely more than one month"[11].

[4] See Case C-53/81, Levin, EU:C:1982:105, paragraphs 11-13.

[5] See the leading judgment in Case C-66/85, Lawrie-Blum, EU:C:1986:284, paragraphs 16 and 17.

[6] Case C-53/81, Levin, EU:C:1982:105, paragraph 17.

[7] See, to that effect, Case C-139/85, Kempf, EU:C:1986:223, paragraph 14; Case 344/87, Bettray, EU:C:1989:226, paragraph 15; and Case C-10/05, Mattern and Cikotic, EU:C:2006:220, paragraph 22.

[8] See Case C-357/89, Raulin, EU:C:1992:87, paragraph 14; and Case C-14/09, Genc, EU:C:2010:57, paragraph 26.

[9] See Case C-14/09, Genc, EU:C:2010:57, paragraph 26; Case C-432/14, O, EU:C:2015:643, paragraph 24.

[10] See Case C-413/01, Ninni-Orasche, EU:C:2003:600, paragraph 32.

[11] See Case C-22/08, Vatsouras/Koupatantze, EU:C:2009:344, paragraphs 25 and 30.

The leading case regarding working hours and the recognition of worker status is *Genc*[12]. In this judgement, the CJEU recognised that a minor activity such as that performed by Ms Genc, with a weekly working time of 5.5 hours and a monthly salary of €175, may be enough to make her entitled to worker status. Ms Genc had been working as a cleaner and, according to her contract of employment, her working time was 5.5 hours per week at an hourly rate of €7.87. The contract, subject to the relevant collective agreement, provided for 28 days of paid leave and continued payment of wages in the event of sickness. The relevant German tribunals referred the question of whether Ms Genc's activity was to be considered genuine and effective to the Court of Justice.

In the *Genc* ruling, the CJEU referred to a previous case[13], alluded to above, in which it ruled that the fact that a worker's earnings do not cover all her/his needs, that the income is lower than the minimum required for subsistence and that the activity does not exceed 10 hours a week, does not prevent the person from being regarded as a worker[14]. With regard to the specific *Genc* case, the Court admitted that working only a very limited number of hours may suggest that the activity performed is marginal and ancillary. However, it immediately reduced the scope of this affirmation. Indeed, according to the CJEU, as referred to above, regardless of the limited level of remuneration and number of hours, "*the possibility cannot be ruled out that, following an overall assessment of the employment relationship in question, that activity may be considered by the national authorities to be real and genuine, thereby allowing its holder to be granted the status of worker"*[15]

The Court further explained what the "overall assessment" must include in order to establish the existence of worker status. According to the Court, the overall assessment of the employment relationship of the person concerned "*makes it necessary to take into account factors relating not only to the number of working hours and the level of remuneration but also to the right to 28 days of paid leave, to the continued payment of wages in the event of sickness, and to a contract of employment which is subject to the relevant collective agreement*"[16].

The Court concluded that it falls to the national courts to make the necessary findings of fact in order to establish worker status, but it also provided criteria that have to be taken into account and ruled out the notion that a low number of hours or low remuneration prevent the activity in question from being genuine and effective.

1.3 The notion of "worker" as implemented in some MS: a comparative analysis

The aforementioned criteria set by the CJEU for the recognition of worker status are interpreted and implemented differently and sometimes inconsistently at national level in many MS. Indeed, the definition of "worker" existing at EU level allows for some discretion as it is for national authorities to establish concepts such as "marginal and ancillary" work.

In the *Genc* case, doubts around the interpretation of the concept of "worker" were expressed by the referring tribunal, which pointed out that "*the Court's case law does not contain a threshold, determined on the basis of working time and level of remuneration, below which an activity would have to be regarded as being marginal and ancillary, and that this contributes to a lack of precision in the concept of marginal and ancillary activity*"[17]. The referring judge was probably suggesting that it would be easier for judges if a threshold for

[12] Case C-14/09, Hava Genc v Land Berlin, EU:C:2010:57

[13] Case C-444/93, Megner and Scheffel, EU:C:1995:442, paragraphs 17 and 18.

[14] See also Case C-213/05, Geven, EU:C:2007:438, paragraph 27.

[15] Case C-14/09, Hava Genc v Land Berlin, EU:C:2010:57, paragraph 26.

[16] Case C-14/09, Hava Genc v Land Berlin, EU:C:2010:57, paragraph 27.

[17] See Case C-14/09, Genc, EU:C:2010:57, paragraph 29.

hours or remuneration were established at EU level in order to avoid inconsistencies at national level. However, the Court of Justice has deliberately chosen that a certain level of hours or amount of remuneration cannot be the only conditions relevant to establishing worker status. In practice, the definition adopted at EU level is so vague that there is currently sufficient room for manoeuvre for MS to effectively create their own notions of "worker".

In the light of changing labour realities, with an increasing number of flexible and atypical working contracts, these national divergences may result in many mobile EU citizens, especially those engaged in precarious employment, being deprived of their free movement rights.

In the following paragraphs, we will present the results of a recent survey commissioned by FEANTSA on the application of the notion of "worker" to mobile EU citizens engaged in low-wage and low-hour employment in Belgium, Germany and the United Kingdom. In each MS, a case-by-case analysis confirms that national authorities are pushing the boundaries of the definition of "marginal and ancillary" as far as possible in order to reduce the number of mobile EU citizens falling within the favourable scope of the notion of "worker".

The main concerns regarding a restrictive interpretation of the notion of "worker" are the following:

a) *The use of thresholds to create a presumption of marginal and ancillary work*

MS, both at national and local level, adopt hours or earnings thresholds so that authorities assessing mobile EU citizens' entitlements tend to refuse worker status to some categories of worker. Even if thresholds are not considered compulsory and generally drafted in the form of guidelines for public authorities, these directives clearly suggest that a certain number of working hours or a certain level of remuneration are the main criteria for assessing whether the activity is genuine and effective. Even when these guidelines explicitly stress, in order to show *formal* compliance with EU law, that an overall assessment of the circumstances of the employment must be carried out, they end up having a negative impact on the interpretation of the notion of "worker".

b) *The reversal of the burden of proof to demonstrate that the activity is genuine and effective*

Where a threshold is provided or where there is a general presumption of marginal and ancillary activity for low-wage and low-hour employment, national authorities have a tendency to operate a reversal of the burden of proof. As a consequence, workers employed in low-wage and low-hour jobs must demonstrate that their activity is genuine and effective, whereas it should be for the public authorities to demonstrate that the activity is marginal.

c) *The refusal to recognise worker status by public authorities granting welfare benefits (UK and Germany)*

