European Integration, Labour, and Social Rights:
The Meanings of Work and the Fragmentation of Social Citizenship

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Introduction

While the parameters of its role in social policy remain contested, the European Union (EU) has emerged as a key actor in the domain of social welfare and social protection. The current economic crisis has only amplified pressure on the EU to build common policies to mitigate the impact of market liberalization and economic downturn. The construction of a European social area is particularly critical for EU citizens who seek to take advantage of their freedom to work and live outside of their home state in the EU, and whose access to social benefits is complicated by their movement across borders.

A growing body of research on the Europeanization[1] of social policy recognizes the extent to which the EU has come to challenge the sovereignty of its member states in this policy domain, extending and deepening its role as a producer and protector of social rights and intervening in policy areas once monopolized by member states. By contesting barriers to the four freedoms embedded in the Single Market project, including freedom of movement, and by engaging in the active production of newly transnational social rights, the EU appears to be "deterritorializing" some aspects of social policy from their long association with state boundaries and "reterritorializing" others upward to the European level. To the extent that states have actively resisted the encroachment of supranational authority on their territorial social welfare systems, they are often depicted as having done so through the institutions of the EU itself, for example by using their collective weight in the Council of Ministers to reassert their prerogatives in key areas of social policy.

Yet regardless of the increasing scope and depth of its activity in the social policy arena, how successful has the EU been in extending social rights in the non-discriminatory way that its policymakers have long intended (and thus in overcoming obstacles to non-discrimination that persist in EU member states)? Do accounts of EU-member state dynamics that concentrate on the European institutional components of the social policy process best explain this outcome? In this paper, I propose that further exploration of domestic regulatory politics and administration can reveal some of the sharpest challenges to the Europeanization of social policy.

To examine this claim, I explore administrative practices that fragment social rights – even rights guaranteed by European legislation – along state boundaries, creating obstacles to those who seek to benefit from mobility in the EU, and complicating efforts by the EU to assert supranational authority over state social welfare systems. I focus on the categories of "work" and "worker" and demonstrate that differing definitions of employment status at the member state level have consequences for access to social welfare and for the protections that migrant workers legally possess under European law, drawing on evidence about EU citizens who engage in nontraditional forms of work or who have nonstandard forms of employment. I argue that regardless of the extension of

[1] This term has a range of definitions. Europeanization as "policy convergence across member states in a particular policy area" is an outcome of interest (Moreno and McEwen, 2005: 34 fn. 14). But for purposes of this project, I support a comprehensive understanding of the term based on Börzel's and Panke's (2010: 407) overview, including "top-down" processes by which the EU "induces domestic change in member states or third countries" and "bottom-up" processes by which "member states and other domestic actors shape EU policies, EU politics and the European polity."

the EU into previously sovereign areas of domestic social security, legal definitions of the status of workers are deeply embedded in national administrative structures and remain challenges for the EU to manage by coordination, legislation, or judicial remedy. These definitions seem likely to endure as obstacles to the creation of a non-discriminatory field of social rights in the EU, and they suggest that there are multiple dimensions to the on-going capacity of states to resist trends toward both the Europeanization and the "marketization" of social policy. Indeed, they suggest that the "regulatory state" that reflects the outcomes of broader structural changes, including liberalization and economic and monetary integration (Majone, 1997), can still assert a powerful role in challenging and disrupting Europeanization.

