

The "Working Poor" and EU Free Movement: The Notion of "Worker" in the Context of Low-wage and Low-hour Employment

19th November 2019

Hosted by Estrella Durá Ferrandis MEP
Chaired by Wayne Stanley, Simon Community

The interpretation of the notion of "worker" is of utmost importance to the proper enjoyment of EU free movement rights by mobile EU citizens. There is evidence of a trend towards a narrow interpretation of "genuine and effective" as regards the nature of the activity, to exclude from residence rights, and from access to welfare benefits, mobile EU citizens engaged in low-wage jobs or working only a few hours a week. A narrow interpretation targets mobile EU citizens with precarious working conditions who are also more vulnerable to homelessness. As a follow-up to the [report on the notion of worker](#) in the context of low-wage and low-hour employment for mobile EU citizens, FEANTSA organised this seminar inviting stakeholders to have an exchange on this topic and also to have the opportunity to present and discuss the main results of the report.

Manuel Velázquez, General Coordinator Labour Inspection for transnational posting of workers, Labour and Social Security Inspection of Spain

The Court of Justice of the European Union, in the [Lawrie-Blum case](#), considered that the concept of 'worker' must be given a Union meaning which includes that, for a certain period of time, a person performs services for, and under the direction of, another person in return for which remuneration is received. To be treated as a worker, a person must pursue an activity which is genuine and effective, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary.

In the three countries studied by FEANTSA – Belgium, Germany and the United Kingdom – the welfare regulations are done through guidance, instructions and public authorities' common practices, usually unpublished. The main conclusion of FEANTSA's report is 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.

Even though atypical work, which is often considered as marginal and ancillary, has increased in all European Member States, there is no European common notion about what should be considered as marginal and ancillary work and that leads to different national approaches. The consequence is that atypical workers do not have access to the welfare system.

The European Labour Authority could have a role to play within this framework: it can carry out analyses and risk assessments on issues of cross-border labour mobility, support Member States with capacity building regarding the effective application and enforcement of relevant Union law, and support Member States in tackling undeclared work.

Moreover, the European Labour Authority shall develop in cooperation with national authorities and, where appropriate, the social partners, common non-binding guidelines, shared definitions and common concepts, building on relevant work at national and Union level.

The narrow interpretation of the notion of “worker” and the exclusion of working poor mobile EU citizens from accessing social rights

Homeless mobile EU citizens working poor: the importance of being considered ‘workers’ – Mauro Striano, Policy Officer, FEANTSA

In many European cities, mobile EU citizens account for a significant proportion of the homeless population and, where access to homeless services is limited to those who have a right to reside, they are highly represented among people sleeping rough. Individuals who, in exercising their right to free movement, become destitute in another EU Member State, are often unaware of their rights and struggle to find adequate support. Homelessness services have been reporting that most of these people moved because of a lack of opportunities in the countries of which they are nationals and wanted to look for a job in another EU country. Homeless mobile EU citizens are a heterogeneous group that range from those who have good opportunities to find a job, to those who have a high level of needs.

The [PRODEC](#) (Protecting the Rights of Destitute mobile EU Citizens) project started in 2017 to create a sense of urgency at the European political level around the issue of homelessness among mobile EU citizens, to ensure legal certainty with regard to their rights, and to empower those who have become destitute to claim their rights. One of the documents produced within the framework of PRODEC is a [legal fitness check](#) on the transposition of EU free movement rules into Belgian, British and German law. According to this report, many obstacles exist in terms of registration formalities, retention of the status of worker, residence beyond three months for jobseekers and self-sufficient persons, strict rules governing access to social benefits and unlawful expulsions. One of the main problems FEANTSA observed is a trend towards a narrow interpretation of the notion of “worker” to exclude from residence rights mobile EU citizens engaged in low-wage jobs or working only a few hours a week. FEANTSA published a [case-by-case analysis](#) that shows the use of 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 and the refusal to recognise worker status during the procedure for registration.

The role of Belgian municipalities in excluding the working poor from residence rights - Anthony Valcke, lawyer, EU Rights Clinic

In the Belgian framework, 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. Public authorities contest the genuine and effective nature of the activity of mobile EU citizens who are engaged in jobs that generate low wages, or that involve working on a part-time basis.