The comparative survey carried out at national level shows that the approach taken by public authorities responsible for conferring welfare benefits seems generally aimed at refusing the status of worker to mobile EU citizens with precarious and low-hour jobs. However, it also seems that through the intervention of legal action challenging negative decisions on the conferring of benefits, the original decisions are reversed and low-wage and low-hour workers have their worker status recognised by national tribunals or directly by public authorities. The need to ask for legal advice and to introduce legal action to force the recognition of free movement rights is clearly an additional burden for low-wage and low-hour workers. This category of workers, even though they are more in need of welfare benefits compared to full-

time workers, are generally refused access to these benefits because of their status as 'working poor'[18].

d) *The refusal to recognise worker status during the procedure for registration in the host MS (Belgium)*

In Belgium, EU citizens and their family members must register with the municipality where they reside within three months of their arrival in the country. Applicants must provide documents corresponding to their status.
Municipalities have reportedly refused to register EU mobile citizens engaged in atypical work[19] and with short-term contracts[20] as legal residents. In those cases, national authorities have a tendency to advise mobile EU citizens to register as self-sufficient persons or as jobseekers – a category that is more burdensome for people wishing to fully exercise their free movement rights – instead of as workers.

2. The implementation of the notion of "worker" in the UK[21]

2.1 The UK legal framework: "worker" as qualified person and earning thresholds

In 2015, the UK introduced a minimum earnings threshold (MET) test as part of its assessment of whether the work activities of mobile EU citizens constitute genuine and effective employment.

The updated guidance, *European Economic Area (EEA) nationals: qualified persons*[22], is a guide published on 15 February 2015 (last update 20 November 2018) explaining to national public authorities how to assess whether a mobile EU citizen is a qualifying person.

According to the guide, while there is no minimum amount of hours that a mobile EU citizen must be employed for, in order to qualify as a worker, the employment must be genuine and effective and not marginal or supplementary[23]. This sentence, that seems to suggest a willingness to comply with the notion of "worker" existing in EU law, is only the introductory remark to the paragraph entitled "Assessing whether the EEA national is a worker".

The subsequent instructions provided to public authorities in the guide show that the objective of the policy is, on the contrary, to exclude workers executing low-wage and low-hour jobs from the notion of "worker". According to the guide, "marginal activity" means that the work involves such little time and money that it is unrelated to the lifestyle of the worker. This activity must be considered supplementary "*because the worker is clearly spending most of their time on something else, not work"*. The case of a student follows as an example: "*a*

[18] For a more extensive overview of the ambiguity within the Union's policy goals of free movement of Union citizens and combating poverty and social exclusion, and on the difficulty of exercising free movement rights for indigent and inactive mobile EU citizens, see Verschueren, Herwig. (2015). Free Movement of EU Citizens: Including for the Poor?. Maastricht Journal of European and Comparative Law. 22. 10-34.
[19] Nathalie Meurens et al, Obstacles to the right of free movement and residence for EU citizens and their family members: Country report for Belgium (PE 559.969, European Parliament 2016), 18-19.
[20] See for example, complaint filed on 4 November 2014 by INCA CGIL, ABVV-FGTB, EU Rights Clinic and Bruxelles Laïque, 'Expulsions de citoyens européens de Belgique. Violation des articles 7 et 14 de la Directive 2004/38 sur le droit de séjour des citoyens UE et des articles 4 et 61 du Règlement n° 883/2004 sur la coordination de la sécurité sociale', registered under CHAP(2014) 3546.
[21] Based on contributions by Matthew Evans
[22] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759064/eea-qualified-persons-v6.0ext.pdf
[23] See p. 12 of the guide.

student who works behind the student union bar for 2 hours a week is actually a student, their work is marginal and supplementary to their actual role as a student"[24].

In addition to these general instructions, the guide also introduced a test (the MET test) regarding the level of earnings of mobile EU citizens[25]. The test requires public authorities to make further enquiries into whether the activity is genuine and effective when the mobile EU citizen is earning below the threshold, which is set at £162 per week for the 2018/19 tax year. Those who earn more than the threshold are automatically workers (first part of the test), while those earning less will have their work assessed and must be able to demonstrate that their activity is not marginal (second part of the test). In practice, the guide indicates that when a person earns less than the threshold, it will be assumed as a starting point that the work is not genuine or effective.

The second part of the test – applicable to mobile EU citizens earning below the MET – must in principle provide for an overall assessment of the circumstances of the case (right to paid leave, continued payment of wages, work duration, hours per week, existence of a contract of employment subject to the relevant collective agreement). However, national public authorities, in the case studies collected in the survey, show a tendency to stop at the first part of the test and automatically consider that earning below the threshold means that the activity is not genuine or effective.

The consequence of the introduction of this policy is a reduction in the number of mobile EU citizens who have the right to reside as workers in the UK. The implementation of the threshold, in practice, means that low-wage and part-time workers, and, in general, precarious workers, may be suspected of not carrying out genuine activities and therefore need to prepare their residence application and evidence carefully. The proliferation of low-wage and zero-hour work contracts in the UK labour market makes the attainment of this threshold even more problematic.

The effect is to create a presumption in the mind of decision makers, mostly public authorities granting welfare benefits, that those who fall below the earnings threshold are not doing effective and genuine work unless they are able not only to adduce the genuine nature of their work, but also to demonstrate that the "genuine and effective" aspects of that work outweigh its low remuneration. This means that, even when the threshold is not a definitive condition for assessing worker status, it clearly creates a reversal of the burden of proof – so that workers earning below the threshold are assumed to be in marginal and ancillary employment and must produce evidence in order to displace that presumption.

2.2 UK cases on the implementation of the notion of "worker"

The following cases regarding the implementation of worker status in the UK for workers engaged in low-wage jobs or working only a few hours a week are a combination of cases from First-Tier Tribunals and from the Advice on Individual Rights in Europe (AIRE) Centre's advice line[26].

In AIRE Centre advice cases, the issue has generally been resolved in a number of instances without the need to appeal against the negative decision before a First-Tier Tribunal (FTT). In most of the cases handled by the AIRE Centre, national public authorities (essentially the

[24] See p. 12 of the guide.

[25] See p. 12 of the guide, under the paragraph *"Level of Earnings: HM Revenue & Customs (HMRC) threshold".* According to the guide: "HMRC has a Primary Earnings Threshold (PET), which is the point at which employees must pay class 1 National Insurance contributions. If an EEA national is earning below PET you must make a further enquiry into whether the activity relied upon is genuine and effective".

[26] http://www.airecentre.org/pages/i-am-seeking-advice-for-myself-or-someone-i-know.html

Department for Work and Pensions (DWP), which is competent for the granting of welfare benefits) refused *prima facie* to recognise worker status to mobile EU citizens earning below the threshold. However, after the introduction of a mandatory reconsideration request backed by legal advice provided by the AIRE Centre, the original decision was generally reversed, and public authorities recognised the qualified status by operating an overall assessment of the working activity.