The European Union: an active but constrained partner in social policy

Early efforts to conceptualize the social dimension of European integration portrayed social policy as a weakly integrated field, with relatively minimal intervention by EU institutions in contrast to the role played by domestic governments. More recently, however, investigators have sought to map a more complex architecture of European social space, in which European, state and even regional institutions engage in the multi-level governance of social policy in diverse ways (e.g., Ferrera, 2005; Kvist and Saari, 2007; McEwen and Moreno, 2005). Furthermore, a degree of consensus has emerged that, despite falling short of the capacities embodied in the typical *state* social welfare system, the EU has generated a supranational field of social rights that in has in some key areas subverted state territorial control. This section demonstrates how literatures that map the emergence of "social Europe" focus on EU institutional activities that have substantively curtailed the ability of states entirely to shield their social welfare systems from European integration. In particular, the EU has established its rights to combat discrimination against non-nationals and to protect the social rights of workers who travel among EU member states. Although states remain the primary actors in social policy and have succeeded in resisting some efforts to Europeanize competences in social welfare, the EU has succeeded in carving out a role for itself as the guardian of a new supranational dimension of social rights by drawing on its policy competences as elaborated in European treaties, its institutional authority to implement and enforce its decisions on social policy, and its ability to shape and guide debate about social policy at the European and member state levels.

While the minimalist role of the then-European Economic Community (EEC) in social policy in the early years after the Treaty of Rome has been described elsewhere (Hine and Kassim, 1998; Falkner, 1998), the Treaty did establish limited competences for the EEC to act in social policy, with provisions for gender equality in pay, the free movement of labor and social security coordination. These competences would be based on two separate areas of the treaty, Title III of the second part, which addressed the free movement of workers and related provisions to ensure nondiscrimination, and Title III of the third part, on social provisions. With respect to the free movement of workers among the member states, the Treaty noted that this implied the abolition of discrimination based on nationality with respect to employment, pay, and other working conditions, and empowered the Council to take a variety of steps to eliminate restrictions or delays [including those that followed from internal (domestic) legislation] that served to discriminate against non-nationals in the free choice of work. Article 51 specifically

granted the Council the right to establish measures in the area of social security to establish the free movement of workers, to ensure that they and their families had the right to the "(a) aggregation (*totalisation*) of all periods taken into consideration by the different national legislatures for the opening and retaining of the rights to benefits as well as for their calculation; [and] (b) the payment of benefits to persons residing on the territories of Member States" (trans. by author. Second part, Title III, Chapter 1, Treaty establishing the European Economic Community, 1957/1967).

In its treatment of social policy, the treaty noted that the member states considered that the improvement and equalization of living and working conditions for laborers would result as much from the harmonization of social systems deriving from the evolution of the Common Market as it would from EEC legislative, regulatory and administrative procedures. Nonetheless, it established a role for the Commission in social policy (promoting collaboration among the member states in the social domain), for the Council (charging the Commission with "functions concerning the implementation of common measures, notably with respect to social security for migrant workers as set out in Articles 48 to 51"), and introduced the requirement that the member states assure equal pay for equal work by men and women (trans. by author. Third part, Title III, Chapter 1, Arts. 117-121, TEEC, 1957/1967).

The Treaty thus introduced, albeit in a limited way, a role for positive integration in social policy, i.e. initiatives to produce, such as by legislation, common or European-level policies in the delineated areas, and a role for the Commission to use its particular set of powers (including producing studies, issuing opinions, and organizing consultations with member states) to promote the social agenda of the Community. Over time, the capacity of the EU to coordinate the implementation of some areas of social policy among member states has raised questions about state territorial sovereignty. Territorial closure in the post-war decades served key functions in constructing national (i.e. state-based) solidarity and legitimacy and producing institutional, economic and social boundaries delineating those who were able to benefit (generally, nationals) from those who could not or who were at a disadvantage (non-nationals) (Ferrera, 2003; Moreno and McEwen, 2005). The Treaty of Rome limited the Community to "coordinating" social security systems, but this coordination is now well-established as an important protection for workers who travel within the EU, ensuring that member states must recognize working time and contributions made to social security schemes abroad.[2] Although coordination has largely recognized the priority of *national* social security schemes, it also ensures the payment of benefits to workers who reside in a member state other than their own, challenging the ability of states to enforce the closure of their social security systems for their respective citizens and overriding the territorial principle of domestic social security. EU-level coordination meant that states were "obliged to let in and out of their borders 'bundles of entitlements': imports of entitlements matured under external regimes. . . or exports of entitlements to be redeemed in foreign territories" (Ferrera, 2003: 631).