The main reasons for refusing or ending residence rights in Belgium are due to a restrictive interpretation of conditions such the nature of work (part-time employment, minimum length of the contract, subsidized employment), inability to find employment within a certain period and the inability to prove self-employment. In such cases, the Belgian authorities tend to refuse to regard such mobile EU citizens as workers and instead register them as jobseekers by therefore limiting their ability to claim a right to reside beyond six months.

The main problem related to job seekers is that Belgian authorities give a very short period to find employment - less than 6 months. There is no clear guidance for municipalities and sometimes they refuse to accept documents presented by job seekers to demonstrate that they are workers. 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 lodging an appeal before the national courts in Belgium was in some cases not enough to overturn a decision made by the public authorities.

Low-wage and low-hour employment in Germany: you need a lawyer to be considered as a 'worker' - Stamatia Devetzi, University of Fulda

In Germany and during the last years, the number of Social Court cases dealing with the question "who is a worker?" appears to have risen quite significantly. It is very important for mobile EU citizens to have a worker status because it is directly linked to a person's ability to apply for benefits. Indeed, if the right of residence exists, they can be entitled to "basic social benefits."

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, there are "Instructions from the Federal Employment Agency regarding basic social benefits". 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. The same applies for work which is carried out only sporadically. Worker status is determined on a case-by-case basis, considering all relevant facts (i.e. working hours, earnings, regularity of the activity, social security coverage, applicability of collective agreements, etc.)

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 in FEANTSA's comparative analysis. All of these cases dealt with mobile EU citizens with low paid jobs and/or few working hours and, in every case, the *Job Centre* – 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 Centres 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.

Quite often the negative decisions of the authorities are challenged. Moreover, since there is no standard or common line concerning working hours or remunerations, there are significant disparities in case law. Case-by-case assessment can make it quite difficult for mobile EU citizens to know their rights and to fight for them.

The minimum earning threshold and labour exploitation of mobile EU citizens in the UK - Meri Ahlberg, FLEX (Focus on Labour Exploitation)

In the UK, a minimum earnings threshold (MET) test was introduced in 2014 as part of the assessment of whether the work activities of mobile EU citizens constitute genuine and effective employment. The MET test was part of a set of measures to restrict mobile EU citizens' access to benefits and is calculated on average income over a 3-month period. In 2019/20, the MET was £166/week. If a mobile EU citizen does not meet the MET requirements, there is a further assessment on whether their employment is « genuine and effective ». Those who earn more than the threshold are automatically considered as 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 the second part of the test, work is assessed case-by-case. The main important factors considered include the duration of work, the number of hours worked each week, the regularity of the work and the level of earning. 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.

Mobile EU workers who do not meet the MET cannot access income support, income-related jobseekers' Allowance (JSA), housing benefits, housing assistance from local authorities or universal credit. Those who are affected the most are workers on zero-hours or other precarious contracts, low-wage workers, part time workers (e.g. those doing unpaid care work in addition to paid work, mainly women) and young workers.

How to address the working poor issue in the EU free movement context?

Freek Spinnewijn, Director, FEANTSA

FEANTSA's work aims at making homelessness among mobile EU citizens an EU priority. The issue of definitions is a real issue since a lot of concepts are still unclear in the EU legal framework. This lack of clarity leads to a whole variety of measures in different countries, some worse than others.

The European Labour Authority has a role to play in this context and it is important not only to look at the abuses of free movement but also at the victims of free movement, namely destitute mobile EU citizens.

The concept of worker is not clear, but this lack of clarity provides opportunities to improve the situation of destitute mobile EU citizens. There is also a need to establish closer links with the social economy sector to try to avoid the situation of homeless people carrying out precarious jobs.

Moreover, it is important to bear in mind the desperate situations in which some mobile EU citizens live, with no access to shelter or any kind of benefit. An EU answer could potentially be a European legal framework guaranteeing a minimum set of rights – or at least the right to shelter – for all, regardless of the administrative status.

The issue is very sensitive. If mobile EU citizens cannot get a job, for some the only solution seems to be that they return to their country of origin. However, these practices – voluntary returns or reconnections – are often not properly planned, nor monitored, and do not offer any guarantee about the adequacy of living conditions once the individuals concerned are back into the countries of which they are nationals.

Estrella Durá Ferrandis MEP, Socialists and Democrats, Spain

Freedom of movement has historically been the reason for political attacks by nationalist and xenophobic forces. Mobile EU citizens are often victims of stigmatising stereotypes. Oftentimes, national authorities do not consider mobile EU citizens as workers to make it impossible for them to access social assistance. Poor workers, especially, are affected by these obstacles; citizens who exercise their freedom of movement in more precarious conditions.