This essentially confirms that there is a negative presumption by DWP officials towards workers earning below the threshold, but also that DWP officials have often established worker status after reconsideration requests backed by legal advice.

The cases before FTTs also seem to confirm this trend. When public authorities did refuse worker status beforehand and then an appeal was introduced against the negative decision, worker status was generally recognised by FTTs. In one reported case (*Massaquai*), the misapplication of EU law regarding the implementation of the notion of "worker" by decision makers was also repeated in the decision of an FTT, and was only at a later stage corrected by an Upper Tribunal that ended up assessing the mobile EU citizen in question as having qualifying person status.

All the following case studies clearly show an incorrect or at least restrictive application of EU law by UK authorities. The general approach of public authorities is that work can only be "genuine and effective" when a worker earns "enough" and consequently does not need to claim welfare benefits.

2.3 Case studies from the AIRE Centre's advice line where no appeal was lodged

- A Romanian single mother who was working 15 hours per week was regarded as not being a worker and was therefore refused welfare benefits, including help with housing costs, by public authorities. She was forced to work as a sex worker and to leave her children unattended at night in order to pay her rent. She was advised that, according to the CJEU judgement in the *Jany* case[27], since the UK allows its own citizens to work as self-employed sex workers, then it must recognise EU citizens as self-employed in the same way. Also, UK case-law[28] made clear that an EU citizen who had worked for cash-in-hand at a restaurant and therefore had an illegal contract of work, nevertheless qualified as a worker. The tribunal stressed that it is a matter of fact, and not law, which determines an individual's worker status.
- A Polish national who was working 16-18 hours a week at the minimum wage for 9 months. The UK authorities refused to award him help with housing costs because they considered that his employment was genuine, but not effective as he would not be earning enough to show that he would have sufficient resources not to become an unreasonable burden on the UK's welfare system. AIRE advised that the fact that a worker has only worked for a short period of time on a fixed-term contract does not exclude her/him from the scope of the freedom of movement of workers, provided the work is not marginal or ancillary.
- A Polish national working 8 hours per week applied for Universal Credit[29]. The benefit was refused: the individual was not considered a worker because of a low number of working hours and since he had been working for just a week. The public authorities misapplied the MET, and wrongly presumed that, because the person in question had only started working recently and for not many hours, he was not a worker. No overall

[27] Case C-268/99, Aldona Malgorzata Jany and Others, EU:C:2001:616.
[28] JA v Secretary of State for Work and Pensions [2012] UKUT 122 (AAC).
[29] https://www.gov.uk/universal-credit

assessment of the full circumstances of the case was provided (previous working experience in the UK was not taken into account).

- An Italian national who arrived in the UK with her 3 children found a part-time job as a cleaner, on a permanent, zero-hour contract basis[30] with her employer and worked 16 hours a week at £6.50 an hour. She was informed that her hours of employment were insufficient to be "genuine and effective" work and that she was therefore not entitled to top-up benefits[31]. She did not meet the first part of the MET test, as she earned around £104 a week. The public authorities did not bear in mind that she was, however, likely to satisfy the second part of the test since she was working over 10 hours a week on average on a permanent contract.
- A German national who had lived in the UK for 14 years and had been self-employed as a cleaner since February 2015. Her income was below the minimum income threshold as she was earning on average £60 per week. The DWP considered that for the purposes of help with housing costs, her work was not genuine and effective along with not satisfying the right to reside test. AIRE advised her to challenge the decision.
- A Portuguese national who had been working for almost three years (2014-2017) as a cleaner with a contract of 16 hours per week and with an income of £99.20 per week was denied help with housing costs because her income was below the MET. The public authorities clearly stated that this mobile EU citizen could not be regarded as exercising a qualifying treaty right in the UK as a worker because her employment could not be considered to be genuine and effective. The AIRE Centre made a mandatory reconsideration request and the original decision was reversed and worker status recognised by the public authorities.
- A Polish national who had been living in the UK since 2006 and worked on and off without registering as self-employed, mostly on construction sites. He had serious alcohol-addiction related problems and was street homeless. He registered as self-employed in January 2014. He started working part-time again on a self-employed basis in the construction industry (16 hours per week and earning £105 a week). He was refused housing assistance for failing to meet the first part of the MET test. The second part of the test, requiring an overall assessment of the circumstances, was clearly not applied. The AIRE Centre advised him to file a mandatory reconsideration request. The public authority reversed the original decision and the mobile EU citizen was awarded the help with housing costs he had applied for.
- A Slovak national who was refused help with housing costs because his income did not meet the MET criteria. He was working for a food production company every week and earning about £5.50 per hour. A letter was submitted by the AIRE Centre in support of his worker status application under EU law, stating that the public authorities (the DWP) had not carried out an overall assessment of the circumstances of the case and had merely stopped at the first part of the MET test. Subsequently, the decision was reversed, and he was awarded help with housing costs.

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[30] "Zero-hours contracts are a form of flexible working that specify no minimum number of working hours a week. While the employee may sign an agreement to be available for work as and when required, the employer is not necessarily obliged to give the worker any work and the employee is not obliged to accept the work offered. The employee is expected to be on call and receives compensation only for hours worked". (See https://www.eurofound.europa.eu/new-forms-of-employment).

[31] People who get Personal Independence Payment (PIP) may be entitled to extra money on top of the existing benefits, a reduction in the council tax or road tax bills and discounts on travel. People may get a top-up (called a premium) on the following benefits: Housing Benefit, Jobseeker's Allowance, Income Support, Working Tax Credit
Employment and Support Allowance, Pension Credit. (See https://www.citizensadvice.org.uk/benefits/sick-or-disabled-people-and-carers/pip/before-claiming/extra-help-pip-entitles-you-to/)

- A Portuguese national who was a victim of domestic violence, who had lived in the UK since 2015 and was placed in a refuge with her 5-year-old children by social services in August 2015. Social services had been providing her with subsistence and paying for her accommodation until she became eligible to claim benefits. She started employment and was earning £67.50 per week. In December 2015, she applied for help with housing costs, but her application was rejected, with the justification that she was not earning the minimum required for her to retain worker status. Following advice provided by the AIRE Centre on the notion of "genuine and effective work" under EU law, a mandatory reconsideration request was introduced, stating that 10 hours of work per week must be regarded as sufficient to warrant worker status. A mandatory reconsideration reversed the original decision and she was granted help with housing costs.