Furthermore, even in areas where the EU had no, or limited, competences to draw upon, the dominance of states in shaping the environment in which social policy is produced was being challenged. The mode in which the Commission implemented

[2] See Mosley (1990) for a discussion of coordination during the post-Treaty of Rome period.

policy, even outside the remit of "positive" integration via legislation, arguably encroached upon state autonomy in social policy. Hine (1998) concluded that the engagement of the Commission in building policy networks, bringing together domestic actors from the interest groups and public agencies involved in delivering social policy in areas such as unemployment and occupational health and safety, served to influence public debate about the role of the EU in social policy, shaping the "intellectual framework in which even national governments think about social policy, gradually pushing out the boundaries of what is seen as a legitimate area of concern and involvement for the Community."[3]

By the late 1990s, the argument that European welfare states remained largely "national states" (Rhodes and Mény, 1998) was being challenged further by the pressures of positive and negative integration (i.e., the removal of barriers to market freedoms). Social policy jurisdiction expanded by the beginning of the twenty-first century to areas in which the Union "shall support and complement the activities of the Member States," include the possibility of action in occupational health and safety, working conditions, social security and the social protection of workers, combating economic and social exclusion, and measures to promote the representation and collective defense of workers' and employers' interests (Article 153, [ex-Art. 137 TEC], Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 2012).

Concerns about social dumping in the wake of the Single Market project of the 1980s were instrumental in creating pressure for common policies to curb a potential race to the bottom in social protection for workers. At the same time, broader structural challenges to member state social welfare systems could be identified. The shift to post-industrial service economies created new challenges for European workforces that no longer resembled the "standard male worker of the *trente glorieuses*, characterized by full-time continuous employment from an early age and with a steadily rising salary" (Bonoli, 2006: 7), and who thus faced disadvantages in accessing the benefits of many of the traditional post-war welfare systems. So-called new risks deriving from labor market instability and atypical career patterns (including part-time work and breaks in career paths for childbearing and child raising) increased the precariousness of living standards for many workers, in particular women, the young, and those with few skills, and threatened both the present and future welfare of those who were unable to participate in the labor market on "traditional" terms. In response, the EU was assigned policy competences in the areas of working conditions, worker information and consultation, and the integration of those excluded from labor markets, and it was empowered to act to combat discrimination against atypical workers (in particular, part-time and fixed-term workers). Culminating in directives in 1997 and 1999, the Commission sought to address new issues in worker protection in the context of market liberalization, with proposals

[3] Hine argued that the Commission's success in building policy networks has been critical for exchanging information and social dialogue, if not "outright 'social partnership'" (Hine, 1998: 8-9). He thus echoes the findings of Falkner (1998) and others who argue that in the post-Maastricht period, the Commission's promotion of social dialogue among the social partners has proven important in enabling it to achieve aspects of its own social policy agenda.

that would require that part-time and fixed-term workers be granted social protection equal to that of permanently employed workers (Treib and Falkner, 2006).

Activity in the post-SEA period has also chipped away at the territorial boundaries of member state social security through negative integration, with requirements for market building and with the role of the European Court in producing a growing body of European case law limiting the sovereignty of member states to construct and maintain "national" welfare states (Hine and Kassim, 1998; Leibfried and Pierson, 2000). The role of the European Court as an enforcer of Single Market freedoms has been fundamental to challenging the sovereignty of the national welfare state, with social policy providing the grounds on which arguments about the functioning of the market and the application of freedoms within the market have been fought. The struggle to maintain national social policy sovereignty against market liberalization has been a theme in Community politics since the formation of the EC, with Court rulings situating national social policy in contexts of market freedoms for consumers, providers of services, and mobile workers. Some conclude that the Court's interpretation of the relationship between social policy and market liberalization has been "expansive," supporting neo-liberal norms at the expense of member state social policies that are construed as incompatible with the principles of free movement and undistorted competition (Barnard and Deakin, 2000). Others, however, note that the Court has upheld "national" social policies and benefits when these are intended to engender social solidarity and when they do not infringe upon citizens' rights to engage in market activity (Ferrera, 2003).