S&D Group's political priorities are focused on the end of poverty and the guarantee of safe mobility. National measures are not enough to end discrimination against mobile EU citizens: European mechanisms are needed. An effective coordination between Member States is needed and, to avoid unfair competition, it is necessary to prevent fraudulent companies from entering into the European labour market. An approval of the *Revision of the Regulation on the coordination of social security systems* is necessary to ensure that workers do not lose rights or benefits.

There is a need for a clear legal definition of intermediary companies based on European directives and international legislation.

We need clear and precise rules to impose sanctions on companies that do not respect the legislation. Additionally, all companies must register with the European Business Register and have certification to operate in the European market. Furthermore, it is important to support social partners in empowering workers, to ensure that there are instruments of defence within the European Union.

Finally, to fight against poverty, it is paramount to improve the quality and stability of employment and to improve social protection and the quality of public services.

Francisco Pérez-Flores, Legal Officer, Free Movement of Workers Unit, DG Employment, Social Affairs and Inclusion, European Commission

The notion of worker is crucial because workers have a privileged status compared to other citizens. Work is a way to integrate into the host society more easily.

At the moment, it is difficult for the Commission to propose a directive that clarifies the notion of “worker” because labour mobility legislation has recently been finalised with the establishment of the European Labour Authority.

However, there are some actions that could be taken in order to improve the intervention of the European Labour Authority, such as through capacity building, common guidelines and awareness raising. The stakeholder group in the ELA, of which trade unions are members, can and should provide a framework to debate the notion of worker. This would probably be the most effective way of improving ELA's intervention, especially now as they are currently preparing the work program for the next years. Other proposals, such as a specific advisory group on destitution among mobile EU citizens, does not seem to be a viable solution.

Lorenzo Repetti, Advisor at the European Trade Union Confederation (ETUC)

Trade unions have always been active and willing to take their responsibility, but it is mainly a competence of the Commission to make sure that the rules are properly applied by the Member States. The ELA could provide the necessary tools to address the issue, but the Commission has an important role to play. The ETUC has already submitted to the Commission complaints about expulsions of workers, which are not acceptable in the current EU legal framework.

Studies, such as the one presented by FEANTSA in the seminar, are important to counter myths related to social tourism and to make sure that freedom of movement is linked with the rights of workers. Many of the reported cases should be examined in depth because similar cases can be found in Member States other than Belgium, Germany and the United Kingdom. The ELA is a useful instrument, but it requires the engagement of many actors such as the Member States and the European Parliament. Trade unions have already submitted some cases to the ELA.

There is an urgent need to approve the *Revision of the Regulation on the coordination of social security systems* to ensure that workers do not lose rights or benefits and a better cooperation between authorities from different Member States.

Concerning the definition of worker, the Court of Justice (ECJ) has provided clear indications, which should not be narrowly interpreted by Member States. The Commission has room for manoeuvre to make sure that the ECJ rulings are respected. The ETUC intends to continue working on this issue and to cooperate with the European organisations and the European Parliament to make sure that workers' rights are fully respected.

Main points of discussion during the debate

- The role of municipalities in restricting access to social benefits: in some cases, there is an implicit strategy to prevent EU citizens from accumulating 5 years of continuous residence, for instance denying worker or self-employment status, so that it is challenging to acquire permanent residence.
- Fixed term contracts: If people with fixed term contracts are denied worker status and they do not secure work immediately after the end of the contract, they cannot retain the status of worker and cannot get unemployment benefits, nor social assistance. It contributes to the risk of destitution. For instance, in Belgium this happens for people doing internships: when they register at the municipality, they are either registered as job seekers or not considered as having a real job.
- The difference between the notion of worker in national law and in European law, which leads to two different set of rules. At the national level worker status is determined for the purpose of social security, taxation, etc., while in EU law, it is for the right of residence. The rules are therefore applied for different purposes.
- The homeless status is not a formal obstacle to the labour market. However, there are requirements for accommodation in the Directive of third country nationals.

This work is supported by the European Programme for Integration and Migration (EPIM). Sole responsibility for the contents lies with the author and the contents may not necessarily reflect the positions of EPIM or its partner foundations.

Document drafted by Georgiana Mozer. For further information about the seminar or the project, please contact mauro.striano@feantsa.org