2.4 Case studies where an appeal was lodged before British tribunals

- A Slovak national who was a victim of trafficking and who had been employed in various activities. His last job had been for 4 months, working around 18 hours per week and paid the national minimum wage. When he left that job and claimed Job Seekers Allowance[32] (JSA) he was told that he had exhausted his right to reside as a jobseeker. At his FTT appeal[33], the Judge concluded that although the work had not lasted for more than a few months, it was genuine and effective for the time it had lasted. The job was not a temporary fixed-term contract and therefore the intention was that it would have lasted longer. This meant that he had established worker status and retained it for the purpose of making a claim for JSA.
- In the case *Massaquai*[34]*,* a citizen of Sierra Leone applied to remain in the UK as the spouse of a citizen of Ireland residing in the UK. The application was refused by the immigration authorities on the basis that it was not accepted that the spouse was working as claimed. The FTT upheld the decision of the immigration authorities and concluded that the appellant was not a worker even though she worked 16 hours a week as a customer service assistant because she earned below the "primary earnings threshold". This decision was held to be plainly irrational and erroneous by the Upper Tribunal. This level of real work was clearly genuine and effective when considered in the context of what she was doing. The Upper Tribunal concluded that she must be regarded a worker.
- A German national who had been working on and off for 2 years as a cleaner in a restaurant. She had had a series of short-term jobs, with differing hours worked. She had also had very short periods of being without a job, but these had been so short that she had never had to claim benefits. Instead of looking at her overall work history, the decision maker found that each of her short-term jobs was temporary and that each one was therefore marginal and ancillary, notwithstanding the fact that over a 2-year period she had had significant periods of work. The decision also seems to suggest that the jobs were ancillary because they were intended to be ancillary to the main purpose of the employer for which she was working (as cleaner in a restaurant rather than as someone working directly in the production or serving of food). The FTT[35] ruled that she had been a worker over the 2-year period.

[32] Jobseeker's Allowance (JSA) is an unemployment benefit you can claim while looking for work (See https://www.gov.uk/jobseekers-allowance)
[33] Appeal number SC024/18/00705.
[34] Upper Tribunal decision in Massaquai v SSWP – EA/03698/2015.
[35] Appeal number SC005/16/00412.

- Romanian nationals who wanted to invoke their status as EU worker and primary carer of a child in education. They were told that the part-time work they undertook (around 10 hours per week over several months) when their EU citizen child was resident in the UK was marginal and ancillary and did not count as work. Their children could not therefore derive rights. The FTT[36] ruled that the work undertaken was enough to count as genuine and effective. They were therefore entitled to claim welfare benefits in the same way as a British national in similar circumstances would have been able to.
- A Polish national who had resided in the UK since May 2006 and continually worked for five years (from 2006-2011) was awarded JSA. This benefit had recently stopped because the public authorities considered that, during the 5 years as a worker, he was not always earning enough to be entitled to qualifying person status. At his FTT appeal[37], the focus was on the period of 2010-11 when his earnings were lower in comparison with other years. He gave evidence that he was registered to work with agencies and was paid throughout this period. He would take on jobs when called upon and the hours varied, but it was continuous work. Based on the documentation provided, the Tribunal found him to be a worker.

3. The implementation of the notion of "worker" in Germany[38]

3.1 The German legal framework

In Germany, having worker status is essentially linked to a person's ability to apply for benefits. In recent years, it appears that the number of social court cases dealing with the question of who is an employee/self-employed person and accordingly has a residence right and a right to additional subsistence benefits has risen significantly.

Germany provides for a specific regulation of marginal employment (a "mini job"). A mini job is any form of employment with an average monthly wage of no more than €450. Persons with low wages or few working hours may be considered as employees and therefore be entitled to the basic welfare and subsistence benefits existing in Germany.

Officially, there is no threshold as regards the minimum number of working hours or level of earnings that would allow authorities to regard an activity as being genuine and effective. However, the authorities tend to regard activities with a low number of weekly working hours as not qualifying the individual concerned for worker status. This trend has been confirmed by the recent introduction of the *Instructions from the Federal Employment Agency regarding basic welfare benefits for jobseekers*[39] (hereinafter "the Instructions"). These Instructions were issued by the country's national employment agency for application by staff in the social welfare authorities granting welfare benefits.

According to the Instructions, to allow someone to fall within the notion of "worker" the activity they carry out must be genuine and effective, and activities on such a small scale that they are regarded as being wholly marginal and insignificant are disregarded. According to the Instructions sent by the Federal Employment Agency to its staff, the marginality of an activity must be assessed on the basis of an overall evaluation of all available circumstances. When the

[36] Appeal number SC312/17/01432.

[37] Appeal number SC320/15/00694.

[38] Based on contributions by Stamatia Devetzi

[39] *Zweites Buch Sozialgesetzbuch – SGB II Fachliche Weisungen, § 7 SGB II Leistungsberechtigte* (Instructions from the Federal Employment Agency regarding basic welfare benefits for jobseekers). For instructions concerning the notion of "worker" see pp. 5-6 (paragraphs 3 and 4).

Agency refers to an "*overall view following evaluation of all available circumstances*" it shows willingness to comply with the criteria developed by the CJEU in *Genc*.

Accordingly, the Instructions, mentioning explicitly the *Genc* case, provide welfare officers with the main circumstances that work in favour of the recognition of worker status: the granting of leave and continued payment of wages in the event of illness; the application of collective agreements; the obligation to pay social insurance[40]; the long-term existence of the employment relationship. The Instructions also provide the criteria for the refusal to recognise worker status: work is carried out only sporadically (purely casual or "courtesy" work); very short working hours, in particular less than eight hours a week; taxes and social security contributions are not paid properly. Thus, on the one hand, the Instructions comply with existing EU case law on the notion of "worker" and with the general criteria for classifying an activity as genuine and effective, while on the other hand they suggest that working less than eight hours per week is an indication that the requirements to be regarded as a worker are not met. This threshold makes social welfare officers' job easier when it comes to assessing which activities must be regarded as marginal and ancillary and to justifying the exclusion from access to social benefits for working poor mobile EU citizens.

3.2 German cases on the implementation of the notion of "worker"

Research carried out on recent (2015-2018) German case law reveals that worker status is assessed on a case-by-case basis, considering the overall circumstances of the activity in question, but also that there is always a specific focus on earnings and working hours as the main criteria for establishing whether the activity is genuine and effective.

35 decisions by the Higher Social Courts (Social Court of Second Instance in Germany) and by the Federal Social Court regarding the recognition of worker status for mobile EU citizens were analysed. All these cases dealt with mobile EU citizens with low paid jobs and/or few working hours and, in all these cases, the *Job Center* – the institution providing subsistence benefits in Germany – had denied or put in doubt the person's status as a worker.

German Tribunals generally complied with the EU notion of "worker" and corrected the findings of Job Centers that took quick decisions, did not carry out an overall assessment of the circumstances of the case and refused to recognise worker status merely on the grounds of a low number of working hours or low earnings. In some cases, the decisions taken by First-Instance Social Courts were later corrected by Higher Federal Social Courts, after introduction of appeals by the mobile EU citizens applying for benefits. In some other cases, First-Instance Social Courts did recognise worker status and Higher Social Courts were appealed to by Job Centers to confirm their initial decision to refuse the person benefits. This demonstrates the tendency of Job Centers to regard working poor EU citizens as not entitled to residence rights and, thus, to welfare benefits[41].