Yet the consequences of case law for domestic social security systems have been far-reaching. Freedom of movement for workers has played a central role in the Court's interpretations of social policy as a potential "obstacle" to market freedoms, even during the years of relatively little positive integration in this area (Bernard, 1996). The implications of the activities of the Court are significant: a member state cannot limit most social benefits to its own citizens; social benefits have been de-linked from state territorial governance, with a state no longer able to claim that benefits only apply within its territory; and a member state no longer has the sole power to determine social protections for those living within its borders, even for migrants. Thus if "national *de jure* authority in these respects is what sovereignty in social policy is all about, it has already ceased to exist in the EU" (Leibfried and Pierson, 2000: 279).

Member state responses: EU institutions and social security "sovereignty"

Even if the member states are no longer sovereign in social policy, they still remain the principle actors in many significant areas associated with the social welfare of their citizens. The primacy of member states derives in part from their unwillingness to pool sovereignty in areas of social policy that have redistributive consequences, reflecting their more general reluctance to move redistributive policy areas (such as taxation) under Community jurisdiction. However, social policy has also been described as a policy area that is uniquely embedded in member states politics, social relations, and even cultural identities (Ferrera, 2003; McEwen and Moreno, 2005). Thus efforts to Europeanize social welfare systems represent a challenge to post-war "national" communities (respecting that many member states are not coterminous with nations), and the persistence of forms

of discrimination against non-nationals, in particular against migrant workers, represents not merely an economic obstacle to mobility but a deeper institutional challenge.

Member states have thus responded to efforts to Europeanize social policy with a variety of efforts to protect territorial and national sovereignty. The literature has usually discussed this resistance by focusing on states' use of EU institutions to mount effective campaigns to preserve sovereignty, with most attention being directed to the Council of Ministers and the European Court as sites of member states' struggles to slow or reverse the expansion of EU social policy. For example, even though the principle of coordination explicitly recognizes the priority of domestic social security systems, states have in some cases resisted coordination as a challenge to their sovereignty. Acting in the Council of Ministers, the member states adopted provisions that did not violate Treaty law on nondiscrimination but which have *de facto* complicated access to social benefits for non-nationals. In the early 1990s, the member states unanimously agreed to provisions that would place some restrictions on portability, using domestic residency requirements to regulate access to benefits; they thus implicitly recognizing that coordination had "become the entering wedge for an incremental, rights-based 'homogenization' of social policy" (Leibfried and Pierson, 2000: 279). While the European Court has ruled in favor of plaintiffs who have argued that states have used residency requirements in ways that violate the aggregation principle for non-nationals, residency itself represents the ability of states to use EU legislation, and the Council of Ministers, to wall off areas of domestic administration and regulation that can be used to promote national interests in social policy. The European Court system has also served to uphold member state control over social security, in contexts where a benefit does not violate a citizen's freedom within the market regarding services or where a benefit fundamentally serves to promote social solidarity. Thus although a European "social space" has taken form, particularly as the EU has sought to protect the freedom of movement for workers within the Single Market, states have successfully drawn on the resources of European institutions to limit the impact of integration on their sovereignty in social policy.

However, the above account hints at an underexplored area in the structuring of EU social policy, suggesting that an analysis of social policy dynamics that concentrates on interactions at the European level is insufficient to explain persistent discrimination toward non-nationals. States have developed a variety of strategies to resist incursion by the EU on their social security systems; the arena of EU institutions is important, but the case of residency requirements indicates that domestic regulatory practices and the administration of policy can be used to shape social policy outcomes in ways that favor nationals over non-nationals. Furthermore, as integration progresses, it is increasingly difficult for states to use the Council of Ministers to protect their sovereignty in social security. In Article III-136, the Lisbon Treaty provides that the "ordinary legislative procedure" (implying qualified majority voting) will apply to the coordination of social security for migrant workers, although a member state may request that a matter be referred to the European Council if it considers that draft legislation will affect fundamental aspects of its social security system (the "emergency brake" procedure). This complicates the ability of any one state to block integrationist legislation in this area, giving the domestic regulatory arena additional importance in efforts to protect sovereignty in social security (harmonization of social security and social protection