In the assessments by German Tribunals, no common line is discernible: out of the 20 decisions by German Tribunals, 13 confirmed worker status when it was previously refused by

[40] The social insurance in Germany includes health, nursing care, pension, unemployment and accident insurance (www.deutsche-sozialversicherung.de). Employers are obliged to register their employees at the employee's compulsory health insurance. The compulsory health insurance of the employee collects all social contributions. The health insurance passes the proportional contribution to the other compulsory social insurances. In general, the employer and employee each pay half of the contributions. The employer pays contributions to accident insurance.

[41] See cases LSG Nordrhein-Westfalen – Higher Social Court for the Land of North Rhine-Westphalia, 26.05.2017, L 7 AS 510/17 B ER, L 7 AS 511/17 B and LSG Sachsen-Anhalt – Higher Social Court for the Land of Saxony-Anhalt, 24.06.2016, L 4 AS 193/16 B ER.

Job Centers in the context of the decision on the conferring of benefits, and 5 denied it, thus confirming the decision of the Job Center[42].

In one case, an activity lasting 4 hours per week with a remuneration of €8.50 per hour providing an income of €149 per month was regarded as justifying worker status by the Federal High Social Court, but not by the First-Instance Social Court or by the Job Center dealing with the request for benefits[43]. This required the mobile EU citizen to introduce several legal actions before having their worker status recognised.

In contrast, in another case, an activity of 12 hours a month (i.e. approximately 3 hours a week) and a remuneration of €102 per month was regarded as not justifying worker status by the Higher Social Court. In that case, the Higher Court corrected the ruling of the First-Instance Social Court and confirmed the initial decision of the Job Center that understood the activity as insignificant and marginal[44]. It is particularly interesting to note that the High Court in that case explicitly stressed that, since the CJEU does not specify a level of income, assessment of the overall circumstances is reserved for the courts of the Member States.

Furthermore, in line with the case law in *Genc*, registering with social security plays a major role in the assessment of worker status in Germany: for example, an activity of 4 hours a week with a remuneration of €7.50 per hour (approx. €120 a month) was classified as insignificant and marginal, in particular due to the lack of registration with social security[45]. On the other hand, an activity with a monthly working time of 8 hours, a gross salary of €500 and the employee's registration with the health insurance fund was not considered to be completely insignificant and marginal, thus justifying the employee's worker status[46].

3.3 Selection of cases where worker status was granted

- A Polish single mother working 8 hours per week with an income of around €200-€300 per month was refused welfare benefits by the Job Center on the grounds that her right of residence was based solely on her status as a job-seeker. The Higher Social Court[47] then confirmed worker status, reiterating that the term "employee" used at EU level also covers part-time work, irrespective of the level of earnings and of the possibility of securing minimum subsistence through the activity.
- A Romanian national engaged in several employment relationships (working 8 hours a month as a cleaner for €9 per hour and working at least 8 hours per week as a courier for €500 gross remuneration) was refused welfare benefits by the Job Center. The public authority considered that he was not entitled to benefits because worker status was not proven on the grounds of the low working time and wage. The Higher Social Court[48] confirmed that the activity must not be considered insignificant and marginal because of the existence of an employment contract and registration with a health insurance provider.
- A Greek national with a mini job contract was working 4 hours for €149 a week. He also enjoyed a minimum holiday entitlement of 20 days per year and continued

[42] Two cases are not mentioned here because the Higher Courts asked for more "evidence" and referred the cases back to the Social Courts of First Instance
[43] LSG NRW, 15.12.2015 – L 6 AS 2016/15 B ER.
[44] LSG Hessen, 18.09.2015 – L 7 AS 431/15 B ER.
[45] LSG NRW, 28.09.2017 – L 19 AS 1540/17 B ER, L 19 AS 1543/17 B
[46] LSG NRW, 27.07.2018 – L 21 AS 2387/17 B ER.
[47] LSG Schleswig-Holstein - Higher Social Court for the Land of Schleswig-Holstein, 11.11.2015, L 6 AS 197/15 B ER.
[48] LSG Nordrhein-Westfalen – Higher Social Court for the Land of North Rhine-Westphalia, 27.07.2018, L 21 AS 2387/17 B ER

payment in the event of illness. His request for benefits was refused by the Job Center on the grounds that he only had residence rights as a jobseeker. The Social Court of First Instance rejected the claim and confirmed the decision of the Job Center because the activity was regarded as marginal. The Higher Court[49], on the contrary, considered that the activity was genuine and effective because under EU law there is no fixed limit regarding the number of hours or the level of remuneration for the granting of worker status. In addition, the existence of sickness and holiday entitlements were further indicators that the activity was not marginal.

- A Romanian national had part-time employment for a duration of 10 months. His contract stated that the work would be on an "on-call" basis with an assignment duration of at least one working hour on one working day per week. During the proceedings, he presented an account that showed that during a month he had carried out the activity for 32 hours and his earnings were €255. His request for welfare benefits was denied by the competent authority and the negative decision was confirmed by the first-instance judges. However, the Higher Court[50] took the view that he had a right to residence as an employee. According to the Higher Court, neither a short working time nor a wage that does not secure a living or an "on-call" activity must automatically be considered a marginal activity. In the case in hand, the employment of the applicant was fixed-term, on-call work within the definition of the German Part-Time and Fixed-Term Contracts Act, with a working time of 12 hours per week for a monthly wage of €450. This resulted in an hourly wage of €8.50, which corresponded to the minimum wage.
- A Hungarian citizen was engaged in a temporary cleaning activity in a bakery with a monthly working time of 22 hours and a gross remuneration of €200 per month. In November 2015, the request by her family for welfare benefits was denied by the public authorities. According to the First-Instance Court to which the case was then referred, it had not been proven that the activity substantiated the status of worker because the circumstances of the case suggested a fake employment relationship. The Higher Court[51] however had no doubt that the activity was genuine and effective because of the wage statements and working hours records submitted. In addition, the wages were paid to the person in cash regularly on a monthly basis. This demonstrated that no fictitious employment relationship existed. The possibility that the person only took up the activity to activate residence status or that her boss supported her for personal reasons was not relevant for the legal effectiveness of her employment relationship.
- A Spanish citizen was working as a nursing assistant with a weekly working time of 4.5 hours a week and a gross salary of €165.75 per week. The Job Center rejected her application for benefits on the ground that the activity carried out had to be considered marginal. The First-Instance Social Court examining the case recognised worker status and imposed the granting of benefits. The Job Center then lodged an appeal against this decision. The Higher Court[52], to which the case was then referred, confirmed the decision of the Social Court of First Instance. In the case in hand, the Higher Social Court affirmed that, according to the documents submitted, the activity was to be assessed as genuine and effective. In addition, the Court noted that the gross wage of €165.75 was higher than the amount recognised as sufficient to justify employee status according to Union law. The fact that the complainant had already completed her