remain subject to unaminity). With respect to social rights, I offer an account below that suggests that migrant workers may face sufficiently complex regulatory regimes when they travel that the principles of aggregation and coordination fail to be realized in practice. While differences in regulation are not *per se* obstacles to mobility or sources of discrimination, they may create sufficiently burdensome conditions on migrant workers to have these consequences in reality, and in ways that are difficult for the EU to remedy.

State regulatory practices and migrant workers' access to social benefits

Only small numbers of EU citizens take advantage of their right to live and work in a member state other than their own: about two and a half percent of EU citizens currently live in another EU country, which is slightly higher than the historical average of two percent, and a recent Eurobarometer survey found that only ten percent of EU citizens had lived and worked abroad (in the EU or elsewhere) during their lives (Euronews, 2012; Eurobarometer, 2010: 5). For those who do live and work abroad, the existence of a perfectly "level playing field" (alongside the nationals of the other state) has long been imperfect, in some cases legally so. For example, the EC Treaty permitted restrictions on sectors of employment to a member state's nationals based on the nature of the activity, including employment in the public service and activities involving the "exercise of official authority" (White, 2005: 889).[4]

Yet even for non-nationals who do engage in the same type of activity as nationals, inequalities emerge because of how different member states define and administer various categories of work and worker; regulations in the fields of employment and labor continue to delineate the Single Market along national boundaries. While traditional full-time workers may encounter these different regulatory regimes as obstacles to equal treatment, the challenges of claiming equal social rights may fall more heavily on those workers whose activities do not fall clearly into standard categories of "work" and who may confront additional complications in accessing social benefits when they travel across EU member states. Furthermore, the specific tax regimes that apply to many categories of non-standard workers (such as in fields of cultural labor) can have punitive consequences for those who choose to migrate. The results are a fragmented, even discriminatory "social area" within the European Single Market, in which some workers are economically or socially disadvantaged because they choose to migrate. Even if these workers manage to claim the full social rights to which they are legally entitled, the excessive costs and burdens of doing so may serve to discourage mobility.

The challenges faced by atypical workers begin with the categories of "work" and "worker" that enable movement, residence, and social rights throughout the EU. Defining the employment status of a worker has consequences for numerous aspects of social policy: employment status influences how much a worker is taxed and how social security is paid (e.g., by employer or employee), whether and to what extent a worker is entitled to benefits, including social security and unemployment benefits, and what form or degree of labor legislation protects the worker (Staines, 2004). The distinction between employee and self-employed status is thus a crucial one for any worker's location in the

[4] At a more fundamental level of political citizenship, non-nationals may, under extraordinary circumstances such as issues of national security, be deported from a member state, in contrast to national citizens; and, with some exceptions, non-nationals continue to lack the right to vote in state-level elections.

arena of social rights. Typically, EU member states distinguish (at a minimum) between workers who are employees and workers who are self-employed, with each state establishing its own criteria for these categories.[5] In most EU states, a self-employed person is "someone who has no employment contract, but who carries out an economic activity on a regular basis which guarantees an income," while an employee undertakes salaried work (Staines, 2004: 10). The procedures for establishing oneself as self-employed vary in complexity, and in some cases require registration with relevant public authorities for tax and social security purposes, forming a company, registering for VAT, or other formalities. Some member states effectively exclude certain types of workers from establishing themselves as self-employed; self-employment can carry tax advantages such as deductions of professional expenses that countries wish to control.[6]