[49] LSG Nordrhein-Westfalen – Higher Social Court for the Land of North Rhine-Westphalia, 15.12.2015, L 6 AS 2016/15 B ER.
[50] LSG Nordrhein-Westfalen – Higher Social Court for the Land of North Rhine-Westphalia, 22.06.2016, L 6 AS 721/16 B ER, L 19 AS 782/16 B.
[51] LSG Sachsen-Anhalt – Higher Social Court for the Land of Saxony-Anhalt, 24.06.2016, L 4 AS 193/16 B ER.
[52] LSG Sachsen-Anhalt – Higher Social Court for the Land of Saxony-Anhalt, 24.06.2016, L 4 AS 249/16 B ER.

training and had attended integration and language courses also spoke in favour of her efforts in future to pursue an activity requiring social security contributions.

- An Italian citizen employed for 3-4 hours a week with a remuneration of €150 was denied welfare benefits by the Job Center. The First-Instance Social Court obliged the Job Center to grant the benefit. The Job Center then appealed against this decision. The High Court[53] considered that, even if the claimant proved employment for only a month, he must be regarded as a worker because the activity was not marginal.

3.4 Selection of cases where worker status was denied

- A Polish national was simultaneously engaged in two different jobs: as a domestic worker with a weekly working time of 2.5/3 hours and a remuneration of €9.50 per hour and as a care worker for 4 hours a week with a remuneration of €7.50 per hour. The person only registered the first activity with the competent authority for mini jobs. His application for benefits was refused by the Job Center because, despite the two activities, he was not satisfying the essential characteristics of dependent employment (agreement around hours, sickness and vacation). This decision was confirmed by the Higher Court[54]. The judges classified the activity as a care worker within the overall context as insignificant and marginal. The decisive factors here were the low weekly working hours, the level of remuneration and the lack of registration in social insurance. The first activity was not taken into consideration because it had lasted for less than a year.
- A Slovak national's application for benefits was refused by the Job Center because her right of residence in Germany was based solely on her status as a job-seeker. This decision was challenged before the Social Court of First Instance. During the proceedings, the applicant was able to demonstrate that she had just started working part-time with an employment contract as an office assistant with a remuneration of €102 per month. The monthly working time was 12 hours. The judge ordered the Job Center to provide basic social benefits. The Job Center filed an appeal against this decision. According to the High Court[55], on the basis of the employment contract, the applicant was not an employee, because employment with a monthly gross remuneration of €102 per month for 12 hours of work as an office assistant is a completely marginal and insignificant activity.
- A Spanish national was denied welfare benefits by the Job Center; he had been working for two months with a fixed term contract of 22.5 hours a week and €9.25 per hour. He was paid €170 during the first month and €391 for the second month. Even if the case before the High Court[56] mostly concerned his residence rights after this period of employment, the judges considered that the duration of the activity and the remuneration of €170 in May and €391 in June were factors against the recognition of employee status and for regarding the work as a marginal and ancillary activity.

[53] LSG Nordrhein-Westfalen – Higher Social Court for the Land of North Rhine-Westphalia, 26.05.2017, L 7 AS 510/17 B ER, L 7 AS 511/17 B.

[54] LSG Nordrhein-Westfalen – Higher Social Court for the Land of North Rhine-Westphalia, 28.09.2017, L 19 AS 1540/17 B ER, L 19 AS 1543/17 B.

[55] LSG Hessen – Higher Social Court for the Land of Hesse, 18.09.2015, L 7 AS 431/15 B ER.

[56] LSG Nordrhein-Westfalen – Higher Social Court for the Land of North Rhine-Westphalia, 16.03.2017, L 19 AS 190/17 B ER

4. The implementation of the notion of "worker" in Belgium[57]

4.1 The Belgian legal framework

The Belgian Immigration Law[58] implementing Directive 2004/38, unlike laws in some Member States[59], does not explicitly refer to Article 45 TFEU on the freedom of movement of workers. Instead, the law simply refers to a "salaried worker or non-salaried worker"[60]. This has led the Belgian authorities to apply national concepts around employment law when considering whether an EU mobile citizen who does not present a conventional working contract can be considered a worker.

Unlike in the UK and Germany, falling within the scope of the notion of "worker" in Belgium is not a concern that arises when checking whether someone fulfils the conditions for receiving welfare benefits. Instead it is taken into consideration before this, when public authorities have to decide on the existence of residence rights during the procedure for registration with Belgian municipalities by incoming EU citizens and their family members.

It is useful to remember that in Belgium, registration with the municipality where they reside is compulsory for both EU citizens and their non-EU family members within three months of their arrival in Belgium[61]. Decision-making is shared between municipalities and the Immigration Office. Municipalities generally handle cases involving EU citizens who can show proof of work, self-employment or enrolment on a course of study. Cases that are regarded as more complicated, such as jobseekers, self-sufficient persons or those who rely on another person for their means of subsistence, will be handled by the Immigration Office.

In this context, municipalities have reportedly refused to register mobile EU citizens on short-term contracts and with atypical work as workers. In particular, public authorities contest the genuine and effective nature of the activity of mobile EU citizens who are engaged in activity which generates low wages, or which involves working on a part-time basis. In such cases, the Belgian authorities tend to refuse to regard such mobile EU citizens as workers and instead register them as jobseekers and limit their ability to claim a right to reside beyond six months after their registration with the municipality.

Under the Belgian rules, upon registration with the municipality, proof of worker status for residence purposes should be demonstrated by producing a letter of engagement by an employer or a work contract in the prescribed format[62]. In practice, the Belgian authorities often request additional documentation.

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[57] Based on contributions by Anthony Valcke

[58] Articles 40 to 47/4 of the Belgian Immigration Law and Articles 43 to 71 of the Belgian Immigration Decree. For reference see Law of 15 December 1980 on the entry, residence, settlement and removal of foreigners, hereafter the "Belgian Immigration Law" (*Loi du 15 décembre sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (MB 31-12-1980, p 14584)*) and Royal Decree of 8 October 1981 on the entry, residence, settlement and removal of foreigners, hereafter the "Belgian Immigration Decree" (*Arrêté royal du 8 octobre sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (MB 27-10-1981, p 13740)*).

[59] For example, explicit reference is made to Article 45 TFEU in national implementation measures for defining the term "worker" in the UK's Immigration (European Economic Area) Regulations 2016 SI 2016/1052 (reg 4(1)(a)).