For migrant workers in the EU who have nonstandard employment, defining employment status can be a challenge and may ultimately be an obstacle to non-discriminatory treatment regarding taxes and social security. The EU neither harmonizes nor coordinates employment status; thus a worker's employment status may change depending on the country in which she is working. Examples from the performing arts demonstrate the complications. For performers who travel extensively across member states, such as popular musicians on tour who negotiate fees for each venue in which they perform, employment status may change frequently during a short period of time; other performers may be established in companies in which their status as employees is more stable. Self-employment status requires that a migrant worker take on the responsibility for vigilance over payment of necessary taxes and social charges. However, performing artists who claim self-employed status are usually required to prove that they pay tax in their own countries, in order to avoid income tax abroad (a point that I develop below). The irregularity of work and earnings for some performers, as well as for other similarly situated migrant workers, may make this an onerous task.

More critically, the employment status of a migrant worker may be ambiguous, (fitting no clear category, or fitting more than one category simultaneously), or irregular. Polácek (2007) offers the example of a self-employed live performer who may decide to become an 'employee' for a brief period in another country, or who might be subject to several employment contracts in multiple EU countries at the same time, while remaining self-employed at home. Rapidly shifting employment patters are common for many cultural workers, and the rise of temporary and part-time work across the EU suggests

[5] Other categories include free-lance workers, who may be defined in contrast to the self-employed. Some member states make additional distinctions between individual self-employed ("own account") workers, who may legally be equivalent to "sole traders," and self-employed workers with employees. States may also create specialist categories of work, such as the *intermittents du spectacle* in the domain of cultural labor in France. These distinctions have implications for VAT and social insurance responsibilities. Staines (2004) offers additional detail on the variations in criteria for self-employment that are found in different member states.

[6] Until recently, performing artists in France were almost always categorized as employees for this reason. The Netherlands requires self-employed workers to meet criteria that include a minimum number of working hours and a prescribed number of clients, criteria that workers with intermittent or non-regularized work may find difficult to meet.

that increasing numbers of EU citizens spend their lives in work in which the amount, duration, intensity, and remunerative possibilities of work are unpredictable.

The same structural shifts in European economies that generated the new social risks outlined in the previous section have compounded the definitional problems related to nonstandard employment. The added dimension of mobility across the EU amplifies the ambiguities for workers in these fields. While coordination and social dialogue at the EU level have begun to grapple with the challenges of atypical work and workers, the control exerted by member states in defining employment status remains significant and has particular economic and social ramifications for migrant workers.

By retaining discretion over definitions of employment status, EU member states also exercise control over how, and whether, migrant workers gain access to social benefits. The relationship between employment status, taxation, and social insurance has served to reproduce the "national" boundaries of social welfare systems that, while legally mandated to extent equal treatment to non-nationals, in practice generate barriers to mobility and discriminatory outcomes.

Coordination at the EU level has served to create the legal infrastructure for aggregation of pension benefits and some unemployment benefits, as noted above. Sickness benefits are also subject to a degree of coordination for those entitled to benefits and treatment in their own countries, with a recently adopted directive on cross-border healthcare clarifying issues of reimbursement costs. The system formerly referred to as the 'E Forms' (now re-labeled), standardized forms employed throughout the EU, EEA and Switzerland, are intended to document working time and contributions paid into social security schemes by certifying that income earned abroad will be subject to social security contributions in the worker's home country, and by certifying the aggregation of periods of insurance, employment, or residence, or periods of work to be considered for granting unemployment benefits. The A1 form is fundamental to the working lives of self-employed workers, who must be able to prove to employers abroad that the worker is responsible for paying her own taxes at home and can therefore be paid a gross fee (i.e., without social security contributions).