[60] Belgian Immigration Law, Art. 40 §4, 1º.

[61] FEANTSA, EU Free Movement Fitness Check Report for Belgium, 4-7. See https://www.feantsa.org/download/prodec-legal-fitness-check_belgium1860392861562691280.pdf

[62] Belgian Immigration Decree, Art. 50, §2, 1º.

Belgian practice takes an even more stringent approach to part-time work. It has previously been reported that in Belgium "work not exceeding 12 hours per week is quasi-irrefutable evidence of the activity being marginal and ancillary. This presumption is thus a *de facto* working-hour threshold and an individual working less than 12 hours per week will thus in all likelihood not be deemed a worker."[63] This "12-hour threshold exists in 'unpublished guidelines' but appears to be determinative"[64]. An example of this 12-hour requirement can be seen on the website of the Brussels municipality's list of documents needed to register as a worker where it is clearly stated that to register with the municipality as a worker, applicants must produce a work contract of at least 12 hours per week. This also corresponds to the minimum number of hours that must be worked in order to be eligible for unemployment benefits in Belgium[65].

The Immigration Office also used to refuse to recognise the status of worker to EU citizens working in Belgium under a type of contract intended to facilitate access to employment, referred to as "Article 60 contracts", whereby a person is employed by a public social assistance centre in order to help them accumulate work experience. Following a change of policy in May 2014, this type of contract should now be accepted as constituting work for the purposes of establishing worker status under Belgian immigration law. This change in policy was supported by the State Council in one case where a person successfully appealed a decision where the appellant was considered a burden on the welfare system due to her husband's employment under an Article 60 contract. The Council ruled that this type of contract should be treated in the same way as regular employment contracts and therefore they cannot constitute social assistance that creates a burden on the Belgian social welfare system.

Internships with the European institutions ("*stages*") are not always readily accepted by Belgian municipal officials as evidence of work either. *Stagiaires* (interns) who present for registration with municipalities have sometimes been turned away and told to return when they have secured employment with a Belgian employer. Alternatively, their applications may be accepted but they will be categorised as jobseekers or self-sufficient persons rather than workers. This then affects their ability to retain worker status at the end of their internship.

4.2 Belgian cases on the implementation of the notion of "worker"

The cases reviewed below regarding the granting of worker status in Belgium to workers engaged in low-wage jobs or working only a few hours a week are a combination of cases from Belgian case law and the case work of the EU Rights Clinic.

A review of Belgian case law[66] by the Belgian Council for Alien Law Litigation (hereafter "the Council") confirms the narrow interpretation of the concept of "worker" adopted by the Belgian authorities. The review of case law in Belgium suggests that, unlike in the UK or Germany, lodging an appeal before the national courts in Belgium was in some cases not

[63] Charlotte O'Brien, Eleanor Spaventa and Joyce De Coninck, FRESSCO Comparative Report 2015, The concept of worker under Article 45 TFEU and certain non-standard forms of employment (European Commission, 2015, 27.

[64] Charlotte O'Brien, Eleanor Spaventa and Joyce De Coninck, FRESSCO Comparative Report 2015, The concept of worker under Article 45 TFEU and certain non-standard forms of employment (European Commission, 2015), 64-65. <https://www.bruxelles.be/documents>

[65] Belgian Federal Public Service for Employment, Work and Social Dialogue, Key issues for part-time workers (2010) (*SPF Emploi, Travail et Concertation Sociale, Clés pour le travail à temps partiel (2010)*), 48 <http://www.emploi.belgique.be/publicationDefault.aspx?id=3600>.

[66] The review is focused on the case law of the Council for Alien Law Litigation (Conseil du Contentieux des Etrangers / Raad van Vreemdelingenbetwistingen), which is the administrative tribunal with special jurisdiction over migration cases.

sufficient to overturn a decision made by the public authorities, because the Council has often upheld decisions by the Immigration Office that refused worker status.

In the same way, case work by the EU Rights Clinic also suggests that municipalities have refused to register mobile EU citizens as workers when they are on short-term contracts and they are engaged in atypical working arrangements.

4.3 Case law before the Belgian Courts and case work handled by the EU Rights Clinic

- A French national was refused registration by the Belgian Immigration Office on the basis that he was not a worker despite having worked 278 hours over a period of 6 months (corresponding to 46.33 hours per month, just below the 12 hour per week threshold). The decision by the Belgian Immigration Office was upheld on appeal[67].
- A Slovak national employed under successive weekly employment contracts covering a period of one month and involving weekly working hours of 8 hours applied for registration. The Belgian Immigration Office refused recognition of worker status and rejected his application for registration on the grounds that his activity was considered marginal and ancillary work. This refusal was upheld by the Council[68].
- An Italian national was regarded by the Belgian authorities as not engaging in a genuine and effective activity despite having worked under a series of daily contracts as a children's entertainer for 27 days spread over a period of two months following her registration with the municipality. This negative decision was upheld by the Council[69]. The Council also refused to take into account evidence submitted at appeal that demonstrated that the person in question had obtained full-time work after the decision was taken by the Immigration Office to refuse to recognise her right to residence and that she should therefore have been regarded as having had a genuine chance of being employed[70]. A further appeal against the Council's decision is now before the Council of State.
- A Dutch national who has been trying to register since 2012 last sought to register as a worker in 2016 based on interim work contracts and provided proof of employment consisting of 12 working days over a period of 16 days but only did so after the three-month registration deadline had passed. The interim work had ended by the time the decision was taken by the Immigration Office to refuse registration. An appeal was unsuccessful before the Council which allowed the Immigration Office's decision to stand[71].
- There is inconsistency as regards the recognition of worker status for persons working under employment contracts issued by regional job centres[72]. In one case involving a Slovak national, the decision of the Immigration Office that found this work to be marginal and ancillary was overturned by the Council[73] on the grounds of insufficient reasoning because it failed to explain how such a contract could amount to marginal

[67] Council for Alien Law Litigation, Judgment of 17 December 2012 (*RVV arrest 93 730 van 17 december 2012*).
[68] Council for Alien Law Litigation, Judgment of 13 March 2015 (*RVV, arrest 156 620 van 18 november 2015*).
[69] Council for Alien Law Litigation, Judgment of 1 March 2019, not yet reported, (*CCE, arrêt nº 212 351 du 1er mars 2019*).
[70] Council for Alien Law Litigation, Judgment of 1 March 2019, not yet reported, (*CCE, arrêt nº 212 351 du 1er mars 2019*), point 3.2.2.
[71] Council for Alien Law Litigation, Judgement of 30 September 2016 (*RVV, arrest 175 671 van 30 september 2016).*
[72] This type of employment contract is called a "contrat de travail ALE / PWA-arbeidsovereenkomsten". As part of these contracts, the worker undertakes, under the authority of a regional Job Centre and for remuneration, to perform certain activities for a maximum of 45 hours per month (generally domestic or care work). An ALE contract allows the worker to keep her/his unemployment benefit while earning a supplement per hour worked.
[73] Council for Alien Law Litigation, Judgment of 27 February 2014 (*CCE*, *arrêt 119 702 du 27 février 2014*).

and ancillary work[74], whereas in another case the Council upheld the Immigration Office's ruling that this type of contract should be considered marginal and ancillary[75], because the Spanish national concerned had failed to contest this ruling[76].