However, difficulties in accessing benefits as a practical matter can be significant for migrant workers in the EU. Employers cannot treat fixed-term (contract) workers less favorably than employees; however, self-employed workers can be, and are, treated differently. With the exception of Denmark (according to 2004 data), where employees and the self-employed are covered by the general social protection scheme, other EU countries provide reduced social benefits for self-employed workers compared to employees. The precariousness of self-employment may be magnified by mobility, with some workers finding social security, pensions and tax schemes inadequate compared to what they are accustomed to in their home countries. In the areas of unemployment benefits, sickness benefits, health insurance and pensions, differences in the treatment of self-employed workers and the presence of special regimes in some countries for particular categories of workers (see footnote five) constitute a bewildering constellation and degree of social protections, presenting enormous logistical challenges for workers in nonstandard types of employment who travel among the EU member states.[7] Some states

[7] This author failed to find even basic information about the A1 form and its UK issuing authorities on the website of the UK national liaison office for posted workers (the Department for Business Innovation and Skills), as directed by the European Union website on "Useful forms for social security rights."

offer no unemployment benefits to self-employed or independent workers, unless such workers qualify under special schemes.[8] General sickness benefit schemes (income support) do not support self-employed workers in Austria, Hungary, Ireland and the Netherlands; other states permit access to reduced benefits, delay the start of benefits or require means-testing. The area of pensions has seen the greatest activity in the creation of special schemes for certain types of workers, although again, these vary across the member states (Staines, 2004).

The fact that some states have produced special schemes or categories of benefits magnifies the difficulties that migrant workers face in determining which benefits they are entitled to and how to access them. Qualifying periods to access benefits are sensitive to disruption for many types of self-employed workers, especially for those who work for short periods of time in multiple EU member states. Polácek notes that this is a significant issue in the performing arts, where performers who cannot demonstrate that they have spent sufficient time to meet the criteria to access benefits feel "punished" for mobility. Organizations that employ live performance workers also report that these workers have difficulties getting periods of time that they have worked in other EU countries recognized at home, or that the home state refuses to recognize this time, with a few interview subjects reporting to Polácek that local authorities did not understand how to deal with EU forms (Polácek, 2007: 32).

The issue of employment status can also result in double payment of social security contributions. Self-employed workers may not be recognized as such when they travel (as has been the case in France until recently), meaning that the "host" country does not recognize that workers are responsible for contributing to social security schemes on their own at home. The host country therefore deducts social security contributions from fees, although the worker may never receive any benefit. Self-employed workers must therefore ensure that they are not contributing to social security systems from which they will never benefit. While benefits in the EU are in theory exportable, some migrant workers pay into benefit schemes that cannot be transferred to other countries or that short-term workers may never be able to use, such as social security payments that contribute to paid holidays or professional training. Other workers may not have sufficient information to know what forms must be filed in order to ensure fair treatment; burdens are more likely to fall on workers who lack access to tax or legal professionals for assistance and advice.

The map of social security systems encountered by migrant workers, especially by those in nonstandard types of employment, is thus a complicated one that reflects the imposition of national preferences and concerns. One set of interviews with workers and organizations encountering this mosaic of regimes reflected highly negative impressions, with terms such as "burdensome," "time-consuming," "incoherent," "expensive," "complex," and "aggravating," with calls for progress in ensuring the uniform application

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[8] The data in this section are from 2004 and some changes may have occurred since. Even some special schemes, e.g., for artists, present complications for migrant workers. Qualifying artists may be required to work as employees (as in the case of Belgium), to have worked for a specific minimum duration of time in previous months or years, or to have their benefits means-tested. The ability of such workers to maintain accurate records of working time and to file the appropriate EU forms is crucial to securing benefits.

of common rules and forms, equal treatment for all migrant workers in the same field of employment, transparency, and improved access to information regarding necessary procedures.[9] Coordination at the EU level and guarantees of equality of treatment for nationals and non-nationals have done little minimize the practical difficulties of some migrant workers who seek to take advantage of their Single Market freedoms.

While the right to fair treatment in accessing social security benefits is firmly grounded in EU law and practice (in principle) and is minimally governed by EU-level coordination and challenges to discrimination, tax policy largely escapes discipline by European institutions. Taxes thus have great potential to act as an obstacle to mobility, particularly given the administrative work required to avoid excessive or double taxation for some workers. Yet there seems little likelihood that these challenges can be resolved without fundamentally altering the balance of institutional power in the EU away from member state control of this area. States will otherwise shape the highly fragmented system of tax responsibilities that all migrant workers encounter in the EU.

All EU countries have signed bilateral tax treaties to avoid or eliminate double taxation, based on the OECD Model Tax Treaty. However, under the Model Tax Treaty, a special tax regime singles out particular categories of employment activity for distinctive treatment, and withholding taxes can be deducted from fees paid to non-resident employees (self-employed and employee) who fall under this regime.[10] Withholding tax rates can be high and vary considerably across the EU, from 10% to 30% of taxable income, although some countries exempt non-profit employees and organizations.[11] However, workers may not know that they have paid withholding taxes if an organization or agency handles their fees. Even when workers are aware of the problem of double taxation, they may fail to secure a tax certificate or other documentation to prove that they have paid withholding taxes, or may find the administrative work too difficult or time-consuming to manage. While the European Court has found in favor of migrant workers who claimed that they had paid excessive tax (e.g., *Arnoud Gerritse*, 12 June 2003, C-234/01), creating a basis from which to challenge discriminatory tax rates against non-nationals in some circumstances, workers

[9] See Polácek, 2007, and the European Institute for Comparative Cultural Research, 2008. The latter contains a map of social security regimes for self-employed artists in Europe, describing how the main social risks of self-employed or freelance artists are covered. The permutations of choice are so complicated that the authors resort to a series of visual "overlays" to describe the nine (major) forms of coverage in the EU. The authors do not attempt to map the additional complications for workers who are considered employees in one member state and self-employed workers in others.

[10] The application of a special "superstar" rule was designed to prevent highly mobile, very successful performing artists and athletes with legal residences in tax havens from taking gross self-employed income without paying any tax at all. Even this rule is complicated by the fact that member states also differ in their definitions of what constitutes a "performer" for tax purposes, meaning that some workers in the cultural domain qualify and others do not.

[11] Polácek (2007) points out that there are no standard rules across the EU on exemptions from withholding and that workers who seek an exemption based on non-profit status often have difficulty securing the required documentation to prove it. The ability to secure exemptions from withholding may determine whether a non-profit organization can engage in cross-border activity in the EU or not.

who travel abroad in the EU must still confront the administrative complications of negotiating diverse tax systems.

The use of tax policy, along with domestic regulations on employment status and the social rights associated with qualifications under particular definitions of employment and work, have created a wide-ranging field of policies in which member states have ultimately produced *de facto* barriers to movement in the EU and discriminatory burdens on some non-nationals.

Conclusions:

The above argument is not intended to lead to the conclusion that discriminatory outcomes are intentional; in many cases the details of domestic employment and labor law likely precede the creation of a European domain of social rights. However, the consequences are such that, despite the expansion of EU activity in social policy in recent decades, member states still retain broad authority to challenge and undermine European aspirations for the production of a non-discriminatory field of European social rights. Somewhat ironically, the purported strengths of the European Union in regulatory policy (as opposed to redistributive policy), in particular in social policy, are challenged as much by the regulatory power of member states as by explicit redistributive efforts by states. Unless new areas of social security policy and tax policy are moved under Community authority, it remains likely that states will continue to create disruptions in the equal treatment of EU citizens with respect to social benefits, and that discriminatory consequences will endure in practice, even as these citizens seek to take advantage of freedoms guaranteed to them by the treaties of the EU.

Discriminatory outcomes are particularly relevant during a period when many member states struggle with high unemployment and slow growth, conditions that an earlier generation of promoters of European integration believed they could mitigate by ensuring free movement within the Single Market area. Obstacles confronting those who might wish to move to find work, but who feel they would be disadvantaged by doing so, are damaging to the EU labor market more broadly. Perhaps more significantly, if workers choose not to move or are punished for doing so, the challenges are both economic and moral, opening possibilities to criticize the legitimacy of the EU as a political project: the sense that some workers have an easier, or better, time securing their rights to free movement and to nondiscriminatory treatment may lead to further questions about the benefits, or even the justice, of participating in the European Union.

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