- A Dutch national who had been in genuine and effective work for an initial period of three months as an agency worker, but whose subsequent two months of employment were found to be marginal and ancillary, was considered not to be a worker. As a result, she was re-categorised as a jobseeker and her application to register was refused on the grounds that she did not have a genuine chance of being employed, because she had not submitted the certificate of equivalence of her degree, and the information provided on her work-seeking efforts was considered insufficient[77].
- In another case involving a Dutch agency worker, the Council struck down an attempt by the Immigration Office to refuse to grant worker status because a temporary agency contract lasting two and half years could be terminated at any time by either party and therefore this meant that the person's source of income was not sufficiently guaranteed[78]. The Council considered that this was not a sufficient reason to decide that the person concerned was not a worker and added that in the event of unemployment, a person having worked for two and half years would not by definition be a burden on social assistance (presumably because they could claim unemployment benefits based on their social security record)[79]. The Council also added that the Immigration Office has the power to investigate whether the person concerned continues to meet the conditions for having the right to reside and, if they do not, to take appropriate action to terminate their right to reside.
- The registration application of a Slovak applicant made on the basis of being a worker was re-assessed and treated by the municipality as a request for registration as a self-sufficient person. The request for registration, based on a three-month internship contract, was rejected since the temporary contract had ended by the date of the decision. Additionally, the argument that the applicant should be able to retain worker status for six months from the date of last employment was not accepted. The Council ruled that, since the applicant never had the right to reside based on worker status, he did not have the right to retain worker status after the end of employment of less than 12 months[80].

[74] Ibid, point 2.2.
[75] Council for Alien Law Litigation, Judgment of 22 November 2016 (*CCE, arrêt 178 130 du 22 novembre 2016*).
[76] Ibid, point 3.2.
[77] Council for Alien Law Litigation, Judgment of 27 February 2015 (RVV, arrest 139.948 van 27 februari 2015).
[78] Council for Alien Law Litigation, Judgement of 26 May 2014 (*RVV, arrest 124 786 van 26 mei 2014*).
[79] Council for Alien Law Litigation, Judgement of 26 May 2014 (*RVV, arrest 124 786 van 26 mei 2014*), point 2.3.
[80] Council for Alien Law Litigation, Judgment of 21 June 2018 (*RVV, arrest 205 699 van 21 juni 2018*).

5. Conclusions and possible EU-level solutions

The lack of a common EU notion of "worker" and, as a result, the different interpretation of the notion of "worker" and the diversity in national approaches to what is meant by "marginal and ancillary activities" creates uncertainty within the framework of EU free movement of workers. Indeed, the same working activity could entitle someone to worker status in some Member States and not in others, or, even worse, lead to different assessment of worker status within the same Member State depending on the practices of different local jurisdictions or public authorities involved in the case[81].

In the absence of a reliable and common EU definition of the notion of "worker", mobile EU citizens, particularly those who are destitute and with precarious administrative status, encounter significant obstacles to exercising their free movement rights. The cases reported show that the restrictive approach taken by national authorities may undermine the free movement rights of mobile EU citizens, especially in terms of registration with the municipal authorities and access to welfare benefits.

Excluding from free movement rights mobile EU citizens who are working only a few hours or earning less than a certain amount of money is politically disproportionate, given the rates of employment among mobile EU citizens generally[82], and unlawful, since EU case law does not provide any specific threshold for assessing worker status.

EU free movement law needs to be properly implemented at national level to guarantee all mobile EU citizens enjoyment of the rights they are entitled to, irrespective of the number of hours or the level of earnings that characterise their economic activity. Working, even a few hours a week, represents a contribution to the economy of the host Member State and a way out of destitution for many mobile EU citizens who are struggling to make a living for themselves and their families.

The European Commission must therefore counter any restrictive interpretation of the notion of "worker" that excludes mobile EU citizens experiencing precarious working conditions from their free movement rights. The EU institutions should support and guarantee the protection of the rights of working poor mobile EU citizens particularly in terms of access to welfare benefits and services. Working poor mobile EU citizens should have access to residence rights and to the same subsistence benefits to which nationals in the same circumstances are entitled. Given the restrictive interpretation of the notion of "worker" applied today in some Member States, full-time workers enjoy full access to the welfare state while working poor mobile EU citizens, who are the most vulnerable and have high support needs, are not granted welfare benefits. The paradox is therefore that those who have enough resources and do not need financial help are entitled to welfare benefits while those who struggle to make ends meet are excluded from the welfare system.

Monitoring the proper implementation of free movement law is paramount but not enough. Further action needs to be taken at EU level. The EU institutions should set more precise criteria for the notion of "worker" by providing a broad and inclusive definition of "marginal and ancillary activity" in line with CJEU case law. A new Communication on the transposition and application of the Citizens' Rights Directive is needed, since the last one was published in 2009 and did not provide any clarification around the scope of the notion of "worker".

[81] Comparative Report 2015, The concept of worker under Article 45 TFEU and certain non-standard forms of employment

[82] Eurostat, EU citizens living in another Member State - statistical overview https://ec.europa.eu/eurostat/statistics-explained/index.php?title=EU_citizens_living_in_another_Member_State_-_statistical_overview

Moreover, the European Labour Authority[83] – a new EU agency set up to ensure that EU rules on labour mobility are enforced in a fair, simple and effective way – will have a very important role to play in addressing the issues highlighted in this report by facilitating a common understanding and application of the notion of "worker".

Having a codified and inclusive definition of "worker" at EU level has significant implications as it relates to EU citizens being able to fulfil the conditions for exercising their right to free movement. Not being considered a worker while residing in another Member State reduces mobile EU citizens' ability to integrate into the host society, given the impossibility for them to register with municipal authorities and to access welfare benefits. In particular, limitations on their right to equal treatment as regards receipt of welfare benefits may lead to destitution as a consequence of exercising their free movement rights[84]. The social integration of any category of mobile workers into the host society must be seen as an instrument for promoting their participation in the EU internal market and in the economy of the host Member State, irrespective of the individual's productivity and level of tax contribution.

[83] https://ec.europa.eu/social/main.jsp?catId=1414&langId=en

[84] Verschueren, Herwig. (2015). Free Movement of EU Citizens: Including for the Poor?, Maastricht Journal of European and Comparative Law, 22, 33.